Regulation Brussels IIbis

Guide for Application

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Preface

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) aims to contribute to the uniform and consistent implementation of the 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, repealing Regulation (EC) No 1347/2000 (hereinafter: Brussels IIbis Regulation). The final outputs of the Project are: (i) the Guide for Application of the Brussels IIbis (hereinafter: the Guide); (ii) the 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 (hereinafter: the Recommendations); and (iii) the Conference of 10 November 2017 'Enhancing the efficiency of the Brussels IIbis Regulation'. The research was completed by 31 June 2018 and is based on the Court of Justice of the European Union case law and relevant literature published up until this date.

The Project was coordinated by the T.M.C. Asser Instituut and partnered by the Utrecht University, International Legal Institute (IJI), the Ghent University and the University of Valencia. The members of the Project Team are: Vesna Lazić (T.M.C. Asser Instituut and Utrecht University), Steven Stuij and Michiel de Rooij (T.M.C. Asser Instituut), Wendy Schrama and Jaqueline Gray (Utrecht University), Lisette Frohn and Richard Blauwhoff (International Legal Institute), Jinske Verhellen and Valerie De Ruyck (Ghent University), Carlos Esplugues Mota, Carmen Azcárraga Monzonís and Pablo Quinzá Redondo (University of Valencia).[1]

The Guide presents a commentary based on the analysis of the provisions of the Regulation, relevant Court of Justice of the European Union case law and comparative literature. In addition, National Reports of all EU Member States are included in the research, in order to identify the problems encountered by national courts and other authorities in applying the Regulation. With the purpose of enhancing consistency and uniformity in the interpretation and application of the Regulation, it is deemed to offer guidance to the practitioners, to serve as research material for academics and to provide for a useful educational tool.

The Guide follows the sequence of the provisions of the Regulation and consists of 11 Chapters: Chapter 1 ('Scope and Definitions') has been co-written by Jaqueline Gray, Wendy Schrama and Vesna Lazić, Chapter 2 ('International Jurisdiction in Cases of Marital Breakdown') has been co-written by Pablo Quinzá Redondo and Jinske Verhellen, Chapter 3 ('International Jurisdiction in Cases of Parental Responsibility') has been co-written by Richard Blauwhoff and Lisette Frohn, Chapter 4 ('Jurisdiction in Cases of Child Abduction') and Chapter 5 ('Common Provisions (Articles 16-20)') have been authored by Vesna Lazić, Chapter 6 ('Recognition and Enforcement in Matrimonial Matters') has been co-written by Valerie De

[1] The administrative and financial management of the Project was carried out by the Project Office of the T.M.C. Asser Instituut.

Ruyck, Jinske Verhellen and Pablo Quinzá Redondo, Chapter 7 ('Recognition and Enforcement in Parental Responsibility Cases') and Chapter 8 ('Common Provisions on Enforcement') have been co-written by Richard Blauwhoff and Lisette Frohn, Chapter 9 ('Enforcement of the Decisions on the Rights of Access and Return Orders issued by the Courts of Child's Habitual Residence Immediately before a Wrongful Removal or Retention – Articles 40-45 and 47 and Other Provisions Applicable to the Enforcement – Articles 48-52'), Chapter 10 ('Cooperation between Central Authorities in Matters of Parental Responsibility') and Chapter 11 ('Relations with Other Instruments, Transitional and Final Provisions') have been co-written by Vesna Lazić and Wendy Schrama. In carrying out the research the authors were assisted by research assistants Guoda Almante Driukaite, Nina Scripca, Linda Peels, Sylvie Bax, Sjors Twisk and an administrative assistant Shila van der Kroef.

National Reports of the Member States are summarised and incorporated in the text of the Guide and fully reproduced in the Annex to the Guide as submitted by the National Reporters in accordance with the Questionnaire distributed to them.

The Recommendations to improve the efficiency of the Regulation's rules are based on research results set out in the Guide. The underlying purpose of the Recommendations is to provide an added value in the legislative process of drafting amendments to the Regulation. They are presented following the lines and sequence of the Commission's 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. Therefore, the Recommendations are to be read and assessed with the reference to this Guide. The Recommendations are set out in a different document consisting of two 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[2].

Vesna Lazić

[2] This publication has been produced with the financial support of the Justice Programme of the European Union. The contents of this publication are the sole responsibility of the authors and can in no way be taken to reflect the views of the European Commission.

CHAPTER 1: Scope and Definitions

Jaqueline Gray, Wendy Schrama and Vesna Lazić

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1. Introduction

This Chapter primarily deals with the **substantive scope of application** (*ratione materiae*) as defined in Article 1 and with the definitions provided in Article 2 of the Regulation[1]. The latter includes the definition of the '**geographical scope of application**' as determined in Article 2(3). It indicates in which EU Member States the Regulation applies. The Regulation imposes uniform rules on jurisdiction and the recognition and enforcement of matrimonial matters and parental responsibilities that are to be applied by participating Member States. All Member States apart from Denmark are parties to the Regulation. Under the Treaty of Amsterdam, the UK, the Republic of Ireland[2] and Denmark[3] negotiated opt-outs from participating in measures concerning the area of freedom, security and justice. In this present instance, the UK and the Republic of Ireland have chosen to opt into this Regulation.[4] Denmark, on the other hand, which has a more rigid opt-out from this policy area,[5] has not chosen to follow suit. The substantive scope of application is reduced to matrimonial matters (divorce, legal separation and a marriage annulment) and matters of parental responsibility. No other issue pertaining to family matters is dealt with in the Regulation. How to understand and interpret these concepts is detailed in the present Chapter. The definition, understanding and interpretation of the substantive scope is relevant for the application of both rules on jurisdiction and provisions on the recognition and enforcement of judgments. The Regulation defines the **personal scope of application** (*ratione personae*) of the rules on jurisdiction in matrimonial matters in Articles 6 and 7. As for the personal scope of application of jurisdictional rules in cases of parental responsibility, this can be derived from Article 8 of the Regulation. Since different provisions are relevant to determine the personal scope of application, this issue is not addressed in the present Chapter. Instead it is analysed *infra* in Chapter 2, under 5 '*Application of Articles 6 and 7 of the Brussels IIbis Regulation*' and in Chapter 3, under 4 '*General rule on jurisdiction based on the habitual residence of the child*'. A proper understanding of how the personal scope of application is defined in a certain legal instrument appears to be crucial in practice. In particular, if the personal scope of application is not clearly defined, it may prove difficult for the judiciary to determine whether a certain EU legal source has a universal application or whether its application is limited to cross-border cases that have a certain connection with the EU. In the latter case, it is necessary to determine in each individual case whether there is a required link with an EU Member State.

Also the **temporal scope of application** (*ratione temporis*) as defined in Article 64 of the Regulation has not been discussed in the current Chapter. Instead, this is addressed in greater

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[1] 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 (hereinafter also the Regulation or Brussels IIbis).
[2] See Protocol (No. 4) on the position of the United Kingdom and Ireland (1997) [2006] OJ C321E/198.
[3] See Protocol (No. 5) on the position of Denmark (1997) [2006] OJ C321E/201.
[4] Although, with the impending 'Brexit', the exit of the UK from the anticipated recast is almost inevitable.
[5] Measures adopted under the area of freedom, security and justice must be concluded in the form of intergovernmental agreements between Denmark and the EU.

detail *infra* in Chapter 11, under 2.1.1 '*Scope of application ratione temporis regarding rules on jurisdiction*'.

The Regulation deals with only international jurisdiction and the recognition and enforcement of judgments rendered in matters falling under its substantive scope. Thus, other sources are to be relied upon when deciding on the applicable law. As for matrimonial matters, this is either the Rome III Regulation[6] for those EU Member States that are bound by this legal instrument, or national conflict of law rules for other Member States. With respect to matters of parental responsibility, the 1996 Hague Child Protection Convention[7] is relevant.

2. Substantive (*ratione materiae*) scope of application – Article 1

The Regulation sets out rules concerning jurisdiction, recognition and enforcement in civil matters relating to matrimonial matters and parental responsibility. At the outset of this examination, it should be noted that the concept of 'civil matters' is to be interpreted autonomously, and in view of the objectives and aims of the instrument.[8] In the context of Brussels IIbis, it is to be defined broadly.[9] It is thereby irrelevant if a certain subject-matter is considered to be of a public law nature. According to the Practice Guide 2015 and CJEU[10] case law, matters that are listed as examples under Article 1(2), but which are nevertheless classified as public law by national law, are to be considered as falling within the scope of the Regulation.[11]

The sections below serve to elaborate upon the material scope of the two aspects of family law that are covered by the Brussels IIbis Regulation, namely matrimonial matters (2.1) and matters of parental responsibility (2.2).

2.1 Matrimonial matters – Article 1(1)(a)

For the purposes of the applicability of Brussels IIbis, matrimonial matters are to be considered as those involving judicial or administrative decisions that give rise to either the dissolution (divorce or marriage annulment) or the weakening (legal separation) of a marital status. Matters relating to the property consequences of the marriage, other ancillary measures[12] or maintenance obligations[13] are expressly excluded by the Regulation. The following sections

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[6] Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343/11 (hereinafter – the Rome III Regulation).
[7] Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (hereinafter 1996 Hague Convention).
[8] CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710 para 26-28; CJEU Case C-251/12 *Van Buggenhout and Van de Mierop* [2013] ECLI:EU:C:2009:474, para 26 and CJEU Case C-435/06 *C.* [2007] ECR I-10141, para 45-46.
[9] The European Commission's Practice Guide for the application of the Brussels IIa Regulation, pp. 19-20, para 3.1.1.3 (available at: file:///C:/Users/user/Downloads/brussels_ii_practice_guide_EU_en%20(7).pdf), hereinafter also Practice Guide 2015.
[10] Court of Justice of the European Union (hereinafter – the CJEU or the Court).
[11] Practice Guide 2015, pp. 19-20, para 3.1.1.3. See also CJEU Case C-523/07 *A.* [2009] ECR I-2805, paras 21-29 and CJEU Case C-435/06 *C.* [2007] ECR I-10141, paras 45-53 for this exemplified point with regard to public law rules relating to child protection.
[12] Brussels IIbis Regulation, Recital 8.
[13] *Ibid*., Recital 11.

elucidate further on the material scope of matrimonial matters in the context of Brussels IIbis by setting out the boundaries of the marital relationship for the purposes of its application, before turning to examine the types of decisions that fall within the remit of this topic.

2.1.1 Admissible relationships

As established above, Brussels IIbis clearly applies to the marital relationship, which has traditionally been regarded as a legally recognised union between a husband and wife. The following sections seek to move beyond this definition and to consider the possible applicability of the Regulation to less conventional forms of marriage – informal marriage and same-sex marriage, as well as registered partnerships.

2.1.1.1 Informal marriage

Informal marriages, such as those that are concluded according to religious rules, are said to be included within the scope of the Regulation to the extent that they are recognised as equivalent to a formal marriage by the applicable law in the competent jurisdiction (see *infra* Chapter 6, under 2.3.2 '*Judicial and non-judicial decisions*').[14]

2.1.1.2 Same-sex marriage

Although neither the Regulation itself nor the accompanying documentation (e.g. the Borrás Report[15] or the Practice Guide 2015) explicitly establishes a stance on its application to same-sex marriage, the reference to 'wife' and 'husband' in Annex I of the Regulation would indicate that it is primarily intended to apply to a 'traditional' marriage – i.e. a marriage between a man and a woman. It is telling that this designation has been retained in the present 2016 Commission's Proposal.[16]

At the same time, it has to be kept in mind that there has been considerable social and legal change in the Member States since the introduction of the original Brussels II Regulation[17] in 2000 as regards same-sex marriage. Whilst this institution did not exist in any Member State sixteen years ago, it is now present in 11 out of these 28 countries. Recent case law from the CJEU[18] also indicates a growing tendency towards paralleling same-sex relationships with

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[14] Magnus/Mankowski/Pintens, *Brussels IIbis Regulation* (Sellier European Law Publishers 2012), Article 1, note 17.

[15] 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' (hereinafter Borrás Report).

[16] 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 also the 2016 Commission's Proposal or Proposal).

[17] Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L 160/19 (hereinafter – the Brussels II Regulation).

[18] See the CJEU's recent judgment in Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2013] ECLI:EU:C:2013:823, in which the Court stated that an employee who is in a same-sex registered partnership should receive the same benefits as married employees (as long as a registered partnership is the highest level of status that same-sex couples can have access to in that jurisdiction). The Court opined that opposite-sex spouses and same-sex partners were in a comparable situation in these circumstances,

marriage for the purposes of obtaining equal treatment in other fields (e.g. staff employment benefits).

It is unclear whether marriage, for the purposes of the Brussels IIbis Regulation, is to be autonomously defined on an EU level rather than by reference to national law.[19] The National Reports show that there is no consensus in this regard. The reports of Spain, France, Greece, Italy, Latvia, Lithuania, and Romania explicitly refer to the national rules in order to define the concept of marriage. According to the National Report of Belgium, its legal doctrine leans towards the existence of an autonomous interpretation. In the context of the Rome III Regulation, the European legislator seems to indicate that interpretation should be undertaken in line with national rules.[20]

The National Reports indicate that if a Member State allows same-sex marriage in its national law, it will tend towards including same-sex marriage within the scope of the Brussels IIbis Regulation (Estonia, Spain, France, Ireland, the Netherlands, and Portugal). Conversely, where same-sex marriage is not allowed under national rules, it will tend to be excluded from the definition of marriage for the purposes of the Regulation (Austria, Bulgaria, Germany,[21] Greece,[22] Hungary, Italy, Latvia, Lithuania, Poland, and Romania). The National Reports of Belgium,[23] Cyprus, the Czech Republic,[24] Finland,[25] Luxembourg,[26] Malta, Slovenia,[27] Sweden[28] and the UK are silent on whether same-sex marriages fall within the Regulation's scope.

In the absence of any concrete guidance by the CJEU or other EU sources on the interpretation of marriage in this specific context, the most prudent approach[29] would be to hold that the Regulation does not generally apply to the dissolution of same-sex marriage. This does not stand in the way of Member States choosing to unilaterally recognise this institution in cases that fall within their judicial competence, as has been evidenced in the National Reports. However, the recent findings of the CJEU in the case of *Coman and Others*[30] might have implications on the application of the jurisdictional rules in Article 3 of the Regulation. This

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and that the company had directly discriminated on the grounds of sexual orientation in not providing the same employee benefits for both groups.

[19] Although it is argued to be such by Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 21 and Bogdan, M., *Concise introduction to private international law* (3rd edn., Europa law publishing 2016), p. 95.

[20] Verhellen, J., *Brussel IIbis Verordening – Huwelijkszaken* (Intersentia 2005), p. 62.

[21] National Report Germany, question 7: In Germany same-sex marriages are characterised as registered partnerships.

[22] National Report Greece, question 7: It is the dominant opinion in legal theory that same-sex marriages would be dealt with as being contrary to public policy.

[23] National Report Belgium, question 7: Most authors see it as an unresolved matter, some exclude same-sex marriages from the Brussels IIbis Regulation.

[24] National Report the Czech Republic, question 7: In the Czech Republic a marriage only exists between opposite-sex partners; Czech law however does recognise same-sex registered partnerships.

[25] National Report Finland, question 7: Same-sex marriages will be possible in Finland from 01/03/2017.

[26] National Report Luxembourg, question 7: Same-sex marriage is allowed in Luxembourg.

[27] National Report Slovenia, question 7: Same-sex marriage does not exist in Slovenia, only registered same-sex partnerships.

[28] National Report Sweden, question 7.

[29] With caution being necessary in this area, given the politically-charged nature of this topic.

[30] CJEU Case C-673/16 *Coman and Others* [2018] ECLI:EU:C:2018:385.

case concerned Mr Coman, who holds Romanian and American citizenship, and Mr Hamilton, an American citizen, who were married in Belgium in 2010. They intended to move to Romania relying on the EU free movement Directive[31] which guarantees the rights of free movement and residence in the EU for spouses. The CJEU decided that a same-sex spouse who is not an EU citizen should be granted residence in an EU Member State even if under its laws same-sex marriages are not recognised (which is the case in Romania). Although the decision does not concern the application of the Regulation, it creates the possibility for the spouses to stay in an EU Member State and eventually obtain a habitual residence there. Accordingly, it could be argued that the CJEU's judgment has an indirect impact on the application of the rules on jurisdiction in Article 3 of the Regulation. However, it is particularly controversial whether the judgment will affect the position of a Member State currently offering no possibility to file for divorce, legal separation or annulment of a same-sex marriage.

2.1.1.3 Registered partnership

The stipulated application to 'divorce, legal separation or marriage annulment', as well as the references to 'spouses' and 'wife' and 'husband' within the Regulation appears to clearly indicate that it is intended to apply solely to marriage. Notwithstanding this, the Greek National Report states that since a registered partnership for same-sex couples has been introduced in Greece, it is considered to fall within the scope of the Regulation.[32] There has also been at least one recorded instance in which the Regulation was applied by a Czech court to a registered partnership.[33]

However, the CJEU has stated that a registered partnership cannot be assimilated with a marriage simply because it is treated as such by certain Member States' national rules.[34] Thus, in the absence of any express indication to the contrary by the EU legislator, this usage is to be treated as an analogous extension of the Regulation's rules to a registered partnership by a Member State jurisdiction, rather than a trend towards its inclusion on an EU level.

2.1.2 Types of decisions covered

The following subsections elaborate upon the three types of judicial or administrative processes that fall within the scope of Brussels IIbis in the context of matrimonial matters. At the outset, it is important to note that since two of the processes (legal separation and marriage annulment) do not exist universally throughout the Member States, the Regulation only assigns personal

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[31] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.
[32] National Report Greece, question 7.
[33] District Court of Rokycany No. 6 C 59/2011 of 20.9.2011. See also the European Commission, *Study on the assessment of Regulation (EC) No. 2201/2003 and the policy options for its amendment: Final report, analytical annexes* (hereinafter – Impact Assessment), p. 118.
[34] Joined CJEU Cases C-122/99 and C-125/99 *P – D and Kingdom of Sweden v Council of the European Union* [2001] ECR I-4319, para 29-41.

jurisdiction through its rules. Member States are free to determine whether, according to their applicable law, they can allow the form of relief being requested.[35]

2.1.2.1 Divorce

The complete dissolution of a marriage through a decision by a judicial or administrative authority is now a universal legal process amongst the Member States.[36] The Regulation applies to every type of divorce judgment emanating from a judicial or administrative authority, regardless of the form of or grounds for divorce.[37] Proceedings involving the conversion of a legal separation into divorce also fall within this ambit.[38]

2.1.2.2 Legal separation

This process constitutes a weakening of the marriage bond through a decision by a competent authority that leads to the spousal obligations (e.g. to cohabit) and consequences of marriage (e.g. the division of property) being redefined. This mechanism is not present in all Member States, and tends to arise in legal traditions that emerged from the Romanic legal family and where the influence of canon law is strong.[39] In certain Member States, such as Italy, it is in fact a prerequisite step to obtaining a divorce.[40]

For the purposes of the Regulation, legal separation is to be distinguished from factual separation, which does involve a change in status and therefore does not fall within the scope of this instrument.[41]

2.1.2.3 Marriage annulment

The possibility to declare a marriage void or voidable based on a legal defect is present in all Member States except for Sweden and Finland.[42] There has been a debate as to whether declaratory judgments concerning whether a marriage is to be considered *ipso iure* null and void (e.g. if one of the purported spouses lacks the necessary capacity to conclude a marriage) would fall within the scope of the Regulation.[43] Arguably, no annulment process is needed in these circumstances, since any declaration would not be constitutive.

In this regard, the Lithuanian National Reporter indicated that the Court of Appeal has ruled that judgments which do not positively create or alter interests do not fall within the scope of Brussels IIbis.[44] However, the other reports do not indicate the national positions on this

[35] See Ní Shúilleabháin, M., *Cross-border divorce law: Brussels IIbis* (OUP 2010), pp. 103-105, paras 3.30-3.33.
[36] Since the introduction of the possibility to divorce under Maltese law following a referendum in 2011.
[37] Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 42.
[38] *Ibid*.
[39] *Ibid*., pp. 69-70, para 48.
[40] *Ibid*.
[41] *Ibid*., p. 66, para 37.
[42] *Ibid*., p. 70, para. 50.
[43] Impact Assessment, p. 7.
[44] National Report Lithuania, question 15.

issue, and in the absence of an autonomous definition of annulment developed by the CJEU, this issue remains unresolved.[45]

Moving on to the question of the potential inclusion of a posthumous annulment by one of the spouses or a third party, the Borrás Report stated that the original Convention would not apply to such cases.[46] In contrast to this previous stance, the CJEU has recently ruled that an action for a marriage annulment instigated by a third party after the death of one of the spouses falls within the scope of the Regulation.[47]

Neither the Regulation, nor documentation such as the Borras Report, establishes a stance on whether third party nullity proceedings during the lifetime of the spouses are included. It has been argued that this matter is unlikely to be covered by Brussels IIbis, since by mentioning the 'applicant' and 'respondent' in Article 3(1) fifth and sixth indents, there would otherwise be a risk of conferring jurisdiction on a state to which neither of the spouses was connected.[48]

However, the CJEU pointed out in the case of *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki*[49] on a 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.

The CJEU case of *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* addressed the question of whether an action for the annulment of a marriage brought by a third party after the death of one of the spouses fell within the scope of Article 1(1)(a) of Brussels IIbis. Edyta Mikołajczyk had brought an action before the Regional Court in Warsaw seeking to annul the marriage of Stefan Czarnecki (deceased) to Marie Louise Czarnecka, which had been entered into in 1956 in France. The applicant stated that she was the heir to the estate of Zdzisława Czarnecka, Stefan Czarnecki's first wife, who had died in 1999. She maintained that the marriage of Stefan Czarnecki to Zdzisława Czarnecka (contracted in 1937 in Poland) had not been dissolved at the time when the marriage between Stefan Czarnecki and Marie Louise Czarnecka was contracted, and that therefore the second marriage was bigamous and should be annulled.[50] The Court of Appeal referred a preliminary question to the CJEU concerning whether it had international jurisdiction to rule in this case in view of doubts as to whether this form of an action for annulment falls within the scope of Brussels IIbis. It referred to the Borrás

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[45] For a further discussion concerning whether declaratory judgments are included within the scope of the Regulation see: Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 51 and 34-35, and Ní Shúilleabháin, *op. cit.*, pp. 119-121, paras 3.55-3.57.
[46] Borrás Report, para. 27. See also Ní Shúilleabháin, *op. cit.*, p. 122, para. 3.58.
[47] CJEU Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* [2016] ECLI:EU:C:2016:772.
[48] Ní Shúilleabháin, *op. cit.*, p. 122, para 3.58.
[49] CJEU Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* [2017] ECLI:EU:C:2016:772.
[50] *Ibid.*, paras 11-12.

Report excluding from the scope of the Brussels II Convention[51] those instances in which the validity of a marriage is considered on the basis of a petition for its annulment following the death of one or both spouses.[52] The CJEU found that Article 1(1)(a) must be interpreted to include an action for a marriage annulment brought by a third party following the death of one of the spouses. In establishing this, it pointed to the unqualified inclusion of a marriage annulment in Article 1(1)(a)[53] and the lack of an exclusion of this particular type of request for a marriage annulment in Article 1(3),[54] as well as the negative effect that a judgment excluding this instance would have upon the creation of an area of freedom, security and justice, which would give rise to legal uncertainty due to the lack of an alternative regulatory framework.[55]

Further, the CJEU found that the fifth and sixth indents of Article 3(1)(a) of Brussels IIbis must be interpreted as meaning that a person other than one of the spouses who brings an action for the annulment of a marriage may not rely on the grounds of jurisdiction set out in those provisions.[56] The fifth and sixth indents do not specifically refer, in contrast to the other jurisdictional bases, to the spouses. However, in order to protect the interests of the spouses and to ensure a genuine link between at least one of these parties and the state concerned, the CJEU established that under these rules the 'applicant' does not refer to any person other than the spouses.[57] It was pointed out that this interpretation does not deprive a third party of access to the courts, since they may rely on other grounds of jurisdiction provided for in Article 3.[58]

2.1.2.4 Matrimonial property issues

The exclusion of matrimonial property matters from the scope of Brussels IIbis Regulation was dealt with on a residual basis in the recent CJEU case of *Todor Iliev v Blagovesta Ilieva,*[59] which primarily concerned the Brussels Ibis Regulation.[60] The facts of this case involved a consideration of whether proceedings concerning the liquidation of property acquired during a marriage after a divorce had taken place fell within the scope of the Brussels Ibis Regulation. The Bulgarian District Court requested clarification on three questions in this reference for a preliminary ruling which, taken together, essentially asked:

> Whether Article 1(2)(a) of the Brussels Ibis Regulation (No. 1215/2012) must be interpreted as meaning that a dispute relating to the liquidation of property — acquired during marriage by spouses who are nationals of a Member State but domiciled in

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[51] 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 [1995] OJ C 316/49 (hereinafter also the Brussels II Convention).
[52] CJEU Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* [2017] ECLI:EU:C:2016:772, para 18.
[53] *Ibid*., para 27.
[54] *Ibid*., paras 29-30.
[55] *Ibid*., paras 32-34.
[56] *Ibid*., para 53.
[57] *Ibid*., paras 49-50, 52.
[58] *Ibid*., para 51.
[59] CJEU Case C-67/17 *Todor Iliev v Blagovesta Ilieva* [2017] ECLI:EU:C:2017:459.
[60] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) [2012] OJ L 351/1 (hereinafter – the Brussels Ibis Regulation).

> another Member State — after a divorce has taken place falls within the scope of this Regulation or whether it comes within the scope of matrimonial property regimes and, consequently, within the exclusions listed in Article 1(2)(a) of the Brussels Ibis Regulation.[61]

In reply to these questions the CJEU referred to its judgment concerning the 1968 Brussels Convention[62] in *de Cavel*[63], in which it found the following*:*

> Disputes relating to the assets of spouses in the course of divorce proceedings may therefore, depending on the circumstances, concern or be closely connected with one of the following three categories: (1) questions relating to the status of persons; or (2) proprietary legal relationships between spouses resulting directly from the matrimonial relationship or the dissolution thereof; or (3) proprietary legal relations existing between them which have no connection with the marriage, and that, whereas disputes of the latter category come within the scope of the Brussels Convention, those relating to the first two categories must be excluded therefrom.[64]

Even though the judgment does not directly concern the interpretation of the Brussels IIbis Regulation, it is relevant for its interpretation. Namely, both Regulations exclude matrimonial property matters from its substantive scope, so that the same line of reasoning may be applied in the context of the Brussels IIbis Regulation. Thus, in finding that a dispute concerning the liquidation of property acquired during a marriage after a divorce is to be qualified as a matter falling under the matrimonial property regime and therefore within the scope of the exclusions contained in Article 1(2)(a) of the Brussels Ibis Regulation,[65] the judgment referred in passing to the express exclusion of the property consequences of marriage by Recital 8 of the Brussels IIbis Regulation.

2.2 Matters of parental responsibility – Article 1(1)(b) and Article 1(2)

The Regulation also establishes uniform rules on the jurisdiction, recognition and enforcement of judicial or administrative decisions in cross-border matters of parental responsibility. This term is to be interpreted broadly, with a view to the context and objectives of the instrument.[66] In order to ensure equality amongst children in its application,[67] matters of parental responsibility are to be considered independently of matrimonial proceedings.[68]

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[61] CJEU Case C-67/17 *Todor Iliev v Blagovesta Ilieva* [2017] ECLI:EU:C:2017:459, para 22.
[62] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32 (hereinafter – the 1968 Brussels Convention).
[63] CJEU Case C-143/78 *Jacques de Cavel v Louise de Cavel* [1979] ECLI:EU:C:1979:83, para 7.
[64] *Ibid.*, para 29.
[65] *Ibid.*, paras 31-32.
[66] CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, para 27 and CJEU Case C-435/06 *C.* [2007] ECR I-10141, para 49.
[67] See the Brussels IIbis Regulation, Recital 5 and CJEU Case C-92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, para 64.
[68] Ensuring equality between children under the Regulation regardless of the marital status of those who hold parental responsibility. This was not the case under the Brussels II Regulation, which only addressed matters of parental responsibility in connection with the dissolution of a marriage.

As a starting point in establishing the scope of matters of 'parental responsibility' for the purposes of the Regulation, one can refer to Article 2(7), which states that it should be taken to mean:

> 'All rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access'.

This summation is supplemented by a non-exhaustive list of inclusions set out in Article 1(2), along with the establishment of a number of express exclusions concerning the material scope of the Regulation in Article 1(3), which will be analysed in greater detail in the subsequent sections.

One general point of perceived difficulty that was highlighted by several of the National Reporters concerned the difference between the conception of 'parental responsibility' in their domestic law and that employed by the Regulation. The French Reporter stated that there was no equivalent to this concept in domestic law, particularly since French judges are not familiar with the notion that persons other than the parents (or guardians) can be holders of parental responsibility. This gives rise to the risk that the term will be confused with the more restrictive concept of 'parental authority'.[69] The Finnish Reporter stated that difficulties may sometimes arise as a result of the mismatch between parental responsibility, and the concepts of custody and guardianship that are used in domestic law.[70] The Spanish Report opined that the understanding of parental responsibility was wider than the closest concept in domestic law, [71] whilst according to the Croatian Reporter, the opposite was true in the Croatian legal system.[72]

However, despite these highlighted concerns, given the generally high degree of elaboration already provided by Article 1(2) and (3), it has to be concluded that such difficulties are more likely the result of a lack of judicial familiarity with the Regulation, rather than the poor drafting of the instrument itself.

2.2.1 Non-exhaustive list of inclusions

Article 1(2) sets out a list of specific inclusions within the scope of 'parental responsibility' in the context of the Regulation. It is emphasised that this list is non-exhaustive and is to be considered as a guide that outlines examples of matters that fall within this category.[73] Those categories set out in Article 1(2) that have given rise to particular discussions are considered below.

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[69] National Report France, question 19.
[70] National Report Finland, question 19.
[71] National Report Spain, question 19.
[72] National Report Croatia, question 3.
[73] CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, para 27 and CJEU Case C-435/06 *C.* [2007] ECR I-10141, para 30.

2.2.1.1 Rights of custody and rights of access

In addition to addressing all proceedings involving custody and rights of access between parents, the Regulation should also extend to decisions on the right of access of third persons such as grandparents or siblings, as it is suggested in the literature[74]. The CJEU in a very recent decision[75] also ruled that the concept 'right of access' encompasses grandparents. The details of this case are presented *infra* under 2.3 'Difficulties in application – CJEU Case law'.

2.2.1.2 The placement of the child in a foster family or in institutional care

There is a potential overlap between the placement of children in secure institutional care and the exclusion of measures taken as a result of criminal offences committed by children. On this point, the CJEU has held that the placement of a child in a secure institution providing therapeutic and educational care in another Member State, entailing a deprivation of liberty for the child's own protection, falls within the material scope of the Regulation by virtue of this express inclusion.[76] The court noted, however, that in accordance with the exclusion of measures for criminal offences set out in Article 1(3)(g), such deprivation of liberty must not be intended to punish the child.[77]

2.2.1.3 Measures for the protection of the child relating to the administration, conservation or disposal of the child's property

Elaborating upon this inclusion, Recital 9 of the Regulation states that decisions involving the assistance or representation of the child with regard to his or her property fall within the scope of the Regulation when these are made in pursuit of the protection of the child. It goes on to exemplify proceedings involving the designation of the child or body responsible for administering the child's property.

On the other hand, decisions relating to the general organisation of the child's property that occur independently of a measure of child protection fall within the scope of the Brussels Ibis Regulation. It is left to the courts to decide whether the matter in question involves an issue of parental responsibility.[78]

2.2.2 Express exclusions

The inclusions set out above are supplemented by an enumeration of express exclusions that apply to the Regulation as a whole. Since the exclusions involved in delineating matrimonial matters have already been discussed *supra* under 2.1.1 '*Admissible relationships*', this section will focus exclusively on the manner in which these exclusions serve to define parental

[74] Magnus/Mankowski/Pintens, *op. cit.,* Article 1, note 70.
[75] CJEU Case *Neli Valcheva v Georgios Babanarakis* C-335/17 [2018] ECLI:EU:C:2018:359.
[76] CJEU Case C-92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, para 56-66.
[77] *Ibid.*, para 65.
[78] Practice Guide 2015, pp. 20-21, para 3.1.1.4.

responsibility. Continuing with the approach of the previous section, the following will only deal with those exclusions that have given rise to discussions.

2.2.2.1 Decisions on adoption, measures preparatory to adoption, or the annulment or relocation of adoption

There is a slight overlap here with regard to the express inclusion of foster care in Article 1(2)(d). In order to delineate the inevitably blurred boundaries between adoption and foster care, it has been proposed that placement with a foster family in preparation for a later adoption be excluded from the Regulation's scope of application.[79] However, given the often uncertain nature of the road from foster care to adoption, it may be difficult to impose such an exclusion in practice.

2.2.2.2 Emancipation

In addition to the exclusion of decisions on emancipation, the Practice Guide 2015 states that decisions made with regard to emancipated persons do not, in principle, fall within the scope of the Regulation (even those decisions involving persons under the age of 18).[80]

2.2.2.3 Maintenance obligations

As mentioned above with regard to the delineation of matrimonial matters, the material scope of the Regulation does not extend to (ancillary) decision-making on maintenance obligations. However, a connection is made between proceedings involving the subject matters covered by Brussels IIbis and the Maintenance Regulation[81] by way of Article 3(c) and (d) of the latter instrument, which provides that if the application for maintenance is ancillary to proceedings involving either the separation or weakening of a marital link or a matter of parental responsibility, the Member State court which is competent to rule on one of the latter matters shall have jurisdiction. It should also be noted that where both of the aforementioned proceedings are occurring in tandem in different Member States, the Member State in which proceedings concerning parental responsibility are being conducted is competent to rule on a maintenance matter concerning the minor concerned.[82]

2.2.2.4 Trusts or succession

Trusts fall within the scope of the Brussels I Regulation (Article 5(6)), whilst the EU unified rules on succession are contained in a separate regulation which was introduced in 2012. However, notwithstanding the exclusion of this latter matter, an application to a Member State court to approve an agreement for the distribution of an estate concluded by a guardian *ad litem* on behalf of minor children was found to constitute a measure relating to the exercise of parental

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[79] Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 72.
[80] Practice Guide 2015, p. 19, para 3.1.1.1.
[81] 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 (hereinafter Maintenance Regulation).
[82] CJEU Case C-184/14 *A v B* [2015] ECLI:EU:C:2015:479.

responsibility, within the meaning of Article 1(1)(b) of Brussels IIbis rather than falling within the scope of the Succession Regulation.[83] The Court stated that the need to obtain approval from the court dealing with guardianship matters is directly connected with the status and capacity of the minor children and constitutes a protective measure for the child relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of Articles 1(1)(b) and 2(e) of the Regulation.[84]

2.3 Difficulties in application – CJEU case law

There may be circumstances in which it may be difficult to assess whether the dispute may be qualified as a matter covered by the Regulation. Regarding matrimonial matters, the cases of *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* and *Ilieva* have already been addressed.[85]

As for the matters of divorce, the CJEU recently added some clarity to the issue of whether the so-called 'private divorces' (i. e., those which are pronounced without the involvement of a State authority) fall under the scope of the Regulation. Although the case of *Soha Sahyouni v Raja Mamisch*[86] concerned the application of the Rome III Regulation, in addressing the issue CJEU explicitly refers to the interpretation and understanding of 'divorce' in Article 1(1)(a) relating to the scope of application and Article 2(4) concerning the definition of the 'court' in the Regulation Brussels IIbis.[87]. The issue in the latter case was whether a divorce resulting from a unilateral declaration made by one of the spouses before a religious court falls under the scope of the Rome III Regulation. The Court argued that as at the time of the adoption of the Rome III Regulation public bodies alone were able to adopt legally valid decisions in the sphere of divorce, by adopting the Rome III Regulation the EU legislature had in mind only situations in which divorce is pronounced by a national court or by another public authority. The Court supported this argument by referring to the concept of 'divorce' in the Brussels IIbis Regulation. According to the Court, the reading of Article 1(1)(a) and 2(4) of the Brussels IIbis implies that a divorce should be pronounced by a national court or by (or under the supervision of) a public authority. CJEU emphasised that [i]t would be inconsistent to define in different ways the same term 'divorce' used in those two regulations and thus to make the respective scopes of those regulations diverge.'[88] Considering the above, the Court concluded that 'private divorces' do not fall under the scope of the Rome III Regulation. As the Court stressed that the synergy of the Rome III and the Brussels IIbis is required[89], the scope of the

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[83] Council 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 (hereinafter Succession Regulation), CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653.
[84] CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653, para 31.
[85] *Supra* in this Chapter, under 2.1.2.3 '*Marriage annulment*' and 2.1.2.4 '*Matrimonial property issues*' respectively.
[86] CJEU Case C-372/16 *Soha Sahyouni v Raja Mamisch* [2017] ECLI:EU:C:2017:988.
[87] *Ibid*., para 41.
[88] *Ibid*., para 42.
[89] As indicated in Recital 10 of the Rome III Regulation.

Brussels IIbis should also be interpreted in a way that the Regulation does not cover divorces pronounced without the involvement of a State authority. There are also a number cases decided by the CJEU which clarify the substantive scope of application concerning 'parental responsibility' under Article 1(1)(b).

The CJEU judgment in the case of *Matoušková*[90] concerned a request for a preliminary ruling submitted by the Czech Supreme Court in proceedings brought by Ms. Matoušková in her capacity as a court commissioner. The question sought to determine whether an agreement on the distribution of an estate concluded on behalf of a minor by his or her guardian *ad litem* requires the approval of a court in order to be valid. A further question was whether such a court decision is to be qualified as a measure within the meaning of Article 1(1)(b) or a measure within the meaning of Article 1(3)(f) of the Regulation. If it is a measure within the meaning of Article 1(1)(b) then it falls within the Regulation's substantive scope of application. In contrast, if this is to be considered as a matter under Article 1(3)(f) it is then excluded from the Regulation's scope.

The facts of the case can be summarised as follows. On 8 May 2009 Ms. Martinus, a Czech national, died in the Netherlands, leaving a spouse and two minor children, the heirs, who resided in the Netherlands. Ms. Matoušková, a notary in the Czech Republic, was authorised to act as a court commissioner in the succession proceedings. She established that the deceased was a citizen of the Czech Republic who was living in Brno (in the Czech Republic) at the time of her death. The Brno Municipal Court appointed a guardian *ad litem* to represent the interests of the minor children so as to avoid a conflict of interest. The participants to the proceedings declared that no succession proceedings were pending in the Netherlands. On 14 July 2011, the heirs concluded an agreement on the distribution of the estate. During the notarial inheritance proceedings on 2 August 2012 new facts came to light. Namely, it appeared that Ms. Martinus had resided in the Netherlands at the time of her death and that succession proceedings were already ongoing in the Netherlands. An attestation to that effect was submitted on 14 March 2011.

Ms. Matoušková submitted for approval the agreement on the distribution of the estate to the court in the Czech Republic dealing with guardianship matters. The Court returned the file without having examined the substance of the dispute. It held that the minor children were long-term residents outside the Czech Republic so that it could not decline jurisdiction or refer the case to the Supreme Court in order to determine which court had jurisdiction. Following this, Ms. Matoušková applied to the Supreme Court with a request to designate the court with local jurisdiction to decide the matter of the approval of the agreement on the distribution of the estate at issue in the main proceedings. The Supreme Court then decided to stay its proceedings, taking the view that an interpretation by the CJEU was necessary.

[90] CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653.

In its consideration, the Court agreed with AG Kokott[91] that legal capacity and the associated representation issues had to be assessed in accordance with their own criteria and were not to be regarded as preliminary issues dependent on the legal acts in question. Therefore, it had to be held that the appointment of a guardian for the minor children and the review of the exercise of her activity were so closely connected that it would have been inappropriate to apply different jurisdictional rules, which would vary according to the subject matter of the relevant legal act.[92]

Therefore, the fact that approval had been requested in succession proceedings could not be regarded as decisive concerning whether the measure should fall within the scope of the law on succession. The need for approval was a direct consequence of the status and capacity of the minor children and constituted a protective measure for the child relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of Articles 1(1)(b) and 2(e) of the Brussels IIbis Regulation.

Just as it is excluded from the Brussels IIbis Regulation, succession must, in principle, be excluded from the 1996 Hague Convention. However, if the legislation governing the rights to succession provides for the intervention of the legal representative of the child who is an heir, that representative must be designated in accordance with the rules of the Convention, since such a situation falls within the area of parental responsibility.[93] This view is also confirmed by the Succession Regulation. Article 1(2)(b) of this Regulation excludes from its scope the legal capacity of natural persons. That Regulation governs only aspects relating specifically to the capacity to inherit under Article 23(2)(c) and the capacity of the person making the disposition of property upon death to make such a disposition in accordance with Article 26(1)(a). This interpretation is also consistent with the case law of the CJEU which is designed to avoid overlap and a legal vacuum between the different instruments.[94]

The CJEU concluded that the Brussels IIbis Regulation must be interpreted as meaning that the approval of an agreement for the distribution of an estate concluded by a guardian *ad litem* on behalf of minor children constituted a measure relating to the exercise of parental responsibility, within the meaning of Article 1(1)(b) of that Regulation and thus fell within its scope. Consequently, it is not a measure relating to succession within the meaning of Article 1(3)(f) which is excluded from the scope of application of the Brussels IIbis Regulation.[95]

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[91] *Ibid*., Opinion of Advocate General Kokott, para 41.
[92] CJEU Case C-404/14 *Matoušková*, [2015] ECLI:EU:C:2015:653, para 30.
[93] *Ibid*., para 32; Lagarde, P., Explanatory Report on the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1998).
[94] CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653, paras 33 and 34; see, by analogy, CJEU Case C-157/13 *Nickel & Goeldner Spedition* [2014] ECLI:EU:C:2014:2145, para 21 and the case law cited.
[95] CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653, para 38.

The case of *Bohez v Wiertz*[96] is another example of difficulties that may arise in connection with delineating the substantive scope of application between Brussels I[97] (or Ibis) and Brussels IIbis. The courts in Finland expressed different views on the nature and enforceability of an order for the payment of a penalty to ensure that one of the parents complied with the access rights of the other parent. For a better understanding of the legal reasoning, the facts of the case are detailed hereunder.

Mr Bohez and Ms Wiertz were married in Belgium with two children. They divorced in 2005 and Ms Wiertz moved to Finland. On 28 March 2007, the Belgian court delivered a judgment concerning custody, residence, rights of access and maintenance with regard to the two children. In order to ensure compliance with the right of access granted to Mr. Bohez, the Belgian court supplemented its judgment with a penalty payment if the access right would be infringed. Mr Bohez applied to the Finnish courts for an order requiring Ms Wiertz to pay him the penalty payment imposed in the judgment of 28 March 2007, or for a declaration that the judgment was enforceable in Finland because multiple visits had not taken place, leading up to a fine exceeding the maximum amount. Ms Wiertz contended that the order for a penalty payment had not been definitively confirmed by the Belgian courts and that the judgment of 28 March 2007 was therefore unenforceable. In its judgment of 8 March 2012, the Court at first instance (Itä-Uudenmaan käräjäoikeus) found that Mr Bohez's application did not relate to the enforcement of a judgment on the rights of access. Instead, in the view of the Court, it only related to the enforcement of a penalty payment imposed to ensure compliance with that judgment. Since the order issued by the Belgian court was a judgment laying down a monetary obligation, the Court at first instance held that it fell within the scope of the Brussels Ibis Regulation. However, the judgment of 28 March 2007 provided only for a periodic penalty payment, the amount of which had not been finally determined. As such, it was contrary to the requirements of Article 49 of the Brussels Ibis Regulation. Consequently, the Court held that the application for enforcement was inadmissible. The Helsinki Court of Appeal (*Helsingin hovioikeus*) upheld the inadmissibility of the claim, but for different reasons. It held that the application fell within the substantive scope of the Brussels IIbis Regulation. The Appellate Court concluded that it followed from Article 47(1) of the Brussels IIbis Regulation that the enforcement procedure was to be governed by Finnish law. Mr. Bohez appealed and the Supreme Court (*Korkein oikeus*) submitted a number of questions to the CJEU. Whether the application for the enforcement of the judgment imposing the penalty payment fell under the Brussels Ibis Regulation or the Brussels IIbis Regulation was amongst the questions submitted.

After referring to *Realchemie Nederland*[98], the CJEU held that 'the nature of that right of enforcement depends on the nature of the subjective right, for infringement of which enforcement was ordered'.[99] In the case at hand, the order for a penalty payment was intended

[96] CJEU Case C‑4/14 *Bohez v Wiertz* [2014] ECLI:EU:C:2015:563.
[97] COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L 12/1 (hereinafter – the Brussels I Regulation).
[98] CJEU Case C-406/09 *Realchemie Nederland* [2011] ECR I-09773, para. 42.
[99] CJEU Case C‑4/14 *Bohez v Wiertz* [2014] ECLI:EU:C:2015:563, para. 34.

to ensure the effectiveness of the right of access. The CJEU concluded that consequently the recovery of a penalty payment formed part of the same scheme of enforcement as the judgment concerning the right of access that the penalty safeguarded. Thus, the latter therefore had to be declared enforceable in accordance with the rules laid down by the Brussels IIbis Regulation.[100]

In the present case, the penalty payment whose enforcement was sought in the main proceedings had been imposed by the court which, under the Brussels IIbis Regulation, had jurisdiction to decide on the merits concerning to right of access. This meant that the enforcement of the penalty was directly linked to the enforcement of the principal obligation and therefore could not be considered in isolation. Recovery of the penalty payment therefore had to fall under the same scheme of enforcement as the rights of access which were to be ensured, namely the rules laid down in Articles 28(1) and 41(1) of the Brussels IIbis Regulation.[101] The Court went on to explain that if the scheme for the enforcement of penalty payments were separated from the scheme which was applicable to the right of access, this would amount to allowing the court of enforcement to verify whether there had been a breach of the right of access. Such a review would breach the principle of mutual trust.

On the question of the enforceability of a periodic penalty payment, the CJEU concluded that such a payment is enforceable 'only if the amount of the payment has been finally determined by the courts of the Member State of origin'.[102] This part of the reasoning is addressed in great detail *infra* in Chapter 9, under 6.2 '*Difficulties in application of Section 4 – CJEU case law*'.

The CJEU judgment in *Gogova*,[103] illustrates that there are circumstances in which it may appear difficult to determine the nature of the claim for the purposes of applying the Regulation. In this case a request for a preliminary ruling was submitted by the Bulgarian Supreme Court. The request concerned, *inter alia*, the issue of whether an application to the court to replace the parents' lack of a common agreement on a child being allowed to travel abroad and to allow for a passport to be issued in the child's name was a question pertaining to 'parental responsibility' within the meaning of Article 1(1)(b) in conjunction with Article 2(7) for the purposes of determining jurisdiction under Article 8(1) of the Regulation. The fact that the question involved the issuing of a passport raised doubts as to the nature of the claim: is this a 'civil matter' or an 'administrative matter'. In the latter case, it would fall outside the Regulation's scope. If it is a civil matter, the Regulation will apply so that the court in the Member State of the habitual residence of the child has jurisdiction. The decision of the court rendered in such proceedings is meant to replace the legal act which is crucial within the administrative procedure for issuing a child's passport in a Member State of the child's nationality which is not the Member State where the child habitually resides. The facts are

[100] *Ibid.*, para 53.
[101] *Ibid.*, paras 48-50.
[102] *Ibid.*, para 61.
[103] CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710.

briefly outlined for the purpose of gaining a better understanding of the legal reasoning of the CJEU.

The parents, both of whom were Bulgarian nationals residing in Italy, lived apart. The child was also a Bulgarian national and resided with her mother in Italy. In order to be able to travel with her daughter to Bulgaria, the mother had to renew the child's passport by filing a request before the competent authorities in Bulgaria. According to Bulgarian law, the common agreement of both parents is needed for a decision on a minor travelling abroad and for obtaining a passport in the child's name. Also, an application for a passport for a minor must be submitted to the competent administrative authorities in Bulgaria by both parents. Since the father did not cooperate in obtaining a new passport for their child, the mother filed the motion with the District Court in Petrich (*Rayonen sad,* Petrich, Bulgaria)) to resolve the disagreement between her and the father concerning their daughter's ability to travel abroad and the issuing of a new passport to her. As the document instituting the proceedings could not be served upon the father as he could not be found at the reported address, a legal representative was appointed by the Court. The representative did not raise an objection based on the Bulgarian courts' lack of jurisdiction and suggested that the dispute should be resolved in accordance with the best interests of the child. The Court issued an order declaring its lack of jurisdiction to hear the case and closed the proceedings. The decision was based on the conclusion that the application concerned parental responsibility for a child within the meaning of Article 8 of the Regulation. Consequently, jurisdiction lay with the court of the Member State of the child's habitual residence, which was Italy. The mother appealed against this decision to the Regional Court (*Okrazhen sad – Blagoevgrad,* Bulgaria). The Court concurred with the judgment and closed the proceedings. After this unsuccessful appeal the case reached the Supreme Court of Cassation (*Varhoven kasatsionen sad*). The latter considered that the outcome of the appeal depended on whether or not the judicial proceedings in the case at hand fell within the substantive scope of application of the Brussels IIbis Regulation. In particular, the Supreme Court considered it questionable whether such proceedings concerned 'parental responsibility' within the meaning of Article 2(7), especially bearing in mind that the judgment rendered in these proceedings would have to be submitted to the administrative authorities in Bulgaria which were to render a decision on whether the child was to be authorised to travel abroad or issued with a passport. If the proceedings in the case at hand were to be considered as an issue of parental responsibility, the jurisdiction of the courts had to be determined on the basis of the provisions of the Regulation which would consequently imply that the courts in Italy as a Member State of the child's habitual residence were competent.

The CJEU first addressed the substantive or material scope of application in Article 1(1)(b) of the Regulation holding in this context that 'the expression "civil matters" must not be understood restrictively but as an autonomous concept of EU law'. As such it covers 'in particular all applications, measures or decisions in matters of "parental responsibility" within the meaning of that regulation, in accordance with the objective stated in recital 5 in its preamble'.[104] It further held that for the purposes of determining whether an application falls

[104] *Ibid*., para 26, referring to CJEU Case C-435/06 *C.* [2007] ECR I-10141, paras 46 to 51.

within the scope of the Regulation 'the focus must be on the object of the application'.[105] The Court concluded that the object of the action in the case at hand was a matter pertaining to the exercise of parental responsibility within the meaning of Article 1(1)(b) in conjunction with Article 2(7) of the Regulation. This conclusion by the CJEU was supported by the argument that the action was aimed at obtaining a ruling from the competent court on the child's need to obtain a passport, on the parent's right to apply for it and the parent's right to travel abroad with the child without the agreement of the other parent.[106] The Court further reasoned that the concept of 'parental responsibility' extends to cases in which an action relates to a particular aspect of parental responsibility and not necessarily to all conditions for the exercise of 'parental responsibility'.[107]

The fact that a court ruling is intended to be used in an administrative procedure for obtaining a passport does not affect the nature or the object of the action, as it is not itself an application to issue a passport. The Court concluded that 'an action in which one parent asks the court to remedy the lack of agreement of the other parent to their child travelling outside his Member State of residence and a passport being issued in the child's name is within the material scope of Regulation, even though the decision in that action will have to be taken into account by the authorities of the Member State of which the child is a national in the administrative procedure for the issue of that passport'.[108]

Thus, the action in the case at hand did fall within the substantive scope of application of the Regulation for the purposes of establishing jurisdiction. Consequently, the courts in Italy where the child had her habitual residence were competent for the application in the present case according to the general rule on jurisdiction contained in Article 8. This is not affected by the fact that a decision rendered in Italy to replace the lack of agreement of the other parent would subsequently be used in administrative proceedings to issue a passport in Bulgaria, a Member State of the child's nationality.

In another case the CJEU has very recently ruled on the scope of 'right of access' in terms of persons whose rights of access to a child are to be considered as falling under the scope of the Regulation. The case of *Neli Valcheva v Georgios Babanarakis*[109] concerned the right of access by grandparents to grandchildren. The Court agreed with the Opinion of Advocate General Szpunar[110] that the Regulation does extend to a request concerning rights of access by grandparents. The Court supports his position *inter alia* by the reference to Article 2(10), which defines 'rights of access' broadly and which does not impose any limitation in regard to the persons who may benefit from those rights of access. The Court also referred to Article 2(7),

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[105] *Ibid*., para 28. The CJEU referred to the interpretation of the 'status of or legal capacity of natural persons' under Article 1(2) of the Brussels I Regulation in CJEU Case C-386/12 *Schneider* [2013] ECLI:EU:C:2013:633, paras 29 and 30 and the interpretation and application of the concept of 'social security' in the same Regulation in CJEU Case C-271/00 *Baten* [2002] ECR I-10489, paras 46 and 47.
[106] *Ibid*., para 29.
[107] *Ibid*., para 32.
[108] *Ibid*., para 35.
[109] CJEU Case C-335/17 *Neli Valcheva v Georgios Babanarakis* [2018] ECLI:EU:C:2018:359.
[110] CJEU Case C-335/17 *Neli Valcheva v Georgios Babanarakis* [2018] ECLI:EU:C:2018:242, Opinion of Advocate General Szpunar.

which defines the concept of parental responsibility as meaning all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect, including rights of custody and rights of access.

The CJEU case of *Health Service Executive*,[111] which will be dealt with extensively *infra* in Chapter 10, under 5.2 '*Difficulties in application – CJEU case law*' concerned a Reference for a Preliminary Ruling that had been submitted by the Irish High Court. The request had been made on an urgent basis (in accordance with Article 104b of the Court's Rules of Procedure), with the facts involving a decision to place an extremely vulnerable young person, who was habitually resident in Ireland, in a secure care institution in England.[112] The placement of the child took place at the request of the Health Service Executive, the statutory authority which is responsible for children taken into public care in Ireland. Although all relevant parties (except the child) were in agreement regarding this decision, the referring court had a number of concerns with regard to the usage of Article 56 in this process.[113] Firstly, for the purposes of the Regulation's scope of application,[114] the Irish High Court wished to clarify whether the judgment in case *A*[115], which provides for the detention of a child for a specified time in another Member State in an institution providing therapeutic and educational care, falls within the material scope of the Regulation. In answering this question in the affirmative, the CJEU referred to several provisions that, taken in conjunction with one another, evidenced the applicability of the Regulation. It stated that parental responsibility within the meaning of Brussels IIbis was to be given a broad definition, and taken to include decisions on the right of custody regardless of whether custody is to be transferred to an administrative authority.[116] Although Article 1(d) and Article 56 do not explicitly refer to the placement of a child in institutional care in another Member State where that placement involves a period of deprivation of liberty for therapeutic and educational purposes, they do exemplify the placement of a child in institutional care in another Member State. Furthermore, it was previously found in the case of *C*[117] that the list of inclusions within the scope of the Regulation is not intended to be exhaustive.[118] Drawing on the requirement to ensure equal treatment for all children (Recital 5), the Court proceeded to state that not interpreting the Regulation as covering placement in secure care would mean that its benefit would be lost to vulnerable children and would therefore be contrary to this purpose.[119]

One point that was, however, emphasised in the CJEU's judgment was that, in accordance with the express exclusion in Article 1(3)(g) of 'measures taken as a result of criminal offences

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[111] CJEU Case C-92/12 *Health Service Executive* [2012] ECLI:EU:C:2012:255.
[112] *Ibid*., paras 22-29.
[113] *Ibid*., para 36.
[114] There were other separate questions regarding Article 56 of the Regulation.
[115] CJEU Case C-523/07 A. [2009] ECR I-2805.
[116] *Ibid*., para 59.
[117] CJEU Case C-435/06 *C.* [2007] ECR I-10141.
[118] *Ibid*., para 63.
[119] *Ibid*., para 64.

committed by children', deprivation of liberty only falls within the scope of the Regulation where it is intended to protect (as opposed to punish) the child.[120]

The CJEU judgment in *C*[121] addressed the definition of parental responsibility within the meaning of the Regulation. It considered the question of whether taking children into care and placement in a foster home, which was defined as a measure of public law by the domestic law in question, was nevertheless to be treated as civil law for the purposes of the applicability of Brussels IIbis.

The facts of this case involved the removal of two children which had been ordered by the Swedish Social Welfare Board on 23 June 2005. Following the issuing of this order the children and their mother relocated to Finland. The Swedish authorities sought to have their order enforced through cooperation with their Finnish counterparts. However, the mother of the children appealed against the Finnish police's order to hand over the children. This first appeal was dismissed, and the mother of the children subsequently appealed to the Finnish Supreme Administrative Court, which stayed the proceedings and made a Reference for a Preliminary Ruling to the CJEU on the basis of whether taking a child into care, which is defined as a matter of public law in Finland, should fall within the scope of Brussels IIbis.

With regard to the question of the Regulation's material scope of application, the referring court made the following enquiries:[122]

> (a) Does Regulation No. 2201/2003 apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into care of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;
>
> (b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;
>
> (c) and, in the latter case, is Regulation [No. 2201/2003] applicable to a decision on placement contained in one on taking into care, even if the latter decision, on which the placement decision is dependent, is itself subject to legislation, based on the mutual recognition and enforcement of judgments and administrative decisions that has been harmonised in cooperation between the Member States concerned?

In answer to the above questions, the CJEU acknowledged that taking a child into care is not expressly mentioned amongst the matters listed as relating to parental responsibility in Article 1(2).[123] However, it stated that this list is not intended to be exhaustive (as shown by the use of the words 'in particular').[124] It drew on the fact that Recital 5 of the Regulation covers all decisions on parental responsibility, including measures for the protection of the child.

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[120] *Ibid*., para 65.
[121] CJEU Case C-435/06 *C.* [2007] ECR I-10141.
[122] There were, however, two additional questions concerning the interplay with the Nordic Council and the application of Brussels IIbis *ratio temporis* which will not be considered here.
[123] CJEU Case C-435/06 *C.* [2007] ECR I-10141, para 28.
[124] *Ibid*., paras 29-30.

Furthermore, it highlighted the linkage between taking a child into care and decisions on custody (Article 1(2)(a))[125] and the placement of a child in foster care (Article 1(2)(d).[126]

The Court then turned to the question of whether a public law measure could fall within the scope of the Regulation. It firstly stated that 'civil matters', as used in the Regulation, is an autonomous concept[127] that should be interpreted in light of the objectives of this instrument. It went on to establish that if the categorisation of a particular measure as a public law matter by national law was the only reason for refusing the applicability of the Regulation, this would compromise the purpose of mutual recognition and the enforcement of decisions in matters of parental responsibility. Neither the judicial organisation of the Member States, nor the conferral of powers on administrative authorities should affect the scope of the Regulation or the definition of 'civil matters'.[128]

In conjunction with emphasising the broad definition to be attached to 'parental responsibility' within the meaning of the Regulation,[129] the CJEU established 'that 'civil matters' must be interpreted as capable of extending to measures which, from the point of view of the legal system of a Member State, fall under public law', and that therefore the taking of a child from his or her original home and his or her placement in foster care was to be considered as a 'civil matter' if this decision was made in the context of public law rules relating to child protection.[130] In light of its answer to Question 1(a), the Court opted not to answer Question 1(b) and (c).[131]

A similar question to that of the above case arose in a later Reference for a Preliminary Ruling that had again been made by the Finnish Supreme Court in *A.*[132] Alongside the brief explanation of the facts *infra*, a more elaborate summary is included in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*'. This instance involved a challenge by a mother against the decision by the Finnish authorities to take into care and place in a foster family three children who had previously been living in Sweden and appeared to be residing in Finland on a temporary basis.[133] The mother argued that the Finnish authorities lacked the competence to take such measures in this instance, since the children were Swedish nationals who were permanently resident in Sweden.[134] The Finnish Supreme Court wished to clarify a number of questions,[135] the first of which was essentially a reiteration of the question posed in C:

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[125] *Ibid*., para 33.
[126] *Ibid*., para 34.
[127] *Ibid*., para 46.
[128] *Ibid*., para 45.
[129] *Ibid*., para 49.
[130] *Ibid*., paras 51 and 53.
[131] *Ibid*., para 55.
[132] CJEU Case C-523/07 *A.* [2009] ECR I-2805.
[133] *Ibid*., paras 14-15.
[134] *Ibid*., para 19.
[135] It also posed questions concerning the definition of habitual residence and the use of protective measures under Article 20 of Brussels IIbis – see para. 20 of the judgment.

> 1. (a) Does … [the] Regulation … apply to the enforcement, such as in the present case, of a public-law decision made in connection with child protection, as a single decision, concerning the immediate taking into care of a child and his or her placement outside the home, in its entirety,
>
> (b) or, having regard to the provision in Article 1(2)(d) of the regulation, only to the part of the decision relating to the placement outside the home?[136]

In recalling its reasoning in the previous decision,[137] the CJEU answered that the Regulation would apply to both the taking into care and placement of a child outside the home where that decision was adopted in the context of public law rules on child protection.[138]

3. Definitions

The Regulation defines a number of issues in Article 2. Each issue defined presents 'an autonomous concept which is independent of the law of Member States'. In general, the jurisprudence of the CJEU attaches great importance to the principle of an autonomous and uniform interpretation of European Union law whereby no express reference is made to the law of the Member States for the purposes of determining the meaning and scope of EU law.

The subsections below seek to establish the nature of the proceedings that take place within the remit of Brussels IIbis by firstly examining the definition of a court or tribunal for these purposes (3.1), before considering the meaning of a 'judge' within this context (3.2).

3.1 Court or tribunal

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 that they are officially recognised in the Member State.[139] The Romanian National Report exemplified the breadth of the scope assigned to this definition by stating that judgments issued by state courts, notaries, registrars, government offices and welfare authorities were recognised in cases involving Brussels IIbis that come within its jurisdiction.[140]

Despite this, a number of the National Reporters mentioned that they perceive a lack of clarity as to whether certain administrative proceedings fell within the scope of the Regulation.

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[136] *Ibid*., para 20.
[137] *Ibid*., para 22.
[138] *Ibid*., para 29.
[139] See the clear inclusion established by the Explanatory Memorandum accompanying the Proposal for the Brussels II Regulation, COM(1999) 220 final, 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, *op. cit.*, Article 1, note 4.
[140] National Report Romania, question 3.

The commentators cited the inclusion of administrative divorce[141] and decision making by social work bodies[142] as potential points of interpretational difficulty within their jurisdictions.

In line with the changes to Article 1(1) in the present 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.

Another issue arises from the fact that it is not entirely clear whether proceedings undertaken by a private or religious authority concerning the dissolution or weakening of the marital bond (e.g. the *get* procedure before a Jewish rabbinic court in a Member State or a divorce performed by a *mufti* under *sharia* law) are excluded from the scope of this Regulation. Whilst such proceedings were expressly excluded from the Brussels II Regulation, the position of the current Regulation has not been enunciated.

There are contrasting opinions on this matter evidenced in the National Reports. According to the National Report of the Czech Republic, private decisions of religious bodies are excluded unless such bodies have been expressly given powers by the law to pronounce a divorce. [143] The French report holds that if the religious authority pronouncing the divorce has jurisdiction to do so in the Member State, its decision will fall under Brussels IIbis for the purposes of recognition.[144] The Greek National Report states that religious decisions or decisions of a private nature are excluded from the scope of the Regulation except for those that are recognised as equivalent to the decisions of judicial authorities.[145] The Irish Report simply holds that religious decisions cannot be recognised.[146] This patchwork approach can be regarded as problematic in terms of legal certainty, as 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. [147]

In contrast to the confusion brought about by the above discussion, it is however clarified in Article 62 of the Regulation that concordats and other agreements between Italy, Malta, Portugal, Spain and the Holy See do fall within the scope of the Regulation for the purposes of the recognition and enforcement of decisions.

Given the degree of contradiction documented in the National Reports with regard to proceedings undertaken by a private or religious authority, it is suggested that the recast and/or

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[141] National Report Spain, question 3.
[142] National Report Slovenia, question 3.
[143] National Report the Czech Republic, question 15.
[144] National Report France, question 15.
[145] National Report Greece, question 15.
[146] National Report Ireland, question 15.
[147] Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 12. 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).

accompanying documentation further elaborate upon the nuances of the approach to be taken by national courts in this regard.

3.2 Judge

The term 'judge' is to be taken to mean the judge, or an official having powers equivalent to those of a judge, who is competent in matters falling within the scope of the Regulation.[148] This category includes members of a court, officers of a court, and officials of administrative and social bodies with the power to make decisions in matrimonial or parental responsibility matters.[149] In addition, the report of Spain also indicates the possibility of notaries being included in this definition[150].

3.3 Definitions of 'Member State', 'Member State of Origin' and 'Member State of Enforcement' – Articles 2(3), 2(5) and 2(6)

The Regulation is an instrument which is binding on all Member States of the European Union, with the exception of Denmark. Accordingly, the term 'Member State' refers to all Members States with the exception of Denmark.[151]

The term 'Member State of origin' in Article 2(5) refers to the Member State in which the judgement to be enforced was issued. The term 'Member State of enforcement' in Article 2(6) refers to the Member State where the enforcement of the judgement is sought. The term is used so that the Regulation reads more easily.[152] According to the National Reports, there appears to be no case law which is relevant either for the definition of the 'Member State of origin' or the 'Member State of enforcement'.[153]

3.4 Definition of Judgement – Article 2(4)

For the purpose of this Regulation, the term 'judgement' refers to a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility pronounced by a

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[148] Brussels IIbis Regulation, Article 2(2).
[149] Magnus/Mankowksi/Pintens, *op. cit.*, Article 2, note 5.
[150] National Report Spain, question 3.
[151] Under Title IV of the EC Treaty, Article 69 EC. Articles 1-3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty of Amsterdam. Denmark, Ireland and the UK are not participating in Community action; however, Ireland and the UK reserved an opt-in possibility and have made use of this. The Protocol on the position of Denmark does not have an opt-in clause, but at any time Denmark may inform the other Member States that it no longer wishes to avail itself as part of this Protocol.
[152] Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in the matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance, COM (2002) 222 final/2, p. 7.
[153] National Report Austria, question 3; National Report Belgium, question 3; National Report Bulgaria, question 3; National Report Croatia, question 3; National Report Cyprus, question 3; National Report Estonia, question 3; National Report Finland, question 3; National Report France, question 3; National Report Germany, question 3; National Report Greece, question 3; National Report Hungary, question 3; National Report Ireland, question 3; National Report Italy, question 3; National Report Latvia question 3; National Report Lithuania, question 3; National Report Luxembourg, question 3; National Report Malta, question 3; National Report The Netherlands, question 3; National Report Poland, question 3; National Report Portugal, question 3; National Report Romania, question 3; National Report Slovenia, question 3; National Report Spain, question 3; National Report Sweden, question 3; National Report the United Kingdom, question 3.

court of a Member State.[154] This term should be interpreted broadly and cover decrees, orders or decisions,[155] as Article 2(4) expressly states. The same follows from the definition of a 'court' in Article 2(1) referring to 'all authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1.' Moreover, the judgment must have the legal effect of *res judicata*.[156]

3.5 Definition of 'parental responsibility' – Article 2(7)

The Brussels IIbis Regulation applies to matters which, *inter alia*, relate to the attribution, exercise, delegation, restriction or termination of parental responsibility.[157] Parental responsibility is defined as *all* rights and duties relating to the person or property of a child which are given to a natural or legal person by a judgement, by operation of law, or by an agreement having legal effect, including rights of custody and rights of access. The scope of the Regulation, as opposed to previous legislation, is no longer defined by reference to specific categories of parent-child relationships or specified categories of children. Instead, it is defined by a general reference to the existence of rights and duties with regard to children. In this approach the nature of the relationship with the 'holder of parental responsibility' is no longer relevant.[158]

The expression 'parental responsibility' has a wide scope and certainly covers custody and access orders or their national equivalents.[159] The concept is given a broad definition so that it includes all rights and duties relating to the person or the property of a child which are given to a natural or legal person by a judgement, by operation of law or by an agreement having legal effect.[160] Such rights may belong to a natural or legal person. The right of custody and the right of access are expressly mentioned as falling within the expression 'parental responsibility'. There are circumstances in which it may appear difficult to determine the 'extent' of this expression for the purposes of determining jurisdiction. This is so when multiple legal proceedings that are related to the child are or will be conducted in different Member States. This is especially so when a decision rendered in the proceedings in one Member State will have to be used or may be relied upon or the judgment rendered merely serves as a condition for initiating the proceedings in another Member State. The facts surrounding the request for a preliminary ruling submitted by the Bulgarian Supreme Court in the CJEU case

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[154] See e.g., CJEU Case C-281/15 *Soha Sahyouni v Raja Mamisch* [2016] ECLI:EU:C:2016:343, para 21.
[155] Provisional orders should be interpreted according to Article 20, and orders as to costs according to Article 49 of the Regulation.
[156] Magnus/Mankowski/Pintens, *op. cit.,* Article 1, note 11.
[157] See also CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, para 26; Boele-Woelki, K. and Gonzalez Beilfuss, C.,'Impact and Application of the Brussels IIbis Regulation: comparative synthesis' in: Boele-Woelki, K. and Gonzalez Beilfuss, C. (eds) *Brussels IIbis: Its Impact and Application in the Member States* (Intersentia 2007), pp. 31.
[158] Practice Guide 2015, p. 19.
[159] Lowe, 'Some moot points on the 1980 Hague abduction convention' (2015) 46 3 Victoria University of Wellington Law Review, 683, p. 694, available at: <http://search.informit.com.au/documentSummary;dn=670492968170800;res=IELHSS> ISSN: 1171-042X, accessed 24 February 2017.
[160] CJEU Case C-435/06 *A* [2009] ECR I-10141, para 49; CJEU Case C-92/12 *Health Service Executive* [2012] ECLI:EU:C:2012:255, para 59.

of *Gogova v Iliev*[161]are illustrative. The facts of this case and the legal reasoning of the CJEU are explained in great detail *supra* in this Chapter, under. 2.3 '*Difficulties in application – CJEU case law*'.

Expanding on that, it is interesting to note that Advocate General Villalon interpreted Articles 2(7), 2(9), 2(11) and Articles 10 and 11 of the Brussels IIbis Regulation as meaning that a 'court of a Member State may be an "institution or other body" within the meaning of those provisions, to which rights of custody may be granted for the purposes of the provisions of that regulation, in so far as the legislation of that Member State provides for the grant of those rights of custody by operation of law'.[162]

Because children can no longer be seen as incidental happenings of the free movement of their parents, children must be regarded as the bearers of rights. The Brussels IIbis Regulation takes a child-friendly approach so as to use wording such as 'parental responsibility' rather than 'parental authority' and to refer to the best interests of children.[163]

3.6 Definition of the 'holder of parental responsibility' – Article 2(8)

The term 'holder of parental responsibility' refers to any person having parental responsibility over a child. The Regulation no longer refers to 'parents' but to 'holders of parental responsibility' because it no longer concerns solely 'traditional parents'. It is therefore suggested that, for example, rights of access of grandparents or former partners of the parent also fall within the scope of the Regulation.[164] Additionally, both a natural person and a legal person can be holders of parental responsibility.[165]

Furthermore, any person who has obligations and rights towards a child can qualify as a holder of parental responsibility, even if they are holders of only one element of parental responsibility. For example, a person holding access rights, e.g. a grandparent, is also a holder of parental responsibility,[166] as well as an administrative authority.[167]

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[161] CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710.
[162] CJEU Case C-497/10 PPU *Mercredi v. Chaffe* [2010] ECR I-14309, Opinion of Advocate General Cruz Villalon, para 147. The Court, however, went on to dismiss the second question of this Case as Articles 10 and 11 were not applicable to the situation at hand.
[163] Kruger, T. and Samyn, L. 'Brussels IIbis: successes and suggested improvements' (2016) 12:1 Journal of Private International Law, pp. 132-168, p. 155.
[164] Swennen, F., 'Atypical families in EU (private international) family law', in Meeusen, J., Pertegas, M., Straetmans, G., Swennen, F. (eds), *International family law for the European Uniono* (Intersentia 2007) p. 418.
[165] Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 19.
[166] *Ibid.*, Article 1, note 23.
[167] CJEU Case C-435/06 *C.* [2007] ECR I-10141, paras 47-48; Carpaneto, L., 'On the recast of the Brussels IIbis Regulation: a few proposals de jure condendo' p. 258, in Queirolo, I., Heiderhoff, B., (eds.), *Party Autonomy in European Private (and) International Law- Tome I* (Arachne 2015), p. 258.

3.7 Definition of 'rights of custody' – Article 2(9)

The term 'rights of custody' includes rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence. This term is defined in the same way in Article 3 of the 1996 Hague Convention.[168]

Custody shall be considered to be exercised jointly when, pursuant to a decision or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility. This definition is similar to Article 3 of the Convention.

According to the relevant case law, the 'rights of custody' are an 'autonomous concept which is independent of the law of the Member States.'[169] The terms of a provision of the law unified on the EU level which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU.[170]

In case *C*[171] the CJEU pointed out that taking the child into care limits the exercise of parental responsibility if the right to determine the child's place of residence is transferred to the authorities under the applicable law. The right to determine the child's place of residence is an integral element of parental responsibility.[172] Thus, taking the child into care may affect the exercise of rights of custody which specifically includes the right to determine the child's place of residence according to Article 2(9). According to Article 1(2)(a), rights of custody constitute one of the matters relating to that responsibility.[173]

3.8 Definition of 'rights of access' – Article 2(10)

'Rights of access' are an aspect of parental responsibility which designate in particular the 'right to take a child to a place other than his or her habitual residence for a limited period of time'[174] along with rights relating to the care of the person of the child.[175] According to the Practice Guide 2015, the Regulation applies to any 'access rights', irrespective of the beneficiary. In accordance with national legislation, access rights may be attributed to the parent who does not reside with the child, or to other family members, such as grandparents or third persons. As already explained above, the latter question was submitted to the CJEU in the case *Neli*

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[168] Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 24.
[169] CJEU Case C-400/10 PPU *McB* [2010] ECR I-08965, para. 41.
[170] *Ibid*.
[171] CJEU Case C‑435/06 *C.* [2007] ECR I-10141; see *supra* in this Chapter, under 2.3 '*Difficulties in application – CJEU Case law*' for the details of the case.
[172] Dutta, A. and Schulz, A. 'First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive' (2014) 10:1 Journal of Private International Law, 1-40, p. 5.
[173] CJEU Case C‑435/06 *C.* [2007] ECR I-10141, para 33.
[174] Brussels IIbis Regulation, Article 2(10).
[175] CJEU Case C-92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, para 59.

Valcheva v Georgios Babanarakis[176], in which the Court ruled that the concept of 'rights of access' encompasses grandparents. Additionally, the Practice Guide 2015 as defined 'rights of access' in a broad way and designates them to include, for instance, contact by telephone, skype, the internet or e-mail.[177]

3.9 Difficulties in the application of Article 2(1)-(10) – National Reports

With respect to the definitions in Article 2(1)-(6) the National Reports do not demonstrate any significant difficulties in the interpretation or application of these provisions.

As for difficulties in the application of Article 2(7)-(10), a clear majority of the National Reporters mention that their respective Member States have had no difficulties in interpreting the term 'parental responsibility'.[178]

However, some National Reports do mention certain exceptions. Thus, the Finnish National Reporter indicates that at times the national courts have encountered difficulties in interpreting and applying the definition of 'parental responsibility'. This is not a concept that has a place in the Finnish national child law system and which operates with a general concept called 'custody of the child'. This raises the question of how the differing terminology must be dealt with when trying to find the true meaning of the foreign concept.[179] A similar difficulty has been encountered in France as the concept of 'parental responsibility' has no equivalent in French law. Thus, French judges are not familiar with the idea that persons other than the parents (or substitutes) can also be the holders of parental responsibility. Therefore there is a risk of confusion with the more restrictive national concept of 'parental authority' which can be problematic for the application of rules which necessitate the agreement of all 'parental responsibility holders'.[180] Polish courts face the same prospective issue as Polish national law does not include the term 'parental responsibility', using 'parental authority' instead. Other National Reports do not indicate any difficulties in interpretation.[181]

In the UK, in the *Re B*[182] case the applicant parent lacked parental responsibility despite playing a significant role in the child's life, on the basis that she was neither a spouse, civil partner, nor in possession of a Residence Order.[183]

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[176] CJEU Case *Neli Valcheva v Georgios Babanarakis* C-335/17 [2018] ECLI:EU:C:2018:359.
[177] Practice Guide 2015, p. 43, para 3.6.2.
[178] National Report Austria, question 19; National Report Belgium, question 19; National Report Bulgaria, question 19; National Report Croatia, question 19; National Report Cyprus, question 19; National Report Estonia, question 19; National Report Germany, question 19; National Report Greece, question 19; National Report Hungary, question 19; National Report Ireland, question 19; National Report Italy, question 19; National Report Latvia, question 19; National Report Lithuania, question 19; National Report Luxembourg, question 19; National Report The Netherlands, question 19; National Report Portugal, question 19; National Report Romania, question 19; National Report Slovenia, question 19; National Report Spain, question 19; National Report Sweden, question 19.
[179] National Report Finland, question 19.
[180] National Report France, question 19.
[181] National Report Poland, question 19.
[182] *Re B (a child)* [2016] UKSC 4.
[183] National Report the United Kingdom, question 19.

In Malta, national legislation provides that both parents are deemed to be trusted with the care and custody of the children which means that both parents are to decide on what is in the child's best interests, unless a court decree stipulates otherwise.[184]

The Belgian case law does not reveal any difficulties relating to the interpretation of the terms 'parental responsibility', 'holder of parental responsibility', 'right of custody' and 'rights of access'. However, some clarifications of the terms appear in Belgian case law. The Supreme Court of Belgium has held that, according to Articles 1(1) and 2 of the Brussels IIbis Regulation, the Regulation applies to all civil cases concerning the attribution, exercise, delegation, restriction or termination of parental responsibility, regardless of the nature of the court. Furthermore, the Court stated that the fact that a specific issue of parental responsibility is part of public law according to domestic law does not pre-empt the application of the Brussel IIbis Regulation when the measure taken relates to entrusting the minor to one of his or her parents.[185]

In Romania, the determination of the holder of parental responsibility and its attribution, exercise, delegation, restriction and termination will be made according to the law designed by the choice of law rules established by the 1996 Hague Convention. The determination of the parents (normally the holders of parental responsibility) will be made according to the choice of law rules regarding filiation or adoption.[186]

Other National Reporters have not encountered noticeable difficulties in their interpretation and application of Article 2(8), although in many countries the concept of 'parental responsibility' does not in fact exist (Spain, Finland, France, Hungary, and Poland).

3.10 Difficulties in the application of Article 2(1)-(10) – CJEU case law

In the majority of cases submitted to the CJEU the problems were in connection with the substantive scope of application under Article 1(1)(b). Within that context, the definitions of 'parental responsibility' and 'rights of custody' were involved.

In the case *McB*[187] the CJEU stated that the 'rights of custody' are an 'autonomous concept which is independent of the law of the Member States.'[188] In the case of *C* the CJEU held that the right to determine the child's place of residence is an integral element of parental responsibility. The exercise of parental responsibility is thus limited by taking the child into care if the right to determine the child's place of residence is transferred to the authorities under the applicable law[189]

[184] National Report Malta, question 19.
[185] Cour de Cassation 21 November 2007, *Revue@dipr.be* 2008/1, 78; National Report Belgium, question 19.
[186] National Report Romania, question 19.
[187] See *infra* in this Chapter, under 3.11.2 '*Difficulties in application – CJEU case law*' for the details of the case.
[188] CJEU Case C-400/10 PPU *McB* [2010] ECR I-08965, para 41.
[189] CJEU Case C‑435/06. *C*. [2007] ECR I-10141, para 33.

In the case of *Gogova*[190] the CJEU was asked to clarify several key issues relating to the scope of the Regulation, also including the definitions in Article 2(7). The CJEU has pointed out that "*The concept of 'parental responsibility' is given a broad definition in Article 2(7) of Regulation No. 2201/2003, in that it includes all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. Where an action requires the national court to rule on the child's need to obtain a passport and the applicant parent's right to apply for that passport and travel abroad with the child without the agreement of the other parent, the object of that action is the exercise of 'parental responsibility' for that child within the meaning of Article 1(1)(b) in conjunction with Article 2(7) of Regulation No. 2201/2003.*"[191]

3.11 Definition of 'wrongful removal or retention' – Article 2(11)

The 'wrongful removal or retention' under the Regulation is largely modelled along the lines of the definition in Article 3 of the 1980 Hague Convention.[192] In accordance with both Articles, the term 'wrongful removal or retention' refers to situations where the child is removed or retained in breach of rights of custody, provided that, at the time of the removal or retention, those rights were actually exercised, or would have been exercised, had the removal or retention not taken place. The only addition is the second sentence of Article 2(11)(b) of the Regulation which defines when custody is considered to be exercised jointly by the holders of parental responsibility.[193] Thereby the right to decide on the child's place of residence is determinative for understanding joint custody: when one holder of parental responsibility is not permitted to decide on the child's place of residence without the consent of the other holder of parental responsibility. As a result, removing a child from one Member State to another without the consent of the other holder of parental responsibility constitutes child abduction under the Regulation. If the removal is lawful under national law, Article 9 of the Regulation may apply.[194] The definition of 'wrongful removal' as provided in the Regulation applies instead of

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[190] This case has been explained in greater detail *supra* in this Chapter, under 2.3 '*Difficulties in application – CJEU Case law*'.

[191] CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710; National Report Bulgaria, question 19.

[192] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 1980 Hague Convention or 1980 Hague Child Abduction Convention). Article 3 of the 1980 Hague Convention reads: The removal or the retention of a child is to be considered wrongful where:
'(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

[193] Lowe, N., Everall, M. and Nicholls, M., *The New Brussels II Regulation: a supplement to International Movement of Children* (Jordan Publishing 2005), p. 155.

[194] *Ibid*.

the definition under the 1980 Hague Convention, because the former overrides the Convention insofar as they concern matters governed by the Regulation.[195]

According to Article 2(11)(a) the right of custody must be acquired by a judgment or by operation of law or by an agreement. The law of the Member State where the child had his or her habitual residence[196] immediately before his or her removal or retention is determinative for the legal effects and consequences of these sources on which the right of custody can be based.[197]

3.11.1 Difficulties in application – National Reports

The predominant view of the National Reporters is that there are relatively few or no difficulties in applying the definition of 'wrongful removal or retention'.[198] In some Member States no cases have been reported where this issue has arisen. In other Member States where the courts have had cases in which the definition was an issue, they experienced no difficulties when applying the definitions as such. Rather, the problems that had been encountered concerned the application of the definition in connection with other sources, in particular the 1980 Hague Child Abduction Convention without applying the Regulation itself.[199] The National Report of Estonia refers to difficulties caused by a 'poor translation' of the Convention,[200] but the required guidance in that respect was provided in the case law of the Supreme Court.

In the United Kingdom, the need to both promote and protect the best interests of the child is stressed, as is the obligation to comply with international law interpretations of the concept of habitual residence.[201] When looking at Belgian cases concerning parental abduction, it becomes clear that the Belgian courts often only look at the place where the child is registered, the place of the school where the child is enrolled and the consent of the parent left behind. In October 2013, for example, the Court of First Instance in Antwerp decided that the place of

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[195] Brussels IIbis Regulation, Article 60(e).

[196] On the meaning of 'habitual residence': Lowe, 'Some moot points on the 1980 Hague abduction convention', *op. cit.*, p. 694; Gallagher, E., 'A House is not (necessarily) a home: a discussion of the common law approach to habitual residence' (2014) 47 N.Y.U. J. Int'l L. & Pol., pp. 463 et seq.; Beaumont, P., Holliday, J., 'Recent developments on the meaning of "habitual residence" in alleged child abduction Cases' in Župan, M. (ed.) *Private International Law in the Jurisprudence of European Courts – Family at Focus* (Osijek 2015) pp. 37 et seq.

[197] CJEU Case C – 376/14 PPU *C. v M.* [2014] ECLI:EU:C:2014:2268, para 47, stating that '[i]t follows from that definition that the identification of a wrongful removal or retention within the meaning of Article 2(11) of the Regulation presupposes that the child was habitually resident in the Member State of origin immediately before the removal or retention and that there is a breach of rights of custody attributed under the law of that Member State'.

[198] National Report Germany, the complete answer to this question can be found under question 30; National Report Latvia, question 32; National Report Lithuania, question 32; National Report Luxembourg, question 32; National Report Malta, the complete answer to this question can be found under question 30, National Report Poland, question 32; National Report Sweden, question 32; National Report Ireland, question 30; National Report Greece, question 32; National Report Austria, question 32; National Report Hungary, the complete answer to this question can be found under question 30 and National Report Slovenia, the complete answer to this question can be found under question 30.

[199] National Report Spain, question 32.

[200] National Report Estonia, question 32.

[201] National Report the United Kingdom, question 32; See also *Re B (A child)* [2016].

habitual residence of a 15-year old boy was located in the Netherlands because the boy had attended school in the Netherlands since September 2011 and his father had never filed a complaint against the boy's stay in the Netherlands.[202] Once the place of habitual residence becomes clear, the court seised will examine whether both parents enjoy custody rights under the law of that State. In cases where the habitual residence of the child is located in Belgium, both parents automatically enjoy custody rights, irrespective of their marital status and regardless of whether they cohabit or not.[203] If the habitual residence of the child is outside Belgium, the court will have to look at the national law of that State in order to determine whether both parents enjoy custody rights. [204]

In Romania, custody rights breached by the removal or retention must not necessarily be granted by a judgment or by an administrative decree, but may result as an operation of law. In a case from 2009 regarding a child habitually resident in Hungary, the Bucharest Court of Appeal stated that the child's retention in Romania by the mother must be considered wrongful (within the meaning of Article 3 of the 1980 Hague Convention) when both parents had custody by virtue of the law and the father did not consent to this retention.[205] One can speak of an 'abduction' when one of the holders of custody rights has moved the child to another state without the consent of the other holder; the wrongful character of the removal does not derive from an act which is illegal by law, but from an infringement of the other holder's rights, equally protected by law and whose normal exercise was disrupted.[206] The courts also distinguish between displacement (which may be legal) and retention, stating that an abduction can only exist if the child is retained without the consent of the parent left behind. When both parents are holders of parental responsibility, and one of them refuses to return the child after the expiration of the period agreed by the other to be spent abroad, the refusal to return is wrongful.[207] In a decision from 2014, the Bucharest Court of Appeal further clarified the circumstances for an abduction: it expressly stated the irrelevance of the fact that prior to the removal in Romania the children did not live with the father, the only relevant factors being their habitual residence in Hungary, the joint parental responsibility of the parents (according to Hungarian applicable law), and the retention by the mother, on Romanian territory, without the father's consent.[208]

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[202] National Report Belgium, question 32; Court of First Instance 23 October 2013, No. 13-3627-A, unpublished but discussed in S. Den Haese, 'Parentale ontvoeringen: de rol en positie van het kind' (Master's Thesis in Law, Ghent University, 2015-2016), p. 130.
[203] National Report Belgium, question 32; Article 373-374 Belgian Code Civil.
[204] *Ibid.*
[205] National Report Romania, question 32; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no.1695 from 9 December 2009. For similar decisions, see Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 148 from 4 February 2010; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 71 from 21 January 2010.
[206] *Ibid.*; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 311/A/16 July 2014; Bucharest Court of Appeal, 3rd Juvenile and Family Division, decision no. 316 from 22 March 2011.
[207] *Ibid.*; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 874 from 11 September 2015; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 211 from 15 February 2010; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 231 from 18 February 2010.
[208] *Ibid.*; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 300/A from 09 July 2014.

3.11.2 Difficulties in application – CJEU case law

In case *C v M*[209] the CJEU provided guidelines on a number of issues relating to the application of the definition in Article 2(11). Considering that the facts and circumstances are rather complicated but are still relevant for the legal reasoning, they are briefly presented.

After a deterioration in the couple's relationship in which a child was born, a British wife (M.) brought an action for divorce on 17 November 2008 in France.[210] The divorce judgment was issued by the *Tribunal de grande instance d'Angoulême* on 2 April 2012. It declared that the divorce should be effective as from 7 April 2009 and it also:

'ordered that parental authority in respect of the child be exercised jointly by the two parents, determined the habitual residence of the child to be with the mother as from 7 July 2012 and organised access and accommodation rights for the father in the event of disagreement between the parties, by providing for different arrangements depending on whether the mother established residence in France or left France in order to live in Ireland. That judgment provides that the mother is permitted to 'set up residence in Ireland' and states, in its operative part, that the judgment is 'enforceable as of right on a provisional basis as regards the provisions concerning the child'.[211]

The divorce judgment was provisionally enforceable under French law. The father's request for a stay on the provisional enforceability of the divorce judgment was dismissed by the First President of the *Cour d'appel de Bordeaux* on 5 July 2012. The mother moved with the child to Ireland on 12 July 2012 and since then they have lived there. The divorce judgment was overturned by the *Cour d'appel de Bordeaux* on 5 March 2013, which ordered the residence of the child to be in France and provided for the mother to have access and accommodation rights.[212] On 7 January 2014 the mother brought an appeal on a point of law against that judgment which was currently pending before the French *Cour de cassation* whereas the father applied to the High Court in Ireland for the enforcement of the judgment of 5 March 2013 of the *Cour d'appel de Bordeaux* relying on Article 28 of the Regulation. Additionally, the father brought an action on the 29th of May, before the High Court, seeking an order, under Article 12 of the 1980 Hague Convention, Articles 10 and 11 of the Regulation and the Child Abduction and Enforcement of Custody Orders Act, 1991 for the return of the child to France and a declaration that the mother had wrongfully retained the child in Ireland. The Irish court

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[209] CJEU Case C-376/14 PPU *C. v M.* [2014] ECLI:EU:C:2014:2268, para 20.
[210] Thereafter both parents instituted a series of proceedings concerning the child in France, both before and after the judgment in divorce litigation was delivered, but they are irrelevant for the present discussion and are therefore omitted.
[211] CJEU Case C-376/14 PPU *C. v M.* [2014] ECLI:EU:C:2014:2268, para 20.
[212] The father subsequently sought and obtained 'the transfer to him exclusively of parental authority the return of the child to his home on pain of penalty and a prohibition on the child leaving France without the permission of her father' in the decision of 10 July 2013 by the Family Court of the Tribunal de grande instance de Niort.'; CJEU Case C-376/14 PPU *C. v M.* [2014] ECLI:EU:C:2014:2268, para 24.

submitted a number of questions to the CJEU for a preliminary ruling. An interpretation of the definition of 'wrongful removal or retention' proved to be crucial.

The reasoning of the court can be summarised as follows:

(a) A removal or retention, before being considered wrongful within the meaning of the Regulation, must have been taken in breach of custody rights. Rights of custody must be acquired by a judgment or operation of the law or an agreement having legal effect under the law of the Member State of the child's habitual residence immediately before the wrongful removal or retention;

(b) The identification of whether a removal or retention was wrongful presupposes that the child had his or her habitual residence in the Member State of origin and that there is a breach of custody rights attributed under the law of that Member State;

(c) The Court concluded that it follows from Article 11(1) that the provision of Article 11(2)-(8) applies when it is requested that the child is to return to the Member State of his or her habitual residence immediately before the removal or retention. Thus, it does not apply if the child did not have a habitual residence in the country of origin, i.e., in the country to which the return of the child is requested. When determining the habitual residence, the standards following from the relevant CJEU case law are to be applied. The Court stated that an order for the return of the child 'must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention'. When assessing this fact 'it is important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it.'[213]

The court reasoned further as follows:

> '… in circumstances where the removal of a child has taken place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment fixing the child's residence at the home of the parent living in the Member State of origin, the failure to return the child to that Member State following the latter judgment is wrongful and Article 11 of the Regulation is applicable *if it is held that the child was still habitually resident in that Member State immediately before the retention*. If it is held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on that provision is without prejudice to the application of the rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State.'

Thus, the Court clearly distinguishes between a decision not to return the child because the child is considered not to have a habitual residence in the Member State to which the return is

[213] Conclusion no. 1 of the judgment.

requested from the decision on the recognition of the decision on parental responsibility. Thus, a non-return order has no relevance for the enforcement of the judgment of the *Cour d'appel de Bordeaux* on 5 March 2013. The Irish court in the present case had to decide on the basis of relevant provisions of the Regulation under Chapter III of the Regulation, in particular Articles 28 and 23, the latter containing the reasons for which the enforcement may be refused.

Also in the *McB* case,[214] the CJEU was in a position to interpret Article 2(11). Mr McB and Ms. E lived together as an unmarried couple in Ireland and had three children. After their relationship had deteriorated in 2009, the mother took her children to England. In November 2009 Mr McB brought an action before the High Court of England and Wales for the return of the children to Ireland. He subsequently filed an action before the Irish High Court to obtain a decision declaring that the removal of the children was wrongful within the meaning of Article 3 of the 1980 Hague Convention. This request was dismissed on the ground that the removal was not wrongful because under Irish law the natural father of the children did not have automatic rights of custody.[215] The father appealed and the Irish court decided to stay its proceedings and to request a preliminary ruling from the CJEU. The question submitted was whether the Regulation precluded a Member State from providing in its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court which would award such rights of custody to him. Such an award of custody would present the basis on which the removal or retention of the child by its mother may be considered wrongful, within the meaning of Article 2(11) of that regulation.[216]

The Court emphasised that Article 2(9) represents an autonomous definition of 'rights of custody'. It defines them so as to include 'rights and duties relating to the care of the person of a child, and in particular the *right to determine the child's place of residence'* (emphasis added).[217] It is an autonomous concept which is independent of the law of the Member States. Accordingly, rights of custody include, in any event, the right of the person with such rights to determine the child's place of residence.

The Court went on to say that the Regulation does not determine which person has such rights of custody which is determinative in qualifying a child's removal or retention as wrongful within the meaning of Article 2(11). Instead, for that purpose the Regulation refers to the law of the Member State where the child was habitually resident immediately before his or her removal or retention to determine whether a person does or does not have such rights of custody. In other words, it is the law of that Member State which determines the conditions under which the natural father acquires rights of custody in respect of his child, within the meaning of Article 2(9) of the Regulation. Thus, the law of that Member State may provide that the acquisition of such rights is dependent on obtaining a judgment from the competent national court. The Court

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[214] CJEU Case C-400/10 PPU *McB* [2010] ECR I-08965.
[215] *Ibid*., para 48.
[216] CJEU Case C-400/10 PPU *McB* [2010] ECR I-8965, para 39.
[217] *Ibid*., para 40.

concluded that the Regulation must be interpreted as meaning that whether a child's removal is wrongful for the purposes of applying that regulation is entirely dependent on the existence of rights of custody. The conditions for obtaining these rights are determined by the relevant national law, in breach of which that removal has taken place.[218]

Additionally, the Irish Court asked whether the Charter of Fundamental Rights, and in particular Article 7 thereof, affects this interpretation of the Regulation. The CJEU concluded that the Regulation must be interpreted as not precluding a Member State from providing under its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction to award such rights to him, on the basis of which the removal of the child by his or her mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11).[219] Articles 7 and 24 of the Charter do not exclude or forbid such an interpretation of the Regulation.[220]

3.12 No Definition of a 'child'

Like the previous legislation on the matter, the Brussels IIbis Regulation fails to give a definition of a 'child',[221] in particular by limiting its scope to minors or to a maximum age.[222] Some authors uphold this as an autonomous concept which should be limited to persons under 18 (who are not emancipated); however, in the absence of an express limitation,[223] others refer to the applicable national law.[224] Even if the provision of a specific age limit might be considered to be an undue interference with national law, it might be useful given the express provision of such limits in other relevant instruments of international law concerning children. Examples are the 1996 Hague Convention which applies to children under 18[225] or the 1980 Hague Convention which applies to children under 16.[226] Moreover, the 1980 Hague Convention applies only in relation to children under the age of 16 who have been wrongfully removed from, or retained in, another Contracting State.[227]

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[218] *Ibid*., paras 43-44.
[219] *Ibid*., para 44.
[220] *Ibid*., para 63.
[221] For an overview of other child-centred conventions see: Murphy, J., 'Other child-centred conventions' in Murphy, J., *International dimensions in family law* (Manchester University Press 2005), pp. 255 et seq.
[222] Hereto Pertegas Sender, M., '*La responsabilité parentale*', p. 6 as referred to in Swennen, *op. cit., p.* 418.
[223] Watte, N. and Boularbah, H, Storme, H, as referred to in Swennen, *op. cit.*, p. 418.
[224] Stone, P. Solomon, D., as referred to in Swennen, *op. cit.*, p. 418. This is also the position of the Commission in the Practice Guide 2015, p. 19; See also Rauscher, T. 'Parental Responsibility Cases under the new Council Regulation Brussels IIa' The European Legal Forum I-2005, 37-45, pp. 37-38: 'Generally, there are two options: *minority* could be determined by reference to the applicable law under the conflict law of the court or *minority* could be given an autonomous definition to be applied by the courts in all Member States. The latter option should be given preference in order to ensure an efficient an equal application of the Regulation in all Member States and to avoid negative conflicts in competency. [...] Brussels IIa should adhere to [the model of Article 2 CPC]'.
[225] 1996 Hague Convention, Article 2.
[226] Carpaneto, *op. cit.*, p. 255.
[227] 1980 Hague Convention, Article 4; see also Beaumont, P., Walker, L., and Holliday, J. 'Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the effect of Brexit on Future Child Abduction Proceedings' (2016) 4 International Family Law, pp. 14.

An overwhelming majority of the National Reports expressed that the absence of a definition of the term 'child' does not raise difficulties in interpretation and application.[228] Member States use national law or the Convention on the Rights of the Child[229] as a guide in defining the 'child'. Nonetheless, a few interesting opinions have been expressed by the National Reporters.

France raises the issue that there is uncertainty as regards the fact that the definition of a 'child' differs from that of a 'minor'.[230] And, in a more profound acceptation, the German Reporter points out the lack of clarity as to whether the term 'child' applies to cryopreservation or other human cells, or if it only applies from the moment of the birth of the child.[231] For Spain, the lack of a definition of a 'child' can pose some problems as it leads to the application of national conflict of law rules in order to determine if a person can be considered a minor.[232] The Slovenian Marriage and Family Relations Act does not include a definition of a child and, instead, the country has ratified the Convention on the Rights of the Child which provides this definition. The Slovenian national reporter supports the idea of including the definition of the term 'child', even though it does not cause any difficulties in Slovenia.[233]

In spite of the almost united voice of the National Reporters claiming that there are no difficulties with the interpretation and application of the concept of a 'child', the question remains whether it might be useful to provide a common definition of the concept in the recast of the regulation.

The Brussels IIbis Regulation is applicable to children under parental responsibility who are under the age of majority, an age which is fixed autonomously by each Member State. It could be argued that a definition of this concept would be an undue interference with national law and competences; however, this would be useful given the express provision of such limits in other relevant legislative instruments of international law concerning children, such as the 1996 Hague Convention (which applies to children under the age of 18) and the 1980 Hague Convention (which applies to children under the age of 16).[234]

Therefore, a uniform definition of a 'child' as a person under the age of 18 would be appropriate for the purposes of this Regulation. This would eliminate any possible discrepancies

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[228] National Report Austria, question 20; National Report Belgium, question 20; National Report Bulgaria, question 20; National Report Croatia, question 20; National Report Cyprus, question 20; National Report Estonia, question 20; National Report Greece, question 20; National Report Hungary, question 20; National Report Ireland, question 20; National Report Italy, question 20; National Report Latvia, question 20; National Report Lithuania, question 20; National Report Luxembourg, question 20; National Report Malta, question 20; National Report The Netherlands, question 20; National Report Poland, question 20; National Report Portugal, question 20; National Report Romania, question 20; National Report Slovenia, question 20; National Report Sweden, question 20; National Report the United Kingdom, question 20.

[229] United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (hereinafter – the Convention on the Rights of the Child).

[230] National Report France, question 20.

[231] National Report Germany, question 20.

[232] Spanish Civil Code, Article 9.1; National Report Spain, question 20.

[233] National Report Slovenia, question 20.

[234] Carpaneto, *op. cit.*, p. 254.

arising from the application of different age limits set at national levels, it would align the EU definition to the one contained in the 1996 Hague Convention, and it would extend the protection provided by the 1980 Hague Convention to children between 16 and 18 as well.[235]

3.12.1 Commission's Proposal

In its Proposal, the Commission introduced a new paragraph 2(7) which finally gives us a definition of a child to cover any person up to the age of 18.[236] Recital 12 states that the provisions on child abduction continue to only apply to children up to the age of 16 as is the case with the 1980 Hague Convention.[237]

[235] *Ibid.*, p. 255.
[236] 2016 Commission's Proposal, p. 33.
[237] Beaumont, *et al.*,' Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the effect of Brexit on Future Child Abduction Proceedings', *op. cit.*, p. 14.

GUIDELINES – Summary

Geographical scope

All Member States, apart from Denmark, currently adhere to the Regulation.

Civil matters

This term is to be interpreted broadly, autonomously, and in view of the objectives and aims of the instrument. Matters exemplified in Article 1(2), but classed as public law according to national law, nevertheless fall within the scope of the Regulation.

Matrimonial matters: admissible relationships

Informal marriages (e.g. those concluded according to religious rules) are included within the scope of the Regulation if they are recognised as being equivalent to a formal marriage by the applicable law in the competent jurisdiction.

Neither Member State consensus nor a clear EU stance can be identified with regard to the applicability of Brussels IIbis to a same-sex marriage. In the absence of any concrete guidance on the EU level, the most prudent approach would be to hold that the Regulation does not generally apply to the dissolution of same-sex marriages. However, this does not stand in the way of Member States choosing to unilaterally recognise same-sex marriages in cases that fall within their judicial competence, as has been evidenced in the National Reports.

Although there are reported cases of Brussels IIbis rules being extended to the institution of a registered partnership, the CJEU has stated that a registered partnership cannot be assimilated with a marriage simply because it is treated as such by certain Member States' national rules. Thus, in view of the linguistic usage in the current regulation, it is proposed here that the regulation is only applicable to a marriage.

Matrimonial matters: types of decisions covered

The Regulation applies to judicial or administrative decisions that give rise to either the dissolution (divorce or marriage annulment) or the weakening (legal separation) of a marital status. Matters relating to the property consequences of the marriage, other ancillary measures or maintenance obligations are excluded.

The Regulation applies to every type of divorce judgment emanating from a judicial or administrative authority, regardless of the form of or grounds for divorce.

Legal separation ought to be distinguished from factual separation, which is not covered by the rules of the Regulation.

The CJEU has recently ruled that the Regulation applies to marriage annulment instigated by a third party after the death of one of the spouses. A third party can 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 ruling opens the door to applying the Regulation's rules to posthumous nullity proceedings instigated by a spouse, as well as possibly nullity proceedings instigated by a third party during the lifetime of the spouses.

Matters of parental responsibility

This term is to be interpreted broadly, with a view to the context and objectives of the instrument. In order to ensure equality amongst children in its application, matters of parental responsibility are to be considered independently of matrimonial proceedings.

In addition to addressing all proceedings involving custody and rights of access between parents, the regulation is also said to extend to decisions on the right of access of third persons.

The CJEU has held that the placement of a child in a secure institution providing therapeutic and educational care situated in another Member State, entailing the deprivation of liberty for the child's own protection, falls within the material scope of the Regulation. Notwithstanding this, the deprivation of liberty for punitive purposes is expressly excluded.

Decisions involving the assistance or representation of the child with regard to their property fall within the scope of the Regulation when these are made in pursuit of the protection of the child, whilst those that relate to the general organisation of the child's property that occur independently of a measure of child protection fall within the scope of the Brussels I Regulation. It is left to the judicial authority to determine which category a decision falls into for these purposes.

Decisions made with regard to emancipated persons do not, in principle, fall within the scope of the Regulation (even those decisions that involve persons under the age of 18).

Although (ancillary) decisions involving maintenance obligations are generally excluded from the scope of the Regulation, a connection is made between proceedings involving the subject matters covered by Brussels IIbis and the Maintenance Regulation by way of Article 3(c) and (d) of the latter instrument. It should be noted that where the respective proceedings occur in different Member States, the Member State in which proceedings concerning parental responsibility are being conducted is competent to rule on a maintenance matter involving the minor concerned.

Notwithstanding the exclusion of succession from the Regulation, the CJEU has found that an application to a court to approve an agreement for the distribution of an estate concluded by a guardian *ad litem* on behalf of minor children is connected with the status and capacity of the minor children and constitutes a protective measure for the child relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of Articles 1(1)(b) and 2(e) of the Regulation.

Nature of proceedings

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.

Despite the general lack of clarity regarding the Regulation's applicability to proceedings undertaken by a religious authority, it is made clear by Article 62 of the Regulation that concordats and other agreements between Italy, Malta, Portugal, Spain and the Holy See do fall within the scope of the Regulation for the purposes of the recognition and enforcement of decisions.

The term 'judge' is broadly interpreted and is taken to mean the judge, or an official having powers equivalent to those of a judge (e.g. officers of the court, social bodies and notaries), who is competent in matters falling within the scope of the Regulation.

Interpretation of 'judgment'

'Judgement' refers to a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility pronounced by a court of a Member State. This

term should be interpreted broadly and covers decrees, orders or decisions. Additionally, the judgment must have the legal effect of *res judicata*.

Interpretation of 'parental responsibility'

The definition includes all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgement, by operation of law or by an agreement having legal effect.

Who can be a 'holder of parental responsibility'

The term 'holder of parental responsibility' refers to any person having parental responsibility over a child. Both a natural person and a legal person can be holders of parental responsibility. The literature suggests that any person who has obligations and rights towards a child can qualify as a holder of parental responsibility, for example, a grandparent, as well as an administrative authority. As for the access rights of grandparents to grandchildren the CJEU has also recently ruled in *Neli Valcheva v Georgios Babanarakis* case[238] in favour of extending the access rights to grandparents.

Interpretation of 'rights of custody'

'Rights of custody' are an 'autonomous concept which is independent of the law of the Member States, as the Court stated in the case of *McB.*[239] 'Rights of custody' include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence. Accordingly, rights of custody include, in any event, the right of the person with such rights to determine the child's place of residence. Additionally, it is the law of the Member State which determines the conditions under which the rights of custody are acquired, within the meaning of Article 2(9).

Interpretation of 'rights of access'

'Rights of access' are another aspect of parental responsibility and designate in particular the 'right to take a child to a place other than his or her habitual residence for a limited period of time' along with rights relating to the care of the person of a child.

Interpretation of 'wrongful removal or retention'

[238] CJEU Case C-335/17 *Neli Valcheva v Georgios Babanarakis* [2018] ECLI:EU:C:2018:359.
[239] CJEU Case C-400/10 PPU *McB* [2010] ECR I-8965.

The term ‘wrongful removal or retention’ refers to situations where the child is removed or retained in breach of rights of custody, provided that, at the time of the removal or retention, those rights were actually exercised, or would have been exercised, had the removal or retention not taken place. In the case of *McB* the Court explained that whether a child’s removal is wrongful for the purposes of applying the Regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place.

CHAPTER 2: International Jurisdiction in Cases of Marital Breakdown

Pablo Quinzá Redondo and Jinske Verhellen

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1. Introduction

Rules on jurisdiction in matrimonial matters are set out in Articles 3-7 of the Brussels IIbis Regulation. Article 3 is the cornerstone of the rules on international jurisdiction dealing with a marital breakdown. Other relevant provisions are found in Articles 4 and 5 on jurisdiction over a counterclaim and the conversion of legal separation into divorce, respectively. Application is subject to the rules in Articles 6 and 7 relating to the personal scope of application (*ratione personae*). The grounds of jurisdiction contained in the Brussels IIbis Regulation are, to a large extent, identical to those provided in its predecessors – the Brussels II Convention and the Brussels II Regulation. Consequently, the three main features highlighted in the Explanatory Report to the former also define the grounds adopted in the text.[1]

1) The jurisdictional grounds in matters of marital breakdown are objective. This implies that it is not possible for the parties to make a choice of court agreement designating the competent court under the Regulation. Furthermore, it does not allow for the submission of jurisdiction, which makes it impossible for the spouses to 'make an implicit choice by simply appearing before the court and not contesting its jurisdiction'. [2]

Whether a revised Regulation should provide for such rules has been debated for many years. In July 2006, the Commission proposed to amend the Brussels IIbis Regulation by introducing new rules on international jurisdiction and applicable law.[3] In particular, that Proposal allowed for a limited choice of court by the parties. This included any of the grounds of jurisdiction contained in Article 3 and two additional criteria. These were the last common habitual residence of the spouses for a period of three years and the nationality or domicile of the applicant in the United Kingdom and Ireland. As there was no unanimity by the Member States, the Proposal was rejected and became the current Rome III Regulation, which is restricted to the area of conflict of laws. This question is still open, but it is important to note that the current 2016 Commission's Proposal does not foresee choice of court agreements.

2) The jurisdiction grounds contained in Article 3 are alternative: there is no order of priority and they are equal to one another. The Regulation clearly follows the principle of *favor divortii*. This means that the spouses are provided with different forums in order to ensure that there will be at least one court of a Member State that has jurisdiction in those instances where there is a real connection with the European Union.

3) As for the exclusive nature of jurisdiction under Articles 3, 4 and 5 according to Article 6, it is important to clarify that the term 'exclusive' has a different meaning to that in the Brussels Ibis Regulation. It follows that the list of grounds of jurisdiction contained in the Regulation is 'exhaustive and closed'.[4] It applies to situations in which the defendant is habitually resident in the territory of a Member State or is a national of a Member State, or in the case of the United Kingdom and Ireland has his or her 'domicile' in the territory of one of

[1] Borrás Report, para 28.
[2] Kruger and Samyn, *op. cit.*, p. 143.
[3] Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM (2006) 399 final.
[4] Borrás Report, para 29.

these Member States. How to deal with defendants who are not habitual residents or nationals of a Member State, or in the case of the United Kingdom and Ireland do not have their domicile in the territory of one of these Member States is a question analysed *infra* when dealing with the interpretation of Articles 6 and 7. Attention is also given to those instances in which the defendant is a national of a Member State, but no court of a Member State has jurisdiction under the grounds provided in the Regulation.

2. General remarks

This part analyses some general concepts and principles of international jurisdiction which crucially impact on the Regulation.

2.1 Determination of local jurisdiction

Articles 3, 4 and 5 determine the competent court in Member States in cases of a marital breakdown. These provisions refer only to international jurisdiction, i.e., they determine the courts of which Member State connected with the case will hear a divorce, legal separation or marriage annulment petition. The Regulation does not provide information about the local jurisdiction, i.e., which particular court in a Member State will be competent. This is to be determined according to the domestic procedural rules of each Member State.[5]

2.2 Application of the *perpetuatio fori* principle

As a general principle, once a court has established its jurisdiction, changes in the personal circumstances of the spouses should not be considered.[6]

2.3 Relevant time

The wording of Articles 3, 4 and 5 does not clarify when the jurisdiction grounds of habitual residence and nationality should be considered. Indents five and six seem to refer to the date when proceedings are initiated, but no other indication is given for the remainder of the jurisdictional rules. Consequently, pre or post-petition habitual residences or domiciles could be controversial.[7] Given this lack of information in the Regulation, it seems coherent to take into consideration the time of filing the suit. In this regard, attention has to be given to Article 16, which determines when a court shall be deemed to be seised.[8]

[5] Hausmann, R., 'Article 3', in: Corneloup, S. (dir.), *European Divorce Law* (LexisNexis 2003), p. 238.
[6] *Ibid*., p. 241.
[7] Ní Shúilleabháin, *op. cit.*, p. 133.
[8] Hausmann, *op. cit*., p. 240.

3. International jurisdiction in general cases: Article 3

Article 3 is divided into two parts. The grounds of jurisdiction listed in Article 3(1)(a) indents one to six are formulated by reference to habitual residence, regardless of the nationality of the spouses. However, Article 3(1)(b) refers to nationality as a ground for jurisdiction, irrespective of where the parties have their habitual residence. Before analysing the rules contained in this provision, information is presented on the concepts of 'habitual residence' and 'nationality.' These concepts can give raise to different interpretations when applying the Regulation.

Firstly, no definition is provided of the 'habitual residence' of one of the spouses in matrimonial cases. One option could be to follow the case law of the CJEU when interpreting the concept of the 'habitual residence of a child'. However, this interpretation does not completely fit the concept of the 'habitual residence of one of the spouses'. In this regard, 'it must be kept in mind that the determining factors in the life of an adult are not the same as those of a child: it is not strange for an adult to work in one Member State but have most of his or her social life in another'.[9]

To mitigate the drawbacks of the lack of any definition of habitual residence in matrimonial matters, some experts suggest that the Recast should include guidelines to assist legal practitioners in the application of the Regulation. In particular, the following are suggested for consideration: 'the duration, the regularity, the stability, the conditions and reasons for the stay on the territory of a Member State and the settlement in that State, the nationality of the spouse, the location and the integration in a socio-professional environment, the economic interests, the language skills, the family and social relationships and the administrative attachment of the spouse in that State'.[10]

Regarding 'nationality', and in the United Kingdom and Ireland, 'domicile', it has to be remembered that the fact that the spouses might 'have more than one nationality, does not allow the national courts to limit its jurisdiction to what they consider to be the "most effective" nationality of both spouses'.[11] This view follows from the reasoning of the CJEU in its *Hadadi* judgment,[12] which is detailed *infra* in this Chapter, under 3.7.1 '*Difficulties in the application of Article 3(1)(b) – CJEU case law*'.

3.1 First indent: 'the spouses are habitually resident'

This ground for jurisdiction refers to situations in which the spouses have their habitual residence in the same Member State. In practice, this jurisdictional ground is very often applicable.[13] This rule on jurisdiction seems to be suitable for most, but not all couples. For

[9] Kruger and Samyn, *op. cit*., pp. 141-142.
[10] 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. 2.
[11] Kruger and Samyn, *op. cit*., p. 142.
[12] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871.
[13] Borrás Report, para 31.

example, it is not appropriate when the spouses change their habitual residence for a short-term relocation, whilst retaining links with the State of their previous habitual residence.[14]

Habitual residence in the same Member State does not require that both spouses are habitually resident in the same locality, but rather in the same country. Changes to habitual residence during separation or divorce proceedings are irrelevant given the principle of *perpetuatio fori.*

3.2 Second indent: 'the spouses were last habitually resident, insofar as one of them still resides there'

This international jurisdiction rule covers situations in which the couple were habitually resident in the same Member State, but after the marital crisis only one of them retains his/her habitual residence in that Member State. As mentioned in connection with the previous rule on jurisdiction, this rule is reasonable, from a theoretical point of view, for both parties in the majority of cases. Yet, in a few situations it cannot reflect a close connection.[15] The wording of this provision does not specifically refer to any of the spouses – either the respondent or the applicant. However, as 'the habitual residence of the respondent' is a separate ground provided in the third indent, it follows that this rule refers specifically to the applicant. Thus, this jurisdictional ground appears to be important for the spouse who remains in the Member State of the couple's last habitual residence, as he or she can immediately initiate proceedings before the courts of that Member State. In contrast, the spouse who vacates his/her habitual residence must wait for six or twelve months, respectively, if he or she wishes to file a divorce petition in the courts of the Member State of his or her habitual residence in accordance with indents five or six.[16]

3.3 Third indent: 'the respondent is habitually resident'

This jurisdictional ground incorporates the general principle of *actor sequitur forum rei,*[17] which is accepted in national laws worldwide. Also, this is the cornerstone in Regulation Brussels Ibis. A comparison between the third indent and indents five and six clearly shows that the position of the respondent enjoys a higher degree of legitimacy than that of the applicant: the latter has to wait for six or twelve months to be able to issue a divorce petition in the courts of his/her habitual residence.[18] This international jurisdiction rule undoubtedly aims to protect the defendant by assuming that it will be convenient for him/her to litigate in the courts of the Member State of his/her habitual residence.[19]

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[14] Ní Shúilleabháin, *op. cit.*, p. 134.
[15] *Ibid.*, p. 135.
[16] Hausmann, *op. cit.*, p. 244.
[17] Borrás Report, para. 31.
[18] Hausmann, *op. cit.*, p. 245.
[19] Ní Shúilleabháin, *op. cit.*, p. 136.

3.4 Fourth indent: 'in the event of a joint application, either of the spouses is habitually resident'

According to the fourth indent, the courts of the Member State in which either of the spouses is habitually resident will have international jurisdiction in cases where there is a joint application. Although this rule appears to offer a limited choice of forum,[20] it is necessary to determine how a 'joint application' is interpreted. Some authors argue that this forum will only be relevant in those Member States where a joint application is possible. Others believe that it has a broader interpretation so as to cover situations in which one of the spouses commences proceedings while the other consents thereto.[21] Taking into account that choice of court agreements are not permitted under the Regulation, mutual consent should be limited to the time of application and not to a previous moment.[22] In addition, the view has been maintained that an uncontested appearance cannot be considered to be an agreement to consent.[23]

3.5 Fifth indent: 'the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made'

Indent five refers to *forum actoris* as a criterion for jurisdiction. The inclusion of such an international jurisdiction rule has been the subject of controversy in the literature and in the process of drafting the Brussels II Convention. Some Member States considered this ground of jurisdiction to be an abusive privilege for the applicant: it could promote unilateral forum shopping and allow the courts of a Member State with no connection to the respondent to hear the case.[24] Other Member States were not in favour of renouncing such a forum as a similar rule is included in their domestic rules on international jurisdiction. Finally, consensus was achieved by including different requirements for the interplay between the rules contained in indents five and six.[25]

Pursuant to indent five, the courts of the Member State of the applicant's habitual residence will only have jurisdiction provided that he/she has resided in that State for at least one year before the application was made, regardless of the nationality of the parties. Despite the wording 'before the application was made', the previous one-year requirement in the forum state can be achieved, according to some authors, once the proceedings have begun. However, this interpretation is subject to a restriction. The one-year period should expire before proceedings become pending in another Member State.[26] A different interpretation could block the applicant from issuing a divorce petition in another Member State having jurisdiction. In line with this, it is important to note that this ground of jurisdiction requires one year's 'residence' and not one year of the applicant's 'habitual residence'. This has been interpreted by considering that the requirement of the 'habitual residence' of the applicant needs to be

[20] Magnus/Mankowski/Borrás, *op. cit.*, p. 91.
[21] Ní Shúilleabháin, *op. cit.*, p. 137.
[22] *Ibid*.
[23] Hausmann, *op. cit.*, p. 246.
[24] Ní Shúilleabháin, *op. cit.*, p. 143.
[25] Magnus/Mankowski/Borrás, *op. cit.*, p. 91.
[26] Hausmann, *op. cit.*, p. 248.

satisfied at the beginning of the proceedings, while 'residence' during the previous year does not necessarily have to be 'habitual'.[27]

3.6 Sixth indent: 'the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there'

Indent six aims to encompass situations in which one of the spouses has returned to the Member State of his or her nationality after the marital crisis or in the case of the United Kingdom and Ireland has his or her domicile there. The above-mentioned comments on forum shopping and unfair unilateralism are also relevant to this jurisdictional ground. Yet, the applicant's choice may appear to be less surprising for the defendant, given the requirement that the nationality and residence must coincide. Therefore, this rule requires a shorter period of residence in the forum state (six months) compared with the period required in indent five (twelve months).

The nationality of the applicant can be attained in the course of the proceedings and there are no temporary limits regarding a lapse of time for acquiring nationality. On the contrary, previous nationalities – before the divorce or legal separation proceedings or marriage annulment have been initiated – should not be taken into consideration. If a person has more than one nationality, any of them can be effective for the purpose of applying this ground of jurisdiction provided that it coincides with the minimum duration of his or her residence.[28]

It has been debated whether indent six could violate Article 18 TFEU[29] prohibiting discrimination on the grounds of nationality, because it requires the shorter period for EU citizens residing in the Member State of their nationality than for those who are not. An argument in defence of the non-discriminatory nature of this international jurisdiction rule could be that all EU citizens are free to move to the Member State of their nationality to make use of the applicability of this jurisdiction rule.[30] In addition, if nationals of other Member States have to be treated equally with domestic nationals under indent six, the application of the Regulation would contradict the intention of the European legislator.[31]

In relation to the United Kingdom and Ireland, domicile replaces the nationality of the applicant. It is important to clarify that the requirement for the applicant to reside in a Member State six months immediately before the application was made as long as his or her domicile is in that Member State, only plays in the United Kingdom or Ireland. In any other Member State, it is only possible to invoke the nationality of the applicant to justify the application of this indent.[32]

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[27] Ní Shúilleabháin, *op. cit.*, p. 143.
[28] Hausmann, *op. cit.*, pp. 249-250.
[29] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (hereinafter also TFEU).
[30] Ní Shúilleabháin, *op. cit.*, p. 145.
[31] Hausmann, *op. cit.*, p. 251.
[32] *Ibid*.

3.7 Seventh indent: 'of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses'

Pursuant to Article 3(1)(b), the applicant can file a divorce petition before the courts of the Member State of the common nationality of the spouses. As mentioned with respect to previous indents, the common nationality of the spouses can be attained in the course of the proceedings, i.e. up until the final oral hearing.[33]

3.7.1 Difficulties in the application of Article 3(1)(b) – CJEU case law

The wording of this provision does not clarify the application in cases of dual or multiple nationalities. However, this question was clarified by the CJEU in the *Hadadi* case.[34] This case involved a Hungarian couple who, after their marriage, moved to France and acquired French nationality. In 2002, the husband issued a divorce petition before a Hungarian court, whereas the wife started proceedings in France.

The CJEU observed that the system of jurisdiction established by the Regulation on the dissolution of matrimonial ties was not intended to preclude the courts of several Member States from having jurisdiction. Rather, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them.[35] The Court clarified that there is nothing in the wording of Article 3(1)(b) to suggest that only the 'effective' nationality can be taken into account in applying that provision. Such an interpretation would restrict individuals' choice of a court which has jurisdiction, particularly in cases where the right to freedom of movement for persons had been exercised.[36]

Consequently, where the spouses each hold the nationality of the same two Member States, Article 3(1)(b) precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that Member State. On the contrary, 'the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and the spouses may seize the court of the Member State of their choice'.[37]

It should be emphasised that the issue of jurisdiction must be determined separately for each of the claims submitted. Thus, the court seised of a claim for divorce may not decide upon the request relating to parental responsibility if they lack jurisdiction under Article 8 or any other provision of the Regulation, even if the national law of that Member States imposes the obligation to rule *ex officio* on the right of custody, access rights and alimony.[38]

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[33] *Ibid*., p. 252.
[34] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871.
[35] *Ibid*., para. 49.
[36] *Ibid*., paras. 51-53.
[37] *Ibid*., para. 58.
[38] CJEU Case C-604/17 *PM v AH* [2018] ECLI:EU:C:2018:10. The facts of the case and the reasoning of the CJEU is detailed *infra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*'.

3.7.2 Difficulties in the application of Article 3(1)(b) – National Reports

According to the majority of the National Reports, the *Hadadi* case offers sufficient guidance in applying this ground of jurisdiction (Austria, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Hungary, Ireland, Malta, the Netherlands, Poland, Portugal, Slovenia, Slovakia and Sweden).[39] In some cases, this is due to the fact that no national case law has specifically referred to the *Hadadi* case (Belgium, Estonia, Finland, Latvia, and Lithuania).[40] Despite this, some experts propose to include a reference to cases of multiple nationalities in the recast (Italy).[41]

In addition, two important aspects have been highlighted in some National Reports. Firstly, some of the specialists consulted have argued that the interpretation underlying the *Hadadi* case could favour forum shopping, since the applicant is provided with another potentially competent court (France and Spain).[42] Secondly, the *Hadadi* case does not cover cases of mixed double nationality (i.e., one of a Member State and the other of a third State), although it can be assumed that the applicant could start proceedings in the courts of the Member State of the common EU nationality (France, Spain). As a means of illustration, the French specialist can be quoted:

> 'The jurisdiction ground "nationality" is often used by French courts to establish jurisdiction pursuant to Article 3(1)(b). The main problem with the jurisdictional ground nationality is that it leads to a rush to the court, and even a rush to the divorce. Indeed, lawyers confront situations in which one of the spouses, while neither are entirely ready to divorce, nevertheless brings an action for divorce in the "best" forum in order to protect his or her interests (see question 11 for proposals). As to the situation of dual nationality, it was of course problematic before the CJEU rendered the *Hadadi* judgment. This last judgment appears to give sufficient guidance on the application of Article 3(1) in situations of dual Member State nationality. However, the *Hadadi* case doesn't say anything about the question when the dual nationality combines a nationality of a third State with one of a Member State (for the sake of the application of Article 6 and/or 7). The solution in such a case would be that the Member State nationality should take priority. In case of a change of nationality ("*conflit mobile*"), legal doctrine is in favour of giving priority to the nationality possessed at the moment when the court was seized (when the proceedings become pending). The same applies

[39] National Report Austria, question 10; National Report Bulgaria, question 10; National Report Cyprus, question 10; National Report the Czech Republic, question 10; National Report Germany, question 10; National Report Greece, question 10; National Report Hungary, question 10; National Report Ireland, question 10; National Report Malta, question 10; National Report the Netherlands, question 10; National Report Poland, question 10; National Report Portugal, question 10; National Report Slovenia, question 10; National Report Slovakia question 10 and National Report Sweden, question 10.
[40] National Report Belgium, question 10; National Report Estonia, question 10; National Report Finland, question 10; National Report Latvia, question 10 and National Report Lithuania, question 10.
[41] National Report Italy, question 10.
[42] National Report France, question 10; National Report Spain, question 10.

to the principle of *perpetuatio fori* under which the jurisdiction of a court – once established – shall not be disturbed by a subsequent change of nationality or domicile'.[43]

The seventh indent also refers to the common domicile of the spouses in the case of the United Kingdom and Ireland. In this regard, two situations can be distinguished. Firstly, if the spouses have their common domicile in the United Kingdom or Ireland and, at the same time, have a common nationality – that is not citizenship of the United Kingdom and Ireland – then this rule on jurisdiction allows them to choose one of the two jurisdictions. Secondly, in the case of different nationalities the spouses will only be able to start proceedings before the courts of the Member State of their common domicile.[44] A different question that should be highlighted with regard to the common domicile is that it seems to avoid the application of an inappropriate forum: having the spouses' domicile in the same State implies a real – and current – connection, whereas a common nationality in cases where spouses are not living together can be, in some cases, unexpected by the defendant.[45]

4. International jurisdiction in specific cases: Articles 4 and 5

International jurisdiction established according to Article 3 can be influenced by Article 4 relating to cases involving a counterclaim, and Article 5 on the conversion of legal separation into a divorce.

4.1 International jurisdiction in cases involving a counterclaim (Article 4)

Article 4 of the Regulation mirrors Article 5 of the Brussels II Convention and the Brussels II Regulation. This rule aims to grant jurisdiction to hear a counterclaim to the same court hearing the initial proceedings. The counterclaim has to fall within the scope of application of the Regulation. This means that petitions on maintenance or the division of property and assets are excluded.[46] Thus, Article 4 only covers counterclaims following the limitation established in Article 1(1)(a) of the Regulation. Examples are counterclaims for divorce following a separation, and counterclaims for nullity preceded by a divorce application.[47]

Article 4 has to be considered in conjunction with the *lis pendens* rule of Article 19(1). Which provisions are applicable to a particular situation can be controversial, despite the fact that they cover different cases. Article 19(1) deals with instances in which each spouse initiates proceedings in different Member States. In contrast, the purpose of Article 4 is to join subsequent petitions based on a different cause of action in cases of marital breakdown before the courts of the same Member State. For example, if one of the spouses has commenced separation proceedings in a Member State, the other spouse cannot start divorce proceedings in another Member State. He/she is only able to counterclaim for divorce in the Member State in which the other spouse has initiated separation proceedings.[48] However, the application of

[43] National Report France, question 10.
[44] Hausmann, *op. cit.*, p. 252.
[45] Ní Shúilleabháin, *op. cit.*, p. 147.
[46] Magnus/Mankowski/Borrás, *op. cit.*, p. 95.
[47] Ní Shúilleabháin, *op. cit.*, p. 148.
[48] Hausmann, *op. cit.*, p. 255.

Articles 4 and 19(1) leads to the same results: the court first seised has jurisdiction for marital breakdown proceedings.[49]

4.2 International jurisdiction in cases of a conversion of legal separation into divorce (Article 5)

As with all the rules on international jurisdiction in cases of marital breakdown, this provision reproduces a previous article from the Brussels II Convention and the Brussels II Regulation. Its objective has been discussed since the preparation of the Brussels II Convention, given the differences in national laws on this issue. Differences arise because a legal separation is a compulsory legal step before applying for a divorce in some Member States, while this institution is unknown in other Member States.[50] Therefore, the application of Article 5 of the Regulation is apparently reserved for Member States in which legal separation exists and can be converted.[51]

According to Article 5, the court that had jurisdiction for the legal separation could also have jurisdiction for the subsequent divorce. In practical terms, Article 5 is an alternative ground to those included in Article 3. All of these jurisdiction criteria are placed on an equal footing for the divorce petition and can be chosen by the applicant.[52] The application of Article 5 does not require that the circumstances of the spouses fit any of the grounds provided in Article 3 at the time the divorce is filed. In other words, Article 5 is an independent rule on international jurisdiction.

It seems to be controversial whether the court having jurisdiction for the legal separation has to be determined according to Article 3 or can be determined according to the domestic international jurisdiction rules of a Member State. In this context, the discussion on the application of Articles 6 and 7 *infra* is also relevant here. Initially, one can assume that the application of Article 5 depends on the previous application of any of the grounds under Article 3.[53] However, it seems logical to accept that if courts having jurisdiction for the legal separation were competent according to the application of their domestic international jurisdiction rules – upon a consideration of Articles 6 and 7 – then Article 5 allows for divorce proceedings to be commenced in the courts of that Member State.[54] Article 5 makes no reference to a specific rule on international jurisdiction which is applicable to the legal separation.

Conversion of a legal separation into a divorce has to be possible according to the *lex fori;* this is in a flexible and wide sense. However, if the conflict of laws rules of the Member State having jurisdiction designate the law of a Member State where that conversion is possible, Article 5 can perfectly work. [55]

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[49] Borrás Report, para 42.
[50] *Ibid*., para 43.
[51] Commission staff working paper, *Annex to the Green Paper on applicable law and jurisdiction in divorce matters*, COM (2005) 82 final.
[52] Magnus/Mankowski/Borrás, *op. cit*., note 24, p. 96.
[53] Ní Shúilleabháin, *op. cit*., p. 148.
[54] Hausmann, *op. cit*., p. 258.
[55] *Ibid*.

5. Application of Articles 6 and 7 of the Brussels IIbis Regulation

The relationship between Articles 6 and 7 has been controversial for many years. In fact, based on the Brussels II Convention and Brussels II Regulation, many authors have tried to clarify the application of these provisions. In the *Sundelind Lopez* case[56] the CJEU offered some guidelines on interpreting them. But this judgment does not cover all situations. For example, it does not provide an answer in cases where the defendant is an EU national but has his/her habitual residence outside the EU.

5.1 Relationship between Articles 6 and 7 on the personal scope of application: a general overview of the different theories

As already mentioned, Articles 6 and 7 have been subjected to different interpretations. Various doctrinal positions can be summarised as follows.[57]

1) A group of authors believe that rules on jurisdiction contained in the Regulation are going to be applicable as long as possible, regardless of the personal circumstances of the spouses. In practical terms, the personal scope of application of the Regulation would be determined by the self-application of Article 3. Where this article does not allow the claimant to litigate in the EU, it would be possible to apply domestic rules on international jurisdiction. Under this theory, Article 6 loses its *raison d'être*, since the Regulation would work perfectly by considering solely the content of Article 7(1).[58]

2) Another doctrinal position focuses on the importance of firstly check if a particular situation falls under the personal scope of application of the Regulation, i.e., the defendant is habitually resident in the territory of a Member State or is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States. It is only in these situations where it makes sense to consider the application of the forums contained in the Regulation. In those instances where the Regulation would not be applicable, domestic international jurisdiction rules could be applicable, regardless the potential applicability of any of the forums contained in Article 3 of the Regulation. [59]

3) A large number of authors distinguish between situations in which the defendant is habitually resident in or is a national of a Member State or has his or her domicile in the United Kingdom or Ireland, and those situations in which the defendant has no such connection with a Member State. In the former, it is not possible to apply the domestic international jurisdiction rules, and in the latter it is perfectly possible to apply these rules when the Regulation is not

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[56] CJEU Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECR I-10403.
[57] Rodríguez Rodrigo, J., 'Reglamento 1347/2000: ámbito de aplicación personal (arts. 7 y 8)' (2005) 4 Revista colombiana de derecho internacional, pp. 361-378.
[58] Calvo Caravaca, A.L. and Carrascosa González, J., *Derecho internacional privado* (16th edn., Comares 2016), p. 233.
[59] Garau Sobrino, F., 'La interpretación contra *legem* de la normativa de Derecho internacional privado por el Tribunal de Justicia de la Unión Europea. ¿Una usurpación de la función legislativa?' in : Esplugues Mota, C. and Palao Moreno, G. (eds.), *Nuevas fronteras del derecho de la Unión Europea. Liber Amicorum José Luis Iglesias Buhigues* (Tirant lo Blanch 2011), p. 121.

applicable. This position implies that while the scope of application of Article 6 exclusively refers to defendants habitually resident in the territory of a Member State or who are nationals of a Member State, Article 7(1) covers the remainder of situations. This doctrinal position seems to be followed in the 2016 Commission's Proposal.

5.2 Difficulties in the application of Articles 6 and 7 – CJEU case law

The scope of application of the Regulation when the defendant is not an EU citizen, i.e., does not have his/her domicile in the United Kingdom or Ireland and does not have his/her habitual residence in the EU, was addressed in the *Sundelind Lopez* case[60]. This case was the second preliminary ruling on the interpretation of the Brussels IIbis Regulation. According to the facts of the case, Ms. Sundelind, a Swedish national with her habitual residence in France, applied for a divorce petition in Sweden. Her husband had his habitual residence in Cuba and he also had Cuban nationality. A court in Sweden could base its jurisdiction on Swedish legislation due to the Swedish nationality of the applicant. Yet, the Swedish courts declared that they had no jurisdiction, since it was possible to start proceedings in France according to Article 3(1)(a). The CJEU supported the position of the Swedish courts holding that 'if a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that Regulation'.

Taking into account the solution provided in this case, only doctrinal positions 1) and 3) can be maintained. Both of them defend the prior application of international jurisdiction rules contained in the Regulation to respondents who are not habitually residents in the territory of a Member State or are not nationals of a Member State and have no domicile in the United Kingdom or Ireland. Doctrinal position 2 would have directly considered the application of domestic international jurisdiction rules since respondents who are not habitually residents in the territory of a Member State or are not nationals of a Member State do not fall within the Regulation's scope of application and thus its rules shall not be applied.

5.3 Difficulties in the application of Articles 6 and 7 – National Reports

The National Reports show that most Member States consider that the *Sundelind Lopez* case offers sufficient guidance on the application of Articles 6 and 7 (Austria, Bulgaria, the Czech Republic, Cyprus, Germany, Greece, Ireland, Latvia, Malta, Slovakia and Sweden).[61] This is probably due to the fact that, in some cases, there are, as yet, no specific judgments where either the application of these Articles or the guidance of the CJEU has been specifically discussed

[60] CJEU Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECR I-10403.
[61] National Report Austria, question 6 ; National Report Bulgaria, question 6 ; National Report the Czech Republic, question 6 ; National Report Cyprus, question 6; National Report Germany, question 6; National Report Greece, question 6; National Report Ireland, question 6; National Report Latvia, question 6; National Report Malta, question 6; National Report Slovakia, question 6 and National Report Sweden, question 6.

(Estonia, Finland, Hungary, Lithuania, Luxembourg and Portugal).[62] However, according to the information provided by some National Reports (Belgium, France, Italy, Romania, Slovenia and Spain)[63], the relationship between these two provisions is not sufficiently clear. This is especially so because the ruling does specify whether national rules on international jurisdiction can also apply if the defendant is an EU national but has his or her habitual residence in a third State. This problem will be analysed immediately below. This idea is clearly explained in the Spanish Report:

> 'After the case of *Sundelind Lopez*, some authors were of the opinion that Article 7 prevailed over Article 6, concluding that domestic international jurisdiction rules were going to be applicable only in those instances where any court of a Member State would be competent according to Articles 3, 4 and 5, regardless of the nationality or habitual residence of the defendant in the EU. However, a large number of authors distinguished between those situations where the defendant was a national of the EU or had his/her habitual residence in the EU, and those who were not. While in the former it was not possible to apply the domestic international jurisdiction rules, in the latter it was perfectly possible to apply them when the Regulation was not applicable. Anyway, there is no harmonization in the Spanish doctrine with regard to this particular question'.[64]

5.4 What if the defendant is a national of the EU?

The analysis of Articles 6 and 7 remains problematic in certain situations. For example, this is the case when a defendant who is an EU Member State national has no habitual residence in a Member State and the applicant does not habitually reside or has not resided in the European Union for the period of time indicated in Article 3(1)(a) indents five and six and does not have the same nationality as the defendant.[65] This problem does not arise in relation to Article 6(a), since if the defendant has his/her habitual residence in a Member State, it is always possible to start proceedings according to Article 3(1)(a) third indent.

The solution which is provided for EU citizens depends on the doctrinal position followed.[66] On the one hand, according to doctrinal positions 1) and 2), it would only be possible to use domestic international jurisdiction rules if none of the jurisdictional grounds in Article 3 establish the jurisdiction of a Member State's court. For example, in such a case it would be possible to rely on the nationality of the applicant to establish jurisdiction, if Member States provide for this rule. On the other hand, according to doctrinal position 3, it would not be possible to apply domestic international jurisdiction rules as EU citizens can only be brought

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[62] National Report Estonia, question 6 ; National Report Finland, question 6 ; National Report Hungary, question 6; National Report Lithuania, question 6 ; National Report Luxembourg, question 6 and National Report Portugal, question 6.
[63] National Report Belgium, question 6 ; National Report France, question 6 ; National Report Italy, question 6 ; National Report Romania, question 6 ; National Report Slovenia, question 6 and National Report Spain, question 6.
[64] National Report Spain, question 6.
[65] De Boer, Th.M., 'What we should *not* expect from a recast of the Brussels IIbis Regulation' (2015) 33 NIPR, p. 13.
[66] Rodríguez Rodrigo, *op. cit.*, p. 375.

before the courts of a Member State by the jurisdictional rules contained in the Regulation. As a result, the defendant spouse could not be sued in any Member State. This doctrinal position aims to protect spouses who are citizens or habitual residents of an EU Member State against exorbitant jurisdictional rules contained in the domestic legislation of Member States, but in return the claimant should wait until the temporal conditions of Article 3(1)(a) indents five and six can be met.

5.5 Situation contained in Article 7(2)

Taking into account that most of the domestic international jurisdiction rules of the Member State are based on the applicant's nationality,[67] Article 7(2) puts the nationals of a Member State and the nationals of another Member State who are habitual residents in that Member State on an equal footing. In other words, Article 7(2) allows a national of a Member State to start proceedings according to the domestic international jurisdiction rules under the same conditions as nationals of that Member State.

In order for the content of Article 7(2) not to overlap with Article 3(1)(a) fifth indent ('the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made'), it can be assumed that the former refers to those instances where the applicant has not resided in that Member State for more than one year before the application is made. As a consequence, what Article 7(2) allows is to accelerate the possibility to issue a divorce petition in those instances where the defendant is not a national of a Member State and does not have his/her habitual residence in the European Union.[68]

5.6 Preferred doctrinal position

In conclusion, taking into account the prevailing view in the literature, the *Sundelind Lopez* case and the content of the 2016 Commission's Proposal, the Brussels IIbis Regulation should be applicable following doctrinal position 3).

[67] Nuyts, A., 'Study on residual jurisdiction (Review of the Member States' rules concerning the "residual jurisdiction" of their courts in civil and commercial matters pursuant to the Brussels I and II Regulations) General Report' (2007), pp. 95-97; Magnus/Makowski/Borrás, *op. cit.*, pp. 105-107.
[68] Ní Shúilleabháin, *op. cit.*, p. 162.

GUIDELINES – Summary

Article 3

To sum up, the international jurisdiction rules of Article 3 of the Regulation are objective, alternative and exhaustive.

Article 4

Article 4 aims to grant jurisdiction to hear a counterclaim to the same courts hearing the initial proceedings.

Article 5

According to Article 5, the court that had jurisdiction for the legal separation could also have jurisdiction for the subsequent divorce.

Articles 6 and 7 – Personal scope of application of the Brussels IIbis Regulation

- If the defendant is habitually resident in the territory of a Member State or is a national of a Member State/has his or her domicile in the United Kingdom or Ireland, he or she can only be sued in a Member State under the forums contained in the Regulation and not by the domestic international jurisdiction rules.

- If the defendant is not habitually resident in the territory of a Member State or is not a national of a Member State/does not have his or her domicile in the United Kingdom or Ireland, an attempt could be made to take action against him/her, first of all, under the rules contained in the Regulation, and should that fail, under the domestic international jurisdiction rules.

CHAPTER 3: International Jurisdiction in Cases of Parental Responsibility

Richard Blauwhoff and Lisette Frohn

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1. Introductory Remarks

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

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

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

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

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[1] See Article 59 for the relation with treaties concluded or to be concluded between two or more EU member States, Article 60 for the relationship with certain multilateral conventions including the 1980 Hague Child Abduction Convention and Article 61 with respect to the 1996 Hague Convention.
[2] Kruger and Samyn, *op. cit.*, p. 146.
[3] Llerranz Ballesteros, M. 'International Child Abduction in the European Union: the Solutions incorporated by the Council Regulation' (2004) 34 2 Revue générale de droit, pp. 343 *et seq.*

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

2. Scope of Application

2.1 Substantive scope – *ratione materiae*

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

In that connection, it should be borne in mind that some of the matters excluded from the substantive scope such as maintenance[8] and succession[9] have already been regulated in other instruments at the EU level. It remains circumspect, of course, whether any other excluded

[4] See Article 1(1)(b) in connection with Article 2(7) of the Brussels IIbis Regulation. See also Borrás, A., 'Lights and Shadows of Communication of Private International Law: Jurisdiction and Enforcement in family Matters with regard to Relations with Third States' in: Malatesta, A., Bariatti, S. and Pocar, F. (eds), *The External Dimension of EC Private International Law in Family and Succession Matters* (CEDAM 2008), p. 113.
[5] Practice Guide 2015, p. 21.
[6] *Ibid.*
[7] *Ibid*., p. 20. See, for example, with regard to the protection of minors in matters of succession: Bonomi & Wautelet, *Le droit européen des successions: commentaire du Règlement n 650/2012 du 4 juillet 2012* (Bruylant 2013), p. 81.
[8] Maintenance Regulation, pp. 1-79.
[9] Succession Regulation, pp. 107-134.

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

2.2 Personal scope – *ratione personae*

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

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

2.3 Temporal scope – *ratione temporis*

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

3. Legal definition of a 'child'

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

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[10] Kramer, X., *et. al.*, 'A European Framework for private international law: current gaps and future perspectives' (2012) <http://www.europarl.europa.eu/studies> accessed 31 October 2017>.
[11] Carpaneto, *op. cit.*, pp. 254 *et seq.*
[12] According to Article 2 of the 1996 Hague Convention, the convention applies to children from the moment of their birth until they reach the age of 18 years.
[13] Althammer, C., *et al., Brüssel IIa, Rom III: Kommentar zu den Verordnungen (EG) 2201/2003 und (EU) 1259/2010* (Verlag C.H. Beck 2014), Article 8, Rn. 3.

3.1 Difficulties in defining a 'child' – National Reports

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

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

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

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

[15] National Report Slovenia, question 20.

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

[17] National Report France, question 20.

[18] National Report Italy, question 20.

[19] National Report Germany, question 20.

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

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

3.2 Difficulties in defining a 'child' – CJEU case law

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

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

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

The general rule regarding jurisdiction in matters of parental responsibility[22] is contained in Article 8(1). This rule determines that the courts of the Member State of the child's habitual residence shall have jurisdiction.[23] The Preamble under 12 explains that the grounds for jurisdiction in matters of parental responsibility are shaped 'in the best interests of the child,' for which the most important starting point is proximity.[24] The underlying principle of proximity therefore extensively explains the pivotal role of habitual residence in matters of jurisdiction.

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

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[20] National Report Spain, question 20.
[21] National Report Romania, question 20.
[22] See Magnus/Mankowski/Borrás, *op. cit.*, Article 8, note 4-5; Shannon, G., 'The Impact and Application of Brussels IIbis in Ireland' in Boele-Woelki and Beilfuss, *op. cit.*, p. 150: 'Article 8(1) of Brussels IIbis [...] is modelled on Article 5 of the 1996 Hague Convention.'
[23] Shannon, *op. cit.*, pp. 150-151.
[24] In the opinion of Advocate General Wahl in CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436 concerning the concept of 'habitual residence', the AG emphasized that jurisdiction in matters of parental responsibility is determined according to the criterion of proximity (referring to Recital (12) of the Brussels IIbis Regulation).
[25] See CJEU Case C-403/09 PPU *Jasna Deticek v Maurizio Sgueglia* [2009] ECR I-12193; see also the CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163; see also Stone, P., *EU Private International Law* (2nd edn., Elgar European Law 2010), p. 454: '[...] As was recognised by Sheehan J in O'K v A [2008], Article 8 eliminates any judicial discretion by the courts of the Member State in which the child is habitually residence to decline jurisdiction in favour of a supposedly more appropriate court of a non-member country'.
[26] Article 8(1) is similar to Article 5 of the 1996 Hague Convention. See also, for example, habitual residence as a key connecting factor regarding jurisdiction in Article 3(a) and (b) of the Maintenance Regulation and Articles 4 and 21(1) of the Succession Regulation.

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

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

The concept of habitual residence has neither been defined in the Regulation,[29] nor in the 1996 Hague Convention. It is also not defined in any other Hague Convention for that matter. Quite innovative are Recitals 23[30] and 24 in the Preamble to the Succession Regulation providing some criteria as to how to determine 'habitual residence.'[31] In a general sense, it is accepted that the interpretation of habitual residence is not to be determined by reference to any concept of habitual residence under any particular national law, but for the purposes of the Brussels IIbis Regulation and for the purposes of the law of the European Union it should be given an 'autonomous' meaning.[32] In other words, the interpretation of habitual residence as a key connecting factor should at once be both autonomous and uniform throughout the European Union. In that respect, the relevant case law of the CJEU is to be taken into account. As a flexible concept, it incorporates a variety of factual circumstances that may have to be considered by a court to determine the existence of a habitual residence.[33]

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

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

[28] *Ibid*.

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

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

[31] Recital 12 of the Brussels IIbis Regulation.

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

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

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

Given that neither the Regulation nor any Hague Convention defines habitual residence, the Court has repeatedly held that the concept is to be autonomously interpreted[35] and, moreover, that its meaning must be uniform. Accordingly, the interpretation given to that concept in the context of Articles 8 and 10 can be transposed to Article 11(1).[36] The 'habitual residence' of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment.[37] Thus, in addition to the physical presence of a child in a Member State, other factors must also make it clear that that the presence is not in any way temporary or intermittent and that the child's residence corresponds to the place which reflects such integration in a social and family environment.[38] Such factors include the duration, regularity, conditions and reasons for the child's stay in the territory of a Member State and the child's nationality.[39] In addition, the relevant factors vary according to the age of the child concerned.[40]

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

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

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[34] CJEU Case C-523/07 *A.* [2009] ECR I-2805, paras 36-39.
[35] This concept has to be interpreted in the light of the context of the provisions referring to that concept and the objectives of the Brussels IIbis Regulation, in particular that which is apparent from Recital 12 thereof, according to which the grounds of jurisdiction which it establishes are shaped in the light of the best interests of the child, in particular according to the criterion of proximity (see CJEU Case C-523/07 *A.* [2009] ECR I-2805, paras 34-35; CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, paras 44 to 46).
[36] CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, para 41 ; see to that effect CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268, para 54. For full details of the latter case see *infra* in Chapter 1, under 3.11.2 '*Difficulties in application – CJEU case law*'.
[37] That place must be established by the national courts, taking account of all the circumstances of fact specific to each individual case (CJEU Case C-523/07 *A.* [2009] ECR I-2805, paras 42 and 44; CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, para 47).
[38] CJEU Case C-523/07 *A.* [2009] ECR I-2805, para 38.
[39] See to that effect CJEU Case C-523/07 *A.* [2009] ECR I-2805, para 39.
[40] CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, para 53.

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

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

Both the Austrian and Greek National Reports submit that there are no problems in applying the rule on general jurisdiction in Article 8 in spite of the lack of a definition of habitual residence.[41] The Reports from Ireland[42] and Sweden[43] also do not report any particular problems either in applying (and, presumably, thereby in 'delineating') the concept of the habitual residence of the child under Article 8. A number of National Reports (Bulgaria[44], Cyprus[45], the Czech Republic[46], Estonia[47], Germany[48] Italy[49], Lithuania[50], Malta[51], Romania[52], Spain,[53] and Slovenia,[54]) indicate that in general the concept of habitual residence in Article 8 is defined in these Member States in accordance with relevant EU case law. Some of the courts in these Member States allegedly had to get to grips with applying the concept of habitual residence in conformity with its autonomous i.e. 'European' interpretation. For example, Bulgarian judicial practice has now broadly embraced the view that the child's habitual residence depends on the habitual residence of the people who are looking after that child.[55]

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

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[41] National Report Austria, question 1 and question 23 and National Report Greece, question 1 and question 23.
[42] National Report Ireland, question 1 and question 23.
[43] National Report Sweden, question 1 and question 23. The Swedish Report emphasises that Swedish case law and Swedish literature on the Brussels IIbis Regulation are very limited and statistics are often not available. The report refers to the decision of the Swedish Supreme Court in the case of NJA 2011 p. 499. This case concerned the habitual residence of a child who had moved, together with its mother who was its sole legal custodian, from Sweden to Indonesia. The father of the child started custody proceedings in Sweden. The court considered that, in line with the CJEU case law, no Member State had jurisdiction under Article 8 of the Brussels IIa Regulation. The reporter emphasizes that this decision shows that the Regulation is applicable even when the case does not involve any Member State other than that of the forum.
[44] National Report Bulgaria, question 1 and question 23.
[45] National Report Cyprus, question 1 and question 23.
[46] National Report the Czech Republic, question 1 and question 23.
[47] National Report Estonia, question 1 and question 23
[48] National Report Germany, question 1 and question 23.
[49] National Report Italy, question 1 and question 23. In the Italian report, it is observed that according to Italian literature Italian courts appear to be more careful than courts in other EU jurisdictions in evaluating the subjective requisite in establishing residence: the Italian courts require factual elements showing the intention to reside, irrespective of the time that has passed.
[50] National Report Lithuania, question 1 and question 23.
[51] National Report Malta, question 1 and question 23.
[52] National Report Romania, question 1 and question 23: the Romanian National Report reveals that there have been many cases concerning families with Romanian nationality and a habitual residence in another Member State. However, the Romanian courts relied on Article 8 and declared that there was no jurisdiction in these cases.
[53] National Report Spain, question 1: the Spanish report adds that in many cases the CJEU case law is not mentioned. Question 23: Another problem, according to the Reporter, is that the Spanish courts still tend to apply national rules regarding international jurisdiction instead of the Brussels IIbis Regulation.
[54] National Report Slovenia, question 1 and question 23.
[55] National Report Bulgaria, question 1 and question 23.

and Enforcement of Judgments in Matrimonial Matters',[56] as well as the settled EU case law on habitual residence. [57] In general, the National Report suggests that the courts of Luxembourg have no difficulties in applying Article 8.[58]

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

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

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

[57] National Report Luxembourg, question 23.

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

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

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

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

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

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

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

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

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

[63] National Report France, question 1.
[64] *Ibid*., question 23.
[65] National Report Greece, question 23.
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] National Report Hungary, question 23.
[71] National Report Latvia, question 1.

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

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

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

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

[72] National Report the Netherlands, question 1 and question 23: as an example the report refers to the decision of the Dutch Supreme Court on 26 June 2015, ECLI:NL:HR:2015:1752 where the court considered that the Court of Appeal had correctly applied the autonomous meaning of 'habitual residence' under the Regulation as developed by the CJEU, i.e. the place which reflects some degree of integration by the child in a social and family environment.
[73] Dutch Supreme Court, 12th of January 2018, ECLI:NL:HR:2018:31, NJB 2018/217, judgment delivered and published after the submission of the National Report of the Netherlands in this study.
[74] National Report Poland, question 1.
[75] *Ibid*., question 23.
[76] National Report Portugal, question 1.
[77] *Ibid.*
[78] *Ibid.*, question 1. See the Ruling of the Second Instance Court of Porto of 29th April 2013 (Acórdão da Relação do Porto de 29-04-2013, available in Portuguese at www.dgsi.pt).

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

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

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

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

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[79] *Ibid.*, question 1.
[80] National Report of the United Kingdom, question 1.
[81] *Ibid.*, question 23.
[82] *Ibid.*
[83] CJEU Case C-604/17 *PM v AH* [2018] ECLI:EU:C:2018:10.

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

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

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

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

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

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

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

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

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

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

[85] CJEU Case C-523/07 *A.* [2009] ECR I-2805, para 44.
[86] CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309; see further Lenaerts, K., 'The best interests of the child always come first: The Brussels IIbis Regulation and the European Court of Justice' (2013) 20(4) Jurisprudence (Jurisprudencija) pp. 1302, p. 1307; Dutta and Schulz, *op. cit.*, p. 13.
[87] CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, para 41.
[88] CJEU Case C-523/07 *A.* [2009] ECR I-2805.

Member State and for the mother's move to that State and,

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

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

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

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

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

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

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[89] *Ibid*., para 55.
[90] *Ibid*., para 56.
[91] Dutta and Schulz, *op. cit.*, p. 10; CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, para 51.
[92] CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, paras 52-55.
[93] *Ibid*., para 55.
[94] CJEU Case C-499/15 *W and V v X* [2017] ECLI:EU:C:2017:118.

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

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

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

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

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

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

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[95] *Ibid*., para 47.
[96] *Ibid*., para 48.
[97] *Ibid*., para 51; the EU legislature, in effect, considered that the court that is geographically close to the child's habitual residence is the court which is best placed to assess the measures to be taken in the interests of the child (CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, para 91).
[98] CJEU Case C-499/15 *W and V v X* [2017] ECLI:EU:C:2017:118, para 53*;* see, to that effect, CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246, para 38.

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

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

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

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

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

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

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[99] CJEU Case C-499/15 *W and V v X* [2017] ECLI:EU:C:2017:118, para 55.
[100] See to that effect CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309, paras 47-49.
[101] *Ibid*., paras 66-67.
[102] Althammer, *et al.*, *op. cit*, Rn. 8-9.
[103] CJEU Case C-523/07 *A.* [2009] ECR I-2805.
[104] See, *infra* in Chapter 4, under 3.1 '*Difficulties in the application of Article 11(1) – CJEU case law*', where the case of *OL v PQ* is further discussed.
[105] CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436.

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

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

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

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

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

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

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

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

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

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

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

4.4 Article 8 and the *perpetuatio fori* principle

The question of jurisdiction in Article 8 is determined at the time the first instance court is seised, meaning the time when the document instituting the proceedings is lodged with the court.[113] Article 16 recognises two starting points in this respect. A court shall be deemed to be seised (i) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the necessary steps to serve the procedural document on the respondent; or (ii) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the necessary steps to have the document lodged with the court. In general, for the seising of a court the moment of registering an application at the court will be decisive. The issue of seising a court will be extensively discussed *infra* in Chapter 5, under 1 '*Seising of a Court – Article 16*'.

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[110] *Ibid*., para 50.
[111] This is confirmed by Article 10 of the Regulation, which envisages precisely the situation in which a child acquires a new habitual residence following a wrongful removal or retention.
[112] CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, para 69.
[113] CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246; CJEU Case C-499/15 *W and V v X* [2017] ECLI:EU:C:2017:118.

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

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

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

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

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

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[114] Rutten, S., 'Perpetuatio fori in ouderlijk gezagskwesties' [2005] NIPR, p. 11; Kruger, T., 'Brussels IIa Recast moving forward' [2017] NIPR, p. 473.
[115] Unlike Article 5(2) of the 1996 Hague Convention which lays down that in case of a change of the child's habitual residence to another Contracting State, the authorities of the state of the new habitual residence have jurisdiction.
[116] See on the issue of the *perpetuatio fori* principle and its pros and cons: De Boer, 'What we should *not* expect from a recast of the Brussels IIbis Regulation', *op. cit.*, p. 10. See also Andrae, M., *Internationales Familienrecht* (Nomos 2014), p. 404.
[117] See Althammer, *et al.*, *op. cit.*, Rn. 14.
[118] Kruger and Samyn, *op. cit.*, p.153.

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

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

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

4.5 Commission's proposal

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

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[119] National Report Belgium, question 23. Cour de Cassation 21 November 2007, *Revue trimestrielle de droit familial* 2008, 176.
[120] National Report Belgium, question 23. See also Court of Appeal of Brussels, 11 March 2013, Revue@dipr.be 2013/2, 40.
[121] Kruger and Samyn, *op. cit.*, p.153.
[122] Compare Kruger and Samyn, *op. cit.*, p. 474.
[123] 2016 Commission's Proposal, p. 36.

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

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

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

5.1 Difficulties in the application of Article 9 – National Reports

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

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

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

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

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

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

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

The Luxembourg National Report describes some cases with regard to Article 9. In a court decision by the *Tribunal d'arrondissement de Luxembourg* a claim was based on Article 9.[131] Some documents showed that the habitual residence of the children had been established in Luxembourg, although they were attending school over the border in Germany (apparently where they lived before). The claim having been filed five years after moving to Luxembourg, the court applied Article 8 of the Regulation in favour of the Luxembourg courts, explaining that Article 9 of the Regulation is only applicable when the legal change of residence occurs during the course of the proceedings. In some other cases the court refused to accept jurisdiction since there was no previous judgment on access rights.[132]

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

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

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[127] National Report Croatia, question 24; Municipal Court of Beli Manastir, P-60/2014 of 4.3.2014. (CRF20140304) available at EU Fam's project database (www.eufams.unimi.it) under a specified code.
[128] National Report the Czech Republic, question 24. Regional Court of Prague, decision dated 27. 4. 2011.
[129] National Report Greece, question 24.
[130] National Report Italy, question 24.
[131] National Report Luxembourg, question 24.
[132] *Ibid*.
[133] National Report the Netherlands, question 24. For example, the Court of Appeal of Amsterdam in its judgment of 10 November 2015, ECLI:NL:GHAMS:2015:4318, seems to have taken the view that Article 9 was simply not applicable as the child still had his/her habitual residence in the Netherlands when proceedings were instituted.
[134] National Report Spain, question 24.

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

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

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

5.3 Commission's proposal

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

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

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

7. Prorogation – Article 12

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

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

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

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

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[135] National Report the United Kingdom, question 24.
[136] 2016 Commission's Proposal, p. 36-37. See further (*inter alia*) Honorati, The Commission's Proposal For A Recast Of Brussels IIa Regulation, *op. cit.*
[137] See also Magnus/Mankowski/Pataut, *op. cit.*, Article 12, note 1.

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

7.1 Prorogation within matrimonial proceedings

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

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

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

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

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

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

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

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

7.2 Prorogation unrelated to matrimonial proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.4 Difficulties in the application of Article 12 – National Reports

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

The National Report for Belgium suggests that the nature of the requirement of an 'unequivocal acceptance' of the forum of another Member State by the parties has been debated to a considerable extent in Belgian case law. The Court of Appeal of Brussels has stated, for example, that the appearance in court of the parents without challenging the jurisdiction of the court could be regarded as a 'clear and unequivocal acceptance' of this jurisdiction.[147] In another case, a Belgian court affirmed that it was up to the parties to the proceedings to express that they have accepted jurisdiction. The fact that the public prosecutor had challenged the prorogated court's jurisdiction was deemed irrelevant for the purpose of Article 12.[148] In the other Belgian cases mentioned no agreement between the parties in respect of prorogation was found to have been reached.[149]

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

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

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

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

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

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

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

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

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

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[150] National Report Hungary, question 25.
[151] *VC v. GC [2012] EWHC 1246 / [2013] 1 FLR 244*.
[152] National Report Luxembourg, question 25.
[153] National Report the Netherlands, question 25; Hoge Raad 23 September 2016, RFR 2017/4.
[154] See, for example, District Court of The Hague, 15 October 2009, ECLI:NL:RBSGR:2009:BK5367, mentioned in: de Boer, Th. M. and Ibili, F., *Nederlands Internationaal personen- en familierecht, Wegwijzer voor de rechtspraktijk* (Wolters Kluwer 2017), p. 163.

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

The National Report for Romania also provides some examples. In a Romanian decision from 2016, Targu Mures Local Court[157] stated that it had not been properly seised on the basis of Article 12(3). The court held that an unequivocal declaration that the defendant accepted the competence of the Court was lacking despite the defendant declaring that a substantial part of the claims were accepted. The Court considered the 'best interests of the child' and decided that they would be best served if the case would have been taken to the Belgian courts, in view of the habitual residence of the child, where all the assessments regarding the child's living environment and its social and familial relations could be made directly, in a proper manner. The Mures County Court took a similar position in another case, albeit allegedly with weak reasoning which focussed on the importance of the principle of proximity and relying on the best interests of the child.[158]

The applicability of Article 12(3) was also raised in a decision by the Galati Court of Appeal in 2014.[159]After mentioning the cumulative character of the conditions set out in a) and b) of Article 12(3), the Court analysed the nature of the mutual agreement. It stated that the mere presence of the defendant at two hearings, in which he asked for an adjournment of the case in order to find legal counsel, could not be interpreted as an 'unequivocal acceptance' of jurisdiction. The Court held that if it was to exercise its jurisdiction it would not be in the best interests of the child. In the Court's view, this was particularly so since the assessment period regarding the living environment of the child and his family and social relations would develop more adequately and more easily in Italy – the state where the child had indeed been habitually resident since 2007. The Report suggests that the Romanian courts have decided that a 'tacit agreement' cannot be assumed when one of the parties (residing in Romania) and the other

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

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

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

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

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

party and the child residing abroad, appears before the court in order to contest competence[160] or whenever the other party does not enter an appearance before the Romanian court.[161]

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

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

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

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

[162] National Report the United Kingdom, question 25.

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

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

[165] *Ibid*.

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

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

7.4.1 The ‘substantial connection’ requirement – National Reports

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

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

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

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

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

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

[168] National Report Belgium, question 25.
[169] National Report Greece, question 25.
[170] National Report Lithuania, question 25.
[171] National Report Bulgaria, question 25.
[172] *Ibid*.
[173] *Ibid*.

12.[174] It was uncertain whether the jurisdiction of the courts seised of an application in matters of parental responsibility could be regarded as having been 'accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings' when the legal representative of the defendant had not pleaded the lack of jurisdiction of those courts. It should be mentioned that the legal representative was appointed by the courts of their own motion in view of the impossibility of serving the document instituting proceedings on the defendant. The underlying question therefore appears to have been how 'express' or 'unequivocal' the acceptance of the prorogued court should be.

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

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

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

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[174] CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, see more in paras 42, 43, 47, operative part 2.
[175] National Report the Czech Republic, question 25 (citation of Judgment No. 21 Cdo 4909/2014 dated 19.3.2015.)
[176] National Report Hungary, question 25.
[177] *Ibid*.

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

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

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

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

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

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[178] National Report Italy, question 25, reference to Cass. S.U. 30646/2011.
[179] National Report Malta, question 25.
[180] National Report Poland, question 25. Decision of the Krakow Court of Appeal dated 11 January 2016, I ACz 2406/15; Decision of the Krakow Court of Appeal dated 12 August 2015, I Acz 1298/15, in which the child's habitual residence was clearly in the UK but Article 12(1) was still applied.
[181] National Report Romania, question 25. Iași County court, 1st civil division, civil decision no 258/2016 from 8 June 2016; see also Braila Local Court, Civil Division, civil decision no 59 from 23 January 2013, deciding that the defendant had unequivocally accepted the Romanian court's competence, since her lawyer was present in court without contesting it.
[182] The Brussels IIbis Regulation uses the term 'the superior interests of the child' in Article 12 and not the term introduced by the United Nations Children's Rights Convention: '*the best interests of the child*' (compare Article 3(1) of the United Nations Children's Rights Convention). The Slovenian translation of the term '*the superior interests of the child*' is (allegedly) more inappropriate, because it is just translated as the '*child's interest*' (slo. *otrokova korist).*
[183] CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246.

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

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

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

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

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

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

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

[184] *Ibid*., paras 45-46.
[185] National Report Romania, question 25. Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no 1054 from 7 June 2012.
[186] National Report the Czech Republic, question 25; e.g. judgment of the Regional Court in Ostrava No 50 Co 58/2012 dated 26.3.2012, judgment of the Supreme Court No 26 Nd 261/2007 dated 17.10.2007.
[187] National Report Romania, question 25. Moreni Local Court, civil decision no 1098 from 17 December 2012; Moreni Local Court, civil decision no 311, from 23 June 2014; Bacău Local Court, Civil Division, civil decision no 2105 from 2 April 2015 (application concerning parental responsibility over a child habitually resident in Greece, made by the Romanian mother, residing also in Greece; the father, legally served, did not participate in the proceedings).
[188] CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246.

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

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

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

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

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

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

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

[189] *Ibid*., paras 38-40.

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

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

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

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

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

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[190] *Ibid*., paras 40-42.
[191] *Ibid*., para 45.
[192] *Ibid*., para 47.
[193] *Ibid*., para 49.
[194] CJEU Case C-656/13 *L* v *M* [2014] ECLI:EU:C:2014:2364.
[195] See to that effect CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 51.
[196] CJEU Case C-656/13 *L* v *M* [2014] ECLI:EU:C:2014:2364, para 49.

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

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

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[197] *Ibid*., para 17.
[198] *Ibid*., para 18.
[199] *Ibid*., paras 19 – 20.
[200] *Ibid*., para 21.
[201] *Ibid*., para 22.
[202] *Ibid*., para 23.
[203] *Ibid*., para 25.
[204] *Ibid*., para 27.
[205] *Ibid*., para 28.
[206] *Ibid*., para 28.
[207] *Ibid*., para 29.
[208] *Ibid*., para 30.

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

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

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[209] *Ibid*., para 48.
[210] *Ibid*., para 48.
[211] *Ibid*., para 50.
[212] *Ibid*., para 52.
[213] *Ibid*., paras 55 – 56.
[214] *Ibid*., para 57.
[215] *Ibid*., para 59.
[216] CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710.

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

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

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

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

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

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

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

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[217] *Ibid*., para 40, referring further to CJEU Case C-656/13 *L* v *M* [2014] ECLI:EU:C:2014:2364, para 56.
[218] *Ibid*., para 42; see, by analogy, with reference to Article 24 of the Brussels I Regulation, the judgment in CJEU Case C-112/13 *A. v B. and others* [2014] ECLI:EU:C:2014:2195, para 54.
[219] *Ibid*., para 43; see to that effect also the CJEU judgment referred above in CJEU Case C-112/13 *A. v B. and others* [2014] ECLI:EU:C:2014:2195, para 55.
[220] CJEU Case C-78/95 *Hendrikman en Feyen/Magenta Druck & Verlag* [1996] ECR I-4943, para 18.
[221] See further also the judgment in CJEU Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246, para 46.

7.6 Commission's proposal

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

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

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

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

Where the link between the child and a Member State is strong enough to qualify as habitual residence, then the necessity for any specific jurisdiction grounded on the mere presence of the child disappears. In such circumstances, the courts are deprived of the jurisdiction they were given by virtue of Article 13(1). The same solution is achieved if the child acquires a habitual residence in a third state. In that situation, a court in an EU Member State could deal with a case of parental responsibility only on the basis of there being a specific ground of jurisdiction, in a similar vein as in Article 12.[225]

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

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[222] 2016 Commission's Proposal, p. 38.
[223] Stone, *op. cit.*, p. 459.
[224] Magnus/Mankowski/Pataut, *op. cit.*, Article 13, note 1-4. Compare: Lagarde, P., Explanatory Report on the 1996 Convention, *op. cit.*, p. 553-555.
[225] Magnus/Mankowski/Pataut, *op. cit.*, Article 13, note 4.
[226] *Ibid*., Article 13, note 7-11.

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

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

8.1 Difficulties in the application of Article 13 – National Reports

The majority of National Reports indicate that there is a rather limited number of cases in which jurisdiction is based on Articles 13(1) and 13(2). Nonetheless, most National Reports also indicate that the courts in the Member States are familiar with the existence of this jurisdictional ground. Furthermore, National Reports of important European transit countries for refugees and displaced persons such as Austria and Greece have predicted that this jurisdictional ground may become more important in the foreseeable future, in the wake of the refugee crisis. In the Bulgarian translation of the Regulation reference is unjustifiably only made to classical refugees and not 'internationally displaced persons.' [227] The National Report for the Czech Republic has also reported some cases, while judicial decisions from Italy have not been made available to the general public. In the National Report for the United Kingdom, in a multi-jurisdictional English-Scottish case, Articles 13 and 15 were deemed not to apply. Consequently, the child in question had reportedly initially been left in a 'legal limbo' because of the lack of an internal UK procedure akin to Article 15.[228]

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

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

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

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

8.3 Commission's proposal

No substantive changes have been proposed.[230]

9. Residual jurisdiction with regard to parental responsibility

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

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

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[229] CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, Opinion of Advocate General Wahl.
[230] 2016 Commission's Proposal, p. 38-39.
[231] Stone, *op. cit.*, p. 459; CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436.
[232] Magnus/Mankowski/Pataut, *op. cit*, Article 14, note 1.

national rules of international jurisdiction are applicable. Rather, the Community rules are *always* applicable and *always supersede* national rules.[233] If the connecting factor used by the applicable jurisdictional provision is located within the European Union, the jurisdiction will always be determined by the application of the relevant provision of Brussels IIbis.[234] Even so, some national jurisdictional rules may still have a *residual role* to play and they will be available for the national courts when no court of a Member State has jurisdiction, *i.e. when the connecting factor of the relevant jurisdictional rule is located outside the EU*. In that case, the court can in principle decide on its own jurisdiction by applying its 'own' national jurisdictional rules. Thus, a strict hierarchy between the 'normal' European jurisdictional rules to be found in the Brussels II provisions and other 'exorbitant' rules can be found.[235] Such 'exorbitant' rules may be based, for example, on nationality when the child's habitual residence is located outside the European Union. This possibility is not limited by Article 14, unlike Articles 6 and 7.[236]

Another difference is that there is no extension of the national grounds of jurisdiction under Article 14.[237] Whereas for matrimonial matters Article 7(2) allows for a European citizen resident in another Member State to avail him/herself of the rules of jurisdiction applicable in the State where he/she is habitually resident, this extension is *not* permitted with regard to parental responsibility proceedings according to Article 14. Therefore, jurisdictional rules can be based on having a certain nationality, like Article 14 of the French Civil Code, which can only be used by French nationals and not by nationals of other Member States for the purpose of parental responsibility proceedings.

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

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

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[233] Hekin, *op. cit.*, in: Boele-Woelki and González-Beilfuss, *op. cit.*, p. 99.
[234] Magnus/Mankowski/Pataut, *op. cit.*, Article 14, note 3 with a comparison with the Brussels I Regulation, in which the main principle is that the Community grounds of jurisdiction are only to be used when the case is closely linked to the European Union, whereas national rules of jurisdiction have almost been 'eliminated' from the Community system laid down by the Brussels II Regulation.
[235] See also Hekin, *op. cit.*, in: Boele-Woelki and González-Beilfuss, *op.cit.*, p. 99.
[236] See Magnus/Mankowski/Pataut, *op. cit.*, Article 14, note 7 for the example of Article 14 of the French Civil Code which allows the French courts to hear a case on parental responsibility involving a French plaintiff and any defendant, whether he/she is a European citizen or one habitually resident in a Member State, something which would not be possible in matrimonial matters since European citizens and European residents are protected from any form of national grounds (Article 6).
[237] Carpaneto, *op. cit.*, p. 273.
[238] Compare Magnus/Mankowski/Pataut, *op. cit.*, Article 14, note 8; see also Stone, *op. cit.*, p. 460: '[...] By Article 61, in a Member State which is a party to the Hague Convention 1996, the residual jurisdiction under Article 14 is restricted by that Convention in cases where the child is habitually resident in a non-member country which is also a party to that Convention.'

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

9.1 Difficulties in the application of Article 14 – National Reports

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

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

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

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

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[239] National Report Austria, question 28. Austrian Supreme Court [OGH] 30.05.2011 2 Ob 19/11z ECLI:AT:OGH0002:2011: 0020OB80000.19.11Z.0530.000; RIS- Justiz RS0127153 ECLI:AT:OGH0002:2011:RS0127153.
[240] See Sec. 99(1)1 No. 1 of the German Act on Family and Non-Contentious Proceedings.
[241] National Report Belgium, question 28.
[242] *Ibid.*

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

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

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

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

[243] *Ibid.*
[244] National Report Greece, question 28.
[245] National Report Lithuania, question 28.
[246] National Report Finland, question 28.
[247] National Report Portugal, question 28.

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

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

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

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

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

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[248] National Report France, question 28.
[249] National Report Austria, question 28.
[250] National Report Sweden, question 28.
[251] National Report Italy, question 28, reference to Cass. 17 July 2008.

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

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

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

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

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

9.3 Commission's proposal

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

10. Transfer of jurisdiction – Article 15

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

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

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

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[252] National Report the United Kingdom, question 28.
[253] McEleavy, P., 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?' (2015) NILR 366, p. 373, available at: <https://link.springer.com/article/10.1007/s40802-015-0040-z>.
[254] 2016 Commission's Proposal, p. 39.
[255] Magnus/Mankowski/Pataut, *op. cit.*, Article 15, note 1-3; De Boer in: De Boer and Ibili, *op.* cit., p. 176.
[256] See further CJEU Case C-455/15 PPU *P v Q* [2015] ECLI:EU:C:2015:763, para 44.

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

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

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

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

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

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[257] Stone, *op. cit.*, p. 461; See also CJEU Case C-523/07 *A* [2009] ECR I-2805.
[258] Practice Guide 2015, p. 35-36.
[259] Stone, *op. cit.*, p. 460: 'Somewhat similar provision for discretionary transfer of a case between courts of different countries is made by Article 8 and 9 of the Hague Convention 1996.'
[260] See for example the National Reports of Austria, Belgium, Cyprus, the Czech Republic, Italy, Poland and the United Kingdom. In the Republic of Ireland, 'Article 15 operates in relation to both incoming (see Child Care Law Reporting Project 2016 concerning a child in care being transferred to Ireland) and outgoing (HSE v. SF [2012] EWEHC 1640.' In Latvia, the 'outcome is 50/50.' In neighbouring Lithuania, there has only been a single case where a local court denied its jurisdiction and applied to another Member State court according to the provisions of Article 15. This also appears to be the case in Slovenia. In Luxembourg and Portugal, Article 15 is allegedly rarely applied.
[261] Stone, *op. cit*, nr. 3, p. 165; De Boer, in: De Boer and Ibili, *op. cit*., p. 176; see also Vassilakakis, E., and Kourtis, V., 'The Impact and Application of Brussels IIbis in Greece' in: Boele-Woelki and Beilfuss, *op. cit.* p. 142: 'Introducing the forum non conveniens into Continental Europe is one of the major novelties of the Regulation, even if its added value has to be assessed in the light of the hostile judgment delivered within the framework of the Brussels Convention by the European Court of Justice in the *Owusu* case.' See further CJEU Case C-281/02 *Andrew Owusu v N. B. Jackson* [2005] ECLI:EU:C:2005:120.
[262] For example, in De Boer, Th. M. 'Enkele knelpunten bij de toepassing van de Verordening Brussel II-bis' (2005) 27 FJR (under paragraph 5).
[263]Magnus/Mankowski/Pataut, *op. cit.*, Article 15, note 12.

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

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

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

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

[264] De Boer, 'Enkele knelpunten in de toepassing van de Verordening Brussel II-bis', *op. cit.*, p. 22 *et seq*.
[265] CJEU Case C-498/14 PPU *David Bradbrooke v Anna Aleksandrowicz* [2015] ECLI:EU:C:2015:3, para 20.
[266] Rauscher, 'Parental Responsibility Cases under the new Council Regulation Brussels IIa', *op. cit.*, I-42.
[267] National Report Belgium, question 27.

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

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

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

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

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[268] *Ibid.*
[269] *Ibid.*
[270] *Ibid.*
[271] *Ibid.*
[272] National Report the United Kingdom, question 27.
[273] *Ibid.*

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

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

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

10.3 Acceptance by the parties – National Reports

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

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

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[274] Kruger and Samyn, *op.cit.*, p. 141.
[275] Court of Appeal of Ghent, 5 September 2005, Revue@dipr.be 2005/3.
[276] National Report Belgium, question 27; Court of Appeal of Ghent, 5 September 2005, *Revue@dipr.be* 2005/3, 26. For a critical comment, see: Kruger, T., 'Kinderhandel: welke rechters moeten/mogen de zaak horen?' (2006) Tijdschrift voor Vreemdelingenrecht, pp. 171-174.
[277] National Report Luxembourg, question 27.

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

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

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

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

[278] CJEU Case C-428/15 *Child and Family Agency v J. D.* [2016] ECLI:EU:C:2016:819.
[279] *Ibid*., para 96.
[280] *Ibid*., para 93.
[281] *Ibid*., Opinion of Advocate General Wathelet, para 36.

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

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

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

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

10.5 Commission's proposal

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

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[282] *Ibid*., para 38.
[283] *Ibid*., para 61.
[284] *Ibid*., Opinion of Advocate General Wathelet, para 96.
[285] *Ibid.*, para 67.
[286] CJEU Case C-523/07 *A.* [2009] ECR I-2805, paras 68-70.
[287] 2016 Commission's Proposal, p. 40.

GUIDELINES – Summary

Article 8

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

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

The interpretation of the concept of the 'child' has been left to the discretion of legal practice. There is a common understanding, however, that for the purposes of the Regulation a 'child' refers to a person younger than 18 years of age. Different approaches in international instruments (for example, regarding the concept of a 'child' as being under16 years of age in the 1980 Hague Convention and under 18 years of age in the 1996 Hague Convention) may give rise to legal uncertainty not only for legal practitioners but also for parents and children. However, there is no CJEU case law which reveals this problem.

Article 9

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

Article 12

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

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

Article 13

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

Article 14

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

Article 15

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

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

CHAPTER 4: Jurisdiction in Cases of Child Abduction

Vesna Lazić

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1. Introduction

It was exactly the issues pertaining to parental responsibility 'independently of any link with a matrimonial proceeding',[1] and in particular introducing the provisions on child abduction, that represented the reasons for revising the Brussels II Regulation. Especially the idea of extending the substantive scope[2] so as to cover child abduction[3] was met with criticism by some authors.[4] Considering that various aspects of child abduction are regulated in the 1980 Hague Convention, it could be perceived as being redundant to extend European Union legislative functions to this matter.[5]

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

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

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

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

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

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

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

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

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

Therefore, the 2016 Commission's Proposal suggests a number of changes to these provisions which must be met with approval.[8] This issue will be addressed in greater detail *infra* in this Chapter, under 3 '*Jurisdiction under Article 11(1)-(5)*' and 4 '*Jurisdiction under Article 11(6)-(8)*' and suggested improvements in the Recommendations, under 4 '*Child Abduction and Return Procedures*'. Some guidance is thereby provided for the application of this provision as it follows from the relevant case law, in particular decisions of the CJEU and the ECtHR[9]. Some suggestions for improving the existing procedural regulatory scheme of the Regulation are offered in the Recommendations. They may prove to be useful within the context of the current discussion on the revision of the Regulation.

2. Jurisdiction under Article 10

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

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

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[8] For more information about the suggested changes, see the 2016 Commission's Proposal, pp. 2-17.
[9] European Court of Human Rights (hereinafter – the ECtHR).
[10] For the commentary on this provison, see Vonken, P. *Internationaal Privaatrecht* (Asser series 10-II, Wolters Kluwer 2016) p. 328; see also Holzmann, C., *Brussel IIa VO: Elterliche Verantwortung und internationale Kinderentfuhrung* (Janeaer Wissenschaftliche Verlagsgesellschaft 2008), p. 181.
[11] Practice Guide 2015, p. 49. See also, McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?', *op. cit.*, p. 372. The author mentions here that: 'Deterrence is at the heart of the new regime [...]'. For more information see also CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 52: 'The Regulation seeks, in particular, to deter child abductions between member states and, in cases of abduction, to obtain the child's return without delay.'
[12] For more particulars on this issue, see Dutta and Schulz, *cit. op.*, p. 6.
[13] Article 2(11) of the Regulation.

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

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

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

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

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[14] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309; CJEU Case C-523/07 *A.* [2009] ECR I-2805; see also, Carpaneto, *op. cit.*, p. 261.
[15] Lenaerts, *op. cit.*, p. 1313; The author refers to the *Povse* judgment (para 43) where the Court made it clear that '[...] the Brussels IIbis Regulation seeks to deter child abduction and to obtain the child's return without delay'; See also Devers, A., *Les enlèvements d'enfants et le règlement Bruxelles IIbis*, in: Fulchiron, H., *Les enlèvements d'enfants à travers les frontières* (Bruylant 2004) p. 37.
[16] For more paticulars on this issue see, Vlas, P., Ibili, F., 'Echtscheiding en ouderlijke verantwoordelijkheid volgens de nieuwe EG-Verordening Brussel IIbis' (2005) WPNR136, no. 6616, p. 263. See also, Stone, *cit. op.*, p. 469; Lazić, V., 'Family Private International Law Issues before the European Court of Human Rights: Lessons to Be Learned from *Povse v. Austria* in Revising the Brussels IIa Regulation' in Paulussen. C, Takács. T, Lazić.V, Van Rompuy. B (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (Springer, 2016), pp. 166-168.

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

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

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

[17] Practice Guide 2015, p. 51; See also McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?', *op. cit.,* p. 372; In order to ensure that the Member State of the child's habitual residence retains control over the child's future, 'a combination of the review or 'trumping' mechanism in Art.11(6)-(8), the strict jurisdiction rule in Article 10 and the automatic enforceability rule in Article 42' is used; See also CJEU Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2011] ECR I-14247, para 44.
[18] Vlaardingerbroek, P., 'Internationale kinderontvoering en het EHRM' (2014) 32 1 NIPR, p. 12-19.
[19] For more information on the competent court in child abduction cases, see also Lenaerts, *op. cit.*, p. 1312; see also Lowe, Everall, Nichols, *op. cit.*

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

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

(1) The child has acquired a habitual residence in the EU Member State where he/she has been removed or retained;

(2) the residence has lasted for at least 1 year after the person who holds the right of custody has had or should have had knowledge of the whereabouts of the child; and

(3) the child has settled in his or her new environment.

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

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

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

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

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

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

[23] *Ibid*., pp. 468-469.

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

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

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

2.1 Difficulties in application – National Reports

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

The circumstances of the case decided by the District Court of Breda as referred to in the National Report for the Netherlands[27] are illustrative of the difficulty that the judiciary sometimes faces when applying Article 10. After the mother had removed the child from the Netherlands to Belgium, the father approached a court in the Netherlands requesting an order for the return of the child. The requested District Court of Breda found, *inter alia*, that the investigations by the Belgian Central Authority were still in a preliminary phase when the case was being heard in the Netherlands and it concluded that it nevertheless had jurisdiction to grant an order for the return of the child under the 1980 Hague Convention. In the interest of the law Advocate General Strikwerda filed an action in cassation and asserted that under Articles 8 to 12 of the 1980 Hague Convention the District Court of Breda had no jurisdiction to order the return of the child under Article 10 of the Regulation. The Dutch Supreme Court[28] held that jurisdiction under Article 10 would only concern decisions on the merits in respect of parental responsibility. The decision on the return of the child under the 1980 Hague Convention was not a decision on the merits, but a disciplinary measure. The Supreme Court then went on to consider that under the system of the 1980 Hague Convention a return order could only be given by the court of the state where the child was present and that was in Belgium. The District Court of Breda, being the court of the child's habitual residence immediately before removal, therefore wrongly assumed jurisdiction for a return order under the 1980 Hague Convention. The facts of this case are a clear example of how the purpose and substance of Article 10 can be misunderstood and misinterpreted.

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

[26] CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268, para 40, second sentence.
[27] National Report the Netherlands, question 34.
[28] NL SC 9 December 2011, NIPR 2012, 2, LJN: BU2834, p. 16.

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

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

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

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

[29] National Report Malta, question 34: initial problems have been overcome with the help of the Central Authorities and good documentation.
[30] National Report Italy, question 34.
[31] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.
[32] National Report Romania, question 34.

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

2.2 Difficulties in application – CJEU case law

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

The judgments of both the CJEU[34] and the ECtHR[35] in the *Povse* case offer a clear example of the problems encountered in practice when applying the procedural legal framework of the Regulation relating to child abduction. In its judgment of 1 July 2010,[36] the CJEU provided guidance on the interpretation of a number of provisions of the Regulation, in particular Articles 10, 11(8), 40, 42 and 47. Accordingly, only the relevant parts of the decision on the interpretation of Article 10 are analysed in this part. Other aspects of this judgment are discussed *infra*, in the context of the analysis of the other provisions, i.e. Articles 11(8), 40, 42 and 47. The facts are rather complicated and involve multiple legal proceedings in Italy and Austria.[37] They are detailed *infra* in Chapter 9, under 4.2 '*Difficulties in application of Article 42 – CJEU case law*'.

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

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

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[33] National Report the Netherlands, question 34: referring to judgment NL SC 9 December 2011, NIPR 2012, 2, LJN: BU2834, p. 16.
[34] CJEU Case C-211/10 PPU *Povse* v *Alpago* [2010] ECR I-6673.
[35] *Sofia and Doris Povse* v. *Austria* App no 3890/11 (ECtHR, decision on admissibility, June 18, 2013).
[36] CJEU Case C-211/10 PPU *Povse* v *Alpago* [2010] ECR I-6673.
[37] This part is based on the research presented in an earlier publication, Lazić, V., 'Family Private International Law Issues before the European Court of Human Rights: Lessons to Be Learned from *Povse v. Austria* in Revising the Brussels IIa Regulation' in Paulussen, *op. cit.*, pp. 163; See also Lazic, V., Legal Framework for International Child Abduction in the European Union – The Need for Changes in the Light of *Povse v. Austria*, in: Župan, M. (ed.), *Private International Law in the Jurisprudence of European Courts - Family at Focus* (Osijek 2015), pp. 295-317.
[38] CJEU Case C-211/10 PPU *Povse* v *Alpago* [2010] ECR I-6673, para 50.

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

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

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

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

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

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[39] *Ibid.*, para 46.
[40] *Ibid.*, para 47; for the comment on this issue, see Lenaerts, *op. cit.*, p. 1313.
[41] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.
[42] CJEU Case C-523/07 *A* [2009] ECR I-2805.
[43] *Ibid.*, para 65.
[44] *Ibid.*, para 71.

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

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

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

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

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

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[45] *Ibid*., paras 67-70.

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

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

[48] See Beaumont, P. 'International Family Law in Europe – The Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity' (2009) Rabels Zeitschrift 509.

[49] Rumenov, *op. cit.*, p. 61.

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

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

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

In a similar vein, the 1980 Hague Convention is adjusted by the requirement contained in Article 11(3) imposing an obligation upon the courts of the Member State of wrongful removal or retention to act expeditiously and to decide upon an application for a return of the child within 6 weeks. Thereby they should follow the most expeditious procedure that may be available under national law (Art. 11(3))[55]. Further restriction is provided in Article 11(4). This provision limits the applicability of Article 13(b) of the Convention relating to the reason for which a return of the child may be refused. According to Article 13(b), the return of the child can be refused it there is a grave risk that the return would expose the child to physical or psychological harm or would place the child in an intolerable position. According to Article 11(4), this reason may not be invoked if adequate arrangements have been made to ensure that the child is sufficiently protected in the country of origin after his/her return. Moreover, a decision not to return may only be given if the person requesting the return has been given an opportunity to be heard (Article 11(5)). These provisions of the Regulation in Article 11(2)–(5) supplement the 1980 Hague Convention and prevail over the relevant rules of the Convention contained in Articles 11–13.[56]

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

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[52] CJEU Case C- 400/10 PPU *McB* [2010] ECR I-8965, para 31.
[53] Stalford, H., '*EU Family Law: a Human Rights Perspective*', in Meeusen, J., Pertegas, M., Straetmans, G. and Swennen, F. (eds.), *International Family Law for the European Union* (Intersentia 2007) p. 120.
[54] *Ibid*., p. 123.
[55] Brussels IIbis Regulation, Recital 17; see also Dutta and Schulz, *op. cit.*, p. 2 and comment of Lenaerts, *op. cit.*, p. 1314: 'If the authorities of the Member State of enforcement do not act expeditiously, they will not only breach Article 11(3) of the Brussels IIbis but also the fundamental rights of the parent suffering from the wrongful removal or retention'. See to this effect *Karoussiotis v Portugal* App no. 23205/08 (ECtHR, 1 February 2011), para 88 *et seq*.
[56] For a detailed overview of the modifications and alterations in the application of the relevant provisions, see Practice Guide 2015, p. 57.

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

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

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

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

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[57] CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268, para 40.
[58] CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436.
[59] *Ibid.*, para 38.
[60] *Ibid*., para 47; CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309; CJEU Case C-523/07 *A.* [2009] ECR I-2805.
[61] CJEU Case C-111/17 PPU *OL v PQ* [2017] ECLI:EU:C:2017:436, para 51.
[62] *Ibid.*, para 56.
[63] *Ibid.*, paras 59-60.

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

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

[64] *Ibid.*, paras 69-70.
[65] *Ibid.*, para 70.
[66] CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268.

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

The CJEU rules that the concept of the child's 'habitual residence' in Article 2(11) and Article 11 of the Regulation cannot differ in content from that given in the former judgments[67] with regard to Articles 8 and 10 of the Regulation. The Court states that it is the task of the court of the Member State to which the child had been removed to determine whether the child was habitually resident in the Member State of origin immediately before the alleged wrongful retention, using the assessment criteria provided in the previous judgments. As part of that assessment it is important to take into account that the court judgment authorising the removal could be provisionally enforced and that an appeal has been brought against it. In this case the mother had moved to Ireland on the basis of a French court order, but was ('subjectively') aware at the time of leaving that the order had been appealed. Accordingly, the CJEU sought to strike a fair balance in this case between both objective and subjective factors and placed emphasis on factual elements.[68]

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

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

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

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[67] CJEU Case C-523/07 *A.* [2009] ECR I-2805; CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.
[68] Kruger and Samyn, *op. cit.*, p. 147.
[69] Beaumont, *et. al.*, 'Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the effect of Brexit on Future Child Abduction Proceedings', *op. cit.*, p. 5: 'Only 20% of the children in these cases were heard.'
[70] National Report Germany, the complete answer to this question can be found under question 33.
[71] For further information consult McEleavy, 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?', *op. cit.*, p. 27: 'The difficulty for judicial authorities will be in ensuring that sufficient resources are made available to ensure that children can be heard in accordance with the procedures normally applicable in the Member State in question'.
[72] Stalford, *op. cit.*, p. 125.

A number of Member States have, to date, no reported cases or lack any data on difficulties which have been encountered[73] or problems have simply never occurred.[74] The difficulties identified do not only relate to the notion itself but must be seen together with the meaning of the concept 'degree of maturity' or the weight that should be attached to the opinion of a 'child'. In some jurisdictions, it is the application of national laws, the Regulation and the 1980 Hague Convention that may cause difficulties for the judiciary. For example, in France and Slovenia there are two different types of procedures that are followed in cases of child abduction. In Slovenia, the practice in conducting proceedings for the return of the child differs. The National Reporter refers to 'the rules of non-contentious procedure' used by some courts[75] and to the procedure under the Claim Enforcement and Security Act used by other courts.[76] In the view of the National Reporter, the latter provides for more expedient procedures for the enforcement of a decision to return the child. In addition, the National Reporter remarks that 'the non-hearing of the child could lead to the refusal of recognition of the foreign judgment' and that 'Slovenia is working on the improvement of child hearings standards'.

In France, Article 388-1 of the Civil Code, just like Article 11(2) of the Regulation, provides that there is an 'obligation to give [the child] the opportunity to be heard'. On the basis of this provision, there are two streams in judicial practice. Either a child is not heard on a systematic basis[77] or it happens by omission when there is no request for the hearing of the child.[78] It seems that the reason for the latter practice is the time constraint of six weeks provided in Article 11(3). Thus, a duty to comply with the time requirement may result in omitting to strictly comply with the requirement to hear the child.[79] In Luxembourg the National Reporter has raised the concern that the courts generally do not provide children with an opportunity to be heard.[80] However, in two instances this has taken place through their representatives and the children have not been directly heard by a judge.

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

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

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

[75] Končina Peternel, M., 'Mednarodna ugrabitev otrok' (2013) 3 Pravosodni bilten, p. 53.

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

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

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

[79] *Ibid.*

[80] National Report Luxembourg, question 35.

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

[82] National Report Romania, question 35.

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

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

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

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

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[83] National Report Belgium, question 35.
[84] National Report Croatia, question 35.
[85] National Report Finland, the complete answer to this question can be found under question 35.
[86] National Report Italy, question 35.
[87] *Ibid.*: 'directly or through experts'; National Report Latvia: either by the judge or otherwise they will use the 'report of a psychologist/psychiatrist'.
[88] National Report Poland, the complete answer to this question can be found under question 35.
[89] National Report Greece, question 35; National Report Italy, question 35 and National Report Finland, the complete answer to this question can be found under question 35.
[90] National Report Spain, question 35.

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

With regard to the aforementioned outcomes of the National Reports some recommendations and references have also been made. These predominantly relate to Article 12 of the Convention on the Rights of the Child,[95] which requires the opinion of the child to be taken into account regardless of judicial or administrative proceedings that concern them.[96] Either this provision of the Convention of the Rights of the Child has been transposed into national law[97] or it is mentioned that the national legislator should bring the law into line with this international standard[98] or that the courts should apply it.[99] In conclusion, the recommendation has been made that 'a revised version of the Regulation would explicitly refer' to the 'Convention on the Rights of the Child as well as the EU Charter[100]'.[101] This will further protect and safeguard the rights of children who are involved these troublesome situations.

[91] National Report Belgium, question 35, the right of the child to be heard in abduction cases has been laid down in Article 22*bis* of the Belgian Constitution.
[92] National Report Italy, question 35.
[93] National Report the United Kingdom, the complete answer to this question can be found under question 35.
[94] *Blaga v Romania* App no. 54443/10 (ECtHR, July 1 2014) para 801.
[95] Convention on the Rights of the Child, Article 12(1)(2) reads: 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.
[96] Vlaardingerbroek, P., 'Changing Parenthood after Divorce' in Erauw, J., Tomljenović, V. and Volken, P. *(eds), Liber Memorialis Petar Šarčević: Universalism, Tradition and the Individual* (Sellier European Law Publishers 2006), p. 358.
[97] National Report Croatia, question 35.
[98] National Report Belgium, question 35.
[99] National Report Slovenia, the complete answer to this question can be found under question 35.
[100] EU Charter of Fundamental Rights.
[101] National Report Belgium, question 35.

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

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

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

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

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[102] Shannon, 'The Impact and Application of Brussels IIbis in Ireland' in Boele-Woelki and Beilfuss, *op. cit.*, p. 155: 'This time limit has proven to be 'quite unrealistic''; See further Thorpe L.J. statement in *Re W. (Abduction: Domestic Violence)* [2005] 1 FLR 7272.
[103] National Report Austria, question 38; National Report Italy, question 38; National Report Luxembourg, question 38 and National Report Poland, question 38.
[104] National Report Latvia, question 38.
[105] National Report Hungary, the complete answer to this question can be found under question 38 and National Report Slovenia, the complete answer to this question can be found under question 38: most cases will take longer than 6 weeks but an attempt is made to abide by the 6-week time limit.
[106] National Report the Netherlands, question 38.
[107] *Ibid*.
[108] National Report the Czech Republic, question 38; National Report France, question 38; National Report Spain, question 38 and National Report Belgium, question 38, which also indicates a 3-4 month average based on the input of the lawyer.
[109] National Report France, question 38.
[110] National Report Cyprus, question 38; National Report Portugal, the complete answer to this question can be found under question 38; National Report Poland, question 38 and National Report Romania, question 38.
[111] National Report Romania, question 38.

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

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

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

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

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

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[112] National Report Cyprus, question 38 ; National Report Poland, question 38 and National Report Portugal, question 38.
[113] National Report Bulgaria, question 38; National Report Estonia, question 38; National Report Finland, the complete answer to this question can be found under question 36; National Report Germany, the complete answer to this question can be found under question 38; National Report Greece, question 38; National Report Lithuania, question 38; National Report Sweden, question 38 and National Report the United Kingdom, the complete answer to this question can be found under question 38.
[114] National Report Malta, the complete answer to this question can be found under question 38.
[115] National Report the Czech Republic, question 38.
[116] 1980 Hague Convention, Article 12(1)(b).
[117] Stalford, *op. cit.*, p. 123.
[118] *Ibid.*, National Report Austria, question 36; See also Austrian Supreme Court [OGH] 27.04.2015 6 Ob 67/15.
[119] National Report Belgium, question 36.

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

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

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

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

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[120] *Ibid*.
[121] National Report the Czech Republic, question 36.
[122] *Ibid.*
[123] National Report France, question 36.
[124] National Report Latvia, question 36.
[125] National Report Luxembourg, question 36.
[126] National Report the Netherlands, question 36.

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

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

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

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

From the National Reports it can be concluded that the majority of the Member States do not have a national guideline in place to assess the 'best interests of the child' when deciding on whether 'adequate arrangements have been made to secure the protection of the child after his or her return'. The majority view is that such a guideline would be helpful. Recommendations include the application of General Comment No. 14[134] that provides an explanatory note on the objectives, interpretation and application of Article 3(1) on the Convention on the Rights of the Child.[135] The Article reads as follows:

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

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[127] National Report Spain, question 36.
[128] National Report the Czech Republic, question 36.
[129] National Report Slovenia, the complete answer to this question can be found under question 36.
[130] National Report Sweden, question 36.
[131] National Report the United Kingdom, the complete answer to this question can be found under question 36: Renton, C., 'Orders Relating to Children Within the European Union under BIIR' (2009) Family Law Week, n. 262.
[132] *Ibid.*
[133] National Report Austria, question 36; Commentary provided in: Kaller-Pröll in Fasching/Konecny (editors), Commentary on civil procedural law [Kommentar zu den Zivilprozessgesetze], second edition, volume V/2 (2008), Article 11 EuEheKindVO, note 14.
[134] Convention on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para 1)* CRC/C/GC/14, 29 May 2013.
[135] Convention on the Rights of the Child, Article 3.

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

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

Other ways in which the concept has been ensured is through the case law of the Supreme or Constitutional Court, by providing an interpretation[141] of the concept, developing certain criteria[142] and also developing instructions and guidelines.[143] The effect of not having a national guideline is that the courts have the necessary flexibility to determine the actual best interests of the child and to assess whether adequate arrangements have been put in place in a particular case. The National Report of Belgium has rightly raised this issue, as well as pointing

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[136] Convention on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para 1), CRC/C/GC/14, 29 May 2013, p. 3-5.
[137] Akandji-Kombe, J-F., *Positive obligations under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights* (Human Rights Handbooks, No. 7, Council of Europe 2007), p. 1-11.
[138] National Report Spain, question 36.
[139] TFEU, Article 81(1)(3) (under Article 65 TEC).
[140] National Report Belgium, question 36; National Report France, question 36; National Report Ireland, the complete answer to this question can be found under question 34 (the concept is 'identifiable by national laws'); National Report Italy, question 36 and National Report Lithuania, question 36.
[141] National Report the Czech Republic, question 36; National Report Malta, the complete answer to this question can be found under question 36; National Report Latvia, question 36 and National Report Spain, question 36.
[142] National Report Greece, question 36; National Report Ireland, the complete answer to this question can be found under question 36; National Report Malta, the complete answer to this question can be found under question 36; National Report Spain, question 36.
[143] National Report Luxembourg, question 36, where the Supreme Court instructs the courts to apply the guidelines of the CJEU but, thus far, they have not yet been applied due to a lack of cases. The National Report of the United Kingdom indicates that the High Court of England and Wales offers a separate 'Welfare-centric protective remit'.

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

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

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

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

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

This procedure has been referred to as 'the overriding mechanism', 'the trumping provision' and/or the 'second bite'.[144] This procedural framework has received criticism in the literature for undermining mutual trust.[145] The availability of the second chance procedure depends on the reason for which the return was refused. If it was refused because the court considered that the child was habitually resident in its State rather than in the State to which a return is sought,[146] there is no second chance. [147] This is also the case when the return is refused because the abduction took place more than a year prior to the proceedings and the child has now settled in his/her new environment[148] or on the basis of fundamental rights concerns.[149] The second chance procedure is available if the return was based on Article 13 defences under the 1980 Hague Convention.

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

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

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[144] Marín Pedreño, C., 'Brussels IIbis Regulation Five Years on and Proposals for Reform' (2010) London, IAFL European Chapter 3, p. 4 <https://www.iafl.com/chapters/europe/index.html.> accessed on July 10, 2017.
[145] Kruger and Samyn, *op. cit.*, p. 158.
[146] The 1980 Hague Convention, Article 3.
[147] Kruger and Samyn, *op. cit.*, p. 158.
[148] The 1980 Hague Convention, Article 12.
[149] *Ibid*., Article 20.
[150] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 78.
[151] Regulation Brussels IIbis, Article 11(3), second paragraph.
[152] *Ibid*., Article 11(6), second sentence.
[153] Marín Pedreño, *op. cit.*, p. 6.

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

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

Most importantly, the 'procedural autonomy' of the provisions of Articles 11(8), 40 and 42 and the priority given to the jurisdiction of the court of the requesting Member State[160] are maintained in the CJEU's case law.[161] It is to be emphasised that it is not required that a return order issued under Article 11(8) is preceded or accompanied by a final judgment on custody rights.[162] This, it is not necessarily the court having jurisdiction to rule on the custody of the child in the requesting Member State. Instead, such a return order may be rendered by any court in that Member State, which is the major shortcoming of the legal reasoning in the *Povse*[163] judgment. The CJEU emphasises the importance of the allocation of jurisdiction established in Article 11(8) solely to the courts in the Member State of origin.[164]

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

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[154] Kruger and Samyn, *op. cit.*, p. 159.
[155] *Ibid*.
[156] According to the 1980 Hague Convention they are competent to decide upon requests for the return of the child.
[157] See also CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 78.
[158] CJEU Case C-455/15 PPU *P v Q* [2015] ECLI:EU:C:2015:763, para 49 and earlier CJEU judgments in CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 63 and CJEU Case C-211/10 PPU *Povse* v *Alpago* [2010] ECR I-6673, para 56.
[159] Dutta and Schulz, *op. cit.*, p. 22.
[160] For more on this see: Llerranz Ballesteros, M., 'International Child Abduction in the European Union: the Solutions incorporated by the Council Regulation' (2004) 34 2 Revue générale de droit, pp. 343 *et seq*., p. 356.
[161] See e.g. CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, paras 63 and 64.
[162] In the *Povse* judgment, the CJEU held that a 'judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child'.
[163] CJEU Case C-211/10 PPU *Povse* v *Alpago* [2010] ECR I-6673.
[164] *Ibid*.
[165] For more on the enforceability of return orders see: Llerranz Ballesteros, *op. cit.*, pp. 343 *et seq*., p. 358.; Lowe, 'Some moot points on the 1980 Hague abduction convention', *op. cit.*, p. 701.

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

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

4.1 Difficulties in application – National Reports

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

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

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

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

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

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

[170] National Report Austria, question 37.

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

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

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

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

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

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[172] See Kruger and Samyn, *op. cit.*, p. 159.
[173] National Report Greece, question 37, makes a comment which is in line with that of the national reporter of Austria concerning the length of time which the procedures take and the settlement of the child in his/her new environment.
[174] National Report Austria, question 37.
[175] National Report Belgium, question 37, referring to: Kruger and Samyn, *op. cit.*, p. 159.
[176] National Report Belgium, question 37: The reporter is of the opinion that the procedure should be abolished and refers to the non-functioning of the principle of 'Mutual Trust', however emphasizing that its position is open to discussion; See further Lazic, V., 'Multiple Faces of Mutual Recognition: Unity and Diversity in Regulating Enforcement of Judgements in the European Union', in Fletcher, M., Herlin-Harnell, E., Matera, C. (eds.), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2017) pp. 337-357.
[177] National Report Belgium, question 37: '[...] Since the Brussels IIa Regulation doesn't provide a time limit in which this procedure must be completed, it is often used only to prolong the case [...] By allowing a party to stretch the case, the best interest of the child [...] is no longer guaranteed'.
[178] National Report France, question 37 and National Report Ireland, the complete answer to this question can be found under question 37.
[179] See also Kruger and Samyn, *op. cit.*, p. 159.
[180] National Report Belgium, question 37.

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

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

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

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

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[181] National Report the Czech Republic, question 37.
[182] *Ibid*.
[183] National Report Italy, question 37 and National Report Luxembourg, question 37.
[184] *Ibid*.
[185] National Report Greece, question 37.
[186] National Report Romania, question 37.
[187] National Report Spain, question 37.
[188] National Report the United Kingdom, question 37; See further Wiwinius, J.-C., *Le droit international privé au Grand-Duché de Luxembourg* (3rd ed., Editions Paul Bauler 2011), p. 380.
[189] CJEU Case C-211/10 PPU *Povse* v *Alpago* [2010] ECR I-6673.

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

4.2 Difficulties in application – CJEU case law

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

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

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[190] CJEU Case C-498/14 PPU *David Bradbrooke v Anna Aleksandrowicz* [2015] ECLI:EU:C:2015:3.
[191] *Ibid*., para 40.
[192] Loi de 30 juillet portant la creation d'un tribunal de la famille et de la jeunesse.

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

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

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

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

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[193] CJEU Case C-498/14 PPU *David Bradbrooke v Anna Aleksandrowicz* [2015] ECLI:EU:C:2015:3, para 54.
[194] Beaumont, P., Danov, M., Trimmings, K. and Yükseel, B. (eds), *Cross Border Litigation in Europe* (Hart Publishing 2017), p. 722.
[195] CJEU Case C-498/14 PPU *David Bradbrooke v Anna Aleksandrowicz* [2015] ECLI:EU:C:2015:3, para 51; Beaumont, Danov, Trimmings, and Yükseel, *op. cit.*, p. 722.
[196] CJEU Case C-211/10 PPU *Povse* v *Alpago* [2010] ECR I-6673.
[197] CJEU Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2011] ECR I-14247.

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

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

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

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

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[198] CJEU Case C-211/10 PPU *Povse* v *Alpago* [2010] ECR I-6673, para 52.
[199] *Ibid*., para 62.
[200] *Ibid*., para 67.
[201] *Ibid*., see further Dutta and Schulz, *op. cit.*, p. 24 *et seq.*
[202] Dutta and Schulz, *op. cit*., pp. 1-40, p. 22.

In all of the above-mentioned cases, the Court has used its *urgent procedure (PPU)*,[203] which enables the Court to answer questions in the area of freedom, security and justice[204] and thus also references by Member State courts regarding the Brussels IIbis Regulation, within a much shorter time than under the general procedure for preliminary rulings.[205] The Court has made clear that the urgent procedure is especially appropriate in cases of child abduction.[206]

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

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

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

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

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[203] Introduced by the Amendment of the Rules of Procedure of the Court of 15 January 2008 [2008] OJ L 24/39; see also Council Decision of 2 December 2007 amending the Protocol on the Statute of the Court of Justice, [2008] OJ L24/42.
[204] TFEU, Article 67 *et seq*.
[205] Dutta and Schulz, *op. cit.*, p. 5.
[206] E.g. CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, para 44.
[207] *Ibid.*

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

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

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

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

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[208] Dutta and Schulz, *op. cit.*, p. 25.
[209] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271, paras 59-60.
[210] *Ibid*., paras 75-81.
[211] *Ibid*., para 80.
[212] Dutta and Schulz, *op. cit.*, p. 25-26.
[213] National Report Austria, question 39; National Report Belgium, question 39; National Report Bulgaria, question 39; National Report Croatia, question 39; National Report Cyprus, question 39; National Report Estonia, question 39; National Report Finland, the complete answer to this question can be found under question 39.
[214] National Report the Czech Republic, question 39; National Report France, question 39; National Report Poland, question 39; National Report Spain, question 39; National Report Slovenia, the complete answer to this question can be found under question 37 and National Report Sweden, question 39.
[215] National Report Austria, questions 39 and 40; National Report Cyprus, questions 39 and 40; National Report Estonia, questions 39 and 40; National Report Hungary, questions 39 and 40; National Report Ireland, questions 39 and 40; National Report Latvia, questions 39 and 40.
[216] National Report France, question 39.

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

In the light of these critical remarks, the new Article 61[223] of the 2016 Commission's Proposal contains a new provision regarding financial resources. This obliges Member States to ensure that Central Authorities have adequate financial and human resources to enable them to carry out the obligations assigned to them under Brussels IIbis.

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

[217] National Report Spain, questions 39 and 40; National Report Latvia, questions 39 and 40; National Report the Netherlands, questions 39 and 40; National Report Romania, questions 39 and 40; National Report Croatia, questions 39 and 40 (referring to the existing time frame under the 1980 Hague Convention).
[218] National Report Spain, questions 39 and 40; National Report France, questions 39 and 40; National Report Italy, questions 39 and 40; National Report Luxembourg, questions 39 and 40; National Report Malta, questions 39 and 40; National Report Sweden, questions 39 and 40.
[219] National Report Luxembourg, question 39 indicating that this question can only be answered on a case by case basis.
[220] National Report Spain, question 39.
[221] National Report the United Kingdom, question 40.
[222] National Report Croatia, question 47; National Report Estonia, question 47; National Report Cyprus, question 47; National Report Spain, question 47; National Report Greece, question 47; National Report Slovenia, question 47.
[223] See the Impact Assessment, pp. 207-208: 'The clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs'.
[224] National Report Poland, question 39.

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

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

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

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

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[225] National Report Slovenia, question 40.
[226] National Report Slovenia, the complete answer to this question can be found under question 37.
[227] National Report Greece, question 40.
[228] Georgouleas, N., 'International Abduction of Children' in Chrysapho, T. (ed.) *International Family Law* (Nomiki Vivliothiki 2016), p. 330. See also: <http://www.europarl.europa.eu/atyourservice/en/20150201PVL00040/Child-abduction-mediator>.
[229] National Report Austria, question 39; National Report Belgium, question 39; National Report Bulgaria, question 39; National Report Croatia, question 39; National Report Cyprus, question 39; National Report Estonia, question 39; National Report Finland, the complete answer to this question can be found under question 39; National Report Germany, the complete answer to this question can be found under question 38; National Report Greece, question 39; National Report Hungary, the complete answer to this question can be found under question 37; National Report Ireland, the complete answer to this question can be found under question 37; National Report Latvia, question 39; National Report Lithuania, question 39; National Report Malta, question 37 and National Report Portugal, the complete answer to this question can be found under question 38.
[230] National Report the Czech Republic, question 39; National Report France, question 39; National Report Poland, question 39; National Report Spain, question 39; National Report Slovenia, the complete answer to this question can be found under question 37 and National Report Sweden, question 39.
[231] National Report Romania, question 39.

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

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

[232] National Report Spain, question 39.
[233] National Report Luxembourg, question 39.

GUIDELINES – Summary

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

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

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

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

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

How to apply Article 10

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

- The CJEU has defined this concept in relevant case law as explained in connection with the application of Article 8. These considerations are relevant and fully applicable in the context of Article 10.
- The concept of 'habitual residence' …must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay in the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.

It is for the national courts to establish the habitual residence of the child, taking account of all the circumstances which are specific to each individual case (the case of *A*).[234]

- To the factors to consider habitual residence in the case *A*, in the *Mercredi*[235] case the CJEU added further factors as follows: '…such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. [….] the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, *with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State*.

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

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

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

Step 3: Establish whether the child has:

a) resided in that other Member State for a period of **at least one year;**

b) after the person, institution or other body having rights of custody has had or should have had **knowledge** of the whereabouts of the child; and

c) the child has **settled** in his or her new environment; and

d) at least one of the following conditions is met:

- within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for a return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained
- a request for a return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

[234] CJEU Case C-523/07 *A.* [2009] ECR I-2805, para 44.
[235] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.

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

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

Main difficulties in the application of Article 10

Habitual residence

Different National Reporters claim that the temporal and substantive conditions and the determination of the child's habitual residence after he/she has moved for a period of time make it more complex to decide on which court has jurisdiction. Habitual residence 'must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. [….] the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State' (in the case of *Mercredi*[237]).

Relationship with the 1980 Hague Convention

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

[236] CJEU Case C-211/10 PPU *Povse* v *Alpago* [2010] ECR I-6673.
[237] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.

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

Provisional measures

A provisional measure does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) and accordingly does not present a basis for the transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed (the CJEU in the *Povse* case[238]).

Article 11 – scope

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

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

Provisions prevailing over or modifying the 1980 Hague Convention

Article 11(3) 6-week time frame

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

Article 11(4) 'adequate arrangements'

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

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

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

Article 11(5) the opportunity to be heard

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

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

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

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

CHAPTER 5: Common Provisions (Articles 16-20)

Vesna Lazić

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Chapter II, section 3 of the Brussels IIbis Regulation includes provisions which are common to proceedings of divorce, legal separation and marriage annulment, as well as parental responsibility. These provisions have given rise to a number of queries in practice. It may be crucial to identify the precise point at which a court is to be deemed to have been seised (Article 16), the stage at which the court will examine whether it has jurisdiction (Article 17) and what steps must be taken when proceedings in disputes concerning matrimonial matters and parental responsibility have been brought before the courts of different Member States (Article 19). Aside from this, these common provisions also cover the practicality of service and what must be done if the respondent does not enter an appearance (Article 18), as well as the conditions and certain aspects of granting provisional, including protective, measures (Article 20).

1. Seising of a Court – Article 16

The moment of commencement may be decisive for a number of legal consequences, such as for the interruption of periods of limitation. In particular, the moment when a court is considered to have been seised is decisive in the context of the applicability of the rule on *lis pendens* in Article 19. Member States may adhere to distinct approaches to determine the moment when proceeding is deemed to have been initiated. In some jurisdictions, the decisive moment is when the claim is filed with the court. In others, the moment when the document instituting the proceedings is considered to be served on the counterparty or is rather received by the person responsible for the service determines the moment when legal proceedings are commenced.

The rule in Article 16 of the Regulation seeks to establish a uniform approach in specifying the moment when a court is deemed to have been seised.[1] This provision neither imposes an obligation that a universal notion of the seising of a court is to be applied throughout the procedural law of the Member States, nor does it attempt to unify the existing definitions in national laws. Instead, the purpose is to unify the application of these criteria within the framework of applying Article 16. Presumably for these reasons it has been argued that the scope of Article 16 is rather limited.[2] The methods of determining the moment when the court is seised reflect the approaches that are accepted in the national laws of the Member States. In other words, each of the two methods of filing a claim may be determinative for the moment when the court is seised, as long as the applicant also subsequently follows the other method of instituting proceedings.

Thus, a court is to be deemed to be seised either at the time when the document instituting the proceedings or an equivalent document is lodged with the court (Art. 16(1)(a)), or when it is received by the authority responsible for service if that document has to be served on the respondent before being lodged with the court (Article 16(1)(b)). Which of the two methods is to be followed depends on the applicable national law.

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[1] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 1; Lupsan, G., 'Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges applying Regulation Brussels IIbis' (2014) 7:1 Baltic Journal of Law and Politics, pp. 113-127, p. 118.
[2] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 7.

However, the court will 'be deemed seised only if the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (under the first option), or to have the document lodged with the court (under the second option)'.[3] Accordingly, both methods are put on an equal footing under the Regulation and the applicant may follow either of them. However, the applicant must ensure that the necessary steps are taken so that the document is subsequently submitted in the alternative way as well.

In this way, it is ensured that differences that exist in national laws regarding the moment of the commencement of court proceeding do not hamper the effectiveness of a mechanism for resolving cases of *lis pendens* and dependent actions. Provisions with identical or similar wording can be found in other EU PIL instruments.[4]

In its Impact Assessment, the Commission identified the problems of *forum shopping* and a rush to the court.[5] However, Article 16 does not seem to be relevant in the context of *forum shopping*. In particular, in none of the published cases were the courts seriously and materially in doubt with regard to the question of with which court a document was filed first. In other words, in essence there was no problem of diverging definitions of the moment when a court is seised.[6] Difficulties rather arose in connection with the interpretation of the moment when litigation is considered to have been commenced in a particular Member State, as will be explained in greater detail elsewhere.[7] Articles 16-19 have undoubtedly and seriously affected family lawyers' practice, the more so since case law tends to show that the successful party is usually the one whose proceedings have progressed further in his/her chosen court. Who strikes first might simply gain a jurisdictional and tactical edge.[8] Therefore, the definition in Article 16 is not a fitting solution for an alleged problem of forum shopping and a rush to the court. In other words, no possible alteration to this provision would resolve the alleged problem.

In the literature, a problem is sometimes raised regarding the differences between the English version which refers to a 'time', and the French version which refers to a 'date' (*la date à la quelle*). It has been suggested that the difference should be balanced by reading and understanding the English 'time' as a 'date'.[9] A possible difference in time has no consequence

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[3] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para. 32.

[4] E.g., Article 32 of the Brussels Ibis Regulation (Article 30 of the Brussels I Regulation) and the wording in Recital 21 relating to the aim and purpose of this provision as follows: 'In the interest of the harmonious administration of justice it is necessary minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending for the purposes of this Regulation, that time should be defined autonomously'.

[5] Impact Assessment, p. 42; for more information see Baarsma, N.A., *The Europeanisation of International Family Law* (Asser Press 2011), p.153-154; Buckley, L., 'European Family Law: the Beginning of the End for "Proper" Provision?' (2012) 6 Irish Journal of Family Law, p. 5.

[6] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 4.

[7] See *infra* in this Chapter, under 4 '*Lis pendens and dependent actions – Article 19*'.

[8] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, notes 4-7.

[9] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 10.

for the purposes of determining the time/date of commencement with the purposes of circumventing the rules of *lis pendens.*[10]

A common definition of the moment when a court is deemed to have been seised is relevant for both matrimonial matters and matters relating to parental responsibility. Yet in practice it is more important in cases involving matrimonial matters where the possibility of conflicting sets of proceedings is more likely to occur.[11] The two methods envisioned in Article 16 have several notions in common which will be detailed below.

1.1 Documents instituting the proceedings or an equivalent document

Regarding the filing of a statement of claim, the Regulation uses the wording 'documents instituting the proceedings or an equivalent document'. This notion has been borrowed from Article 27(2) of the 1968 Brussels Convention[12] and later Article 34(2) of the Brussels I Regulation.[13] The same wording is also used in the corresponding provision of Article 30 Brussels I Regulation[14] and in Article 32 of the Brussels Ibis Regulation. Thus, interpretative support can be gained from the jurisprudence of the CJEU in the context of the Brussels I Regulation.[15] However, the CJEU has not provided a formal definition of this concept. Instead, it has employed a functional description which can identify the relevant document by the function it has, independent of its designation or denomination in the respective legal system.[16] The CJEU has described the term as 'the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin'.[17]

As suggested in the literature, the relevant provisions imply that the document instituting the proceedings must be served before an enforceable judgement can be obtained and that it must enable the respondent to decide whether to defend the action.[18] As for the latter, it is to be presumed that the document which instituted the proceedings, or an equivalent document, must contain sufficient information about the subject matter, that the key elements

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[10] See e.g., CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 44, in which the Court held '[w]ith regard to the time difference between the Member States concerned, which would enable proceedings to be brought in France before they could be brought in the United Kingdom, and which could disadvantage certain applicants, such as Ms A, apart from the fact that it does not seem to work against such an applicant in a case such as that in the main proceedings, the time difference is not in any event capable of frustrating the application of the rules of lis pendens in Article 19 of Regulation No 2201/2003, which, taken in conjunction with the rules in Article 16 of that regulation, are based on chronological precedence'.

[11] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht*, *op. cit.*, Article 16, note 1; Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 11.

[12] Stone, *op. cit.*, p.196; See also CJEU Case C-129/83 *Siegfried Zeiger v Sebastiano Salinitri* [1984] ECR 2397, para. 15. Originally, the date of seising was determined in accordance with the above mentioned CJEU ruling: '[...] the question as to the moment at which the conditions for definitive seising [...] are met must be appraised and resolved, in the case of each court, according to the rules of its own national law'.

[13] This wording has been adopted in Article 45(1)(b) of the Brussels Ibis Regulation.

[14] Stone, *op. cit.*, p. 437: 'Article 16 of the Brussels IIA Regulation follows Article 30 of the Brussels I Regulation in specifying that a court is seised at the issue, rather than the service of the document instituting the proceedings'.

[15] *Ibid.*, p. 196-197.

[16] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 13.

[17] CJEU Case C-474/93 *Hengst Import BV v. Anna Maria Campese* [1995] ECR I-2113, para. 19.

[18] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht*, *op. cit.*, Article 16, note 1.

must be brought to the respondent's attention and that the document must be comprehensible.[19] The comprehensibility requirement triggers a further question of whether the document has to be drafted in a language which the respondent is known to understand. When addressing this issue, a reference can be made to the Service Regulation,[20] as the Brussels IIbis Regulation itself in Article 18 refers to Regulation (EC) 1348/2000,[21] the predecessor of the Service Regulation.[22] However, the moment when the defendant has actually received the document according to the conditions under the Service Regulation does not necessarily have relevance regarding the moment of seising the court for the purposes of applying the *lis pendens* rule.

Furthermore, documents which contain additional application that widens or extends the subject matter of the proceedings are also documents which institute proceedings insofar as they apply to such an extension. Correspondingly, documents which strive to establish counter-applications can be documents which institute proceedings, but only insofar as the counter-application goes beyond the substantial scope of application. Thus, a simple counter-application for a divorce in divorce proceedings which are already pending does not suffice.[23] In proceedings for the dissolution of marriage it is uncommon that any additional application might add another party to the proceedings. Yet, if this does occur, the document evidencing such an application is a document instituting proceedings insofar as they relate to the other party.[24]

Additionally, an application for merely preliminary proceedings or an application for injunctive relief insofar as it does not institute the main proceedings, does not qualify as a 'document instituting the proceedings or equivalent document' within the meaning of Article 16.

1.2 Service of documents

Regarding the service of the document, the provision of Article 16 uses the wording 'to take the steps he was required to take to have service effected on the respondent'[25] and when the document 'is received by the authority responsible for service'. Thus, for determining the moment of 'seising the court' within the meaning of Article 16 for the purpose of applying the rule on *lis pendens* it is not the moment of the actual service on the respondent that is decisive.

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[19] Layton, A. and Mercer, H. *European Civil Practice* (Sweet & Maxwell 2004), para 26.032.

[20] Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000 [2007] OJ L 324/79 (hereinafter: Service Regulation). Article 8 of the Service Regulation reads that the addressee 'may refuse to accept the document to be served at the time of service [...] if it is not written in, or accompanied by a translation into, either of the following languages: (a) a language which the addressee understands; or (b) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected'.

[21] Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2000] OJ L 160/37.

[22] It is self-explanatory that the 2016 Commission's Proposal suggests a replacement by referring to the current version of the Service Regulation.

[23] Magnus/Mankowski/Mankowski, *op. cit.,* Article 16, note 18.

[24] *Ibid.*

[25] Article 16, para 1(a) of the Brussels IIbis Regulation.

The same holds true when a respondent refuses to accept the document due to the lack of a necessary translation.[26]

Indeed, the moment when the document has been properly served on the respondent remains relevant for other issues, such as compliance with the deadlines and all other issues pertaining to the requirement of 'due process'.

The Regulation expressly refers to the Service Regulation (i.e., its predecessor) in Article 18, addressed *infra* in this Chapter, under 3 '*Examination as to admissibility – Article 18*'.

1.3 Lodging/Filing a Claim

This term, just as the previous one, does not yet have a detailed definition. The best interpretation of its meaning would be a formal one in the sense that it means filing the relevant document with the court i.e. submitting it to the court as the first addressee.[27] The required degree of formalisation is not prescribed by EU law. In this regard the national courts determine the necessary formalities.[28] However, it must be applied and interpreted autonomously in accordance with the actual wording used in the Regulation. Relevant is thus the moment when the document is 'lodged with the court' regardless of the fact that the national procedural law of a Member State does not attach the same relevance to this moment, as will be explained in the following part.

1.3.1 Autonomous interpretation of the definition in Article 16

It should be noted that it is irrelevant whether the moment of filing the claim with the court qualifies for the moment of the commencement of litigation under the national procedural law of the Member State in which the court is seised. Thus, the Regulation provides for a uniform definition of the time when a court is deemed to have been seised. That moment is 'determined by the performance of a single act', depending on the procedural system concerned. Thus, in some Member States it will by the lodging of the document instituting the proceedings with the court and in others by the service of that document on the respondent or rather on the authority responsible for service, always provided that the second act was subsequently actually performed.[29] Once an act instituting the proceedings or other equivalent document has been lodged with the court in a Member State that requires that method for commencing proceedings, that will be the moment when the 'court has been seised', regardless of when it has been served

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[26] See the so-called 'double date' provision in Article 9 of the Service Regulation, the purpose of which is exactly to prevent that an improper service could affect the claimant's right of access to justice. According to this provision, the moment from which the periods of limitation start to run differs with respect to the claimant as compared to the respondent. For the former, the deadline starts to run from the moment when the document has been filed with the bailiff or another 'agent' entrusted to affect the service of the document. For the respondent, it is the moment when the document has actually been properly served on him/her.

[27] Stumpe, F., 'Torpedo-Klagen im Gewand obligatorischer Schlichtungsverfahren – Zur Auslegung des Art. 27 EGBGB' ArbG Mannheim, S. 37, (2008) IPRax, 22, 24.

[28] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 19.

[29] CJEU Case C-173/16 *M.H. v M.H.* [2016] ECLI:EU:C:2016:542, para 25. See also CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 32.

on the respondent or the authority responsible for service, but always provided that it was subsequently actually served.

Within that context, it should be emphasised that the moment when the document has been lodged with the court determines the moment when the court is seised within the meaning of Article 16. It is thereby irrelevant that there may be a different procedural regulation in the national law of a particular Member State providing for another moment for the commencement of litigation, i.e., the moment when the proceeding is considered to be pending. Thus, the moment when the court becomes seised is the moment when the relevant document is actually filed with the court regardless of the fact that the law of the Member State of the seised court provides for another moment when litigation commences. The facts of the CJEU case of *M.H. v. M.H.*[30] are illustrative of this.

One spouse filed a divorce petition which was received by the registry of the competent court in England at 7:53 a.m. on 7 September 2015. That petition was date stamped at the latest by 10:30 a.m. of the same day. The petition was subsequently issued by the Court registry on 11 September 2015 and was served on the other spouse on 15 September 2015. The divorce proceedings so initiated before the Court in England were considered to date from 11 September 2015 and to have been pending before that court since that date and not from 7 September 2015 when it had actually been filed.

The other spouse lodged a judicial separation summons at the registry of the competent Court in Ireland at approximately 14:30 on 7 September 2015, which was issued shortly afterwards on the same day. The summons was served on the respondent in the main proceedings on 9 September 2015. These proceedings in Ireland were considered to date from 7 September 2015 and to have been pending before that court after that date.

The High Court of Ireland had to decide on the contradictory applications of the parties. The party that initiated proceedings in England sought a declaration that the Court in England had been first seised for the purposes of Article 19 of the Regulation. The opposing party requested the court to declare that the Court in Ireland had been first seised. The High Court held that on the basis of Article 16 of the Regulation the Family Law Court in England had been the first seised. The appellant in the main proceedings lodged an appeal against that decision and the Court of Appeal (Ireland) decided to stay the proceedings and to refer the question of how to interpret Article 16(1)(a) to the CJEU.

In the underlying case, the CJEU held that the moment when the document instituting the proceedings is lodged with the court is decisive. It concluded that Article 16(1)(a) 'must be interpreted to the effect that the 'time when the document instituting the proceedings or an equivalent document is lodged with the court' is the time when that document is lodged with the court concerned, even if under national law filing that document does not of itself immediately initiate proceedings'.[31]

[30] CJEU Case C-173/16 *M.H. v M.H.* [2016] ECLI:EU:C:2016:542.
[31] *Ibid.*, para 29.

Accordingly, the rule in Article 16 operates independently from the particularities of the national law on when proceedings are considered to have been initiated. In other words, the moment of filing the claim with the court is relevant, regardless of whether or not this moment is considered as the moment of initiating the litigation under the law of a particular Member State.

We therefore understand that Article 16 comprises an autonomous notion which helps to determine the point in time when the competing proceedings become pending.[32] This intrusion into national law does not do away with national law in its entirety,[33] as it does not impose any obligation on the Member States to introduce this notion into their national law. It is clear that establishing a general notion of when a court is deemed to be seised so as to introduce this into national law would be very inappropriate.[34] In other words, such an autonomously defined notion operates merely within the meaning of Article 16 and for the purposes of applying this provision. All other aspects and consequences attached to the initiation of proceedings remain governed by the national law of the court seised.

1.4 The other method of seising must have subsequently been effected

Article 16 lays down that a court will be seised at the time when proceedings are formally initiated, but only if the necessary subsequent initiations according to another method have been completed.[35] Therefore, paragraph (a) of Article 16(1) provides that a court is only seised by the filing of a claim *if* the necessary steps are subsequently taken to effect the service on the respondent. Paragraph (b) provides that a court is only seised by serving a claim at the authority responsible for service *if* that claim is subsequently filed with the court.

In the situation in which paragraph (a) is applicable, the Regulation wants to discourage the applicant from becoming idle and failing to serve the document. Naturally, this provision is not relevant if the service is to be effected *ex officio*, i.e. by the court with which the claim is filed. Therefore, compliance with the condition under Article 16(1)(a) is only relevant when service is not effected by the court.[36]

Article 16 makes use of the concept of retroactivity, in that the first of the two acts matters, but only *if* the second follows suit. It is important to clearly understand this provision as establishing that the application becomes pending on the date of the first act, and not on the date when the subsequent act is completed.[37]

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[32] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 31.
[33] Layton and Mercer, *op. cit.*, para 22.053.
[34] Fulchiron and Nourissat, *op. cit.*, p. 181, 187.
[35] Mostermans, A.P.M.M. 'Nieuw Europees echtscheidingen onder de loep: de rechtsmacht bij echtscheiding', (2001) NIPR 293, p. 293, 301.
[36] Crawford, E. B., 'The uses of positivity and negativity in the conflict of laws' (2005) 54 4 ICLQ, pp. 829-853, p. 829, 839.
[37] Kohler, C., *Die Revision des Brüsseler und des Luganer Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil – und Handelssachen – Generalia und Gerichtsstandsproblematik*, in Gottwald, *Revision des EuGVÜ – Neues Schiedsverfahrensrecht* (Verlag Ernst und Werner Gieseking 2000), p. 1.

The necessary measures which must be taken for serving the document are subject to the time limits imposed by national law. Therefore, if the national law does not limit the time for attempting service, then avoiding undue delay and acting with appropriate speed should be the yardstick.[38] Should the initial application suffer from formal or substantive flaws, and if the court orders the applicant to correct them, the applicant must do so within the time ordered by the court in which event '*lodging the amended application concludes the applicant's efforts'*.[39] In such a case, the date of lodging the first deficient application will be the date of seisure provided that the applicant corrects the flaws within the time ordered by the court.

If the applicant fails to take the necessary subsequent steps, the effect of *lis pendens* ceases, regardless of what effects are provided by the *lex fori* and whether or not they operate *ex tunc.*[40] For example, in its judgement in the case of *P v. M,* which is detailed *infra* in this Chapter, under 1.6 '*Difficulties in application – CJEU case law*', the CJEU held that the provision of Article 16 requires that merely one condition is to be satisfied, that condition being the lodging of the document instituting proceedings or an equivalent document with the court. The lodging of the document itself renders the court properly seised for the purposes of applying the relevant provisions of the Regulation, provided that the applicant has not subsequently failed to take the required steps to have service effected on the respondent.[41]

Difficulties may arise in connection with establishing the time of the seisure if the *lex fori* requires the parties to undertake efforts to reconcile or exceptionally concerning the requirement that arrangements regarding all issues pertaining to parental responsibility have been made prior to filing a petition for divorce. A requirement that such arrangements imply the 'procedural effects' of the admissibility of a divorce petition may be particularly problematic. It could be argued that reconciliatory attempts should be regarded, as a matter of principle, as integral parts of the divorce proceedings if the *lex fori* considers them as such. However, permitting reconciliatory attempts to affect the concept of seising the court would circumvent the principle of the autonomous interpretation and uniform application of the relevant provisions of the Regulation. Besides, as is rightly pointed out in the literature, it would lead to grave injustice, as this would mean that an applicant who started in a system which requires reconciliatory attempts before trial could never ensure that proceedings are initiated first, as his/her opponent would have a window of opportunity to initiate proceedings in another Member State.[42] Accordingly, such an interpretation would result in an inconsistent application of the Regulation and would encourage a rush to the court.

The same holds true for the requirement of achieving an agreement on all aspects of parental responsibility concerning the children of the spouses as a condition for filing for divorce. Particularly inappropriate would be to apply such provisions of national law in the

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[38] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht, op. cit.*, Article 16, note 7.
[39] Gruber, U. P., 'Die "ausländische Rechtshängigkeit" bei Scheidungsverfahren', (2000) FamRZ, pp. 1129, p. 1129, 1133.
[40] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 53.
[41] CJEU Case C-507/14 *P v M* [2015] ECR OJ C 65, para 37.
[42] Briggs, A., 'Decisions of British Courts during 2005 Involving Questions of Public or Private International Law' (2006) 76 (1) BYIL, p. 655.

context of applying the Regulation when the court seised for a divorce would not even have international jurisdiction to decide on issues of parental responsibility. Indeed, national courts may encounter serious difficulties in 'reconciling' such provisions of national law with the Regulation. It would therefore be most appropriate to deal with these problems by enacting legislation concerning the application of the Regulation on the national level. In any case, such provisions of national law should not be applied in the context of the Regulation as it would hamper the purpose intended to be achieved by the provisions of Articles 16 and 19.

1.5 Relevance of Article 16 for the notion of *lis pendens*

Article 16 is essential for the application of Article 19 on *lis pendens*. The purpose of the latter is to prevent parallel proceedings before the courts of different Member States and consequently to avoid conflicts between decisions which might result from such parallel proceedings. With that aim, 'the EU legislature intended to put in place a mechanism which is clear and effective in order to resolve situations of *lis pendens*'.[43]

For the applicability of the *lis pendens* rule in Article 19 it is crucial to determine when the court has been seised. Namely, the provision of Article 19 refers to the 'the court first seised' and to the 'court second seised' in matrimonial matters in paragraph 1 and in cases concerning parental responsibility in paragraph 2. Only the court which is first seised is permitted to continue proceedings in order to decide whether or not it has jurisdiction. Any other court must stay the proceedings until the court first seised has ruled on its own jurisdiction. If the court first seised declares that it has jurisdiction, the court second seised must decline jurisdiction (para. 3). Thus, 'that mechanism is based on the chronological order in which the courts concerned have been seised'.[44] Within that context, Article 16 provides for an autonomous determination of the moment when the court is deemed to be seised, as has already been explained. The provision of Article 19 on *lis pendens* will be addressed *infra* in this Chapter, under 4 '*Lis pendens and dependent actions – Article 19*'.

1.6 Difficulties in application – CJEU case law

The CJEU's case law has provided guidelines on a number of issues raised by the national courts of the Member States. In the already mentioned case of *M.H. v. M.H.*, the facts of which are detailed *supra* in this Chapter, under 1.3.1 '*Autonomous interpretation of the definition in Article 16*'), the CJEU made it clear that Article 16 'must be interpreted to the effect that the time when the document instituting the proceedings or an equivalent document is lodged with the court is the time when that document is lodged with the court concerned, even if under national law lodging that document does not in itself immediately initiate proceedings'.[45]

If a stay of proceedings has subsequently been requested, such a request does not affect the moment when the court is seised. The CJEU judgment in *P v. M*[46] is illustrative in this

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[43] CJEU Case C-173/16 *M.H. v M.H.* [2016] ECLI:EU:C:2016:542, para 22, referring to the CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 29.
[44] *Ibid.*, para 23.
[45] *Ibid.*, para 29.
[46] CJEU Case C-507/14 *P v M* [2015] ECR OJ C 65.

respect. The Court has held that Article 16(1)(a) must be interpreted as meaning that a court is deemed to be seised 'even where the proceedings have in the meantime been stayed at the initiative of the applicant who brought them, without those proceedings having been notified to the defendant or that defendant having had knowledge of them or having intervened in them in any way, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent'.[47]

This case concerned a married couple with two children living in Spain. On 7 July 2011 M initiated proceedings in Spain seeking provisional measures prior to divorce and an action relating to parental responsibility. On 18 July 2011, the applicant requested that the procedure be suspended in order to attempt to reach an amicable agreement. As these attempts had failed, P commenced proceedings in Portugal on 31 August 2011. The next day M requested a continuation of the proceedings in Spain. The Portuguese court refused to hear the case because it held that the Spanish court had been seised first. P filed an appeal against this decision and the Portuguese Supreme Court referred the case to the CJEU for a preliminary ruling.

When interpreting Article 16 of the Regulation, the CJEU held that there were two possible conditions in order for a court to be seised. One is the filing of a writ or summons with the court and the other is the notification of or service on the other party or rather on the authority responsible for service. Only one of the two is required to effect seisure, provided the other follows.[48] Since M had filed the claim with the court in Spain, it was irrelevant that there was then a delay of nearly two months before service on the respondent was effected. Considering that the moment of lodging the claim is the moment the court is seised within the meaning of Article 16, the Spanish court was first seised of the matter.

A number of other cases submitted before the CJEU concerned the interpretation of Article 16. Since these judgments discussed issues closely connected to the *lis pendens* rule, they are discussed in the context of Article 19 (see *infra* in this Chapter, under 4 '*Lis pendens and dependent actions – Article 19*').

2. Examination as to jurisdiction – Article 17

According to a rather unambiguous provision[49] of Article 17 of the Regulation, a court which has been seised must examine whether or not it has jurisdiction over the case. If it concludes that it has no jurisdiction and that jurisdiction lies with a court of another Member State, the court seised must declare of its own motion that it lacks jurisdiction.[50] Thus, this provision requires a court not to trespass on the exclusive jurisdiction of another court if it does not have equivalent jurisdiction itself.[51] Clearly the obligation to determine jurisdiction falls on the court, rather than upon the parties to the proceedings. Yet in practice it is likely that the legal

[47] *Ibid*., para 43.
[48] *Ibid*., para 37.
[49] CJEU Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECR I-10403, para 19.
[50] Kruger and Samyn, *op. cit.*, p. 141.
[51] Briggs, *op. cit,*, p. 527.

representatives of the parties will identify any possible jurisdictional issues.[52] In the absence of such objections and initiatives by the parties the court must decide on jurisdiction *ex officio*.

Article 17 aims to protect the jurisdictional system of the Regulation against attempts to circumvent rules on jurisdiction.[53] Additionally, this verification is closely linked to the principle of the free movement of judgments and the principle of mutual trust. Accordingly, it does not allow the courts to review the assessment made by the first court as to its jurisdiction, and in in this way it avoids the risk of conflicting and irreconcilable statements on jurisdiction.

This rule was thought to prevent attempts of *forum shopping*. Yet such an aim is rather misconceived when the court seised lacks jurisdiction. Namely, Article 17 only requires that the court must decide the matter of its own motion. *Forum shopping* becomes a genuine problem only if and insofar all of the courts concerned are competent according to the relevant rules on jurisdiction, in particular if the court originally seised has jurisdiction.[54] However, Article 17 does not deal with this issue and accordingly does not provide a remedy for this.[55]

Within the EU, a court generally does not have the means to directly transfer the case to a court in another Member State. Article 19(3) and Article 15 are to some extent exceptions to this rule. Article 17 is an attempt to provide an answer to this problem, but only its negative part, that the case cannot be heard before the court actually seised. For the applicant, this might be detrimental with regard to costs, negative conflicts of jurisdiction, and possibly time bars.[56]

Firstly, for Article 17 to be applicable the court seised must lack jurisdiction. This can be assessed under Articles 3-6 of the Regulation for matrimonial disputes and Articles 8-13 in cases of parental responsibility. However, the question remains whether the provisions in Articles 7(1) and 14, which refer to residual jurisdiction, confer jurisdiction on the courts and this jurisdiction is of equal ranking as the provisions of Articles 3-6 and 8. In other words, the question is whether Articles 7(1) and 14 are part of the jurisdictional system of the Regulation. Such an interpretation would be sensible.[57]

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[52] Setright, H., *et. al.*, *International Issues in Family Law* (Jordan Publishing 2015) p. 79.
[53] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht*, *op. cit.*, Article 17, note 1.
[54] According to the Borrás Report: 'Bearing in mind the major differences between internal regulations on the Member States and the interplay of choice-of-law rules applicable, it is easy to imagine that the fact that the grounds of jurisdiction set out in [Article 3 BR II 2003] are alternatives may lead some spouses to attempt to make their application in matrimonial matters before the courts of a State which, by virtue of its choice-of-law rules, applies the legislation most favourable to their interests. For this reason, the court first seised must examine its jurisdiction, which might not happen if the issue were discussed in that Member State only as an exception'.
[55] Magnus/Mankowski/Mankowski, *op. cit.*, Article 17, notes 3-7. On the connection between Article 17 and Article 7, see CJEU Case C-68/07 *Kerstin Sundeling Lopez v. Miguel Enrique Lopez Lizazo* [2007] ECR I-10405, paras 19-20. According to Article 7(1), where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined in each Member State by the laws of that state. However, if different actions are already pending the forum must comply with Article 17 and declare of its own motion that it has no jurisdiction, in favour of the court in the other Member State which is competent by virtue of Article 3. The ranking of Article 7(1) is lower than Articles 3-5, thus if somewhere other than the state of the forum actually seised has jurisdiction based on Articles 3, 4 or 5, the applicant must lodge the application there.
[56] Jost, F., *Recht in Europa. Festschrift für Hilmar Fenge zum 65. Geburtstag Broschiert – 1996* (1 edn. Verlag Dr. Kovac 1996) 63, p. 66-68.
[57] Magnus/Mankowski/Mankowski, *op. cit.*, Article 17, notes 10-11.

In addition to this first prerequisite, another condition for Article 17 to be applicable is that the court of another Member State must have jurisdiction according to the provisions of the Regulation. The wording of Article 17 uses 'and' indicating that it is exact and strictly cumulating.[58] Therefore, if a court lacks jurisdiction, it cannot dismiss the case based on Article 17 if no other court in another Member State does not have jurisdiction. In the event that no other court in a Member State has jurisdiction pursuant to the provision of the Regulation, Article 17 does not require the court seised to dismiss the case. In this case, the seised court is invited to assess whether it can establish its own jurisdiction in light of Articles 6, 7 or 14, in conjunction with national law.[59]

The Practice Guide 2015[60] and the relevant literature[61] indicate several possible situations that can arise, depending on the particular circumstances of the case. In this Guide for Application we make a distinction between matrimonial disputes and cases concerning parental responsibility.

Matrimonial disputes

- Where the court seised reaches the conclusion that it has jurisdiction under the Regulation the court may move on to determine the application even though the court in another Member State may have jurisdiction on the basis of Articles 3-5, provided that this court is seised first.
- Where the court seised reaches the conclusion that it has jurisdiction under the Regulation, and there is no court in another Member State that has a competing jurisdiction in relation to the same subject matter, the court may move on to determine the application.
- Where the court seised reaches the conclusion that it has no jurisdiction under the Regulation, but another Member State does have jurisdiction, the former must declare that it does not have jurisdiction without being required to take any further steps.
- Where the court seised reaches the conclusion that it has no jurisdiction under the Regulation and that no court in another Member State has jurisdiction, the former may establish its jurisdiction relying on its own national rules on jurisdiction.

Cases concerning parental responsibility

- Where the court seised reaches the conclusion that it has jurisdiction under the Regulation, and there is no court in another Member State that has a competing jurisdiction in relation to the same subject matter, the court may move on to determine

[58] Magnus/Mankowski/Mankowski, *op. cit.*, Article 17, note 16.
[59] Magnus/Mankowski/Mankowski, *op. cit.*, Article 17, note 20.
[60] Practice Guide 2015, p. 13-14.
[61] Setright, *et al*., *op cit.*, p. 79 *et seq*.

the application.

- Where the court seised reaches the conclusion that it does have jurisdiction under the Regulation, but another Member State has or may have prevailing jurisdiction under Articles 9 and 10, the seised court must decline jurisdiction pursuant to Article 17 in favour of the court which holds prevailing jurisdiction. In certain cases, Article 19 may be relevant in the first place rather than Article 17. This may be the case so far as Article 12 is concerned. In practice, the court seised after another court has been seised on the basis of Article 12 will have to decline jurisdiction by virtue of the *lis pendens* rule in Article 19. Accordingly, the provision of Article 17 is in this context irrelevant.
- Where the court seised reaches the conclusion that it does not have jurisdiction, and no other Member State has jurisdiction either, the court, under Article 14 of the Regulation, may look to national law to determine its jurisdiction.

2.1 Difficulties in application – CJEU case law

In a number of cases the CJEU has been requested by national courts to provide clarifications in connection with the application of Article 17. In case *A*,[62] which is discussed in greater detail *supra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*', the referring court stayed its proceedings and submitted several questions to the CJEU for a preliminary ruling concerning the interpretation of the Regulation. Amongst the questions asked was the question of whether the court of a Member State that has no jurisdiction under the Regulation must dismiss the case as being inadmissible or whether it must transfer it to the court of another Member State.

First, the Court noted that in the context of the provisions relating to the rules of jurisdiction in matters of parental responsibility, Article 15 was the only one to provide for a possibility to request the court of another Member State to assume jurisdiction.[63] In the view of the CJEU, Article 17 does not provide that the case must be transferred to the court of another Member State.[64] The CJEU held that the court 'must declare of its own motion that is has no jurisdiction, but it is not required to transfer the case to another court'. The court went on to state that in so far as the protection of the best interests of the child so requires, the national court which has declared of its own motion that it has no jurisdiction must inform, directly or through the Central Authority designated under Article 53 of the Regulation, the court of another Member State having jurisdiction.[65]

3. Examination as to admissibility – Article 18

Article 18 aims to protect a respondent's right to be heard in proceedings commenced under the Regulation. It provides that 'where a respondent is habitually resident in a state other than the Member State where the action was brought' and he does not attend the hearing, the court must

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[62] CJEU Case C-523/07 *A* [2009] ECR I-02805.
[63] *Ibid*., para 55.
[64] *Ibid*., para 69.
[65] *Ibid*., para 71.

stay the proceedings so long as 'it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all the necessary steps have been taken to this end'.

The burden is placed on the applicant to ensure that the respondent has been served in such a way, and within such a timeframe, so as to protect the rights of the respondent. The staying of proceedings must not be confused with dismissing the application. Article 18 refers to issues of service and not jurisdiction, while dismissing the application demands that the court declares of its own motion that it has no jurisdiction.

The concept of 'service' must be in accordance with the concept in the Service Regulation to which the provision of Article 18 expressly refers. Serving the document may be difficult in practice, in particular in cases in which the respondent has moved to another place which is unknown to the applicant and the court. However, in many cases service can be effected on the respondent's representatives.[66]

Moreover, service requires compliance with the regime which is applicable to issues of service, and the requirements of the Service Regulation must be applied. Here we must again refer to Article 8 of the Service Regulation[67] which confers upon the addressee the right to reject the service if the document is not in a language listed therein. If the addressee rightfully rejects the service on these grounds, service has failed. Article 18(2) applies the provisions of the Service Regulation instead of Article 18(1) where the document instituting the proceedings of the equivalent document must be transmitted from one Member State to another pursuant to that Regulation. Article 18(3) has the same effect where service must be attempted in accordance with the 1965 Hague Convention on Service Abroad.[68]

Article 18(1) is likely to apply in a small number of cases as the scenarios where the other two Service instruments do not apply are limited to cases where the respondent's address is not known or where the respondent is not habitually resident in an EU Member State or a Contracting State to the 1965 Hague Convention.[69]

The effect of staying the proceedings under Article 18(1) is that the reference court, during that time, cannot take any steps and can make no orders while attempts are made to locate the respondent and to effect service on him/her. This interpretation, however, would be inconsistent with both the Service Regulation and the 1965 Hague Convention, as both of these instruments allow the courts to take provisional or protective measures during this time. Article 18 cannot be interpreted in a more restrictive way than the two legal instruments concerning the service of documents.[70]

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[66] Magnus/Mankowski/Mankowski, *op. cit.* Article 16, note 19.
[67] The Service Regulation deals, however imperfectly, with questions of language and translation, CJEU Case C-443/03 *Gotz Leffler v. Berlin Chemie AG* [2005] ECR I-9611.
[68] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter – the 1965 Hague Convention).
[69] Setright *et al*., *op. cit.*, p. 81.
[70] *Ibid*., p. 82.

Therefore, perhaps the best interpretation would be that Article 18 allows the court to exercise provisional and/or protective jurisdiction (see Article 20 of the Regulation) so that measures can be taken to safeguard the child that is subject of the proceedings which are pending until the conditions of Article 18 are met. This interpretation is consistent with Recital 16 of the Regulation.[71]

For Article 18 to be applicable, the respondent must not make an appearance. When the document instituting the proceedings has not been properly served upon the respondent, it is for national law to step in and to provide supplementary rules, and to decide whether the applicant is given a second opportunity to serve the document properly.

Relevant factors in this provision are the respondent's habitual residence and the State to which the document in question must be transmitted. The notion of habitual residence is the same as the one in Article 3(1); Article 18 does not have a different meaning. The State to which the document must be transmitted depends on the factual opportunities concerning where to serve the document, and more importantly on the applicable legal framework referring to service.[72]

The document instituting the proceedings is the document provided by the law of the *forum* to bring the proceedings to the notice of the respondent by its service. It must contain the essential elements of the legal action as the respondent must be informed about the applicant's principal claims and about the ultimate goal of the proceedings.

As for the systematic relationship between the paragraphs of Article 18, paragraph (2) has precedence over paragraph (3) as per the provisions of the Service Regulation[73] which give the Service Regulation precedence over the 1965 Hague Convention. In turn, paragraphs (2) and (3) have precedence over paragraph (1). The rule in paragraph (1) is only applicable in the rare event in which service is to be effected neither in a Member State of the Service Regulation nor in a Member State of the 1965 Hague Convention.[74]

4. *Lis pendens* and dependent actions – Article 19

The aim of Article 19 is to prevent parallel cases concerning the same child and the same subject matter being brought before the courts of two Member States at the same time. If it is applied correctly, this provision should remove the possibility of two Member States rendering different judgments in the same case, and therefore avoid a situation where there are two irreconcilable judgments which might meet the criteria for recognition and enforcement.[75]

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[71] Recital 16 of the Brussels IIbis Regulation reads: 'This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State'.
[72] Magnus/Mankowski/Mankowski, *op. cit.*, Article 18, notes 3 and 5.
[73] Article 20(1) of the Service Regulation.
[74] The Member States of the Service Regulation are the same as the Member States of the Brussels IIbis Regulation: all EU Member States, with the exception of Denmark. The States Parties to the 1965 Hague Convention can be found at: <https://www.hcch.net/en/states/hcch-members>.
[75] Setright, *et al.*, *op. cit.*, p. 82.

The possible conflict is solved by establishing the principle of *prior temporis – qui prior est tempore potior est iure*. The proceedings before the court first seised have precedence, as strict chronological precedence reigns.[76] Effectively, Article 19 establishes a race for who commences proceedings first. This rule is simple and certain and aims to prevent and avoid complex and prolonged arguments over which forum is more convenient.[77] The provision of Article 19 applies to both matrimonial matters (paragraph 1) and to parental responsibility (paragraph 2).

In order to determine whether Article 19 is applicable in cases of parental responsibility the following circumstances must be met: proceedings relating to the child must be commenced before the court of another Member State and they must involve the same cause of action.[78] If these criteria are met the seised court must stay its proceedings until the jurisdiction of the first court seised is established (Article 19(2)).[79] If the court first seised has jurisdiction, the court second seised must decline jurisdiction in favour of the first court (Article 19(3)). Conversely, if the court first seised determines that it does not have jurisdiction, the court second seised may continue the proceedings and decide on its own jurisdiction under Article 17 of the Regulation.

In order to facilitate the proper functioning of this provision, it is necessary for Member States to be able to easily identify the date on which a court has been seised. As already discussed, the moment when the court is considered to have been seised is defined in Article 16. Besides, it is necessary to protect the respondent in the event that an applicant has filed the claim with the court, but thereafter has not taken the required steps to notify the respondent.[80]

Article 19 comes into operation if both proceedings are pending before courts in different Member States. Thus, this provision does not address the situation of *lis pendens* if one of the courts involved is located in a non-Member State – national rules will apply in this case.

Paragraph (1) of Article 19 refers to applications for divorce, legal separation or marriage annulment. It should be emphasised that Article 19(1) does not require that the causes of action must be identical. This is in apparent contrast to the corresponding provision of Article 29 of the Brussels Ibis Regulation (Article 27 of the Brussels I Regulation). The following reasoning by the CJEU in *A v B*[81] is illustrative:

> 'In order then to determine whether a situation of lis pendens exists, it is apparent from the wording of Article 19(1) of Regulation No 2201/2003 that, contrary to the rules in Article 27(1) of Regulation No 44/2001 applicable to civil and commercial matters, in matrimonial matters applications brought before the courts of different Member States are not required to have the same cause of action. As the Advocate General noted in point 76 of his Opinion, while the proceedings must involve the

[76] Magnus/Mankowski/Mankowski, *op. cit.*, Article 19, note 1.
[77] *Ibid*., Article 19, note 3.
[78] Setright, *et al*., *op. cit.*, p. 82-83.
[79] Dutta and Schulz, *op. cit.*, pp. 1-40, p. 12.
[80] *Ibid*., p. 8-9.
[81] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654.

> same parties, they may have a different cause of action, provided that they concern judicial separation, divorce or marriage annulment. That interpretation is supported by a comparison of paragraphs 1 and 2 of Article 19 of Regulation No 2201/2003, from which it is clear that only the application of paragraph 2, concerning proceedings relating to parental responsibility, is subject to the proceedings brought having the same cause of action. Consequently, a situation of lis pendens may exist where two courts of different Member States are seised, as in the main case, of judicial separation proceedings in one case and divorce proceedings in the other, or where both are seised of an application for divorce'.[82]

In contrast to that, according to paragraph (2) of Article 19 the same *lis pendens* rule applies if several proceedings related to parental responsibility, relating to the same child and involving the same cause of action, are brought before different courts.

If the conditions in paragraph (1) or (2) are met, this means that if the court first seised has jurisdiction, the court second seised must, of its own motion, stay the proceedings pursuant to paragraph (3) of Article 19. The court second seised does not have to and must not wait for an application to be submitted by either of the parties in that respect. It is not urged to dismiss the case which is pending before it singlehandedly, as the danger of dismissing the case prematurely will then arise. Any further consequences are partially dealt with by paragraph (3).

Under paragraph (3) of Article 19 the court second seised is obliged to decline jurisdiction if the court first seised has established that it has jurisdiction. Hence, the stay (instituted under paragraph (2)) will be transformed into a mandatory dismissal of its own motion.[83] If the court first seised has established that it has jurisdiction, but this decision is subject to an appeal or other judicial review, paragraph (3) is not triggered until the courts in the first state give their final say. In any case, the court second seised must not speculate or guess as to the likelihood of the appeal succeeding.[84] When the court first seised declines jurisdiction, the court second seised may continue with the proceedings pending before it.

4.1 Difficulties in application – CJEU case law

The CJEU's case law has provided guidelines on a number of issues raised by the national courts of the Member States. In the case of *A v B,*[85] Ms A and Mr B, who were French nationals, were married in France in 1997, having entered into a marriage contract under the principle of separate property. They moved to the United Kingdom in 2000. The couple had three children. In June 2010, the couple separated after Mr B moved out. A had initiated a procedure for judicial separation on 30 March 2011 before the family court of the *Tribunal de grande instance de Nanterre*. This procedure was to lapse on 17 June 2014 because of 'no petition (assignation) having been filed within the period of 30 months from the making of the non-conciliation order

[82] *Ibid*., para 33.
[83] Magnus/Mankowski/Mankowski, *op. cit.,* Article 19, notes 53-54.
[84] *Ibid*., Article 19, note 59.
[85] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654.

by the French court, [so that] the provisions of that order expired at midnight on 16 June 2014'. 'On 24 May 2011, the wife filed a petition for divorce and a separate application for maintenance with the courts of the United Kingdom. The court declined jurisdiction over the request for divorce petition on 7 November 2012, on the basis of Article 19 of Regulation, with Ms A's consent.

On 15 December 2011, the family court judge in France declared that the issues relating to the children, including the applications concerning maintenance obligations, were to be dealt with in the United Kingdom, but that the French courts had jurisdiction to adopt certain interim measures. She ordered that Mr B pay Ms A a monthly allowance of EUR 5,000. That order was upheld on appeal by a decision of the cour d'appel de Versailles of 22 November 2012.

The referring court explained that with no petition having been filed within the period of 30 months from the making of the non-conciliation order by the French court, the provisions of that order expired at midnight on 16 June 2014. The wife filed another petition for divorce on 13 June 2014 with a United Kingdom court, whereby she intended 'to ensure that that petition would take effect only from one minute past midnight on 17 June 2014'. On 9 October 2014, Mr B applied to the referring court for Ms A's divorce petition in the United Kingdom to be dismissed or struck out on the ground that the jurisdiction of the French courts had been unambiguously and incontrovertibly established within the terms of Article 19(3).

On 17 June 2017, the husband filed a fresh petition for divorce before the French Court. Thus, because of the time difference between the two Member States, it was impossible to bring an action before a United Kingdom court at the same time (7:20 local time).

The referring court asked whether, in the case of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, Articles 19(1) and 19(3) must be interpreted as meaning that, in a situation in which the proceedings before the court first seised in the first Member State expired after the second court in the second Member State was seised, the jurisdiction of the court first seised must be regarded as not having been established. Additionally, the referring court asked whether the conduct of the applicant in the first proceedings, notably his lack of diligence, and the existence of a time difference between the Member States concerned are relevant for the purposes of answering that question.

The CJEU confirmed that the provisions on *lis pendens* in Article 19 and on seising the court in Article 16 'are based on chronological precedence'.[86] The concept of 'established jurisdiction' must be interpreted independently by reference to the scheme and purpose of the act that contains it.[87] The purpose of the *lis pendens* rules is to prevent parallel proceedings and to avoid conflicting decisions.[88] The mechanism is based on the chronological order in which the courts are seised. As the Advocate General noted in point 76 of his Opinion, while the

[86] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 44; See Magnus/Mankowski/Mankowski, *op. cit.*, Article 19, note 1.
[87] See CJEU Case C-89/91 *Shearson Lehman Hutton* [1993] EU:C:1993:15, para 13; CJEU Case C-1/13 *Cartier parfums-lunettes and Axa Corporate Solutions assurances* [2014] EU:C:2014:109, para 32.
[88] CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163, para 64.

proceedings must involve the same parties, they may have a different cause of action, provided that they concern judicial separation, divorce or marriage annulment.[89] Consequently, a situation of *lis pendens* may exist in situations such as in the main proceedings, where the one court is seised in judicial separation proceedings and the other court is seised in divorce proceedings, or when both are seised of an application for divorce.

In such circumstances, the court second seised must stay its proceedings of its own motion until the jurisdiction of the court first seised is established. In order for the jurisdiction of the court first seised to be established within the meaning of Article 19(1), it is sufficient that the court first seised has not declined jurisdiction of its own motion and that none of the parties has contested that jurisdiction.

However, in order for there to be a situation of *lis pendens* proceedings brought between the same parties and relating to petitions for divorce, judicial separation or marriage annulment should be pending simultaneously before the courts of different Member States. When one set of proceedings expires, the risk of irreconcilable decisions, and thereby the situation of *lis pendens*, disappears. It follows that even if the jurisdiction of the court first seised was established during the first proceedings, the situation of *lis pendens* no longer exists and, therefore, that jurisdiction is not established. In that situation, the court second seised becomes the court first seised on the date of the lapsing of the first proceedings.[90]

Thus, in cases of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, Articles 19(1) and 19(3) must be interpreted as meaning that in a situation where the proceedings before the court first seised have expired after the second court in the second Member State was seised, the criteria for *lis pendens* are not met and therefore the jurisdiction of the court first seised must be regarded as not having been established.

In the landmark case of C *v. M,*[91] the proceedings concerned a child born in France to a French father and a British mother. The details of this case have been discussed *supra* in Chapter 1, under *3.11.2 'Difficulties in application – CJEU case law*'.

The referring court stated that the dispute raised questions of interpretation concerning Articles 2, 12, 19 and 24 of the Regulation. It stated that the French courts were the ones first seised and that their jurisdiction had been accepted by both parents at the time those courts were seised and that those courts asserted that they continued to have jurisdiction with respect to parental responsibility notwithstanding the presence of the child in Ireland. The referring court sought to ascertain whether or not that jurisdiction had ceased in the light of the provisions of Article 12(2)(b) or Articles 12(3)(a) and 12(3)(b) of the Regulation.[92]

On 31 July 2014, the Irish Supreme Court decided to stay the proceedings and issued a request for a preliminary ruling under Article 267 of the TFEU. The Court noted that, since

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[89] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, Opinion of Advocate General Cruz Villalon.
[90] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 37.
[91] CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268.
[92] *Ibid*., para 30.

there is no conflict or a risk of a conflict of jurisdiction between the French and the Irish courts in the main proceedings, Articles 12 and 19, which were mentioned by the referring court, are not relevant.[93]

From here it shows that *lis pendens* can only exist in cases where proceedings are pending simultaneously and both concern the same cause of action. In the underlying case the proceedings concerned an appeal against a divorce judgement and an order for the return of the child under Article 10 and 11 of the Regulation and thus there were no parallel proceedings and no risk of conflicting decisions, since they did not have the same cause of action.

Additionally, the Court noted in its preliminary ruling, *inter alia*, that where the removal of a child has taken place in accordance with a judgment which was provisionally enforceable and which was thereafter overturned, the child's habitual residence must be determined by making an assessment of all the factual circumstances. Whilst it was possible that the child's habitual residence may have changed, account had to be taken of the fact that the judgment authorising the removal of the child could be provisionally enforced and that an appeal had been brought.

In the case of *Mercredi* (dealt with in greater detail *supra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*') it was clarified that there was no *lis pendens* between the proceeding on an attribution of parental responsibility and an application for the return of the child, since these two proceedings have as their objects different 'causes of action'.[94]

5. Provisional, including protective, measures – Article 20

The provisions on provisional measures in the Brussels IIbis Regulation are clearer than in the other European Union Regulations in the field of private international law.[95] However, they have still resulted in a fair share of problems in their application. Provisional measures may be of essential importance in settling cross-border family disputes, particularly in urgent cases. Because of this, it is important to correctly ascertain which court has jurisdiction to grant provisional measures and under which conditions may the courts issue interlocutory measures.[96]

Article 20 enables a court to take provisional, including protective, measures in accordance with its national law in respect of a child situated on its territory, even if a court of another Member State has jurisdiction. It is important to clarify that Article 20 does not confer jurisdiction[97] and, as a consequence, the provisional measure ceases to have effect when the competent court has taken the measures it considers appropriate.[98] This provision is expressly emphasised in Recital 16 of the Regulation as well. Article 20(1) empowers the court of the

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[93] *Ibid*., para 37.
[94] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309, paras 65-66; Dutta and Schulz, *op.cit.*, p. 13.
[95] Kruger and Samyn, *op. cit.*, p. 148.
[96] Magnus/Mankowski/Mankowski, *op. cit.*, Article 20, note 1.
[97] Practice Guide 2015, p. 23.
[98] Lowe, Everall, Nicholls, *op. cit.*, p. 137; and Magnus/Mankowski/Mankowski, *op. cit.* Article 20, note 12.

Member State where the child is present to adopt provisional measures on parental responsibility. Once the court of the Member State having jurisdiction under the Regulation has taken the measures it considers appropriate, Article 20(2) provides that the provisional measures adopted under Article 20(1) no longer apply.[99] Hence, the Regulation indirectly grants the courts which are competent for the substantive proceedings the power to decide on the provisional measures taken by a court outside that Member State.[100]

The Court has ruled that there must be a real connecting link between the dispute and the court granting the measures and that the measures must be provisional and reversible.[101] The Brussels IIbis Regulation has additional built-in limitations, as will be discussed throughout this section. For instance, urgency is an explicit requirement, while this is not the case in Brussels Ibis.[102] The CJEU has made it clear that orders made merely in the exercise of jurisdiction conferred by Article 20 are not enforceable in other Member States.[103]

The concept of jurisdiction based on urgency is also found in the 1996 Hague Convention, though unlike the Convention, Article 20 of the Regulation does not grant jurisdiction in situations of urgency itself.

An application for interim relief can be filed before the court which has jurisdiction as to the substance of the case, or before another court, subject to the conditions of Article 20. Respectively, this provision allows an applicant to seek provisional or protective measures from a court, even if another court has jurisdiction as to the substance of the case.[104]

Additionally, the mere fact that proceedings on the substance of the case have not yet commenced does not deprive a court of its jurisdiction under Article 20. However, the measures will cease to have effect when the court which has substantive jurisdiction adopts final measures, also meaning that a court is no longer empowered to grant provisional measures when a judgement on the merits has been rendered.[105]

As regards the geographical scope of this provision, in the absence of any indication to the contrary, Article 20 does not apply when the substance of the matter falls outside the territorial scope of application of the Regulation.

There can be no *lis pendens* between the proceedings for the return of child and proceedings concerning any issue on the merits of parental responsibility, such as the right of custody, rights of access or any other issue following from Article 1(2) of the Regulation. An order for the return of the child to the Member State of origin from the Member State where the child was removed or retained 'does not concern the substance of parental responsibility and

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[99] Lenaerts, *op. cit.*, pp. 1302-1328, p. 1318.
[100] Dutta and Schulz, *op cit.*, p. 14.
[101] CJEU Case C-391/95 *Van Uden* [1998] ECR I-7091 and CJEU Case C-99/96 *Mietz* [1999] ECR I-2277.
[102] Kruger, T., 'The Disorderly Infiltration of EU Law in Civil Procedure' (2016) 63:1-22 Netherlands International Law Review, p.12.
[103] *Ibid*.; CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, paras 76-83 and 86-91.
[104] Magnus/Mankowski/Mankowski, *op. cit.*, Article 20, note 2.
[105] Magnus/Mankowski/Mankowski, *op. cit.*, Article 20, note 5-6; see also: Kruger, 'The Disorderly Infiltration of EU Law in Civil Procedure', *op. cit.*, p. 12.

therefore has neither the same object nor the same cause of action as an action seeking a ruling on parental responsibility'. Besides, the provision of Article 19 of the 1980 Hague Convention expressly provides that a decision brought under the Convention upon the request for a return 'is not to be taken to be a determination on the merits of any custody issue'.

As already discussed *supra* in Chapter 4, under 2.2 '*Difficulties in application – CJEU case law*' (*Povse* judgment), a provisional measure cannot be considered a 'judgment on custody that does not entail the return of the child' for the purposes of interpreting Article 10(b)(iv). As such, it does not present the basis for a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed. A provisional measure cannot be considered as a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv). Accordingly, it cannot be relied upon so as to confer jurisdiction on the courts of the Member State to which the child has been unlawfully removed.[106]

In *Deticek*, discussed in greater detail *infra* in this Chapter, under 5.4 '*Difficulties in application – CJEU case law*', the CJEU provided clarification on Article 20. Thus, a court of a Member State is not permitted to provisionally grant custody of a child present in that Member State to one parent, if a court of another member State, having substantive jurisdiction, has already delivered a judgment provisionally granting custody to the other parent and if that judgment has been declared enforceable in the territory of the former Member State.[107]

The provisions on provisional measures are merely permissive: they allow a digression from the normal framework of jurisdictional rules that the Regulation has laid down.[108] The provisional measures which can be granted fall under the limitations of *lex fori;* however, not every provisional measure which is available under the national legal system falls under the scope of Article 20. According to the relevant literature and CJEU case law,[109] the limits set out by this provision are:

(i) Article 20 can only be invoked in urgent cases;[110]

(ii) the measures must respond to a specific objective – the protection of persons or assets;[111] and

(iii) the measures must be geographically and temporarily delimited.

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[106] CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673, para 46-50.
[107] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 61.
[108] Kruger, 'The Disorderly Infiltration of EU Law in Civil Procedure', *op. cit.*, p. 12; see also Borrás Report, paras 58-59.
[109] Magnus/Mankowski/Mankowski, *op. cit.*, Article 20, note 17; CJEU Case C-523/07 *A* [2009] ECR I-2805, para 47.
[110] For an overview of the assessment of the concept of urgency, see CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 41-44. According to the Court's view, there is no urgency in the case of a wrongful removal of a child from his/her habitual residence, even if the return of the child to his/her original place of residence can affect his/her psychological situation and the Court also established that the request for provisional measures was not compliant with the second condition indicated by the Court, i.e. the territorial link; For more information, see Mellone, M., 'Provisional measures and the Brussels IIbis Regulation: an assessment of the status quo in view of future legislative amendments' [2015] 1 NIPR, p. 23.
[111] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 39.

Therefore, the characteristic elements of the measures are urgency, the protection of persons or assets with the Member State of the seised court, and a temporary limitation.[112] These shall be detailed in the following.

5.1 Urgency

The condition of urgency for the application of Article 20 is a *sine qua non* condition. However, this raises the issue of how this urgency must be assessed. The notion of urgency is not defined within the Regulation,[113] and an interpretation based on national law is difficult in the light of diverging national criteria on this condition.[114]

5.2 Protective finality

As a second condition, the provision of Article 20 may be relied upon for the protection of persons or assets within the Member State of the seised court. This second requirement is two-fold. On the one hand, it is needed for the measure to have a protective finality. In the case of matrimonial disputes, the limited scope of application of the Regulation (divorce, legal separation and marriage annulment) and the aim of the measures of Article 20 may be difficult to reconcile. Only measures such as an authorization to abandon the spouses' common residence or a provisional allocation of the spouses' common residence to one of them, or the updating of the civil status records with the divorce claim may be available under Article 20.[115]

On the other hand, in cases relating to parental responsibility, provisional, including protective, measures which could be taken are more diverse. As such, these measures range from those taken to protect a child or a child's assets, provisional placement in care institutions and provisional measures relating to the care of a child. As for the latter, such measures are within the scope of the Regulation, regardless of the fact that they have to be requested before the administrative courts and are considered to be public measures under the applicable law.[116] Also, measures aimed at furthering provisional arrangements on care, custody and rights of access with regard to children are all available under Article 20.

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[112] Thus, when it comes to the scope of application of this rule, the CJEU has pointed out that, given the express reference to persons and assets, Article 20 goes beyond the scope of application of Brussels IIbis. For more information, see CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, para 86; in favour of the CJEU's position, see Mosconi, F., Campiglio, C., *Diritto internazionale private e processuale* (UTET Giuridica 2013), p. 118; for a different perspective, see Magnus/Mankowski/Pertegas, *op. cit.*, Article 20, note 17; Kruger, 'The Disorderly Infiltration of EU Law in Civil Procedure', *op. cit.*, p. 12.

[113] Carpaneto, *op. cit.*, p. 272; the author refers to CJEU Case C-523/07 *A* [2009] ECR I-2805 (at para 48) where the CJEU clarified that the urgency requirement is satisfied in a situation which is likely to endanger the children's welfare, including his/her health or development. In the following *Deticek* case, the CJEU further noted that the concept of urgency under Article 20 relates to both the situation of the child and the impossibility in practice of bringing the application concerning parental responsibility before the court with jurisdiction as to the substance.

[114] Vandekerckhove, K., *Voorlopige of bewarende maatregelen in de EEX-Verordening, in de EEX-II en in de Insolventieverordening,* in: de Leval, G. and Storme, M., (eds.) *Le Droit Processuel & Judiciaire Européen* (2003), p. 119.

[115] Garcia, A., *Crisis matrimoniales internacionales. Nulidad matrimonial, separación y divorcio en el nuevo derecho internacional privado español* (Universidade de Santiago de Compostela 2004), p. 317.

[116] See in this sense CJEU Case C-523/07 *A* [2009] ECR I-2805, para 22, with reference to a previous CJEU judgement (CJEU Case C-435/06 *C.* [2007] ECR I-10141).

Yet there is a strict requirement of territoriality for issuing such protective measures. Article 20 allows the courts to take measures relating to persons or assets as long as these are present in the Member State of the court seised.[117] This condition is not surprising as it would be counter-intuitive to request a measure where the targeted individuals or assets are not present. If the individuals or the assets to which the provisional measures relate are relocated to another State, this should have no impact on the applicability of Article 20. However, this raises the question of the enforceability of such measures in another Member State. In this respect in *Purrucker I* the CJEU noted that the rules in Chapter III of the Regulation are not applicable to measures ordered solely on the basis of Article 20.[118]

5.3 Temporary limitation

The provisions of Article 20 clearly indicate that the measures must be of a temporary nature as they cease to apply when, under the Regulation, the court vested with jurisdiction as to the substance of the proceedings has taken appropriate measures. In the case of *A* this condition was emphasised by the CJEU.[119] Advocate General *Kokott* suggested that the duration of the provisional measures cannot *a priori* be considered problematic, because the fundamental objective is to avoid a lacuna in the care arrangements in cases of parental responsibility. Therefore, it is in the interest of the applicants to terminate the effects of the provisional measures by filing proceedings on the merits.[120]

5.4 Difficulties in application – CJEU case law

In its case law, the ECJ has interpreted Article 20 in a highly restrictive manner. It has thereby emphasised that the provisional character of the measure is a requirement that must be fulfilled together with the first two conditions – the urgency of the measure and the measure having a specific objective.[121]

The operation of Article 20 has been considered by the CJEU in the case of *Purrucker I.*[122] There the CJEU clarified that orders made in the exercise of jurisdiction based solely on Article 20 are not enforceable in other Member States. In mid-2005, Ms Purrucker, a German national, moved to Spain to live with Mr. Vallés Pérez, where she gave birth to twins prematurely. After the relationship deteriorated, Ms Purrucker wanted to return to Germany with her children, while Mr Vallés Pérez was, initially, opposed to this. On 30 January 2007 the parties signed an agreement before a notary which had to be approved by a court in order to be enforceable, which stated that the twins were subject to the parental responsibility of the father and the mother, both of whom would have custody, without prejudice to the father's right

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[117] See also CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193.
[118] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, paras 83 and 87; see for full details *infra* in this Chapter, under 5.4 '*Difficulties in application – CJEU case law*'.
[119] CJEU Case C-523/07 *A* [2009] ECR I-2805, para. 65.
[120] *Ibid*., Opinion of Advocate General Kokott, paras 61-64.
[121] Dickinson, A., 'Provisional Measures in the "Brussels I" Review: Disturbing the Status Quo?' (2010) 6:3 Journal of Private International Law, pp. 519-564, p. 538; CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, paras 77-78; CJEU Case C-523/07 *A* [2009] ECR I-2805, para 48; CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, paras 39-40.
[122] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353.

of access to his children, which he could freely exercise at any time and as he wished. Additionally, the couple agreed that Ms Purrucker was to move with the twins to Germany where she was to establish a permanent place of residence, provided that she recognised the father's access rights which allowed him to visit his children at any time.

As one of the twins, Samira, could not yet be discharged from hospital, Ms Purrucker left for Germany on 2 February 2007 accompanied only by her son Merlin and her son from a previous marriage. Samira would be brought to Germany after being discharged from hospital.

There were three sets of proceedings pending simultaneously, involving Ms Purrucker and Mr. Vallés Pérez, namely one brought in Spain by Mr Vallés Pérez in June 2007, concerning the granting of provisional measures, which, under certain conditions, could be regarded as substantive proceedings concerned with awarding rights of custody concerning the children Merlín and Samira.

The second application was brought in Germany by Ms Purrucker on 20 September 2007, concerning the awarding of rights of custody over the twins. By a judgment of 8 December 2008, the German Amtsgericht held that the Spanish court was first seised within the meaning of Articles 16 and 19(2) of the Regulation, and therefore stayed its proceedings until the Spanish judgment acquired *res judicata*. Ms Purrcuker appealed against this judgment and on 14 May 2009 this judgment was set aside for reconsideration by the Oberlandesgericht, observing that the application for rights of custody brought in Spain in June 2007 by Mr Vallés Pérez was part of the proceedings brought for the granting of provisional measures, whereas the application for rights of custody brought in Germany on 20 September 2007 by Ms Purrucker was an action relating to the substance of the matter. Additionally, it held that Article 19 did not confer exclusive jurisdiction on any of the courts seised to decide which court had been first seised.

The third and last case was brought in Germany by Mr Vallés Pérez, concerning the enforcement of the judgment of the Spanish court of 8 November 2007 granting provisional measures. These were the proceedings that gave rise to the reference for a preliminary ruling.

One of the questions was whether the provisions laid down in Article 21 of the Regulation are also applicable to provisional measures within the meaning of Article 20 of that Regulation or, in contrast, whether it applies only to judgments on the substance of a matter. The issue of the enforceability of decisions on provisional measures under Article 21 of the Regulation had been subject to considerable debate in academic writing.

The CJEU explained as follows: '[W]here the substantive jurisdiction …of a court which has taken provisional measures is not, plainly evident from the content of the judgement adopted, or where that judgement does not contain a statement, which is free from any ambiguity, of the ground in support of the substantive jurisdiction of that court, with reference made to one of the criteria of the jurisdiction specified in Arts 8-14 of that regulation, it may be inferred that that judgement was not adopted in accordance with the rules of jurisdiction laid down but that regulation. (…) [N]onetheless, that judgement may be examined in the light of Art 20 of the regulation, in order to determine whether it falls within the scope of that

provision'.[123] The CJEU held that Article 20 orders did not enjoy extra-territorial recognition and enforcement under Article 21 as other decisions on the merits. In the view of the Court, this was not what the drafters had intended. Additionally, the Court held that the provisions laid down in Article 21 of the Regulation did not apply to provisional measures within the meaning of Article 20 relating to rights of custody.[124] In short, measures issued by a court of a Member State not having substantive jurisdiction according to the rules of the Regulation in Articles 8-14 are not enforceable under Article 21.

In the case of *Purrucker II*, the CJEU had to determine whether the adoption of provisional measures under Article 20 of the Regulation could trigger the application of the *lis pendens* rules as laid down in Article 19. In this case, three sets of proceedings were under way involving Ms Purrucker and Mr Vallés Pérez: the first, brought in Spain by Mr Vallés Pérez, concerned the granting of provisional measures. It is conceivable that, under certain conditions, these proceedings could be regarded as substantive proceedings concerned with the awarding of rights of custody over Merlín and Samira. The second was brought in Germany by Mr Vallés Pérez, and concerned the enforcement of the judgment of the Spanish court granting provisional measures, and this was the subject of the judgment in *Purrucker I*, which is discussed *supra*. The third and last application was brought by Ms Purrucker in Germany and concerned the awarding of rights of custody over the twins. These were the proceedings which gave rise to this reference for a preliminary ruling in *Purrucker II*. The referring court asked whether Article 19(2) is applicable where the court of a Member State first seised by one of the parties in order to obtain measures in matters of parental responsibility is only seised of an action to obtain an order for provisional measures and where a court of another Member State is second seised by the other party to an action with the same object seeking to obtain a judgment as to the substance of the matter. The CJEU ruled that the *lis pendens* rule of Article 19 does not apply in relation to proceedings before the court of another Member State initiated to obtain provisional measures.[125] Firstly, the Court referred to its ruling in *Purrucker I*: 'it is evident from the position of Article 20 in the structure of the Regulation that it cannot be regarded as a provision which determines substantive jurisdiction for the purpose of that Regulation'.[126] Second, provisional measures cease to produce effects as soon as appropriate provisional or definitive measures have been adopted by the national court having substantive jurisdiction.[127]

Additionally, the Court stressed the fact that it is not the nature of the proceedings before a national court that determines the application of the *lis pendens* rule of Article 19. For example, prior to ruling on the substance of the matter, national law may require the adoption of provisional measures. Hence, the application of Article 19 requires national courts to engage in a comparative analysis of the claims of the respective applicants. To that effect, if the facts of the case and the claim of the applicant reveal no elements indicating that the court first seised

[123] *Ibid.*, para 76.
[124] *Ibid*., para 100.
[125] Lenaerts, *op. cit.*, p. 1320; CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163, paras 73-77.
[126] CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163, para 61.
[127] Lenaerts, *op. cit.*, p. 1321.

is called upon to exercise its substantive jurisdiction, then the *lis pendens* rule does not apply.[128] This complies with the principle that the court must consider the object of the measures requested.[129]

It can be concluded that the provision of Article 19(2) does not apply where a court of a Member State is first seised only for the purpose of granting provisional measures within the meaning of Article 20 and where a court of another Member State has jurisdiction as to the substance of the matter.

In *A*,[130] which is set out in greater detail *supra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*', the CJEU was asked whether the seised Finnish court, which concluded that it did not have jurisdiction, had to transfer the matter to the court having jurisdiction. The CJEU interpreted the provisions of Article 20 as containing an implicit duty of information. It held that 'insofar as the protection of the best interest of the child so requires, the national court which has taken provisional or protective measures *must* inform, directly or through the central authority designated under Article 53 of the Regulation, the court of another Member State having jurisdiction'.[131] Thus, the CJEU underlined the indispensability of mutual co-operation and respect between courts of different Member States for the application of the Regulation.

As regards the urgency criterion as a condition for the application of Article 20, the CJEU held that this requirement was met 'in a situation likely serious to endanger (the children's) welfare, including their health or their development'.[132] The Court further elaborated that in the case of provisional measures concerning parental responsibility, 'the concept of urgency in Article 20 relates both to the situation of the child and to the impossibility in practice of bringing the application concerning parental responsibility before the court with jurisdiction as to the substance'.[133] Additionally, the Court found that the provision is applicable when a child stays temporarily or intermittently in a state other than the State of his or her habitual residence.[134]

In the case of *Mercredi*[135] (discussed in greater detail *supra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*') the referring court sought, *inter alia*, an answer concerning the relevance of a non-return decision in one Member State for the decision on the jurisdiction of the court in a Member State of the child's habitual residence to decide on parental responsibility. The CJEU concluded that such a non-return order brought on the basis of the 1980 Hague Convention had no effect on judgments which have to be delivered in that other Member State in proceedings relating to

[128] CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163, paras 73-77.
[129] Kruger and Samyn, *op. cit.*, p. 149.
[130] CJEU Case C-523/07 *A* [2009] ECR I-2805.
[131] *Ibid*., para. 66.
[132] *Ibid*., para. 48.
[133] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, paras 42-49.
[134] CJEU Case C-523/07 *A* [2009] ECR I-2805, para 48.
[135] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.

parental responsibility which were brought earlier and are still pending in that other Member State.[136]

The issue of provisional measures was also discussed in the case of *Detiček.*[137] Ms Detiček, and Mr Sgueglia, spouses involved in divorce proceedings, had lived in Rome (Italy) for 25 years. Their daughter Antonella was born on 6 September 1997. On 25 July 2007, the Tribunale di Tivoli provisionally granted sole custody of Antonella to Mr Sgueglia and ordered her to be placed temporarily in the children's home of the Calasantian Sisters in Rome. On the same date, Ms Detiček took her daughter to Slovenia.

By a judgment of 22 November 2007 by the Regional Court of Maribor, Slovenia, confirmed by a judgment of the Supreme Court of Slovenia of 2 October 2008, the order of the Tribunale di Tivoli of 25 July 2007 was declared enforceable in the territory of the Republic of Slovenia. Enforcement proceedings were brought before the District Court of Slovenia for the child to be returned to Mr Sgueglia. However, by an order of 2 February 2009, that court suspended enforcement until the final disposal of the main proceedings. On 28 November 2008 Ms Detiček applied to the Regional Court of Maribor for a provisional and protective measure giving her custody of the child. By an order of 9 December 2008, that court allowed Ms Detiček's application and awarded her provisional custody of Antonella. Mr Sgueglia challenged that order before the same court, which dismissed his action by an order of 29 June 2009. Against this order, Mr Sgueglia brought appellate proceedings before the Court of Appeal of Slovenia.

In those circumstances, the Regional Court of Maribor decided to stay the proceedings and to submit a question to the CJEU on the interpretation of Article 20. The CJEU concluded that this provision does not permit a court of a Member State to take a provisional measure granting custody of a child present in the territory of that Member State to one parent if a court of another Member State having substantive jurisdiction under the Regulation over the custody of the child has already delivered a judgment provisionally granting custody over the child to the another parent and that judgment has been declared enforceable in the territory of the former Member State. In other words, the court not having substantive jurisdiction is not allowed to decide provisionally on the custody of the child when a court in another Member State having substantive jurisdiction has provisionally granted the custody to another parent and this decision was declared enforceable in the former Member State.

The CJEU further addressed the conditions provided under Article 20(1) providing the possibility for the courts of a Member State in which the child is present to take such provisional, including protective, measures. The Court discussed three cumulative conditions that must be satisfied, namely that the measures concerned must be urgent, they must be taken in respect of persons or assets in the Member State where those courts are situated, and they

[136] *Ibid*., para 71.
[137] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193.

must be provisional.[138] A failure to comply with any one of those three conditions therefore has the consequence that the measure contemplated cannot fall within Article 20(1).[139]

The concept of urgency in that provision relates both to the situation of the child and to the impossibility in practice of bringing the application concerning parental responsibility before the court with jurisdiction as to the substance. The CJEU conceded that in the case at hand the requirement of urgency within the meaning of that provision had not been met.[140]

Next, provisional measures must be taken in respect of persons[141] in the Member State in which the courts with jurisdiction to take such measures are located. A provisional measure in matters of parental responsibility ordering a change to the custody of a child is taken not only in respect of the child but also in respect of both parents.[142] In the present case, the father resided in another Member State.

Finally, the above considerations are supported by the requirements which follow from Recital 33. It states that the Regulation recognises fundamental rights and observes the principles of the EU Charter of Fundamental Rights. The right set out in Article 24(3) of the EU Charter of Fundamental Rights is such a right. It assumes the right of the child to maintain, on a regular basis, a personal relationship and direct contact with both parents. Article 20 of the Brussels IIbis Regulation cannot be interpreted so as to disregard that fundamental right.[143]

As to the concept of urgency, the CJEU held that allowing a gradual change of circumstance to fulfil the requirement of urgency would undermine, on the facts of the present case, the principle of the mutual recognition of judgments and the Regulation's objective of deterring the wrongful removal of children from Member States.[144] Article 20 cannot therefore be interpreted in such a way that it can be used by the abducting parent as an instrument for prolonging the factual situation caused by his or her wrongful conduct or for legitimating the consequences of that conduct.[145]

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[138] CJEU Case C-523/07 *A* [2009] ECR I-2805, para 47.
[139] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 40.
[140] *Ibid*., para 44.
[141] The strict interpretation of persons obviates the very purpose of the rule, namely to protect children in urgent situations, see: van Iterson, D., *Ouderlijke verantwoordelijkheid en kinderbescherming* (Maklu 2011), p. 127-128; Magnus/Mankowksi/Sender, *op. cit.,* Article 20. Advocate General Sharpston has expressed the view that the interpretation that the child and the persons exercising parental responsibility must be present in the Sate granting the provisional measures is wrong, see his Opinion in CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353.
[142] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, paras 40-52; see also Kruger and Samyn, *op. cit.*, p. 149: 'this is so because the measures are also aimed at the parents in the sense that they influence their exercise of parental responsibility. This judgment seems to imply that provisional measures can only be granted if all persons involved are present on the territory of the court'.
[143] Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 55.
[144] Dickinson, *op. cit.*, p. 538.
[145] Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 57.

GUIDELINES – Summary

Article 16 – moment when a court is seised

A court is to be deemed to be seised, depending on the applicable national law, either:

- at the time when the document instituting the proceedings or an equivalent document is lodged with the court (Art. 16(1)(a)),
    - And if the applicant has not subsequently failed to take all the necessary steps to have service effected on the respondent; **or**
- when it is received by the authority responsible for service if that document has to be served before being lodged with the court (Article 16(1)(b)),
    - And if the applicant has not subsequently failed to take all the necessary steps to have the document lodged with the court.

Document

The CJEU has described this term as 'the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin'. These include:

- documents which contain additional application which extend the subject matter of the proceedings, insofar as they apply for such an extension;
- documents which strive for establishing counter-applications, insofar as the counter-application goes beyond the substantive scope of application;
- a document for additional application in the dissolution of a marriage, insofar as such a document relates to the other party.

Autonomous determination of the moment in time when the court is seised – the moment of filing the claim with the court

Article 16 comprises an autonomous notion which helps to determine the point of time when the competing proceedings become pending. It is irrelevant whether the moment of filing the claim with the court qualifies for the moment of the commencement of litigation under the national procedural law of a Member State in the court seised. Thus, Article 16 provides for a uniform definition of the time when a court is deemed to be seised. That moment is 'determined by the performance of a single act', i.e., by filing the claim with the court (the CJEU case of *M.H. v M.H*[146] and the case of *P v M*[147]).

[146] CJEU Case C-173/16 *M.H. v M.H.* [2016] ECLI:EU:C:2016:542.
[147] CJEU Case C-507/14 *P v M* [2015] ECLI:EU:C:2015:512.

A claimant's request to stay the proceedings does not affect the moment when the court has been seised (the CJEU case of *P v M* [148]).

Article 17 – Examination as to jurisdiction

Firstly, for Article 17 to be applicable the operative court (the court seised) must lack jurisdiction. Secondly, the condition of another court having jurisdiction must be met. If a court lacks jurisdiction, it cannot dismiss the case based on Article 17 if no other court in another Member State does not have jurisdiction. In the event in which no other court in a Member State has jurisdiction, the seised court is invited to assess whether it can establish its own jurisdiction in light of Articles 6, 7 or 14, in conjunction with national law.

That Article 17 does not provide for a transfer of the case to the court of another Member State (the CJEU case *A*[149]).

Article 18 – Examination as to admissibility

The staying of the proceedings must not be confused with dismissing the application. Article 18 refers to issues of service and not jurisdiction, while dismissing the application demands that the court declares of its own motion that it has no jurisdiction. Article 18 allows the court to exercise a provisional and/or protective jurisdiction so that measures can be taken to safeguard the child if the conditions of Article 18 are met. For Article 18 to be applicable, the respondent must not make an appearance. This appearance does not require that the respondent replies as to the substance of the proceedings.

When the document instituting the proceedings has not been properly served upon the respondent, it is for the national law to step in and provide supplementary rules, and to decide whether the applicant is to be given a second opportunity to serve the document properly. Paragraph (2) of Article 18, has precedence over paragraph (3) as per the provisions of the Service Regulation, which give the Service Regulation precedence over the 1965 Hague Convention. In turn, paragraphs (2) and (3) have precedence over paragraph (1).

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

Article 19 – Lis pendens and dependent actions

In order to determine whether Article 19 is applicable the following 3 circumstances must be met:

- proceedings relating to the child must be commenced before the court of another Member State;
- these proceedings must be related to parental responsibility;
- and they must involve the same cause of action.

If these criteria are met the seised court must stay its proceedings until the jurisdiction of the first court seised is established (Article 19(2)). If the court first seised has jurisdiction, the court second seised must decline jurisdiction in favour of the first court (Article 19(3)). When the court first seised declines jurisdiction, the court second seised may continue with the proceedings pending before it.

The rules of *lis pendens* in Article 19 of the Regulation are intended to prevent parallel proceedings before the courts of different Member States and to avoid conflicts between decisions which might result therefrom. For that purpose, the EU legislature intended to put a mechanism in place which was clear and effective in order to resolve situations of *lis pendens*. As was clear from the words 'court first seised' and 'court second seised' in Articles 19(1) and 19(3) of the Regulation, that mechanism was based on the chronological order in which the courts were seised (the CJEU case of *A v B*[150]).

Lis pendens can only exist when two or more sets of proceedings with the same cause of action are pending before different courts and where the sets of proceedings are directed to obtaining a judgment capable of recognition in a Member State other than that of the court seised as the court with jurisdiction as to the substance of the matter. The provisions of Article 19(2) are not applicable where a court of a Member State first seised for the purpose of obtaining measures in matters of parental responsibility is only seised for the purpose of its granting provisional measures within the meaning of Article 20 and where a court of another Member State which has jurisdiction as to the substance of the matter within the meaning of the same regulation is seised second concerning an action directed at obtaining the same measures, whether on a provisional basis or as final measures (the CJEU case of *Purrucker II*[151]).

[150] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654.
[151] CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163.

Article 19(2) applies in the case of a conflict between two courts of different Member States before which, on the basis of the Regulation, proceedings have been brought relating to parental responsibility over a child with the same cause of action (the CJEU case of *Mercredi*[152]).

There is no conflict or risk of a conflict of jurisdiction between a case whose object is the return of a child and a case seeking a ruling on parental responsibility, since the former does not concern the substance of parental responsibility and therefore has neither the same object nor the same cause of action as the latter. There can therefore be no *lis pendens* between such actions (the CJEU case of C *v M*[153]).

Paragraph (1) of Article 19 refers to applications for divorce, legal separation or marriage annulment and does not require that the causes of action must be identical. In order for there to be a situation of *lis pendens*, it is important that the proceedings are pending simultaneously. In cases of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, Articles 19(1) and 19(3) must be interpreted as meaning that in a situation where the proceedings before the court first seised expired after the second court in the second Member State was seised, the criteria for *lis pendens* are not met and therefore the jurisdiction of the court first seised must be regarded as not having been established (the CJEU case of *A v B*[154]).

Article 20 – Provisional measures

Article 20 enables a court to take provisional, including protective, measures in accordance with its national law in respect of a child situated on its territory even if a court of another Member State has jurisdiction. It is important to clarify that Article 20 does not confer jurisdiction, and as a consequence, the provisional measure ceases to have effect when the competent court adopts final measures, also meaning that a court is no longer empowered to grant provisional measures when a judgement on the merits has been rendered.

According to the relevant literature and CJEU case law, the limits set by this provision are:

- Article 20 can only be invoked in urgent cases
    - *Conditio sine qua non*;
- the measures must respond to a specific objective – the protection of persons or assets; and
- the measures must be geographically and temporarily delimited

[152] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.
[153] CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268.
[154] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654.

- persons or assets must be present in the Member State of the court seised;
- the measures must be of a temporary nature.

Therefore, the characteristic elements of the measures are urgency, the protection of persons or assets within the Member State of the seised court, and a temporary limitation.

Orders made in the exercise of jurisdiction conferred by Article 20 are not enforceable in other Member States (the CJEU case of *Purrucker I*[155]).

The provision of Article 20 is to be interpreted as containing an implicit duty of information and it underlines the indispensability of mutual co-operation and respect between the courts of different Member States for the application of the Regulation. As regards urgency as a condition for the application of Article 20, this requirement is met 'in a situation likely serious to endanger (the children's) welfare, including their health or their development' (the CJEU case of *A*[156]).

In the case of provisional measures concerning parental responsibility, 'the concept of urgency in Article 20 relates both to the situation of the child and to the impossibility in practice of bringing the application concerning parental responsibility before the court with jurisdiction as to the substance' (the CJEU case of *Detiček*[157]).

[155] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353.
[156] CJEU Case C-523/07 *A* [2009] ECR I-2805.
[157] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193.

CHAPTER 6: Recognition and Enforcement in Matrimonial Matters

Valerie De Ruyck, Jinske Verhellen and Pablo Quinzá Redondo,

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1. Introduction

The principles concerning recognition in matrimonial matters are set out in Chapter III of the Regulation. The Regulation provides for three recognition regimes: automatic recognition, recognition through judicial proceedings and incidental recognition in pending procedures.

In principle, the Regulation seeks to establish an automatic and mutual recognition of decisions in matrimonial matters throughout the EU without any intermediate proceedings.[1] By facilitating the automatic recognition of judgments in matrimonial matters, the EU legislators have attempted to enhance the free movement of persons in the EU and to ensure that EU citizens can have the same marital status in all Member States.[2] The court of the Member State with jurisdiction should have the central role in taking its decisions. Hence, the role of other Member States should be limited.

The basis for the automatic recognition can be found in Article 21(1). According to this provision, a judgment from a Member State relating to divorce, legal separation and marriage annulment must be recognised in the other Member State without any special procedure being required.

Since decisions on matrimonial matters have an impact on persons' civil status, Article 21(2) adds that no special procedure shall be required for updating the civil status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State and against which no further appeal lies under the law of that Member State.

Furthermore, the recognition or the confirmation of the non-recognition can be requested in separate judicial proceedings. Article 21(3) allows any interested party to apply for a decision on the recognition of a foreign judgment. The procedure is set out in section 2 of Chapter III of the Regulation (same procedure as for the enforcement of judgments).

In addition, recognition can be requested incidentally in pending proceedings. Article 21(4) provides for the possibility for a court of a Member State to determine the recognition of a judgment raised as an incidental question. Recognition can only be refused on a limited number of grounds. These grounds for the non-recognition of judgments relating to divorce, legal separation or marriage annulment are laid down in Article 22. These grounds were inspired by the grounds in Article 34 Brussels I Regulation (now Article 45 Brussels Ibis Regulation).

In practice, the provisions of Section 2 of Chapter III concerning a declaration of *enforceability* are likely to have limited meaning and relevance. There is rarely any need to enforce a decision on divorce, annulment or legal separation. It is sufficient that the courts or authorities of a Member State recognise that the marriage has been ended/annulled or that the spouses no longer live together in the case of a legal separation. Only when the costs or expenses

[1] This is within the philosophy and the objectives set out by the Tampere European Council of 1999 – Presidency conclusions Tampere European Council 15-16 October 1999, available at: http://www.europarl.europa.eu/summits/tam_en.htm, point 34.
[2] Scott, J.M., 'A question of trust? Recognition and enforcement of judgments' (2015) 1 NIPR, p. 27.

ordered in a judgment relating to matrimonial matters need to be claimed in another Member State can the provisions on enforcement be applicable according to Article 49 of the Regulation.

The National Reports raise only a limited number of existing problems in the application of the principles of recognition in matrimonial matters. When the Reporters mention specific problems in their Member States, these problems will be referred to in the relevant sections.

The 2016 Commission's Proposal also acknowledges that there is hardly any evidence of existing problems with regard to recognition in matrimonial matters. Therefore, the Proposal maintains the *status quo* on the recognition of decisions in matrimonial matters.[3]

In the following sections, we will first explain the recognition regime in matrimonial matters under the Regulation. Furthermore, we will discuss the scope, the different recognition procedures and the grounds of non-recognition.

2. Scope

As mentioned above, the rules governing recognition in matrimonial matters are set out in Chapter III of the Regulation. Chapter III, however, has to be understood within the Regulation's scope of application (see *supra* in Chapter 1, under 2 '*Substantive (ratione materiae) scope of application – Article 1)*'.

2.1 Origin of the decisions

First, there is the limited geographic scope. The recognition of judgments in matrimonial matters under Chapter III of the Regulation is limited to judgments rendered in the Member States. The recognition of the judgments of third countries follows the national rules of private international law of the Member State addressed.

2.2 Temporal scope

As for the temporal scope, only judgments of Member States in proceedings instituted after the date of the entry into force of the Regulation (1 March 2005) can be recognised automatically based on Article 21. However, Article 64 provides a transitional provision for proceedings commenced under or judgments given after the entry into force of the Brussels II Regulation, which had a date of application of 1 March 2001.

2.3 Nature of the decisions

2.3.1 Judgments in relation to the dissolution of matrimonial ties

2.3.1.1 General

Recognition under the Regulation in relation to divorce, legal separation or marriage annulment only affects the dissolution of the matrimonial ties as such. It does not lead to a recognition of the provisions in the judgment on the property of the partners, their maintenance obligations or other measures (Recital 8). The patrimonial (e.g. maintenance obligations between spouses, liquidation of the matrimonial regime, a possible allocation of damages and interest) and

[3] 2016 Commission's Proposal, p. 10-11.

personal (e.g. the question whether a divorced woman can retain the name of her former husband) consequences of the dissolution will be governed by other EU regulations or by the national private international law rules.[4]

As the Regulation does not contain a definition of a 'marriage' or of 'matrimonial ties', it is questionable whether these concepts should be interpreted autonomously or according to the *lex fori* and whether a same-sex marriage and a registered partnership fall within the scope of the Regulation (see *supra* in Chapter 1, under 2.1.1 '*Admissible relationships*'). Therefore, the question arises whether same-sex marriage divorces and registered partnership dissolutions can be recognised under the Regulation. In the Rome III Regulation, the European legislators seem to guide this discussion in the direction of an interpretation according to the national rules.[5]

2.3.1.2 Application of Articles 1 and 21 – National Reports

The National Reports show that there is no consensus in the Member States as to whether the concept of marriage should be interpreted autonomously or according to the national rules. Since there is hardly any case law on the matter, the discussion thus far is solely based on legal doctrine. The National Reports of Spain, France, Greece, Italy, Latvia, Lithuania and Romania explicitly refer to the national rules in order to define the concept of marriage. According to the National Report of Belgium, Belgian legal doctrine tends to prefer an autonomous interpretation.

Relating to same-sex marriages, the National Reports of the Member States tend to include same-sex marriage within the scope of the Regulation when the *lex fori* allows same-sex marriages (Estonia, Spain, France, Ireland, the Netherlands and Portugal), while they tend to exclude it when same-sex marriages do not exist in the Member State (Austria, Bulgaria, Germany,[6] Greece,[7] Hungary, Italy, Latvia, Lithuania, Poland and Romania). Consequently, this will also have an impact on the recognition of the dissolution of same-sex marriages. In that view, the Latvian National Report mentions that 'since the term registered partnership and same-sex marriage do not exist in the Latvian legal system, it is impossible to recognize and enforce judgments taken in another Member State in respect of same-sex marriages or registered partnership'.[8]

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[4] Chalas, C., 'Article 21', in: Corneloup, S., *op cit.*, p. 365.
[5] Verhellen, J., 'Brussel IIbis Verordening – Huwelijkszaken', in: Allemeersch, B., Kruger, T. (eds.), *Handboek Europees Burgerlijk Procesrecht* (Intersentia 2015), p. 62.
[6] National Report Germany, question 7: In Germany same-sex marriages are characterized as registered partnerships.
[7] National Report Greece, question 7: 'A foreign provision accepting the validity of such marriage will be considered as contrary to public policy.'
[8] National Report Latvia, question 7.

The National Reports of Cyprus, the Czech Republic,[9] Finland,[10] Luxembourg,[11] Malta, Slovenia,[12] Sweden[13] and the UK are silent on the issue of whether same-sex marriages fall within or outside the scope of the Regulation.

The Belgian Report refers to the Belgian legal doctrine. Most authors view this as an unresolved matter; although some exclude same-sex marriages from the Regulation.[14] The Courts of First Instance of Brussels[15] and Arlon[16] have dealt with cases on same-sex marriages. Both courts considered the provisions of the Regulation, without devoting attention to the question of whether the Regulation actually applies to same-sex marriages. After the courts had determined that the Regulation did not grant them international jurisdiction, they both resorted to the *forum necessitatis* of Article 11 Belgian Code of Private International Law. The Court of Arlon set aside the fact that Article 3 of the Regulation granted international jurisdiction to the French courts. It argued that France did not accept same-sex marriages (at that time) and therefore would not grant a divorce. The Court of Arlon thus applied the Regulation only in order to check whether the Regulation gave jurisdiction to the courts of a Member State that actually recognises same-sex marriages. As this was not the case at that time in France, the court applied the national jurisdiction rules provided for in the Belgian Code of Private International Law.

With regard to registered partnerships, it is generally accepted that they fall outside the scope of the Regulation (see *supra* in Chapter 1, under 2.1.1.3 '*Registered partnership*'). In a case concerning a Dutch 'fast-track divorce',[17] the Belgian Court of First Instance of Mechelen decided that the Regulation does not apply to a 'flitsscheiding', the transformation of a marriage into a registered partnership nor the partnership or its dissolution.[18]

The Greek Report mentions, however, that since the registered partnership for same-sex couples has been introduced in Greece, it falls within the scope of the Regulation.[19] In the Czech Republic, the District Court of Rokycany applied the Regulation for the dissolution of a registered partnership on 20 September 2011. It stated that although registered partnerships were not within the scope of the Regulation, it was feasible to apply it in that particular case *per analogiam*, as the national law did not provide any jurisdictional norm for such partnerships.

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[9] National Report the Czech Republic, question 7: In the Czech Republic a marriage only exists between opposite sex partners, but Czech law does allow same-sex registered partnerships.
[10] National Report Finland, question 7: Same-sex marriage has been legal in Finland as from 01/03/2017.
[11] National Report Luxembourg, question 7: Same-sex marriage is allowed in Luxembourg.
[12] National Report Slovenia, question 7: Same-sex marriage does not exist in Slovenia, only registered same-sex partnerships.
[13] National Report Sweden, question 7: Same-sex marriage exists; however, marriage annulment and legal separation are unknown in Sweden.
[14] National Report Belgium, question 7.
[15] Court of First Instance of Brussels 19 June 2013, *Revue@dipr.be*, 2013/4, p. 70.
[16] Court of First Instance of Arlon 20 November 2009, *Revue trimestrielle de droit familial*, 2012, p. 696.
[17] These are proceedings whereby a marriage has first been transformed into a registered partnership, after which the partnership is terminated.
[18] Court of First Instance of Mechelen 12 January 2006, *Echtscheidingsjournaal*, 2006, p. 153.
[19] National Report Greece, question 7.

2.3.2 Judicial and non-judicial decisions

2.3.2.1 General

It is clear that according to Article 2(4) of the Regulation, all judicial decisions fall under the scope of Chapter III (see *supra* in Chapter 1, under 2.1.2 '*Types of decisions covered*'). This is not to imply that non-judicial decisions cannot be recognised under Chapter III of the Regulation. Two types of non-judicial decisions emerge from the National Reports: administrative procedures and religious decisions.

2.3.2.2 Application of Articles 2(4), 21 and 63 – National Reports

Administrative procedures that are officially recognised in a Member State are included within the scope of Article 2(4) of the Regulation.[20] The National Report of Ireland, however, mentions that non-judicial decisions cannot be recognised by the Irish courts. No further explanation has been given in the Report.[21]

With regard to religious proceedings, they were explicitly excluded in the Brussels II Regulation.[22] The Brussels IIbis Regulation did not confirm this exclusion.[23] In the absence of any specific indication of a change in position by the EU legislator, different authors assume that the Brussels IIbis Regulation was also intended to retain this exclusion.[24] This is also confirmed in the National Reports. According to the National Report of the Czech Republic, the Czech doctrine:

> 'interprets the notion of "decision" for the purposes of the recognition of foreign decisions on divorce as a decision of a state's authority (judicial or, where applicable, administrative) and excludes "private" decisions of religious bodies, unless they were given powers to divorce expressly by law'.[25]

The National Report of France, however, states that 'if the religious authority pronouncing the divorce "has jurisdiction" in the Member State to do so, its decision will fall under the Brussels IIbis recognition regime'.[26] Moreover, the Greek National Report states that 'religious decisions or decisions of a private nature are excluded from the scope of the Regulation except

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[20] Proposal for Regulation 1347/2000, Explanatory Memorandum, COM (1999) 220 final 11; this is confirmed by Article 1(1) of the Brussels IIbis Regulation insofar as it defines the scope of the Brussels IIbis Regulation in terms of civil matters 'whatever the nature of the court or tribunal'; Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance, COM (2002) 222 final, where it is confirmed that administrative proceedings are covered.
[21] National Report Ireland, question 15.
[22] Proposal for Regulation 1347/2000, Explanatory Memorandum, Com (1999) 220 final 11.
[23] Gallant, E., 'Compétence, reconnaissance et exécution (Matières matrimoniale et de responsabilité parentale)', in: X., *Répertoire de droit européen (no. 243)* (Dalloz 2013).
[24] Ní Shúilleabháin, *op. cit.*, p.124; Gallant, 'Compétence, reconnaissance et exécution (Matières matrimoniale et de responsabilité parentale)', *op.cit.*, no. 243; Hammjen, P., 'Le règlement (CE) n°2201/2003 du 27 novembre 2003 dit 'Bruxelles IIbis'. Les règles relatives à la reconnaissance et l'exécution', in: Fulchiron and Nourissat, *op. cit.*, no. 87; Wautelet, P., 'La dissolution du marriage en droit international privé – Compétence, droit applicable et reconnaissance des decisions étrangères', in: Wautelet, P., *op. cit.*, p. 129-130.
[25] National Report the Czech Republic, question 15.
[26] National Report France, question 15.

for those that are recognised as equivalent to the decisions of judicial authorities'.[27] Furthermore, the Irish National Report also states that religious decisions cannot be recognised in Ireland.[28]

There is no consensus as to whether a divorce decision obtained under Sharia law and taken by the *mufti*, the religious leaders of the Muslims living in the region of Thrace in Greece, can be recognised under Chapter III of the Regulation. *Mufti* judgments have civil effects in Greece once they have been rendered enforceable by a decision of the Greek civil courts. This recognition of the earlier proceedings by the Greek civil courts is subject to a limited investigation of the relevant mufti's jurisdiction and compatibility with the Greek Constitution. According to Vassilakakis and Kourtis, an exclusion of *mufti* proceedings from the scope of the Regulation would lead to unequal results for this group of European citizens.[29] We note that the Greek Report does not mention any problems with regard to the non-recognition of the Greek *mufti* judgments in other Member States.

Article 63 of the Regulation expressly stipulates that marriage annulment decisions pronounced by the ecclesiastical courts in Italy, Spain and Portugal and based on international treaties concluded between the Holy See and Italy, Spain and Portugal can be recognised subject to the conditions laid down in Chapter III, Section 1 of the Regulation.

The National Reports do not mention case law or problems regarding the recognition of decisions based on international treaties with the Holy See. The National Report of Spain, however, mentions that:

> 'according to Article VI.2 of the Agreement between the Holy See and Spain on legal affairs of 3 January 1979, declarations of annulment and pontifical decisions concerning a valid but unconsummated marriage shall be considered valid under the civil law if they were declared to be in compliance with State Law by a decision by the competent Civil Court'.

The Reporter mentions two main problems in that regard. Firstly, the Reporter stresses that the mentioned provision does not exclusively refer to judgments rendered by the Spanish Ecclesiastical Courts. Therefore, the Reporter concludes that this stipulation could be interpreted as meaning that the Ecclesiastical judgments of other member states regarding the nullity or dissolution of a non-consummated marriage can have civil effects in Spain as long as they are valid under Spanish civil law. Secondly, the reporter explains what should be understood by the wording 'under civil law'. The Reporter refers to Article 80 of the Spanish Civil Code. That provision states that Ecclesiastical judgments will have civil effects in Spain as long as they obtain the exequatur according to the Spanish private international law recognition rules. Finally, the Reporter notes that new recognition and enforcement rules are

[27] National Report Greece, question 15.
[28] National Report Ireland, question 13.
[29] Vassilakakis, E. and Kourtis, V., 'The impact and application of the Brussels IIbis Regulation in Greece', in: Boele-Woelki and Gonzalez Beilfuss, *op. cit.*, p. 137-138.

now applicable in Spain since the entry into force of Law 29/2015 of 30 July 2015 on international judicial cooperation in civil matters.[30]

2.3.3 Negative judgments

2.3.3.1 General

It is also contested whether negative judgments fall under the recognition mechanism of the Regulation. Negative judgments refer to judgments that refuse the dissolution of matrimonial ties. Different authors and the Borrás Report state that only decisions that grant a divorce, legal separation or annulment can be the object of recognition under the Regulation.[31]

2.3.3.2 Application of Articles 2(4) and 21 – National Reports

Only the National Report of Lithuania mentions a case in which a Lithuanian Court interpreted and clarified the definition of a 'judgment' in relation to the recognition of a negative judgment.[32] According to the Reporter, the court clarified that only court judgments which positively create or alter the interests of a claimant might be recognised. Judgments that reject a request and which do not create or alter the interests of a claimant cannot be recognised in the jurisdiction of Lithuania based on the Regulation.[33]

2.3.4 Posthumous and third party nullity procedures

2.3.4.1 General

According to some of the national legislations, one spouse can request the annulment of a marriage if the other spouse is deceased. Some also accept that a third party with an interest in the validity of the marriage can request this annulment. The Regulation does not address the question of whether the recognition of such a judgment falls within its scope. The Borrás Report expressed that posthumous annulments fall outside the scope of the Regulation. However, Borrás did not address the matter of third party annulments.[34]

2.3.4.2 Application of Articles 1, 2, 3 and 21 – CJEU case law

The CJEU has provided some clarification. In a decision of 13 October 2016 in relation to the application of Article 3 on jurisdiction, the CJEU[35] ruled that an action for the annulment of a marriage brought by a third party following the death of one of the spouses falls within the scope of the Regulation (see *supra* in Chapter 1, under 2.1.2.3 '*Marriage annulment*').

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[30] National Report Spain, question 15.

[31] Borrás Report, no. 60; Gaudemet-Tallon, H., 'Le Règlement 1347/2000 du Conseil du 29 mai 2000: Compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs' (2001) JDI, p. 406; Heyvaert, A., *Belgisch internationaal privaatrecht – een inleiding* (Mys & Breesch 2001), p. 25; Mostermans, P., 'De wederzijdse erkenning van echtscheidingen binnen de Europese Unie' (2002) NIPR, p. 263; Wagner, R., 'Die Anerkennung und Vollstreckung von Entscheidungen nach der Brüssel II-Verordnung (2001) IPRax, p. 76; Storme, H., in: Erauw, J. *Handboek Belgisch internationaal privaatrecht* (Kluwer 2006), p. 176.

[32] Court of Appeal of Lithuania 7 March 2014, No 2T-29/2014; National Report Lithuania, question 15.

[33] National Report Lithuania, question 15.

[34] Borrás Report, no. 27.

[35] CJEU Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* [2017] ECLI:EU:C:2016:772.

Consequently, the recognition of an annulment of a marriage which had been requested by a third party following the death of one of the spouses falls within the scope of the Regulation.

2.3.5 Authentic instruments and agreements between parties

2.3.5.1 General

The Regulation indicates in Article 46 that authentic instruments and agreements between parties that are enforceable in one Member State should be treated as judgments. Therefore, such authentic instruments and agreements should be recognised under the same conditions as judgments. Under the Brussels II Regulation only court-approved agreements were covered. By amending the language in the Brussels IIbis Regulation, the EU legislator extended the terminology to encompass private agreements, without requiring that they should be in writing or authenticated.[36]

2.3.5.2 Application of Articles 21 and 46 – National Reports

The Spanish National Report refers to notarial divorce procedures where notaries are allowed to grant a divorce provided that the spouses agree and as long as they do not have responsibility for any minor or disabled persons.[37] The Reporter further states that the recognition of such a notarial divorce deed falls within the scope of the Regulation.[38] The other National Reports do not address this issue.[39]

3. Recognition regimes

3.1 Automatic recognition

As mentioned above, Article 21(1) of the Regulation provides for the automatic recognition of a judgment relating to divorce, legal separation and marriage annulment delivered in another Member State. Although no special procedure is required, the authorities of the Member States may refuse *ex officio* the recognition of a judgment delivered in another Member State based on one of the grounds for non-recognition listed in Article 22 of the Regulation (see *infra* in this Chapter, under 4 '*The grounds for non-recognition*').

3.2 Procedural recognition

An automatic recognition, however, is neither irrevocable nor absolute. The parties may contest the recognition or the refusal thereof. According to Article 21(3) of the Regulation, any interested party can commence proceedings to apply for a court decision concerning the recognition of a judgment from another Member State. If a party decides to contest the automatic recognition of a divorce decision and the court decides not to recognise the decision,

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[36] Ní Shúilleabháin, *op. cit.*, p. 128.
[37] National Report Spain, question 3.
[38] *Ibid*., question 15.
[39] However, this is a very topical issue. Since 1 January 2017, France also has a divorce procedure by means of a mutual contractual agreement without the intervention of a judge. The agreement must only be deposited with a notary who checks on compliance with formal requirements. The depositing of this agreement gives it a certain date and enforceability. See Hammje, P., 'Le divorce par consentement mutuel extrajudiciaire et le droit international privé. Les aléas d'un divorce sans for' (2017) Revue critique de droit international privé, p. 143.

the automatic recognition will retroactively lose its international force.[40] Scott argues that the possibility of such an application to a court should continue to exist in order to deal with the rapid changes in family law, for example concerning the recognition of judgments relating to a civil partnership or a same-sex marriage.[41]

The competent court is the court mentioned in the list pursuant to Article 68, while the intern territorial jurisdiction is determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought (Article 21(3), 2nd paragraph Brussels IIbis Regulation).

The procedures can be requested by any interested party. However, the Regulation does not define the term 'interested party'. Therefore, the law of the relevant court will determine whether the applicant has an interest in the proceedings.[42] The concept of an interested party should be widely interpreted and is not limited to the parties to the original proceedings.[43] Creditors of the spouses, heirs of the spouses and the government could be interested parties.[44] It should be noted that the National Reports do not mention any specific problems concerning these matters.

According to Article 31, the court can only refuse recognition on the grounds specified in Article 22 of the Regulation (see *infra* in this Chapter, under 4 '*The grounds for non-recognition*'). The applicant has the burden of proof concerning the existence of one of the grounds in Article 22 of the Regulation.

3.3 Incidental procedural recognition

The recognition or non-recognition of a decision can also be determined by a court answering an incidental question. According to Article 21(4), whenever a party invokes the authority of the *res judicata* of a judgment pronouncing a divorce, legal separation or marriage annulment before a court of a Member State, that court is competent to decide incidentally upon the recognition of that judgment. This court does not have to refer the question of recognition to the court which is competent according to Article 68 of the Regulation. The court where the issue of recognition is raised as an incidental question may itself determine this issue; however, the court can only use the grounds of non-recognition listed in Article 22. When a court decides incidentally on the recognition of a foreign judgment, it is no longer possible to file a request for the recognition of that judgment at another court of the same Member State, not even at the court that has been specifically designated according to Article 68 of the Regulation.[45]

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[40] De Vareilles – Sommières, P., 'La libre circulation des jugements rendus en matière matrimoniale en Europe', *Gazette du Palais*, 1999, no 352, p. 15, no 75; Chalas, *op. cit.*, p. 370.
[41] Scott, *op. cit.*, p. 29.
[42] Chalas, *op. cit.*, p. 375.
[43] Teixeira de Sousa, M., 'Article 22', in : Corneloup, S., *op cit.*, p. 385; Borrás Report, no. 65; Helms, T., 'Die Anerkennung ausländischer Enscheidungen im Europäischen Eheverfahrensrecht', FamRZ, p. 2001, 261.
[44] Chalas, *op. cit.*, p. 375.
[45] X., *Comment on EC Regulation Brussels II*, Article 21, available at: <www.europeancivillaw.com>.

4. The grounds for non-recognition

The grounds for the non-recognition of judgments in matrimonial matters are provided in Article 22 of the Regulation. The list of grounds is limited to the public policy exception (Article 22(a)), the fair process exception (Article 22(b)) and the incompatibility exception between different judgments (Article 22(c) and Article 22(d). It is not possible to invoke another ground for non-recognition based on national law.[46] Some authors argue that the grounds of Article 22 are compulsory. Accordingly, if one of the grounds is present, the judgment may not be recognised and the courts do not have any discretionary authority.[47]

The grounds for non-recognition are further limited by Articles 24, 25 and 26. Under no circumstances may the court review the judgment as to its substance (Article 26), and the court also cannot question the jurisdiction of the court of origin (Article 24). Furthermore, the court of recognition may not control the law applied by the court of origin (Article 25).The Regulation does not mention any effectiveness requirement in the judgment's State of origin. It does not require that the judgment is final. The National Reports do not indicate any problems resulting from the lack of an effectiveness requirement in the judgment's State of origin.

In this section, we will briefly analyse the different grounds for non-recognition. Consequently, we will elaborate on the application thereof in practice.

4.1 Public policy

4.1.1 General

According to Article 22(a) of the Regulation, a divorce, legal separation or marriage annulment judgment cannot be recognized 'if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought'.

The public policy ground in the Brussels IIbis Regulation has – in accordance with the jurisprudence of the CJEU relating to the Brussels Ibis Regulation – a very limited scope.[48] It is not for the Court to define the content of the public policy of a Member State, although it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing the recognition of a judgment emanating from a court in another Member State.[49] This prohibits the court of the Member State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and the rule that would have been applied by the court of the State in which enforcement is sought. Similarly, the court of the Member State in which recognition is sought may not review the

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[46] Vandenbosch, A. and Muylle, M., 'Commentaar bij Artikel 22 en 23' in: Couwenberg, I., Hansebout, A. and Vanfraechem, L., *Duiding Internationaal Privaatrecht* (Larcier 2014), p. 317-318.

[47] Borrás Report, no. 67; Vandenbosch and Muylle, *op. cit.*, p. 318; Couwenberg, I., 'Tenuitvoerlegging in België van buitenlandse beslissingen' in: Pertegas, M., Brijs, S. and Samyn, L., *Betekenen en uitvoeren over de grenzen heen* (Intersentia 2008), p. 107.

[48] CJEU Case C-145/86 *Hoffmann v Krieg* [1988] ECR 645 (on the 1968 Brussels Convention); Ní Shúilleabháin, *op. cit.*, p. 255.

[49] CJEU Case C‑420/07 *Apostolides* [2009] EU:C:2009:271, para 57 and the case law cited.

accuracy of the findings of law or fact made by the court of the Member State of origin.[50] As such, an appeal against a refusal of recognition based on the public policy exception can only be successful where the recognition or enforcement of the judgment given in another Member State would differ to an unacceptable degree with the legal order of the Member State in which enforcement is sought in such a way that it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a foreign judgment of another Member State to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State in which recognition is sought or of a right recognised as being fundamental within that legal order.[51]

The public policy ground in Article 22 of the Brussels IIbis Regulation has the same wording as the public policy ground in the Brussels Ibis Regulation. Therefore, the jurisprudence of the CJEU concerning the Brussels Ibis Regulation can help to interpret Article 22(a) Brussels IIbis Regulation.

The non-recognition ground based on public policy principles is rarely accepted in cases relating to the recognition of judgments on divorce, legal separation and marriage annulment.

In Member States that are liberal in granting divorce, the recognition of a divorce judgment rarely violates the public policy of that Member State. In Member States which have a more limited view of divorce, the scope of the public policy ground is further limited by Articles 24, 25 and 26 of the Regulation.[52]

Article 24 prohibits any review of the jurisdiction of the court of origin, even when it is founded on the domestic law of the State of origin.[53] Moreover, Article 24 states that the test of public policy may not be applied to the rules relating to jurisdiction set out in Article 3 to 14. The exercise of jurisdiction based on the Regulation cannot be an infringement of the public policy of the court of recognition.[54]

Article 26 prevents a judgment from being reviewed as to its substance. Therefore, a court may not refuse recognition on the basis that the granting court was mistaken as to the facts, the evidence or the law.[55]

Article 25 specifies that 'the recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.' This provision was introduced at the

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[50] *Ibid*., para 58 and the case law cited.
[51] *Ibid*., para 59 and the case law cited. In particular, as regards the circumstances in which the fact that a judgment of a court of a Member State had been delivered in breach of procedural safeguards may constitute a ground for the refusal of recognition under Article 34(1) of Brussels I Regulation, the Court has held that the public policy clause in that article would apply only where such a breach means that the recognition of the judgment concerned in the Member State in which recognition is sought would result in a manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State (see CJEU Case C‑681/13 *Diageo Brands* [2015] EU:C:2015:471, para 50).
[52] Teixeira de Sousa, *op. cit.*, p. 388.
[53] Teixeira de Sousa, *op. cit.*, p. 389; Ní Shúilleabháin, *op. cit.*, p. 258.
[54] Ní Shúilleabháin, *op. cit.*, p. 258.
[55] Ní Shúilleabháin, *op. cit.*, p. 258.

request of the Nordic States that were concerned that other Member States would use the ground of public policy in order to refuse the recognition of their divorces granted on relatively liberal grounds.[56] For example, if in the State of origin a divorce can be granted after a separation of two years, the public policy ground cannot prohibit recognition by a State where the law requires five years of separation.

4.1.2 Application of Article 22(a) – CJEU case law

In the case of *P v. Q*[57], the Court applied its interpretation of the public policy exception in the Brussels I Regulation to the Brussels IIbis Regulation.[58]

According to the CJEU, the following principles apply. First, only the public policy principles of the Member State of recognition are relevant. Thus, the fundamental values of the Member State where recognition is sought should be violated. However, the CJEU has the authority to review the application of these national public policy rules when a court refuses the recognition of a judgment. In *Krombach v. Bamberski* (a case concerning the 1968 Brussels Convention (later converted into the Brussels I Regulation), the CJEU decided that while the Member States are in principle free to determine, according to their own conceptions, what public policy requires, the limits of that concept are to be interpreted according to the Convention. Consequently, the CJEU decided that the Court should review the limits within which the courts of a Member State may have recourse to the public policy concept for the purpose of refusing the recognition of a judgment from a court in another Member State.[59] This was confirmed by the CJEU in its *Renault* judgment.[60] The CJEU further indicated that in order to define these limits, it will draw inspiration from the constitutional traditions common to the Member States and from the guidelines provided by international treaties on the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention on Human Rights[61] has particular significance.[62]

Secondly, the public policy exception only applies where there is a manifest violation thereof. In relation to the term 'manifest', the CJEU has argued that recourse to the public policy ground is only possible if the judgment is

> 'at variance to an unacceptable degree with the legal order of the State in which enforcement is sought in as much as it infringes a fundamental principle […] the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order'.[63]

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[56] Ní Shúilleabháin, *op. cit.*, p. 258.
[57] CJEU Case C-455/15 PPU *P v Q* [2015] ECLI:EU:C:2015:763.
[58] The reasoning of the CJEU is discussed in greater detail *infra* in Chapter 7 under 1.4 '*Grounds for non-recognition – CJEU case law*'.
[59] CJEU Case C-7/98 *Krombach v. Bamberski* [2000] I-01935, para 22-23.
[60] CJEU Case C-38/98 *Renault v. Maxicar* [2000] I-02973, para 171.
[61] The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the European Convention on Human Rights).
[62] CJEU Case C-7/98 *Krombach v. Bamberski* [2000] I-01935, para 25.
[63] *Ibid*., para 37.

4.1.3 Difficulties in the application of Article 22(a) – National Reports

The National Reports do not mention any relevant case law where the public policy exception has been applied. This was also the conclusion of Hess and Pfeiffer after their analysis in 2011.[64]

4.2 Respect for the rights of defence when the respondent is in default of appearance

Article 22(b) stipulates that a judgment regarding divorce, legal separation or marriage annulment shall not be recognized

> 'where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally'.

Article 22(b) is an addition to the protection of Article 18 of the Regulation, which also protects the respondent's rights of notification and defence (see *supra* in Chapter 5, under 3 '*Examination as to admissibility – Article 18*'). The principle protected in Article 22(b) can be part of the procedural public policy of a Member State. Article 22(b) embodies a violation of a fair trial, but is only applicable when the respondent has not appeared, was not notified in sufficient time[65] or was not able to arrange his/her defence. An irregularity in the citation is not sufficient. Thus the irregularity must prevent the possibility for the defendant to defend him/herself.[66] However, if the respondent has unequivocally accepted the judgment, the lateness or irregularity of the citation becomes irrelevant. Helms argues that failing to appeal against the judgment does not prove that there was an unequivocal acceptance of that judgment.[67] On the other hand, the contracting of a new marriage by the respondent or the demand for maintenance from the former spouse proves an unequivocal acceptance of the judgment.[68]

4.3 Irreconcilable judgments

With regard to irreconcilable judgments, the Regulation provides for two situations.

Firstly, Article 22(c) stipulates that a judgment relating to divorce, legal separation or marriage annulment shall not be recognized 'if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought'.

A judgment on matrimonial matters cannot be recognized when it is incompatible with another judgment in the Member State of recognition. Article 22(c) does not explicitly require

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[64] Hess, B. and Pfeiffer, T., 'Interpretation of the public policy exception as referred to in EU Instruments of Private International and Procedural Law' (Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, European Union, 2011) available at: www.europarl.europa.eu/studies.

[65] This is not subject to any deadline, but must be sufficient for the respondent to retain a lawyer and to be able to organize his/her defence. CJEU Case C-166/80 *Klomps v Michel* [1981] ECR 1593; Teixeira de Sousa, *op. cit.*, p. 390.

[66] Vandenbosch and Muylle, *op. cit.*, p. 318.

[67] Helms, *op. cit.*, p. 264.

[68] Borrás Report, no 70.

the actions to have the same object. Article 22(c) even disregards whether the judgment in the State of recognition predates or postdates the judgment given in the State of origin.[69] Thus, it is not necessary that the inconsistent judgment of the State of recognition falls within the scope of the Regulation.[70]

Secondly, Article 22(d) stipulates that a judgment relating to divorce, legal separation or marriage annulment shall not be recognized 'if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought'.

This provision relates to cases in which the judgment, delivered in another Member State or in a third country between the same parties, meets two conditions: (a) it was given earlier; (b) it fulfils the conditions that are necessary for its recognition in the Member State in which recognition is sought.[71]

4.4 Application of Article 22 – National Reports

The National Reports reveal that decisions refusing the recognition of judgments in matrimonial matters are rare.

The Reports of Greece, Germany and Romania address the refusal of recognition based on the procedural incompleteness of the files. In Germany, civil servants report that there are often difficulties in attaining authentic documentary evidence concerning foreign divorces.[72] In Greece, a lack of the necessary documents for recognition can lead to a delay in court hearings.[73] Moreover, in Romania, the Brăila County Court[74] denied the recognition of a divorce judgment delivered by a French court, as the claimant had not produced a certified copy of the foreign judgment nor the certificate mentioned in Article 39 of the Regulation. The Report of Romania also refers to a decision by the Suceava County Court[75] of 8 October 2015 in which the recognition of a divorce judgment originating from Spain was refused on the ground that the claimant had not proved that the judgment was final. The applicant also did not produce the certificate required by Articles 37 and 39 of the Regulation. In the appeal procedure, the applicant produced the requested certificate.[76] The National Report of Romania further makes reference to several examples of court decisions that have refused the recognition of divorces by default based on Article 22 of the Regulation.[77]

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[69] Borrás Report, no 71.
[70] Teixeira de Sousa, *op. cit.*, p. 391; Rauscher, *Europäisches Zivilprozessrecht und Kollisionsrecht*, *op. cit.*, Articles 22, 21.
[71] Borrás Report, no 71.
[72] National Report Germany, question 14.
[73] National Report Greece, question 16.
[74] County Court of Brăila, 1st Civil Division, case 426, 21 May 2015; National Report Romania, question 17.
[75] County Court of Suceava, case 1502, 8 October 2015; National Report Romania, question 17.
[76] Court of Appeal of Suceava, 1st civil Division, case 77, 26 January 2016; National Report Romania, question 17.
[77] National Report Romania, question 17, with reference to: Court of Appeal of Iaşi, case 152, 3 November 2008; County Court of Mehedinti, 1st Civil division, case 181, 30 September 2014; County Court of Galati, 1st Civil Division, case 1784, 24 November 2014; County Court of Bucharest, 4th Civil Division, case 423, 3 April 2014;

Furthermore, in Italy, the Court of Appeal of Perugia incidentally decided upon the recognition of a Spanish judgement in order to determine its own jurisdiction. The Court found that a Spanish judgment that had granted a divorce without a previous period of personal separation did not breach public policy within the meaning of Article 22. However, the Spanish divorce judgment could not be recognized since it contradicted procedural public policy. The judgment was rendered in proceedings where the statement of claim was served on the defendant according to the rules on untraceable persons even though the plaintiff was aware of the defendant's residence in Italy.[78]

Moreover, the Court of Second Instance in Poland rejected the recognition of a Dutch divorce judgment by default. The court argued that the applicant had not produced any evidence of the specific dates of the acts informing the defendant of the divorce proceedings. Therefore, it was impossible to determine whether the defendant had sufficient time to arrange his defence.[79]

5. Member States' national recognition rules

Decisions emanating from third countries can only be recognized in a Member State by the national recognition rules of that State. The National Reports show that there is a trend for Member States to implement the grounds of Article 22 Brussels IIbis Regulation in their national recognition rules for judgments on matrimonial matters. However, most Member States have added extra grounds for non-recognition. Some Member States use a completely different mechanism or focus on completely different grounds. These grounds are often linked to the nationality of the spouses concerned and/or imply a control of the jurisdiction of the court of origin. Many Member States have separate recognition rules for specific forms of marriage dissolution, such as repudiation.

County Court of Dambovita, 1st civil Division, case 1160, 1 October 2014; Court of Appeal of Bacău, 1st Civil Division, case 334, 20 February 2013.

[78] Court of Appeal of Perugia, case 20110310, 9 March 2011, https://w3.abdn.ac.uk/clsm/eupillar/public/case/2419.

[79] Court of Second Instance of Krakowie, case I ACz 1669/14, 5 October 2014, https://w3.abdn.ac.uk/clsm/eupillar/public/case/1463.

GUIDELINES – Summary

The recognition of judgments in *matrimonial matters* is regulated by **Chapter III** of the Brussels IIbis Regulation (*Articles 21-22*).

Only judgments of Member States can be recognized under Chapter III of the Regulation and the rules are limited to judgments that affect the dissolution of matrimonial ties. The dissolution of matrimonial ties by authentic instruments or by agreement between the parties that are concluded and enforceable in one Member State, fall within the scope of the recognition rules of the Regulation.

There is no consensus as to whether the dissolution of same-sex marriage divorces can be recognized under the Brussels IIbis Regulation. The National Reports of the Member States tend to include same-sex marriages within the scope of the Brussels IIbis Regulation when the law of the court of recognition allows same-sex marriages. They tend to exclude it when same-sex marriages do not exist in the Member State in question. With regard to registered partnerships, it is generally accepted that they fall outside the scope of Brussels IIbis. Therefore, the recognition of their dissolution also falls outside the scope of the recognition rules of the Regulation.

Judicial and non-judicial decisions can be recognized under Chapter III of the Brussels IIbis Regulation. The National Reports confirm that official administrative procedures fall within the scope of Brussels IIbis; religious proceedings are excluded, except for mufti judgements rendered enforceable by a decision of the Greek civil courts and marriage annulment decisions based on international treaties with the Holy See.

Different authors, the Borrás Report and the Lithuanian Reporter argue that judgments that refuse the dissolution of matrimonial ties (negative judgments) cannot be the object of recognition under the Brussel IIbis Regulation.

Since a recent decision of 13 October 2016 by the CJEU, the recognition of the annulment of a marriage requested by a third party following the death of one of the spouses falls within the scope of Brussels IIbis (posthumous and third party nullity procedures).

CHAPTER 7: Recognition and Enforcement in Parental Responsibility Cases

Richard Blauwhoff and Lisette Frohn

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1. Non-recognition of judgments in parental responsibility cases

1.1 Grounds for non-recognition

A Member State will recognise foreign judgments, i.e. orders or decrees of parental responsibility issued in the other Member States. This follows from Article 21 of the current Regulation. The exceptions to this general rule regarding recognition are laid down in Article 23.

If judgments relating to parental responsibility are recognised, they may still be changed. This may happen, as the case may be, as soon as the judgment requires an adjustment because of a change of circumstances. Judgments relating to parental responsibility may be considered final only insofar as a regular remedy is no longer available.[1] Article 23 also covers all judgments relating to parental responsibility pronounced by a court or an authority of a Member State whatever the judgment may be called, including a decree, an order or a decision (Article 2(4)). Judgments on the right of access (Article 41) and on the return of the child (Article 42) have to be recognised without any possibility of opposing their recognition if they have been certified in the Member State of origin in accordance with the provisions of Articles 41(2) or 42(2).[2]

According to Article 23(a) recognition may only be declined if the foreign judgment is 'manifestly' contrary to the public policy (*ordre public*) of the Member State in which recognition of the judgment is sought. This inclusion of the public policy exception as a ground for non-recognition should therefore be invoked cautiously and should be interpreted restrictively. In that respect, due regard should be given to the case's connection with the forum State. [3] This means, for example, that a court in the state of enforcement should not be permitted to reject a judgment only because it would have reached a different view about the best interests of the child in the case at hand. Thus, a court may very well not agree with the decision to be enforced, but this fact will not of itself be a sufficient ground to rely on the exception of public policy. To give an example, where a Portuguese court had ratified an agreement by the parents to the effect that the child in question would spend alternative two-month periods with his father in Portugal and his mother in the United Kingdom, the position of the Portuguese court in reaching its decision was not considered by the UK court to be 'so obviously and extremely abusive as to qualify as an exceptional case'. The judge at first instance was prepared to find that the decision was contrary to public policy on the basis of the mother's emotional and mental health at the time of the agreement, but this was overturned by the Court of Appeal, which held that the case fell far short of what was required to give rise to the public policy exception.[4]

Furthermore, protection is offered to persons in default, pursuant to Article 23(c). National rules of civil procedure apply as regards the service of documents, as do international

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[1] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 2-3.
[2] Magnus/Mankowski/Siehr, *op. cit*., Article 23, note 4.
[3] Magnus/Mankowski/Siehr, *op. cit*, Article 23, note 11-13; Rauscher, 'Parental responsibility cases under the new Council Regulation 'Brussels IIA', *op. cit.*, p. I-44.
[4] Scott, *op. cit.*, p. 30 *et seq*. with reference to *In re L (A Child) (Recognition of Foreign Order)*, [2012] EWCA Civ 1157, [2013] Fam 94.

rules of service.[5] If documents have to be served on a person in Denmark or on a person in a non-Member State that is party to the 1965 Hague Convention, for example, the Convention will apply and documents will have to be served in accordance with this Convention.[6] In addition, sufficient time must be given and the documents must be sufficiently precise and clear.

The proposed recast states in the proposed Article 38 that, upon the application of any interested party, recognition shall be refused if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child. Accordingly, the rule that recognition may be refused if the judgment was pronounced, except in the case of urgency, without the child having been given an opportunity to be heard, in violation of the fundamental ruls of procedure of the (specific) Member State in which recognition is sought, has been dispensed with.[7] Otherwise, on this point the proposed recast essentially remains the same.

1.2 Grounds for non-recognition – National Reports

The 'best interests of the child' should, in that connection, be evaluated in every single case taking into account the specific circumstances of each case.[8] In Austria, recognition and enforcement are refused, for example, in accordance with § 113 (1) no. 1 of the AußStrG if this would be contrary to the best interests of the child or other basic principles of Austrian law (*ordre public*). The National Report suggests that in Austrian law the principle of the best interests of the child is thus given a higher priority than in the Brussels IIbis Regulation. For example, a Serbian decision relating to the right of access was denied enforcement in Austria because of a violation of the best interests of the child.[9] Serbia is, of course, (still) a third state. Even so, the decision stipulated that the mother who held the right of custody could not spend weekends with her children during the school year. Only weekdays with the associated daily stress would have been allocated to her in order to be together with the children. However, it was considered to be not in the best interests of the children that she would not be able to spend leisure time with her children during the school year, especially when she had the right of custody. The Irish report suggests that Article 23(a) arguably reflects the common law grounds of fraud, duress and denial of justice.[10]

Under Irish law, Article 23(b) is not a stated ground for refusal but the 31st Amendment to the Constitution now lays down the right of the child to be heard, subject, however, to the court's discretion in entertaining those views.

In Austria, § 113 of the AußStrG lacks a provision that is comparable to Article 23 (b). However, that does not mean that a foreign decision is recognized and declared enforceable even when the child has not had the opportunity to be heard, thereby infringing essential

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[5] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 25-29.
[6] Magnus/Mankowski/Siehr, *op. cit*., Article 23, note 28-29.
[7] See also the 2016 Commission's Proposal.
[8] Magnus/Mankowski/Siehr, *op. cit*., Article 23, note 14.
[9] National Report Austria, question 31; Regional Court for Civil Law of Vienna [LGZ Wien] 19.09.2008 43 R 605/08a EFSlg [Ehe-und familienrechtliche Entscheidungen] 122.329.
[10] National Report Ireland, question 31.

procedural principles of the Member State in which recognition or enforcement is sought. The infringement in the hearing will either be regarded as a breach of the best interests of the child or as such against the procedural ordre public.

According to the Austrian National Report, a court[11] has to hear minors in personal proceedings concerning care and education or personal contacts. Minors who have reached the age of 14 may be able to take legal action in proceedings relating to care and education or personal contacts. In other words, a minor who has reached the age of 14 has the same legal rights as the other parties to the proceedings.

Recognition will be refused if the child has not been granted a hearing. Moreover, according to § 138 ABGB,[12] the best interests of the child must be taken into account and ensured in all matters relating to minor children, in particular care and personal contacts. Important criteria for the best interests of the child that are listed in Austrian law include, among other things, the consideration of the child's opinion as a function of his/her understanding and his/her ability to form opinions (no 5) and the prevention of the child's impairment through the implementation and enforcement of a measure against his/her will (no. 6).

In the National Report of Poland, mention is made of the decision of the Supreme Court dated 24 August 2011, IV CSK 566/10[13] which concerned the rejection of a contention that the judgment presented for recognition (a declaration of enforceability) was directly opposed to another, later judgment relating to parental responsibility making these judgments irreconcilable.

A person may waive the requirement of a fair hearing as a ground for non-recognition and accept the decision rendered without his or her appearance, but the acceptance must be made unequivocally. A tacit acceptance is insufficient unless special circumstances reveal that the foreign decision has been expressly accepted.[14]

Pursuant to Article 23(d), the recognition of a judgment relating to parental responsibility may be declined if an interested person, such as a parent, had not been heard.[15] Irreconcilability with a later local judgment (Article 23(e)) as a ground for non-recognition is not limited to a judgment based on changed circumstances but may include situations such as those mentioned in Article 11(8).[16] In Belgium, a case from the Court of Appeal of Antwerp can be mentioned here.[17] The court allowed the recognition of a British judgment of the High Court of Justice, Family Division that ordered the immediate return of the child after the father had refused to bring the child back to the UK. In this case the mother had the right of custody.

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[11] National Report Austria, question 31. However, this inquiry may also be carried out by a person or authority named in § 105 (1) sentence 2 of the AußStrG.
[12] General Civil Code [Allgemeines Bürgerliches Gesetzbuch], JGS [Justizgesetzsammlung] 1811/946, last amended by BGBl [Bundesgesetzblatt] I 2016/43.
[13] National Report Poland, question 31.
[14] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 33.
[15] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 34.
[16] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 36.
[17] National Report Belgium, question 31; Court of Appeal of Antwerp 22 June 2011, no. 2011/AR/1143, available at: http://www.eurprocedure.be.

In June 2010, the High Court had enacted an agreement between the parties relating to the father's rights of access during holidays. The father had refused to bring the child back to the UK after the summer holiday in Belgium. The High Court had subsequently ordered the immediate return of the child in September 2010. The mother had requested the enforcement of both decisions of the High Court in Belgium.

The court of first instance had refused recognition based on Article 23(e) Brussels IIbis (the judgment is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought). The president of the Court of First Instance of Mechelen had previously awarded custody of the child to the father in October 2010. In the meantime, that decision of the president of the Court of First Instance of Mechelen had been reviewed in third-party proceedings. In its new decision of 16 May 2011, the president of the court of first instance declared that it had no jurisdiction on the basis of Article 19 of Brussels IIbis. The father had also initiated separate summary proceedings to obtain provisional measures on the basis of Article 20 of Brussels IIbis, but no order has been issued at the time when the Court of Appeal had to make its decision. Therefore, the Court of Appeal could not apply the exception of Article 23(1)(e).

The Court of Appeal also considered the grounds of refusal in Articles 23(a), 23(c) and 23(d), but found that these grounds could not be applied in the present case.

- Article 23(a): The court emphasized that the public policy exception can only be used if the judgment is 'manifestly' contrary to public policy. The fact that the mother had a small apartment and financial difficulties did not suffice to justify the exception. Neither did the limited social integration of the mother in the UK, nor the fact she only had a temporary residence permit.
- Article 23(c): The father claimed the right to an interpreter in the proceedings in the UK. The fact that this was not offered to him would be in violation of Article 6, § 3 of the European Convention on Human Rights. The Court of Appeal did not agree with this argument.
- Article 23(d): It was only because the father did not return the child to the UK, in violation of the British judgments concerning the father's right of access, that the UK ordered a 'passport order' against him, thereby preventing him from going to the UK and exercising his parental responsibility. Once the father would allow his daughter to return to the UK, this 'passport order' would be lifted and he would once again be able to exercise his parental duties.

In Lithuania, a court decision rendered in the Netherlands was not recognised by the Court of Appeal of Lithuania according to the provisions (c) and (d) of Article 23.[18] There was no additional information except for the date of the hearing on 10 December 2012. One of the parents sent a message to the court by fax on 10 December 2012, before the time of the hearing, requesting that another date be appointed for the court hearing as she could not participate on

[18] National Report Lithuania, question 31.

the date notified. The court did not allow the request of the parent and reached a final decision on 10 December 2012. The Court of Appeal of Lithuania ruled that the grounds for the refusal of recognition, determined in the provisions of (c) and (d) of Article 23, were applicable and withheld its recognition of the decision of the Dutch court.[19] Likewise, a court decision which had been rendered in Italy was not recognised by the Court of Appeal of Lithuania according to Articles 23(a), 23(c) and 23(d). There was evidence that one of the parents could not participate in the court hearing because she had left Italy before being informed about the hearing and hence could not participate. The Court of Appeal of Lithuania took the view that there was enough evidence to confirm that the child's residence with the mother was in the best interests of that child, and refused to recognise the decision ordering the child to reside with the father.[20]

As for 'irreconcilability with a foreign judgment' as a ground for non-recognition (Article 23(f)) there is little evidence in the National Reports to suggest that the decision regarding recognition or non-recognition is often hampered by conflicting or irreconcilable judgments given on the same or different facts. This may be accounted for by the fact that later judgments can adjust earlier decisions to subsequent changed circumstances or replace an earlier decision even if it was given on the basis of the same facts.[21]

Article 56 deals with decisions relating to the placement of a child in another Member State. In such cases the central authorities or other authorities having jurisdiction in the latter State have to be consulted or, at least, be informed. If this has not been done, the Member State in which the placement is to take place is not obliged under Article 23(g) to recognise the placement decision by the Member State of origin.[22]

The National Reports indicate that in both Italy and Romania Article 23 does not play a very significant role. The same could be said for Luxembourg, where none of the judgments reviewed dealt with claims for the recognition or enforcement of judgments from non-EU Member States in cases of parental responsibility.[23] The National Report states that in such a situation the Luxembourg court would check the following: the grounds of jurisdiction applied by the foreign court; the enforceability of the decision; whether the right to due process had been respected; the application of the appropriate law; and compliance with Luxembourg's public policy.

[19] National Report Lithuania, question 31. The Court of Appeal of Lithuania decision of 08-07-2013 in civil case No. 2T-26/2013.
[20] National Report Lithuania, question 31. The Court of Appeal of Lithuania decision of 16-03-2015 in civil case No 2T-23-407/2016.
[21] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 37.
[22] Magnus/Mankowski/Siehr, *op. cit.*, Article 23, note 39; Francisco Javier Forcada Miranda, 'Revision with respect to the cross-border placement of children' (2015) 1 NIPR, p. 36.
[23] National Report Luxembourg, question 31.

1.3 Comparison between the grounds for non-recognition laid down in Article 23 and in national laws

In some Member States, such as Malta and Portugal, the grounds for non-recognition in national private international law are said to mirror the grounds which are found in Article 23.[24] In the Czech Republic a recognition rule in national private international law based on reciprocity (where recognition and/or enforcement is sought against a Czech national) is also included in § 15 under 6 of the PIL Act.[25] In Spain, a comparison between Law 29/2015, of 30 July, on international judicial cooperation in civil matters and Article 23 of the Brussels IIbis Regulation demonstrates that four of the grounds for non-recognition which are to be found in Spanish private international law essentially amount to the same grounds (public policy, infringement of the rights of defence and both cases of the irreconcilability of decisions). As for differences with the Regulation, Spanish Law includes two additional grounds for non-recognition that do not appear in the Regulation (Articles 46(c) and 46(f) Law 29/2015, of 30 July, on international judicial cooperation in civil matters).[26] However, at the same time, three of the grounds for non-recognition in Articles 23(b), 23(d) and 23(c) are not provided in the Spanish legislation. This can be explained by the fact that these grounds are very specific, whereas the Spanish ones deal with general situations.

In France, the grounds for refusing the recognition of judgments emanating from non-EU Member States provided in French national law are more manifold and also include a 'review of the jurisdiction of the courts of the State of origin' and a 'review that the foreign courts were not fraudulently seized'. Even though procedural grounds for refusing jurisdiction are allegedly not detailed (e.g., default of appearance, irreconcilability of judgments) the public policy ground is sufficiently broad to be able to include them.[27] In Greece, the conditions laid down by Article 23 are included in the relevant provision concerning recognition and enforcement in the Greek Code of Civil Procedure. Additionally, according to Greek law, in order to recognise a foreign decision, the foreign Court that has issued the judgment should be competent to rule on the case, according to the criteria adopted by the Greek Code of Civil Procedure. Furthermore, the final judgment must actually be final and considered as *res judicata* in the state of issuance.[28]

In Hungary, too, a foreign decision cannot be recognised when it is contrary to the Hungarian public order; when the party against whom the decision was made had not attended the proceedings either in person or by proxy because the subpoena, statement of claim, or other document on the basis of which the proceeding was initiated had not been property served at his domicile or residence or had not been served in a timely fashion in order to allow him/her to have adequate time to prepare his/her defence; when it was based on the findings of a procedure that seriously violated the basic principles of Hungarian law; when the prerequisites for litigation on the same right from the same factual basis between the same parties before a

[24] National Report Portugal, question 31; National Report Malta, question 31.
[25] National Report the Czech Republic, question 31.
[26] National Report Spain, question 31.
[27] National Report France, question 31.
[28] National Report Greece, question 31.

Hungarian court or another Hungarian authority materialized before the foreign proceeding was initiated (the suspension of a plea); and when a Hungarian court or another Hungarian authority had already resolved a case by a definitive decision concerning the same right from the same factual basis between the same parties.[29]

The Latvian national report makes mention of bilateral agreements in matrimonial and parental responsibility matters with the Russian Federation and Belarus.[30] Otherwise, in terms of the grounds for refusing the recognition of judgments in parental responsibility matters the main distinction is whether a judgement of an EU Member State is involved or whether it is from a non-EU Member State.[31] The Polish grounds for non-recognition lack provisions concerning the child not having been heard as a justification for non-recognition as well as when a person claiming that the judgment infringes her/his parental responsibility has not been heard.

In Sweden, in the absence of statutory provisions to the contrary, foreign judgments emanating from third countries are in principle not recognised, even though they can be given evidentiary value regarding facts and/or foreign law. Some recent decisions[32] indicate that some legal effects, for example in the field of social benefits, may even be given to foreign judgments that are not valid in Sweden.[33]

Throughout the various jurisdictions of the United Kingdom, there is no automatic recognition of foreign judgments regarding matters of parental responsibility, but the national report of the UK suggests that UK courts will generally 'give grave consideration…subject to the principle that such orders are always variable'.[34] The question of whether or not the person against whom the judgment was made was present in the foreign jurisdiction, and had engaged in the proceedings there, is also important.[35]

1.4 Grounds for non-recognition – CJEU case law

The *Rinau* case indicates that, once a decision refusing the return of a child has been taken and once this decision has been brought to the attention of the court of origin, its replacement by a decision to return the child does not prevent the court of origin from certifying the enforceability of its own decision ordering the return of the child.[36] The facts of this case are set out in detail *supra* in Chapter 4, under 4.2 '*Difficulties in application – CJEU case law*'.

The Court's case law further shows that recourse to the public policy rule in Article 23(a) of that Regulation should occur only very exceptionally. In the case of *P v. Q,*[37]

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[29] National Report Hungary, question 31.
[30] National Report Latvia, question 31.
[31] *Ibid.*
[32] E.g. NJA 2013 N 17.
[33] National Report Sweden, question 31.
[34] National Report the United Kingdom, question 31.
[35] *Ibid.*
[36] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271. An application for the non-recognition of a judicial decision is not permitted if an Article 42 certificate has been issued.
[37] CJEU Case C-455/15 PPU *P v Q* [2015] ECLI:EU:C:2015:763.

the CJEU firstly referred to the principle of mutual trust on which the recognition and enforcement of judgments delivered in a Member State should be based on, and emphasised that the grounds for non-recognition should be kept to the minimum required, as indicated in Recital 21 of the Regulation. It concluded that recourse to the public policy rule as mentioned in Article 23(a) of the Regulation is only possible when the recognition of a judgment given in another Member State would be unacceptable to a considerable extent within the legal order of the State in which the recognition is sought. Also, the best interests of the child should always be taken into consideration. In complying with the Regulation's Article 26 prohibition of any review of the substance of a judgment given in another Member State (*révision au fond*) the infringement would have to constitute a manifest breach, having regard to the 'best interests of the child', of a rule of law regarded as so 'essential' in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order.

Furthermore, under Article 23(b) the recognition of a foreign decision relating to parental responsibility must be declined if the child has not been heard, either directly or indirectly, i.e. if the child was, at the time of the decision, capable of forming his or her own views and if there was no case of urgency. In *Aguirre Zarraga v Pelz*[38] the child's German mother tried to resist enforcement in Germany on the ground that the Spanish judgment had been rendered in violation of human rights, as it appeared that the child had not been heard in the Spanish proceedings, and this was considered to be contrary to Article 24 of the EU Charter of Fundamental Rights. The Court ruled that it was not a requirement that the court of the Member State of origin had to obtain the views of the child in every case by means of a hearing, but that the right of the child to be heard does require that the legal procedures and conditions are made available to enable the child to express his or her views freely. (This case is detailed *infra* in Chapter 9, under 4.2 '*Difficulties in application of Article 42 – CJEU case law*').

1.5 Commission's proposal

The recognition of a decision in the proposal would be refused only if one or more of the grounds for refusal of recognition provided for in the proposed Articles 37 and 38 are present.[39] The grounds mentioned in points (a) to (c) of Article 38(1), however, may not be invoked against decisions on rights of access and the decisions on return pursuant to the second subparagraph of Article 26(4) which have been certified in the Member State of origin.

[38] CJEU Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2011] ECR I-14247.
[39] 2016 Commission's Proposal, p. 27, 51-52.

GUIDELINES – Summary

The grounds for non-recognition should be used very restrictively and always only if the refusal of recognition can be justified in view of the best interests of the child. The interest of the Member States in ensuring a very high level of the recognition of judgments between the Member States also indicates a very restricted use of the grounds for non-recognition.

By and large, the grounds for non-recognition mentioned in Article 23 appear to mirror those that are found in the private international law of the Member States but they can, generally, be considered to be more restrictive.

This stricter regime at the European level is justifiable given the common European legal order envisaged by the Regulation which is based firmly on the principle of mutual trust regarding the recognition of judgments between the Member States only.

It is therefore also to be hoped and expected that the amendments proposed by the Recast will promote greater respect for the principle that the child should be given the opportunity to be heard in parental responsibility matters that affect her or him, even in ‘urgent’ situations.

CHAPTER 8: Common Provisions on Enforcement

Richard Blauwhoff and Lisette Frohn

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1. Prohibition on reviewing the jurisdiction of the court of origin – Article 24

1.1 Explanation of the concept and the way it is currently regulated

Article 24 imposes an absolute prohibition on reviewing the jurisdiction exercised by the court of origin when reaching the judgment that is presented for enforcement. Further, it prohibits the court of enforcement from considering the jurisdiction relied upon as the basis for the judgment when applying the public policy exception in Article 23(a).

1.2 Difficulties in application – National Reports

In most of the National Reports, no specific problems are mentioned regarding Article 24. In the Romanian Report,[1] regarding recognition and Article 24, a concern has been expressed. Even though in the majority of cases the recognition of foreign decisions has been respected,[2] some courts still mention the fulfilment of the recognition and enforcement of decisions in cases of parental responsibility conditions laid down by the Romanian Civil Procedure Code,[3] and not the conditions laid down in the Regulation. Some judgments might be contrary to Article 24.

1.3 Difficulties in application – CJEU case law

The absolute prohibition in Article 24 follows from the CJEU ruling in *Purrucker I*,[4] which is detailed *supra* in Chapter 5, under 5.4 '*Difficulties in application – CJEU case law*'. The court held that Article 24 Brussels IIbis Regulation prohibits any review of the jurisdiction of the court of the Member State of origin.[5] In the legal literature, a number of comments have been made regarding problems in application following from relevant case law from the CJEU. In this context, Scott is of the opinion that, even though there are only a few cases where the public policy exception to recognition and enforcement was invoked, this does not mean that it will have no effect. Its mere existence may have a restraining influence.[6] The same author argues that the aim of achieving adherence to its jurisdictional requirements should preclude arguments over jurisdiction. Where obtaining *exequatur* is relevant, the Regulation expressly prohibits any review of the jurisdiction of the Member State of origin.[7] The public policy test will not permit a review of the jurisdiction of the Member Sate which has delivered the judgment. However, there is no definition of public policy in Brussels IIbis. In *Hoffman v Krieg*,[8] the CJEU held under Brussels I that a refusal to recognise a judgment based on public policy should operate only in 'exceptional circumstances'. Even if the court of origin has assumed jurisdiction on a basis that is contrary to the Regulation, this will not permit a court in the state where recognition and enforcement is sought to refuse the recognition of a judgment.

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[1] National Report Romania, question 29.
[2] *Ibid*.
[3] *Ibid*.
[4] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez I* [2010] ECR I-07353.
[5] *Ibid*., para 90.
[6] Scott, *op. cit*, p. 31.
[7] *Ibid*., p. 32.
[8] CJEU Case C-145/86 *Hoffman v Krieg* [1988] ECR 645.

Scott[9] holds that in practice maintaining this position is not quite so straightforward as it may seem, as 'mistakes happen'. There have indeed been instances of courts being seised of a case, only to discover that a second court purports to exercise jurisdiction in breach of the *lis pendens* provisions of Article 19 of Brussels IIbis. If this occurs, the court that had been first seised is permitted not only to question jurisdiction, but should also decline to enforce an order of the court second seised. See, in that connection, the case of *Mercredi*.[10]

Mellone sees a contradiction in the ruling in *Purrucker I* and *Purrucker II*.[11] In *Purrucker I*,[12] the Court held that provisional measures which fulfil the conditions under Article 20 of the Regulation, but which are nonetheless issued by non-competent courts under the rules of jurisdiction of Brussels IIbis, are not admitted to the simplified regime of the circulation of decisions.

Moreover, in the *Purrucker II*[13] case, the Court added that in the case of *lis pendens* between a provisional measure and ordinary proceedings, the latter shall continue, regardless of whether they commenced after the proceedings related to a provisional measure.

Both decisions were essentially based on the same concept: provisional measures issued by non-competent courts are an exception to the system of jurisdiction and the recognition of decisions determined by the Regulation. As such, they cannot ('really') be considered as 'decisions' in light of the simplified system of the recognition of decisions and of the *lis pendens* mechanism. This important ruling by the Court has provoked an initial and fundamental effect: in order to ascertain whether the court issuing the provisional measure is or is not competent on the merits, the court seised for the enforcement shall investigate the original competence of the issuing court (which is, *a priori*, prohibited under Article 24 of the Regulation). If the test is positive, then the enforcement can be granted: if not, it will not be granted (at least under the Brussels II system).

In the case of *Inga Rinau*[14] one of the issues placed before the CJEU in the context of a child's return concerned the meaning of Article 24 in scenarios where a national court is unable to review the jurisdiction of the foreign court which issued the original decision. For full details of this case, see *supra* in Chapter 4, under 4.2 '*Difficulties in application – CJEU case law*'. If the court cannot identify any other grounds for non-recognition under Article 23 Brussels IIbis, is it obliged to recognise the decision of the court of origin ordering the child's return if the court of the Member State of origin failed to observe the procedures laid down in the regulation when deciding on the issue of the child's return? With this rather complicated question, the referring court sought to ascertain whether Article 24 must be interpreted as meaning that the court of the Member State in which the child is wrongfully retained is obliged to recognise the decision requiring the child's return issued by the court of the Member State of origin if that

[9] Scott, *op. cit.*, p. 32.
[10] CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309.
[11] Mellone, *op. cit.*, p. 23-24.
[12] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez I* [2010] ECR I-07353.
[13] CJEU Case C-296/10 *Purrucker v Guillermo Vallés Pérez II* [2010] ECR I-11163.
[14] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271, para 42(6).

court failed to observe the procedures laid down in the Regulation.[15] The Advocate General stated: 'It may be noted that it is clear from Articles 21 and 31(2) of the Regulation, read together, that a judgment concerning parental responsibility must as a general rule be recognised and enforced in another Member State unless one of the grounds of non-recognition set out in Article 23 is present, and that Article 24 expressly prohibits review of the jurisdiction of the court of origin'.[16] The Court decided *inter alia* that once a decision has been taken and brought to the attention of the court of origin, it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child.

Article 24 specifically addresses the question of whether the public policy test referred to in Articles 22(a) and 23(a) may be applied in relation to the jurisdiction rules set out in Articles 3 to 14. The answer is unambiguous: the public policy exception cannot be invoked in respect of these jurisdictional rules nor can it be with regard to national rules of residual jurisdiction. This presumably implies that if a court in a Member State has assumed jurisdiction based on Brussels IIbis, this assertion of its jurisdiction cannot be condemned as offensive to public policy.[17] A court cannot therefore refuse the recognition of a decision on the basis of the granting court's failure to properly apply Articles 3 to 7 of Brussels IIbis. Even if a court is unable to review the jurisdiction of the court of the Member State of origin and cannot determine whether this court of origin had jurisdiction under Brussels IIbis, it cannot review the jurisdiction of the court of origin. The rationale of the provision is that the grounds for non-recognition should be 'kept to a minimum'.[18]

2. Non-review as to substance – Article 26

2.1 Explanation of the concept and the way it is currently regulated

Article 26 concerns an essential part of any effective arrangement for recognition and enforcement. In his report[19] on the 1968 Brussels Convention, Jenard observed that it was 'obviously an essential provision of enforcement convention that foreign judgments must not be reviewed. The court of a State in which recognition is sought was not to examine the correctness of that judgment. It could not substitute its own discretion for that of the foreign court, nor refuse recognition if it considered that a point of fact or of law has been wrongly decided'.[20] The Borrás Report on the Brussels II Convention traced the history of such a provision and observed that it was a necessary rule in order not to subvert the meaning of the

[15] *Ibid.*, para 56.
[16] *Ibid.*, Opinion of Advocate General Sharpston, para 98.
[17] Fawcett, J., 'Part III Jurisdiction, Foreign Judgments and Awards, Ch.16 Recognition and Enforcement of Judgments Under the Brussels/Lugano System' in: Cheshire and others *Private International Law* (14th edn., OUP 2008).
[18] Recital 21 of the Brussels IIbis Regulation and CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271, para 50.
[19] Jenard, P., 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters' [1968] Official Journal of the European Communities No. C 59/1.
[20] Jenard, P., *op. cit.* citing Graulich, P., *Principes de droit international privé* (1961), Conflits de lois. Conflits de juridictions. No 254 ; and Battifol, *Traité elementaire de droit international privé*, no 763.

exequatur procedure in recognition. That recognition must not allow the court in the State in which recognition is sought to rule again on the ruling made by the court in the State of origin.[21]

While there can be no review of the original judgment, that judgment may no longer be appropriate to the child's situation. That court cannot under any circumstances review the judgment as to its substance. The court does however have the opportunity to reject recognition, and therefore enforcement, where this would be manifestly contrary to public policy. The public policy exception applies both in relation to the recognition of judgments relating to divorce, legal separation and marriage annulment and the recognition and enforcement of judgments relating to parental responsibility. It represents a safeguard against the recognition, and in cases of parental responsibility against the enforcement, of a judgment that would be unacceptable in a national context, either because the law applied by the court of origin is unacceptable, or because the judgment itself is unacceptable. In practice the public policy exception is often invoked, but is seldom applied.[22]

2.2 Problems in application following from relevant literature

Article 26 Brussels IIbis establishes what appears to be a clear prohibition; however, there may still be questions as to how it should be applied. A question raised is whether Article 26 prohibits the court of enforcement from reviewing the effect of the implementation of the judgment upon the particular child concerned.[23]

2.2.1 The best interests of the child

Article 23(a) allows the court of enforcement to refuse to recognise or enforce a judgment if thus would be 'manifestly contrary to the public policy' of the Member State where the recognition is sought, taking into account the best interests of the child. Since this sentence is not repeated in Article 26, it can be questioned if Article 23(a) nevertheless allows the court to examine the substance of the judgment, albeit to a very limited extent, thereby evaluating whether the judgment would be contrary to the best interests of the child.[24] A judge is expressly forbidden by Article 26 from reviewing the decision by the court of origin as to its substance, but is at the same time obliged to take into account the best interests of the child. This may depend upon exactly how the term 'public policy' is to be interpreted.[25]

One question would be whether Article 26 forbids an examination of the judgment by the court of enforcement and whether this falls within the scope of the Regulation.[26]

A second question is whether Article 26 prohibits the court of enforcement from examining whether the judgment that has been presented for enforcement falls within the scope of Brussels IIbis, and so is capable of being enforced pursuant to that instrument. There does not appear to be anything prohibiting the court of enforcement from considering this issue and

[21] Borrás Report, p. 27, 64, para 77.
[22] Scott, *op. cit.*, p. 29.
[23] Setright, *et. al.*, *op. cit.*, p. 149-150.
[24] *Ibid.*
[25] *Ibid*., 6:101.
[26] *Ibid*., 6:100.

refusing to recognise a judgment on the ground that it falls outside of the scope of application of the Regulation. Thus, it becomes clear that the review of a judgment by the court of enforcement must be limited to determining whether it falls within the scope of Brussels IIbis, and the application of the Article 23 factors.[27]

It has been argued that a court invited to recognize or enforce a judgment under a European Regulation must be free to determine for itself whether the judgment falls within the scope of the Regulation. This seems to be the practice under the instruments dealing with judgments in civil and commercial matters and appears to follow from the logic of the system established by the Regulation.[28] This apparent reservation seems to soften the clear prohibition, although this exception is not laid down in the provision itself.

2.2.2 Substance

Where Article 26 of the Brussels IIbis establishes a clear prohibition on reviewing the ruling of the court of origin as to substance, Article 23 provides the grounds for non-recognition. As these grounds all relate to procedural grounds, no contradiction can be found between Article 26 and Article 23. As to the term 'substance', some clarification would be useful. Especially the distinction between 'substance' and 'procedure' is not always clear to practitioners, as can be seen from the following cases. A number of courts have held that an examination of issues of a procedural nature would nonetheless amount to a review of the substance of the foreign judgment.[29] A different approach was taken by Advocate General Jacobs in *Hendrikman v. Magenta Duck & Verlag GmbH*[30] where the issue concerned the equivalent Article 29 of the 1968 Brussels Convention, prohibiting a court before which recognition is sought from making any inquiry into whether the defendant had been validly represented in the proceedings leading to the foreign judgment.[31] In his opinion,[32] the Court expressed the view that it would be stretching normal usage to construe the concept of the 'substance' of a judgment as encompassing such unequivocally procedural elements as service and presentation. However, he still argued that the court before which enforcement was sought could not investigate this type of procedural irregularity. The grounds for refusing enforcement were set out exhaustively in other Articles, and procedural irregularities could not be investigated except to the extent that they fell within one of the grounds so set out. In other words, even if a restrictive meaning is given to the term 'substance' in Article 26, the structure of the Regulation as a whole extends and reinforces the prohibition on reviewing the substance of the foreign judgment.[33] A different point of view was given by an English court which held that a prohibition on reviewing the substance of a foreign judgment prevails over the grounds for which recognition may be

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[27] *Ibid*., 6:104 and 6:107.
[28] Dicey and Morris, *The Conflict of Laws (*13th ed., Sweet & Maxwell 1999), paras 14-202.
[29] *Les Assurances Internationales v. Elfring*, Jur. Port. Anvers 197901980, [184] (the notification addressed the wrong person); Bundesgerichtshof (VIII ZB 9/79, 16 May 1979, (1979) E.C.C. 321 (judgment with the defendant having been heard).
[30] CJEU Case C-78/95 *Hendrickman and Feyen v. Magenta Druck & Verlag* [1996] ECR I-4943.
[31] Magnus/Mankowski/McClean, *op. cit.*, Article 26, note 6.
[32] *Ibid.*; CJEU Case C-78/95 *Hendrickman and Feyen v. Magenta Druck & Verlag* [1996] ECR I-4943, para 46 ff and para 22.
[33] Magnus/Mankowski/McClean, *op. cit.*, Article 26, note 7.

refused. This was the case of *Interdesco SA v Nullifire Ltd*[34] where it was alleged that the foreign judgment had been obtained by fraud; the Commercial Court held that where the foreign Court, in its judgment, has ruled on precisely the matters that a defendant seeks to raise when challenging the judgment, the Article prohibiting a review of the substance precluded the requested court from reviewing the conclusion of the foreign court.

3. Stay of proceedings – Article 27

3.1 Explanation of the concept and the way it is currently regulated

The Regulation seeks to ensure the ready recognition of judgments given in other Member States. However, there are circumstances in which the recognition of a foreign judgment can be fairly problematic, for instance in the case of a judgment that has not become *res judicata,* and the judgment is subsequently overturned on appeal. Article 27 aims to prevent the compulsory recognition of judgments which may be annulled or amended in the State of origin. Article 27(1) applies when an ordinary appeal against the judgment given in another Member State has been lodged in that Member State. The authority to stay proceedings depends on whether the appeal has actually been lodged.[35]

The power to stay proceedings is a matter of discretion; the Article imposes no mandatory duty for the recognizing court to stay proceeding. This opportunity to have discretion amounts to a measure to prevent possible abuse by a party seeking to delay the recognition and enforcement of a judgment by lodging a hopeless appeal. The question arises, however, as to the basis on which the discretion is to be exercised. There are cases, especially in the family context, where a delay in recognizing or enforcing a judgment could have harmful effects on the child or the adult parties concerned, and this will no doubt predispose a court to decline to stay proceedings.[36]

3.2 Difficulties in application – CJEU case law

3.2.1 Proceedings finalised

There has been some relevant case law regarding Article 27 Brussels IIbis. As to whether divorce proceedings in one jurisdiction have become finalised so that the divorce and any related jurisdiction has come to an end, the Court of Appeal in *Moore*[37] held that Article 27 applied so that proceedings in the country first seised had been completely determined when any appeal had been concluded. In *C v S*,[38] the court stated that for a court to remain seised of the matter there had to be existing proceedings before it. Despite these two decisions, there is still much uncertainty, and a potential for litigation, about when proceedings in the first seised jurisdiction have become completely finalized so that any proceedings in the second in time court can go ahead.[39] Hodson says that whilst there is some degree of precision about when a

[34] *Interdesco S.A. v Nullifire Ltd* [1992] 1 Lloyd's Rep. 180.
[35] Magnus/Mankowski/McClean, *op. cit.*, Article 27, note 1-3.
[36] *Ibid*., Article 27, note 8.
[37] *Moore v Moore* [2007] 2 FLR 339, EWCA 3612 (Civ).
[38] *C v S* [2010] 2 FLR 19 EWHC 2676 (Fam).
[39] Hodson, D., *The International Family Law Practice 2013-2014* (3rd edn., Family Law 2013).

court is first seised under Brussels IIbis, there remains a great deal of uncertainty for practitioners and (second seised) courts across Europe about when the first seised court is no longer seised.

3.2.2 The importance of speed

Another issue relating to Article 27 is the importance of speed. The fundamental importance of speed in a case where divorce petitions were issued within an hour or so of each other is shown in *LK v K*.[40] The stay of proceedings did not contribute to this issue. In *C v S*,[41] the issuing of divorce orders back and forth from England to Italy led to unintentionally unfortunate outcomes.

3.2.3 Ordinary appeal

One element of Article 27 has been clarified by the CJEU. The power to order a stay only applies when the appeal is an ordinary appeal. The distinction between an ordinary appeal and an extraordinary appeal can be found in many Member States but it is not the same in all States. In some States, there are clear legal definitions, in others a distinction is drawn on the basis of doctrinal opinions. The Court has stated in its decision in *Industrial Diamond Supplies v Riva*[42] that the distinction between ordinary and extraordinary appeals had to have an autonomous meaning; the nature of the distinction drawn in the national law of the State of origin or in that of the State asked to recognize the judgment was not determinative. For the purposes of the 1968 Brussels Convention and now of the present Regulation, an ordinary appeal is any appeal which forms part of the normal course of an action and which, as such, constitutes a procedural development which any party must reasonably expect. The Court held that any appeal bound by the law to a specific period of time which starts to run by virtue of the actual decision whose recognition is sought constitutes an ordinary appeal. Any appeal which might be dependent on events which were unforeseeable at the date of the original judgment or upon action taken by persons who were extraneous to the judgment, would not be an 'ordinary appeal'.[43] A definition, in line with the case law of the Court, of what an 'ordinary appeal' is could therefore be a convenient addition to Article 27. This would be to harmonize the procedural laws of the Member States.

When should proceedings be stayed? In *Industrial Diamonds Supplies v. Riva,*[44] the Court spoke of the power to stay proceedings 'whenever reasonable doubt arises with regard to the fate of the decision in the State in which it was given'. This ruling seems to be contradictory when one reads the ruling with Article 26 in mind; an argument that the appeal in the State of origin is very likely to succeed, because the foreign court's decision was plainly wrong, cannot be entertained, for that would have the effect of reviewing the substance of the foreign judgment, expressly prohibited in Article 26.[45] However, courts do explore the likelihood that

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[40] *LK v K (Brussels II Revised: maintenance pending suit)* [2006] 2 FLR 1113, EWHC 153 (Fam)
[41] *C v S* [2010] EWHC 2676 (Fam).
[42] CJEU Case C-43/77 *Industrial Diamonds Supplies v. Riva* [1977] ECR 2175.
[43] Magnus/Mankowski/McClean, *op. cit.,* Article 27, note 6.
[44] CJEU Case C-43/77 *Industrial Diamonds Supplies v. Riva* [1977] ECR 2175, para 33.
[45] Magnus/Mankowski/McClean, *op. cit.,* Article 27, note 9.

the pending appeal will affect the outcome, or the particular aspects relevant to recognition or enforcement.[46]

3.3 Suggested improvements

As stated by Magnus/Mankowski, referred to in the above section, a definition, in line with the case law of the Court, of what an 'ordinary appeal' is could be a convenient addition to Article 27. This is to harmonize the procedural laws between the Member States.

3.4 Commission's proposal

Firstly, the 2016 Commission's Proposal shows an adaptation of the above-mentioned suggestion. In the first paragraph (a), the sentence 'if an ordinary appeal against the judgment has been lodged' has been replaced by 'the decision'. Furthermore, the Commission's proposal shows a few changes to Article 27. The proposal has added two paragraph (b)-(c) stating that a court can stay proceedings if:

> (b) an application has 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) 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.

4. Enforceable judgments and declarations of enforceability (*exequatur*) (Articles 28-36)

Articles 28 to 36 are essentially concerned with the enforcement of decisions relating to parental responsibility.[47] The enforceability of a decision regarding parental responsibility should follow from the decision itself. [48]

An *exequatur* is not required for 'rights of access' and for the return order subsequent to the second chance procedure under the current Regulation.[49] What is to be considered 'enforceable' requires an autonomous interpretation and also requires the objective of Article 28 and subsequent provisions to be taken into consideration. It means that the decision should be enforceable in the Member State where the decision was made.

Furthermore, the judgment should have been served, something which will usually be established by means of the certificate issued by the competent court or authority of the Member State of origin under Article 39 and in the form specified in Annex II.

As for the service of certificates between the Member States, Recital 15 of the Regulation indicates that the Service Regulation should apply to the service of documents in proceedings instituted pursuant to the Regulation. An application for a declaration of enforceability may be made by any 'interested party'.

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[46] Liege, 8 March 1984, Jurisprudence de Liege (1984) 289; *Societe Protis v. Societe Cidue,* Versailles CA, 21.
[47] Althammer, *et. al., op. cit.,* Article 28, no. 10.
[48] *Ibid.*
[49] Articles 41 and 42 of the Brussels IIbis Regulation. For a comment on these exceptions and the proposal see, for example: Kruger and Samyn, *op. cit.*, p. 159-160.

The current procedure with regard to enforcement should be considered to be a matter of national law pursuant to Article 47(1) of the Regulation. In that connection, it is worth recalling that the legal systems of Ireland and those of the United Kingdom do not have an *exequatur* system unlike the other Member States. Rather, a judgment from another Member State should be registered in Ireland and the United Kingdom.

Pursuant to the first subparagraph of Article 29 (Jurisdiction of local courts) an application for a declaration of enforceability shall be submitted to the court appearing in the list notified by each Member State to the Commission pursuant to Article 68. The local jurisdiction shall be determined by reference to the place of the habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates. Where neither of the places referred to in the first subparagraph can be found in the Member State of enforcement, the local jurisdiction shall be determined by reference to the place of enforcement (second subparagraph of Article 29). The provision aims to provide greater clarity for citizens with regard to the question of which court has jurisdiction to hear the case. The court to which the application is made must have the authority to check that it does indeed have jurisdiction. Moreover, in some cases a child may be present but not habitually resident in a state; in such a case the second sub-paragraph confers jurisdiction in such cases to the local court for the place of enforcement.[50]

The procedure for making the application is governed by the law of the Member State of enforcement (Article 30(1)). Procedural matters are accordingly in principle governed by the *lex fori*. Even so, this provision contains mandatory requirements as regards an address for service and regarding the documents that must be supplied with the application. The Regulation does not specify any sanction for a failure to provide an address for service as this is left to the national law of the Member State in which enforcement is sought.

If the law of the Member State of enforcement does not provide for the furnishing of an address, the applicant should appoint a representative *ad litem* (Article 30(2)). The documents referred to in Articles 37 and 39 are attached to the application (pursuant to Article 30(3)). Strictly speaking, that requires affixing the documents by stapling or other means, but it is thought that the supply of the documents at the same time as the application itself will suffice.[51]

Article 31 aims to ensure that a decision on an application for a declaration of enforceability is given promptly in an *ex parte* procedure. The court applied to should give its decision 'without delay' but there is no specific time-limit within which the decision should be given. Paragraph 2 of Article 31 specifies that an application may only be refused for one of the reasons mentioned in Articles 22 (grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment), 23 (grounds of non-recognition for judgments relating to parental responsibility) and 24. Article 24 is not an additional ground for refusal but prohibits any review of the jurisdiction of the court of the Member State of origin and ensures that the test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the

[50] Althammer, *et. al.*, *op. cit.*, Article 30, no. 2.
[51] Magnus/Mankowski/McClean, *op. cit.*, Article 30, note 6; see further also Althammer, *et. al.*, *op. cit.*, Article 37, no 1 *et seq*.

rules as to jurisdiction set out in Articles 3 to 14. Pursuant to 31(3), under no circumstances may a judgment be reviewed as to its substance.[52]

Article 32 incorporates an obligation for the appropriate officer of the court to bring to the notice of the applicant, without delay, the decision given on the application in accordance with the procedure laid down by the law of the Member State of enforcement. The identity of this officer and the form in which and the method by which the decision is to be notified are matters for the national law of the Member State in which enforcement is sought. It should further be noted in respect of this provision that there appears to be no duty under the current Regulation to inform any other party.[53]

4.1 Appeal against a positive decision of enforceability (Articles 33-34) and a stay of the proceedings (Article 35)

Article 33 regulates the option to appeal against a positive decision of enforceability which is necessary and vital in order to avoid violations with Article 6 of the European Convention on Human Rights.[54] The right to appeal is only available to the formal parties at first instance and not to genuine third parties or an interested state body. It is modelled after Article 43 of the Brussels I Regulation.[55] The object of the appeal is the final decision of the court of first instance.[56]

Paragraph 2 of Article 33 vests exclusive jurisdiction in the appellate courts designated by the Member States. If an appeal has been lodged with a court not so designated, then this court has to transfer the case to the competent court in the same State, using the rules on the procedural transfer of the respective *lex fori*.[57] The Regulation does not establish a detailed regime. It is left to national legislatures to impose time-limits for a written reply by the respondent in the appeal proceedings and to prescribe whether such proceedings are predominantly to be oral or written in nature as long as the requirements of a fair trial are observed.[58] Either party should have the opportunity to participate and to be heard by the appellate court. Some degree of judicial involvement would not only be consistent with national law in many member states, but also appropriate given the nature of the judgments to be enforced.[59]

The respondent may be drawn into the contradictory proceedings at second instance even if he/she in substance has won at first instance by virtue of Article 33(4). This has to do with the unilateral nature of the *exequatur* proceedings at first instance. If he/she does not abide by the court's call and does not appear, he/she will only enjoy the minimum protection offered by Article 18.

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[52] Althammer, *et. al.*, *op. cit.*, Article 24, no 2.
[53] *Ibid.*, no. 1.
[54] Magnus/Mankowski/McClean, *op. cit.*, Article 33, note 1.
[55] See also Althammer, *et. al.*, *op. cit.*, Article 33, no 1.
[56] A list of courts is available under http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/manual_cv_en.pdf.
[57] Magnus/Mankowski/McClean, *op. cit.*, Article 33, note 17.
[58] *Ibid.*, Art. 33, note 17.
[59] Scott, *op. cit.*, p. 33.

Pursuant to Article 33(5), the appeal against a declaration of enforceability must be lodged within one month of the service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and this runs from the date of service, either on him/her personally or at his/her residence. No extension to this time may be granted on account of distance.

Extensions for other reasons may be granted, however, according to the national law of the state of the *exequatur* proceedings. It should be noted that if a party against whom enforcement is sought is resident in a third state, then only Article 33(5)(1) is applicable so the shorter time applies in spite of longer distances and greater risks in communication. The judgment given on appeal may only be contested by means of the proceedings referred to in the list notified by each Member State to the Commission pursuant to Article 68 (Article 34). The purpose of this provision is to reduce further means of appeal against an appellate decision, on limited grounds and on grounds of law only. Of particular importance is the exclusion of any further means of appeal which would be based on factual grounds.[60] The provision does not restrict the scope of the remedies that may be made available but leaves this to the *lex fori* of the Member State.[61]

Article 35 regulates a stay of proceedings in the case of enforcing still appealable judgments. The appeal court in the enforcement state may stay its proceedings and await the decision of the judgment state's court or set a time limit for lodging such an appeal. The provision applies only where in the enforcement state an appeal is lodged either against the decision of a court of that state declaring a foreign judgment enforceable (Article 33) or against an appeal judgment concerning such a decision (Article 34). The court of appeal or even the court of third instance may then stay the proceedings; even though the third instance's entitlement can be seen as contentious because that instance will often limit itself to reviewing questions of law whereas the decision to stay may involve questions of fact, this choice has been justified in order to avoid the irreversible consequences of the enforcement of a still appealable judgment and, more generally, to avoid conflicting judgments.[62] The appeal court in the enforcement state cannot order a stay of proceedings on its own motion, but rather the party against whom enforcement is sought must apply for a stay of the proceedings.

It has been contended that, by way of analogy, a child should have an ('independent') right to apply for a stay, at least where the appeal against the original judgment was lodged in that child's interest and where that child objects to the appeal in the enforcement state but enforcement is not sought against the child.[63]

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[60] Magnus/Mankowski/McClean, *op. cit.*, Article 34, note 1; Althammer, *et. al.*, *op. cit.*, Article 34, no 1.
[60] Althammer, *et. al.*, *op. cit.*, Article 34, no 3.
[61] *Ibid.*
[62] Magnus/Mankowski/McClean, *op. cit.*, Article 35, note 5.
[63] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht*, *op. cit.*, Article 35, note 2; Bülow/Böckstiegel/Geimer/Schütze, *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (Verlag C.H. Beck 2016), Article 35, note 4; Magnus/Mankowski/McClean, *op. cit.*, Article 35, note 12.

4.2 Difficulties in application – National Reports

From Belgium, one case has been reported which lays bare some difficulties. In this case the Court of Appeal of Ghent had set up a preliminary agreement between the divorced parents on parental responsibility over their children. The mother wanted to take the children to Scotland for the summer holidays. The court was concerned about the execution of its decision in Scotland. The Belgian court referred to Article 28(2) and confirmed that the judgment would only be enforceable after its registration in Scotland. The Belgian court also confirmed its competence to issue a certificate under Article 39 at the request of one of the parties, something which would be needed to obtain the enforcement of the judgment in Scotland.[64]

From Estonia some problems have been reported as regards the specification of exactly what sort of enforcement measures should be taken. However, the National Reports attest to the claim that in most other Member States, courts have not encountered particular problems in relation to the recognition and enforcement of decisions in cases of parental responsibility. Nonetheless, in some instances, as the Greek National Report exemplifies, foreign judgments have not been recognised or enforced due to the following grounds: a) that there was no written agreement on the custody rights and rights of access ratified by the foreign court[65] (b) or because there was no certificate that the foreign decision was final. In the absence of the certificate the Greek court stayed the proceedings and ordered a repetition of the hearing,[66] (c) no certificate proving that the foreign decision is not irreconcilable with a latter Greek judgement was produced. Nonetheless, in that case the Greek court stayed the proceedings and ordered a repetition of the hearing.[67] As for Italy, it has simply been affirmed that decisions about parental responsibility should undergo a procedure of *exequatur*,[68] with the exception of decisions on right of visitation and decisions on the return of a child who had been illicitly transferred abroad.[69] From Luxembourg only one case is reported wherein a Luxembourg court dealt with the question of the execution of a judgment on parental responsibility issued by a court of another Member State. The Luxembourg court applied Article 21(1) to automatically recognise the decision (issued by a French court).[70] But at the same time the court pointed out that a declaration of enforceability was lacking and therefore requested the interested party to still apply for it, following the procedure for making such an application. Nothing was said about the fast-track procedure of *exequatur* with regard to the certificate issued by the court of origin, according to Articles 40 and 41.[71]

4.3 Partial enforcement – Article 36

Pursuant to Article 36 only a part of a judgment may be declared enforceable where either enforcement of all parts of the judgment cannot be authorised or where the applicant has so

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[64] National Report Belgium, question 29.
[65] National Report Greece, question 30.
[66] *Ibid.*
[67] *Ibid.*
[68] National Report Italy, question 29. Reference to Cass. 27188/2006.
[69] National Report Italy, question 29.
[70] National Report Luxembourg, question 29.
[71] National Report Luxembourg, question 29. Cour d'appel de la jeunesse', no. 31882, 26 March 2007.

requested. This can be the case, for example, where the judgment concerns more than one child or the right of access as well as the return of the child or where only part of the judgment falls under the Regulation. In respect of Article 36, Magnus contends that decisions on costs and detailed orders on access with several dates should not be considered to be severable.[72] A court is not allowed to reject the enforcement of the whole judgment because parts of it are not enforceable and the court has no discretion but must decide *ex officio*. In contrast to (1) it is not necessary, however, that the remainder of the judgment, for which no enforcement is sought, is unenforceable.[73]

Individuals are entitled to request that the records reflect their new status on the production of a copy of a judgment pursuant to Article 37 and of a certificate (Article 39) in the standard form set out in Annex I of the Regulation.

4.4 Difficulties in application – CJEU case law

The case law of the CJEU is limited with regard to the requirements with regard to enforcement. In *Rinau*[74] it was affirmed, however, that a procedure must be interpreted in the light of the fact that, being of an enforceable and unilateral nature, it cannot take account of the submissions of that party without assuming a declaratory and adversarial nature, which would run counter to its very logic according to which the rights of the defence are ensured by means of the appeal provided for in Article 33 of the Regulation.[75] In *C v. M,*[76] it was held that the Regulation must be interpreted as meaning that, in circumstances where the removal of a child had taken place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment fixing the child's residence at the home of the parent living in the Member State of origin, the failure to return the child to that Member State following the latter judgment was wrongful; Article 11 of the Regulation is applicable if it is held that the child was still habitually resident in that Member State immediately before retention.[77]

5. Documents required for the recognition and enforcement of decisions (Section 3: provisions common to Sections 1 and 2 (Articles 37-39))

5.1 Introduction

Section 3 of Chapter III currently contains three provisions (Articles 37 to 39) defining the formal requirements for documents which are in principle (still) necessary for the recognition and enforcement of decisions from other EU Member States (with the exception of Denmark) concerning marriage and parental responsibility. This may change radically in view of the changes relating to the abolition of *exequatur* in the proposal.

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[72] Magnus/Mankowski/McClean, *op. cit.*, Article 36, note 5 and 7.
[73] *Ibid*., Article 36, note 8.
[74] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271. See for full details *supra* in Chapter 4, under 4.2 '*Difficulties in application – CJEU case law*'.
[75] *Ibid*., para 101.
[76] CJEU Case C‑376/14 PPU *C v. M* [2014], ECLI:EU:C:2014:2268. See for full details *supra* in Chapter 1, under 3.11.2 '*Difficulties in application – CJEU case law*'.
[77] *Ibid*., para 54.

Generally, two documents are at present required: an authenticated copy of the respective judgment and a certificate using the standard form provided for by Annex I of the Regulation (on matrimonial matters) or II (on parental responsibility).

The documents must be produced by the person instituting the proceedings or relying incidentally on the judgment. The copy should satisfy the conditions necessary to establish its authenticity which means that the copy must meet the requirements of authentication prescribed by the particular Member State where the judgment has been rendered (*locus regit actum*). Legalisation or other formalities are not required, nor is a translation required although the latter can be requested by the court which is concerned with the recognition or enforcement of the judgment (Article 38(2)).[78]

Additional documents are required in the case of default judgments (Article 37(2)). It must then also be shown and evidenced by documents that the defaulting party had the opportunity to defend him/herself properly in the original proceedings or is content with the judgment.[79]

Proof of the service of proceedings (Article 37(2)(a)) can be effected by the original or a copy of the document which shows that the defaulting party was served with the document that instituted the proceedings or was served with a similar document that informed the defaulting party of the proceedings.[80] With respect to default judgments relating to parental responsibility it could be argued that a document proving that the defaulting party was properly

[78] Althammer, *op. cit.*, Article 37, no. 2. National Report the Netherlands, question 29. In the Netherlands, the Court of Appeal of 's-Hertogenbosch, 3 March 2015, ECLI:NL:GHSHE:2015:648 recognized without reservation a Spanish decision on the basis of Article 21 Brussels IIbis. The Court of Appeal did find that it had to make a ruling on the translation of the terms 'patria potestad' and 'guardia y custodia' used in the Spanish decision. In Court of Appeal of The Hague, 7 December 2005, NIPR 2006, 12 the wife had lodged divorce proceedings in Spain, the husband one month later in the Netherlands. As the documents instituting the proceedings in Spain had not been served properly on the husband (Article 8 of Brussels II Regulation, lack of translation), the Dutch courts had been seised first.

[79] National Report Spain, question 29. In Spain, for example, in case number 232/2012 of 2 May the Provincial Court of Zaragoza confirmed that '…it is not enough to plead the involuntary non-appearance in order to exclude the enforcement of a judgment…the Regulation demands that respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence'. See also National Report Romania, question 29. Furthermore, in Romania the Brasov County Court discussed the incidence of Article 22(b) of the Regulation in relation to a judgement pronounced by default in Germany. The court granted the recognition since the claimant was the party in default of appearance in the divorce proceedings; his request was considered *per se* a non-equivocal acceptance of that default judgement. The significance of the documents mentioned in Articles 37(2)(a) and 37(2)(b) (proof of proper service and of a clear acceptance of the default judgement) was also discussed; since these documents are designed to safeguard the procedural rights of the defaulting party, when this is the one seeking recognition, the court decided to dispense with their production. See further National Report Greece, question 30. In Greece, although generally no problems have been observed in relation to the recognition of divorce decisions which are systematically granted when the necessary documents for the recognition are missing the hearing may be repeated.

[80] Magnus/Mankowski/Magnus, *op. cit.*, Article 37, note 20; National Report Malta, question 29. The Maltese Report raises the issue of notifications (serving the other party with the official court documents) and suggests that a recast could introduce a new method of notification by email or some other form of technologically advanced way in order to gain time as usually a considerable amount of time is 'wasted' on several attempts to notify the other party.

served does not suffice since the child should have had the opportunity to be heard, even though this will often be documented in the judgment itself.[81]

As an alternative to the requirement of the service of proceedings, the claimant can also prove and has the burden of proof that the defaulting party has clearly accepted the default judgment. It has been suggested that Article 37(2)(b) applies only to judgments in matrimonial matters but not to those in matters of parental responsibility on the basis of a textual interpretation of the term 'defendant' (*Antragsgegner; défendeur*).[82]

There is no strict time-limit for the production of the required documents. A later production during the proceedings is permitted or the court may set a time-limit for the production of the respective document(s) (Article 38(1)). If the required documents are not presented the court or competent authority can set a time frame for their production, accept equivalent documents or completely dispense with their production or dismiss the motion at once. The choice is left to the discretion of the court. Since the aim is to facilitate the recognition and enforcement of judgments and to ensure procedural fairness towards the parties involved, a dismissal without giving the claiming party at least an opportunity to provide missing documents will only be a correct decision in rather rare cases where it is clear from the outset that no recognition or enforcement can be granted.[83]

The applicant can present all the required documents in the language in which they were originally issued, that being the language of the judgment. Nonetheless, Article 38(2) entitles the court to request a translation into the court's language.

Finally, Article 39 obliges the court or authority of the Member State whose courts have rendered the judgment to issue a certificate in the form prescribed by Annex I or II if an interested party so requests.[84]

The contents of the certificate are standardised by Annex I and II of the Regulation.[85] The Annex I certificate (on matrimonial matters) must state the name, address and date of birth of the spouses and particulars of their marriage, whether the judgment concerned a divorce, an annulment or a separation, whether it is subject to an appeal and when it takes effect. It does not state whether and when the judgment was served on the spouse against whom recognition

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[81] Magnus/Mankowski/Magnus, *op. cit.*, Article 37, note 24.
[82] *Ibid*., Article 37, note 26.
[83] *Ibid*., Article 37, note 2.
[84] National Report Belgium, question 29. An example is provided by a Belgian case, see the Court of Appeal of Ghent 27 May 2010, *Revue@dipr.be* 2010/3, 62. In this case the Court of Appeal of Ghent had set up a preliminary agreement between the divorced parents on parental responsibility over their children. The mother wanted to take the children to Scotland for the summer holidays. The court was concerned with the execution of its decision in Scotland. The court referred to Article 28(2) Brussels IIbis and confirmed that the judgment would be enforceable after registration in Scotland. The court also confirmed its competence to issue a certificate under Article 39 at the request of one of the parties, which would be needed to obtain the enforcement of the judgment in Scotland.
[85] National Report Romania, question 29. In the Romanian Report mention is made of a case decided by the Suceava County Court, civil decision no. 1502 from 8 October 2015, refusing the recognition of a divorce judgement originating from Spain on the ground that the claimant did not prove that the judgment was final and also did not produce the certificates required by Arts 37 and 39 of the Regulation. The applicant instigated an appeal, produced the requested certificates and the decision was quashed by the Suceava Court of Appeal, 1st civil Division, civil decision no. 77 from 26 January 2016.

or the enforcement of costs is sought.[86] Few problems have been reported in this regard by the Reporters of the Member States. Even so, the Belgian Report states that an ongoing issue concerning the Regulation is the lack of awareness of its application among the local authorities. Thus, dealing with the recognition of divorce acts or judgments within the EU, the Flemish Agency for Integration[87] has reported that many local authorities are not aware that European judgments or acts are governed by the recognition regime of Brussels IIbis. It may occur that a European divorce act already has an apostille, but not an Article 39 certificate. The question remains in such a case whether a certificate is still really necessary.

The Annex II form (on parental responsibility) requires the name, address and date of birth of the person(s) with rights of access and of the persons holding parental responsibility, the name and certificate of the children covered by the judgment, the attestation of the enforceability and service of the judgment and specific information as the case may be on access arrangements or return orders.[88]

Each interested party is entitled to request the issue of the respective certificate. With respect to judgments in matrimonial matters both spouses have that right. With respect to judgments on parental responsibility either parent or the child are entitled and, as the case may be, the respective authority is also entitled as an interested party under Article 28.[89]

5.2 Commission's proposal

The proposal envisages a series of standard certificates which aim at facilitating the recognition or enforcement of the foreign decision in the (proposed) absence of the *exequatur* procedure. These certificates are expected to facilitate the enforcement of the decision by the competent authorities and are also expected to reduce the need for a translation of the decision. [90]

[86] Magnus/Mankowski/Magnus, *op. cit.*, Article 39, note 8.
[87] The 'Agentschap Integratie en Inburgering', see http://www.integratie-inburgering.be.
[88] Magnus/Mankowski/Magnus, *op. cit.*, Article 39, note 9.
[89] *Ibid*., Article 39, note 4.
[90] 2016 Commission's Proposal, p.15.

GUIDELINES – Summary

Articles 28-36

A judgment must be enforceable in the Member State in which it was given but this does not mean that the judgment has to be *res judicata* in order to be recognised. The requirement that the decision authorising enforcement be served has a dual function, namely to protect the rights of the party against whom enforcement is sought and in order to calculate the strict and mandatory time-limit for appealing to be calculated precisely.

Article 37-39

The current Regulation does not autonomously state what requirements of authentication are required. The court seised should receive reliable information regarding the means of authentication in the judgment state.

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

Vesna Lazić and Wendy Schrama

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1. Introductory remarks

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

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

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

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

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

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

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

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

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

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

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

Provisions which are relevant for a Member State of enforcement:

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

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

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

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

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

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

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

3.1 General remarks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3 Difficulties in application of Article 41 – National Reports

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Enforcement scheme under Article 42

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

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

4.1 Difficulties in application of Article 42 – National Reports

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

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

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

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

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

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

[40] National Report Poland, question 44.

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

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

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

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

[45] National Report Spain, question 44.

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

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

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

4.2 Difficulties in application of Article 42 – CJEU case law

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

The case of *Rinau*[51] illustrates the problems that can arise due to multiple instances of adjudication in different EU Member States. This seriously hampers the efficiency of proceeding and delays the return of the child. One of the questions submitted to the CJEU in this case concerned the issue of when it is appropriate to commence a second chance procedure under Article 11(8). Namely, a first instance decision on the non-return of the child can be reversed or overturned by higher courts in the Member State to which the child has been wrongfully removed or retained. In such a case, there would be no decision on non-return strictly speaking and the second chance procedure in the Member State from which the child is removed or returned may appear unnecessary. The facts of the case are outlined *supra* in Chapter 4, under 4.2 '*Difficulties in application – CJEU case law*'.

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

[47] National Report Austria, question 43.

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

[49] National Report France, question 43.

[50] National Report Latvia, question 43.

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

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

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

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

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

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

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

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

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

The father brought two sets of proceedings in Germany. First, he petitioned for the return of his daughter to Spain on the basis of the 1980 Hague Child Abduction Convention. That application was granted in the first instance, but overturned on appeal. The latter decision was based on Article 13(2) of the 1980 Hague Convention and the child's clear objections to return to Spain.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[67] *Ibid*., paras 80–81.

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

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

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

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

[72] Lazić, 'Family Private International Law Issues before the European Court of Human Rights: Lessons to Be Learned from *Povse v. Austria* in Revising the Brussels IIa Regulation' in Paulussen, *op. cit.*, p. 179.

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

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

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

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

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[73] Beaumont, *et al.*,' Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the effect of Brexit on Future Child Abduction Proceedings', *op. cit.*, p. 24.

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

[75] Beaumont, *et al.*,' Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the effect of Brexit on Future Child Abduction Proceedings', *op. cit.*, p. 25

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

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

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

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

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

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

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

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

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

5. Documents to be submitted – Article 45

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

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

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

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

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

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

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

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

6.1 Difficulties in application of Section 4 – National Reports

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

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

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

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

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

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

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

6.2 Difficulties in application of Section 4 – CJEU case law

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

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

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

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

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

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

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

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

7. Commission's proposal

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

8. Other provisions in Section 6 of Chapter III

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

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

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

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

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

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

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

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

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

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

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

8.2 Difficulties in the application of Article 48 – National reports

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

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

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

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

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

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

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

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

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

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

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

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

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

8.6 Difficulties in application of Article 52 – National Reports

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

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

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

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

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

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

GUIDELINES – Summary

Abolishing the exequatur

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

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

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

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

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

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

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

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

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

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

Hearing of the child

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

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

CHAPTER 10: Cooperation between Central Authorities in Matters of Parental Responsibility

Vesna Lazić and Wendy Schrama

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1. Introduction

Cooperation between Central Authorities in matters of parental responsibility is dealt with in Chapter IV of the Brussels IIbis Regulation. Just like the Regulation, the 2016 Commission's Proposal in the title of Chapter V illustrates that the legislator opted for restricting it to parental responsibility, where this cooperation contributes to realising the aims of free movement.[1] In this respect, judicial cooperation is essential to target the aim of free movement for international couples.[2] Central Authorities, which have to be designated by each Member State according to Article 53, play a crucial role in the application of the Regulation. The cooperation between the Central Authorities of the Member States aims to improve the application and enhance the effectiveness of the Regulation.[3] This is done by ensuring that jurisdiction in matters of parental responsibility is assigned to the most convenient court and that decisions taken by a court in one Member State are effective in other Member States, as well as by promoting an amicable resolution of family disputes.[4] That could create synergy in many ways. It also follows from the Practice Guide 2015 that Member States have to provide for sufficient financial means and training for the personnel of these Central Authorities.[5] In this context the 1996 Hague Convention is relevant: both international instruments aim at effective cooperation in a cross-border context. The cooperation provisions in the 1996 Hague Convention are more detailed and provide more clarity concerning the tasks of the Central Authorities. For children with their habitual residence in an EU Member State the provisions of the Regulation prevail over the more elaborate 1996 Hague Convention rules. For most EU Member States, the Central Authorities designated pursuant to the Brussels IIbis Regulation are the same as those under the 1996 Hague Convention (see *infra* in this Chapter, under 4.1.1 '*National Reports on the organisation and cooperation of Central Authorities*').

2. Designation of Central Authorities – Article 53

According to Article 53 of the Regulation, all Member States are under an obligation to designate at least one Central Authority to assist with the application of the Regulation. It is required that Member States specify the geographical or functional jurisdiction of each authority when a Member State has assigned more than one authority. In the Practice Guide 2015 it is stressed that the authorities should ideally coincide with the already designated authorities that are engaged in applying the 1980 Hague Child Abduction Convention so that they can benefit from the experiences acquired in child abduction cases.[6] However, this is not the case in Bulgaria, Hungary, Italy, Lithuania and the UK in relation to Gibraltar.[7]

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[1] Magnus/Mankowski/Pinheiro, *op. cit.*, Article 43, note 2.
[2] Setright, *et. al.*, *op. cit.* p. 166.
[3] Magnus/Mankowski/Pinheiro, *op. cit.*, Article 54, note 3; 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), p. 268-271.
[4] Recital 25 of the Brussels IIbis Regulation.
[5] Practice Guide 2015, p. 85.
[6] *Ibid.*, p. 83. See also Rauscher, T., *Europäisches Kollisions – und Zivilprozessrecht*, (vol. I) (3rd edn, Otto Schmidt Verlag 2011), Article 53, note 1.
[7] See overview provided in, Župan, *op. cit.*, p. 273.

According to Article 67, Member States are to communicate within 3 months following the entry into force of the Regulation the names, addresses and means of communication for the Central Authorities that they have designated pursuant to Article 53. The same obligation applies regarding the languages that are accepted for communications under Article 57(2).[8] In most Member States, the Ministries of Justice function as Central Authorities.[9]

3. Functions of the Central Authorities – Article 54

Article 54 assigns a very general task to the Central Authorities. The authorities are under a duty to provide information on national laws and procedures, to take measures to improve the application of the Regulation and to strengthen cooperation. This task incorporates a duty to promote cooperation within the borders of a Member State.[10] For this purpose the European Judicial Network in civil and commercial matters will have to be used, pursuant to Article 54.[11] The European Judicial Network is composed of contact points designated by the Member States, central bodies and the Central Authorities. The contact points are available to other contact points and to local judicial authorities in their Member State to assist them in resolving cross-border issues with which they are confronted. They also provide information to facilitate the application of the laws of the other Member States. The contact points provide for practical assistance to the authorities in a particular Member State. In addition, they communicate regularly with the contact points in other Member States as provided for in the legal instruments in the area of judicial cooperation in civil and commercial matters. The Network has to provide support to the Central Authorities and to facilitate relations between different courts and with the legal professions.[12]

In addition to this general task, the Central Authorities also have specific tasks of providing information and assistance in matters relating to parental responsibility, both to institutions such as courts and administrative bodies and to parents.[13] The Central Authorities have to assist in a number of scenarios and to collect and provide information on various matters to parents, courts or other relevant bodies. The topics specified in Article 55 concern information about the situation of the child, including any pending procedures or decisions that may be taken concerning the child. The Central Authorities also have to inform and assist parents who seek the recognition or the enforcement of orders, in particular those relating to rights of access and the return of the child. They also facilitate communication between the courts, and they provide information and assistance to the courts in the context of Article 56. Promoting amicable settlements through, for instance, family mediation is yet another task of the Central Authorities.

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[8] This information can be found at: https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-en.do.
[9] Župan, *op. cit.*, p. 271-272.
[10] Corneloup, S., *et al.*, 'Children on the move: a private international law perspective' (Directorate General for Internal Policies of the Union Policy Department for Citizens' Rights and Constitutional Affairs, PE 583.158-June 2017), p. 30.
[11] Practice Guide 2015, p. 83.
[12] Judicial cooperation in civil matters in the European Union, a guide for legal practitioners, p. 111, <http://ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf>.
[13] Župan, *op. cit*, p. 278-281.

The provisions on cooperation between the Central Authorities in matters of parental responsibility are essential for the effective application of the Regulation. The Central Authorities must, for example, collect and exchange information on the situation of the child in connection with custody or proceedings on the return of the child, assist holders of parental responsibility to have their judgments recognised and enforced especially concerning access rights and the return of the child, as well as to facilitate mediation. The Central Authorities also meet regularly within the framework of the European Judicial Network in order to exchange views on their practices, as well as to discuss ongoing cases. Cooperation between the Central Authorities, in particular in bilateral discussions, has proved very useful in connection with cross-border child abduction cases. As for these cases, the Stockholm Programme mentions expressly that, apart from effectively implementing existing legal instruments in this area, the possibility to use family mediation at the international level should be explored, taking thereby account of good practices in Member States. Accordingly, a working group created within the framework of the European Judicial Network has been mandated with proposing efficient means to improve the use of family mediation in cases of international parental child abduction.[14]

4. Cooperation between Central Authorities in different Member States in cases relating to parental responsibility – Article 55

Article 55 provides that the Central Authorities shall, upon a request from a Central Authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of the Regulation. As one of these tasks is to provide information, in this context issues of data protection may arise. Article 55 recognises that each Member State is likely to have data protection laws which impact on its powers to exchange information under the Regulation.[15] Article 55 distinguishes between a number of situations in which a request for information has been received by the Central Authority. Central Authorities have different tasks, but it is not always clear what these entail. Important is that the functioning of the Central Authorities depends on national legislation and implementation policies. As a result, there are substantial differences between Central Authorities, ranging from being an administrative tool for the exchange of information and documents to systems where the Central Authority may act as a party.[16] It is not clear under the current provision whether Central Authorities may directly communicate with foreign social or local authorities.[17]

Subparagraph (a) concerns the specific task of collecting and exchanging information on the situation of the child, as well as information about previous court orders made in relation to a child who was or has been the subject of proceedings in another Member State.[18] There is

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[14] Council document 16121/10, JUSTCIV 194, of 12 November 2010, Conclusions of the ministerial seminar organised by the Belgian Presidency concerning international family mediation in cases of international child abduction, available at http://register.consilium.europa.eu.
[15] Setright, *et. al., op. cit.,* p. 166.
[16] Župan, *op. cit.* p. 277. Jonker, M., Abraham, M., Jeppesen de Boer, C., Van Rossum, W. and Boele-Woelki, K., *Internationale kinderontvoering, De uitvoeringspraktijk van inkomende zaken in Nederland, Engeland & Wales, Zweden en Zwitserland* (Boom Juridische uitgevers 2015, English summary), p. 167-174.
[17] Župan, *op. cit.* p. 278.
[18] Setright, *et. al., op. cit.,* p. 166; Magnus/Mankowski/Pinheiro, *op. cit.,* Article 55, note 2.

not much guidance as to what the Central Authorities are expected to do in this respect. Article 55(a) refers only to 'the situation of the child, any procedures under way and decisions taken concerning the child'. Holders of parental authorities and Central Authorities can ask for information, but courts are not listed expressly, leaving room for different interpretations.

Subparagraph (b) describes the duty of providing information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory. This provision contributes to legal protection of parents, who are not familiar with these often complex legal matters.[19] The working methods of the Central Authorities are set out in Article 57 of the Regulation. In this context, reference should also be made to Article 77(1) which requires the holders of parental responsibility in this situation to attach to their request for assistance the relevant certificate provided for in Articles 39, 41(1) or 42(1) and all available information which is of relevance to the enforcement of the order.[20]

Subparagraph (c) is particularly important in situations where a transfer of proceedings to a court in another country is being considered. This provision regards the facilitating of court-to-court communications, especially in connection with Article 11(6) and (7) in cases where an order for non-return has been ordered by the court of the State in which the child has been wrongfully removed or retained. The same holds true in cases regarding Article 15(c) involving the transfer of a case from one court to another.[21] In such situations it will be necessary to obtain information that will assist the court in determining whether the transfer of proceedings would be in the child's best interests and to ascertain the willingness of the Member State in question to accept jurisdiction.[22] The Central Authorities also assist in obtaining translations of documents and examining the jurisdiction of the courts in other Member States in these types of cases, serving as a link between the national courts and the Central Authorities of other Member States.[23] For the interpretation of subparagraph (c) the judgment in case *A*[24] is relevant. The CJEU has held that the protection of the best interests of the child may require the national court to inform the court of another Member State having jurisdiction in matters of parental responsibility that it has taken provisional measures pursuant to Article 20, or when it has declared of its own motion that it does not have jurisdiction. This information may be provided directly or through the Central Authorities.

Article 55(d) provides that the Central Authorities shall assist courts in proceedings to be followed in cases concerning the placing of children in another Member State under Article 56.[25] When a child is to be placed in foster care or institutional care in another Member State, a request for information is necessary to ascertain what facilities are available and whether the competent authority will provide its consent to the placement pursuant to Article

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[19] Župan, *op. cit.*, p. 281-282.
[20] Setright, *et. al., op. cit.*, p. 167.
[21] Magnus/Mankowski/Pinheiro, *op. cit.*, Article 55, note 4.
[22] Setright, *et. al., op. cit.*, p. 167.
[23] Magnus/Mankowski/Pinheiro, *op. cit.*, Article 55, note 4.
[24] CJEU Case C-523/07 *A.* [2009] ECR I-02805.
[25] Setright, *et. al., op. cit.*, p. 168. 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. 10.

56. Before issuing a placement order, the court must first consult the Central Authority or another authority in the Member State where the child is to be placed as to whether the intervention of a public authority is needed in that State. If the public authority's intervention in that Member State is required for domestic cases concerning the placement of a child, the placement order can only be made if the competent authority agrees to the placement (Articles 56(1) and 56(2)). In cases where the public authority's intervention is not required for domestic cases of child placement, the placing authority then only needs to inform the Central Authority or the authority having jurisdiction in the Member State where the placement is to take place.[26]

Lastly, subparagraph (e) may be helpful in cases of parental child abduction in assisting the parties to mediate so as to secure rights of access pending the determination of proceedings for the child's return to the country of his/her habitual residence.[27] Mediation can play an important role in child abduction cases to ensure that the child will still be able to see the non-abducting parent after the abduction and, once returned, can continue to see the abducting parent.[28] It is important, however, to ensure that the mediation process will not be used to unduly delay the return of the child.[29] The Central Authorities do not need to provide a mediator themselves.[30]

Each Central Authority shall bear the costs of its activities. This applies either in relation to the holder of parental responsibility or other interested parties or in the relationship between the Central Authorities themselves.[31]

The provisions on cooperation between the Central Authorities in matters of parental responsibility have not proved to operate satisfactorily. In particular, experts have reported difficulties in connection with the obligation to collect and exchange information on the situation of the child under Article 55(a). The main concerns relate to the interpretation of this provision, the fact that applications for information have not always been dealt with in a timely manner, as well as difficulties in obtaining translations of the information exchanged. Moreover, significant differences exist between the Member States with regard to the assistance provided by the Central Authorities to holders of parental responsibility who are seeking the enforcement of access rights judgments.[32] In the literature, numerous suggestions for improvement have been made.[33] It is an almost unanimous view that the Brussels IIbis

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[26] Article 56(4) of the Brussels IIbis Regulation.
[27] Practice Guide 2015, p. 83, para 7.3.
[28] *Ibid.*, p. 43; Župan, *op. cit*., p. 284; Kruger, *op cit*., p. 41-42.
[29] Magnus/Mankowski/Pinheiro, *op. cit.*, Article 55, note 8. See also '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', p. 8.
[30] Magnus/Mankowksi/Pinheiro, *op. cit*., Article 55, note 10.
[31] See also Rauscher, *Europeisches Kollisions- und Zivilprozessrecht*, *op. cit.*, p. 362, note 2.
[32] 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, para 3.
[33] Pretelli, I., *Child Abduction and Return Proceedings: Directorate General for internal policies policy department C: Citizens' rights and constitutional affairs, Legal affairs, 'Recasting the Brussels IIa regulation,*

Regulation does not give sufficient guidance as to what is to be expected from the Central Authorities. It has been pointed out that the vague description of the cooperation between the Central Authorities has often led to delays or even failures to comply with requests.[34] Also, the enforcement of judgments delivered in another Member State was identified as being problematic – judgments are often not enforced or are enforced with significant delays.[35] Regarding the unspecific provisions on cooperation, difficulties have been reported in connection with the interpretation of the obligation to collect and exchange information on the situation of the child, including translation issues.[36] Other problems concern the lack of resources and staff.[37]

4.1 Difficulties in application – National Reports

4.1.1 National Reports on the organisation and cooperation of Central Authorities

Although many Central Authorities lack financial resources and have to cope with the problem of a lack of staff, the National Reports do not indicate that problems have arisen because of the Central Authority's working methods or the way in which it is institutionally organised. Amongst the positive aspects the following have been mentioned: a relationship based on trust with the courts, impartiality, efficiency, the necessary expertise and sufficient training/courses on the relevant issues of the Regulation.[38]

Some National Reporters have stated that the gulf between the Central Authority and the agencies which are in charge of handing out the reports on the state of affairs and filing the cases causes serious delays.[39] In this context it is mentioned that it can be difficult to find a balance between causing no unnecessary delay and the aim of being impartial.

Workshop 8 November 2016, Compilation of briefings', p. 12-13; Kruger, T., Enhancing Cross-border cooperation: in: Directorate General for internal policies policy department C: Citizens' rights and constitutional affairs, Legal affairs, 'Recasting the Brussels IIa regulation, Workshop 8 November 2016, Compilation of briefings', p. 37.

[34] Župan, *op. cit.*, p. 271-273, 277-278.

[35] Impact Assessment.

[36] 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, p. 11; Directorate General for internal policies policy department C: Citizens' rights and constitutional affairs, Legal affairs, 'Recasting the Brussels IIa regulation, Workshop 8 November 2016, Compilation of briefings'.

[37] For the lack of resources and staff, see Judicial cooperation in civil matters in the European Union, a guide for legal practitioners, p. 37 <http://ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf>; Župan, *op. cit.*, p. 273; Pretelli, *op. cit.* p. 12; Fridrich, L., The experience of a national central authority, Directorate General for internal policies policy department C: Citizens' rights and constitutional affairs, Legal affairs,'Recasting the Brussels IIa regulation, Workshop 8 November 2016, Compilation of briefings', p. 48-49.

[38] National Report Austria, question 48; National Report Belgium, question 48; National Report Croatia, question 48; National Report Cyprus, question 48; National Report the Czech Republic, question 48; National Report France, question 48; National Report Germany, question 48; National Report Hungary, question 48; National Report Italy, question 48; National Report Latvia, question 48; National Report Portugal, question 48; National Report Slovenia, question 48; National Report Spain, question 48; National Report the United Kingdom, question 48. The staff members of the Central Authority are given sufficient training/courses on the relevant issues in the Brussels IIbis Regulation.

[39] National Report Austria, question 47 and National Report Cyprus, question 47.

Furthermore, it can be derived from the answers in the National Reports that no practical difficulties have been mentioned with regard to internal cooperation within the organisation of the Central Authorities.[40]

As to the question of whether there are any practical difficulties and/or good practices with regard to cooperation between the Central Authority and other authorities/organisations/the judiciary in the Member State, most National Reporters have answered that there is good and active communication between the Central Authority and the judiciary/organisations/other authorities.[41] A majority of the National Reports indicate that there are no difficulties with regard to co-operation with other Central Authorities,[42] with the exception of the Czech Republic, the Netherlands, Latvia and Sweden.

To sum up, the following major shortcomings can be identified: the inaccurate interpretation of the 1980 Hague Convention and the Regulation causing delays in complying with requests,[43] a lack of communication with some Central Authorities,[44] as well as administrative difficulties such as the translation of documents.[45]

In order to improve the difficulties in connection with translations, the Belgian National Report suggests that attention should be paid to whether or not a Central Authority in the other

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[40] Except for those respondents who did not answer: Bulgaria and Cyprus, and those who did not know based on the available information: Germany and Latvia, all respondents concluded in their National Reports that there are no practical difficulties concerning internal cooperation. This can be found in the answers to question 49.

[41] National Report Austria, question 50; National Report Belgium, question 50; National Report Croatia, question 50; National Report the Czech Republic, question 50; National Report Estonia, question 50; National Report Greece, question 50; National Report Hungary, question 50; National Report Latvia, question 50; National Report Luxembourg, question 50; National Report Malta, question 50; National Report the Netherlands, question 50; National Report Slovenia, question 50 and National Report Sweden, question 50.

[42] National Report Croatia, question 51; National Report Estonia, question 51; National Report France, question 51; National Report Hungary, question 51; National Report Ireland, question 51; National Report Italy, question 51; National Report Luxembourg, question 51 ; National Report Malta, question 51 ; National Report Portugal, question 51 and National Report Slovenia, question 51.

[43] National Report the Czech Republic, question 51: the Czech Central Authority has had fairly negative experiences with the services of some foreign Central Authorities and their inaccurate interpretation of the Hague Child Abduction Convention and the Regulation and delays in reactions to requests. In one case, a foreign Central Authority requested, four months after the receipt of a return application, additional documents which were, in the opinion of the Czech Central Authority, irrelevant for return proceedings (confirmation that the father paid maintenance). After some time, more than one year after the receipt of the return application, the foreign Central Authority replied that no return proceedings would be initiated; the applicant (the left-behind parent) was advised to find a lawyer to represent him and to commence return proceedings. In another case, the foreign Central Authority refused to initiate proceedings on contact rights explaining that the 1980 Hague Convention shall only be applicable in urgent cases arising from abduction or another serious circumstance. Some foreign Central Authorities provide information on the situation of the child but only with a considerable delay (in some cases more than six month).

[44] National Report the Netherlands, question 51. In most cases cooperation with the Central Autrhorities of other member states can be considered as good, both formally and informally. With the Central Authorities of a few states, however, the cooperation can be considered to be difficult due to a lack of communication with the Central Authorities (late or no response to messages etc.).

[45] National Report Sweden, question 51. In general, the cooperation is satisfactory, but problems arise occasionally with regard to the translation of documents; National Report Latvia, question 51. There are no specific substantial difficulties with regard to cooperation between the Central Authorities. All of the difficulties experienced are purely administrative – which Central Authority has to provide a translation of the documents, providing a response to the requests takes too long etc.

Member State assists the applicant with the translation of the application into the right language. In this context, the Belgian Central Authority draws attention to the fact that the language to which documents have to be translated depends on the presumed whereabouts of the minor(s). It therefore strongly advises that the Central Authority of the other Member State reaches out to its Belgian Central counterpart with an indication of the supposed whereabouts of the minor(s) before ensuring the translation/informing the applicant about the language to be translated into.

There are two ways in which Central Authorities are organised. Most Member States have one Central Authority for all resolutions, regulations and treaties.[46] Only a few Member States have Central Authorities that are different bodies than the Central Authority under Brussels IIbis.[47]

4.1.2 National Reports on the absence of a time frame

There is consensus among most National Reporters that a time frame where the Central Authorities are involved in child abduction cases could be useful, as delays tend to favour the abductor and are potentially harmful to the child. The Czech National Reporter notes that the Central Authorities in some Member States reply with a considerable delay and that a time limit in the Regulation might be helpful.[48] In Italy, the time limit is one of the main problems in the application of the Regulation regarding the best interests of the child. The National Reporter suggests that the terms formulated in Article 11 should be absolutely respected. This might probably be a sufficient measure to prevent unnecessary time lapses, which is a crucial aspect in this matter. The Italian National Report emphasises that the actual duration of appeal procedures is far too lengthy. The Reporter suggests two ways in which the time can be shortened: either by limiting the possibilities for an appeal or by providing for specialised courts with appropriate procedures enabling them to decide within a very short time.[49]

In Latvian national law, both for incoming and outgoing cases, the time frame for the Central Authority is set at 10 working days. In incoming cases, 10 working days after the receipt of the application it shall be sent to the Court and in outgoing cases the application shall be sent to the Central Authority 10 working days after the receipt of the application.[50]

The Luxembourg National Reporter refers to a case where the absence of a time frame was considered to be an obstacle for the return of wrongfully abducted children. In that case, the Dutch Central Authority took seven months to notify the Luxembourg authorities about the

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[46] National Report Austria, question 50, National Report Belgium, question 50; National Report the Czech Republic, question 50; National Report Estonia (except for under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption), question 50; National Report France, question 50; National Report Greece, question 50; National Report Ireland, question 50; National Report Italy, question 50; National Report Latvia, question 50; National Report Malta, question 50; National Report the Netherlands, question 50; National Report Portugal, question 50; National Report Romania, question 50 and National Report the United Kingdom, question 50.

[47] National Report Croatia, question 50; National Report Lithuania, question 50; National Report Luxembourg, question 50; National Report Slovenia, question 50; National Report Sweden, question 50.

[48] National Report the Czech Republic, question 39.

[49] National Report Italy, questions 39 and 40.

[50] National Report Latvia, question 39.

wrongful removal of three children to Luxembourg. Besides, the left-behind parent only contacted the Dutch Central Authority one year after the children's wrongful removal, with the result that the Court in Luxembourg ruled on the non-return of the children due to the fact that they had already been in Luxembourg for a long period of time.[51] The Luxembourg Central Authority tends to establish restrictive terms in order to avoid any risk of prosecution being avoided.

As to the practice in the Netherlands, it appears that the system which has been developed has only managed to ensure that court proceedings at first instance are completed within the six-week period envisaged by the Commission. This is only the first out of three stages which are available in the Netherlands in the procedure for the return of the child.

In Romania, the absence of a time frame for the activities of the Central Authorities involved in child abduction cases may delay the procedures, but does not significantly affect the results thereof. Under Romanian law, the Central Authority is obliged to promptly examine any request of assistance: it has 10 days from receiving the request to verify that the conditions set out in Article 8(2) of the 1980 Hague Convention are met. Even if the Central Authority refuses to administer the case as provided in Article 27 of the 1980 Hague Convention, the applicant is allowed to seise the competent courts directly.[52]

The Spanish National Reporter remarks that there are two deadlines established in Article 11(6) and (7) regarding some actions undertaken by Central Authorities, but that the absence of a time frame regarding their own activity in these cases is undesirable. The National Reporter believes that the absence of time frames in general is always negative, above all in matters related to minors, where efficiency in the resolution of cases is imperative for the sake of the best interests of the child. Finally, the National Reporter notes that the establishment of deadlines is useless without financial support and the necessary means, both human and material, to accomplish their tasks.[53]

4.2 Difficulties in application – CJEU case law

Article 55(c) has been the subject of interpretation by the CJEU in the case of *A*.[54] The Finnish court submitted a question for a preliminary ruling concerning an obligation to cooperate after a provisional measure had been taken: was there any obligation of cooperation towards the court of the Member State having jurisdiction as to the substance of the matter either directly or through the Central Authority after such a measure had been issued.

The CJEU held that provisional or protective measures cease to apply when the court of the Member State having jurisdiction as to the substance of the matter has taken the measures it considers appropriate. Since provisional or protective measures are temporary, certain circumstances related to the physical, psychological and intellectual development of the child

[51] National Report Luxembourg, question 39; Tribunal d'arrondissement de Luxembourg', no. 149284, 19 December 2012.
[52] National Report Romania, question 39; Article 8 from Act no. 369/2004 under Romanian Law.
[53] National Report Spain, question 39.
[54] CJEU Case C-523/07 *A.* [2009] ECR I-02805, para 65.

may require early intervention. The need for and the urgency of definitive measures must be determined having regard to the child's circumstances, his/her likely development and the effectiveness of the provisional or protective measures adopted. In that context, the protection of the best interests of the child may require that the national court which has taken provisional or protective measures should inform, directly or through the Central Authority designated under Article 53 of the Regulation, the court of another Member State having jurisdiction on the merits about the measure that has been taken. After such a measure has been ordered, the national court is not required to transfer the case to the court of the other Member State having jurisdiction on the substance. The Court derived this particular duty from Article 55(c), which entails an obligation for the court to inform the court of the other Member State having jurisdiction as to the substance of the matter as to the provisional measure which has been taken.[55]

5. Placement of a child in another Member State – Article 56

It has become progressively clear that in order to protect the best interests of the child, it is necessary to 'tailor' the protection measures to the specific and individual needs of the child in question. In that view, the cross-border placement of children has gradually developed from being perceived as an obstacle to an opportunity, where a care solution available in a State other than the child's State of origin may sometimes better meet the child's specific and individual needs. More precisely, in some cases the best way to meet the specific needs of a vulnerable child might be to move the child from his/her State of origin and to place him/her in another State that accepts this solution.[56] On the other hand, many issues arise in this complicated area of cooperation, where the rights of particularly vulnerable children are at stake. Therefore, the cross-border placement of children in institutional care or with foster parents demands safeguards in terms of cooperation between the authorities of different Member States in order to avoid children ending up in a legal 'no man's land'. These types of parental responsibility decisions are covered by the special procedure set out in Article 56 of the Regulation. Article 23(g) sanctions a failure to comply with the procedure of Article 56 so as to qualify it as a ground for the refusal of the recognition and enforcement of a judgment.

Article 56 of the Brussels IIbis Regulation and the cooperation system of Article 33 of the 1996 Hague Convention are closely connected. The Brussels IIbis regime has been inspired by the Convention, but there are also differences.[57] The placement of a child involving two EU Member States is governed by Brussels IIbis. Scenarios where the 1996 Hague Convention's rules will apply is where both of the legal systems involved are parties to the Convention.

There is no definition of placement in the Brussels IIbis Regulation, other than that it relates to the placement of a child in institutional care and with a foster family. The Regulation does not extend to kafala and similar legal constructions. Yet these are included in the

[55] Dutta and Schulz, 'First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation From C to Health Service Executive' (2014) 10:1 Journal of Private International Law, 1-40, p. 38.
[56] Carpaneto, 'Cross-border placement of children in the European Union', *op. cit.*, p. 20.
[57] Miranda, *op. cit.*, p. 36.

1996 Hague Convention. Placement in a family prior to adoption or following a criminal offence committed by the child are not covered by Article 56.[58] The case law of the CJEU has clarified that the placement of a child in a secure institution providing therapeutic and educational care situated in another Member State, entailing the deprivation of liberty for the child's own protection, falls within the material scope of the Regulation by virtue of this express inclusion. The CJEU has noted, however, that in accordance with the exclusion of measures concerning criminal offences laid down in Article 1(3)(g), such a deprivation of liberty must not be intended to punish the child.[59] Whether the placement of a child with his/her extended family falls within its scope is not clear, but a study has shown that Article 56 is generally applied to the placement of children with relatives, such as grandparents or aunts/uncles.[60]

Several safeguards are provided by Article 56 of the Regulation which relate to both consultation and consent for the placement. The Regulation distinguishes between Member States where, according to their domestic laws, public authority intervention is required in the context of domestic child placements and Member States where such intervention is not needed. In line with the principle that the cross-border placement of children follows the procedure for domestic placement, for the first type of Member States, the court of the original Member State must first consult the Central Authority or the relevant authority with jurisdiction in the other Member State. Only if the competent authority in the receiving Member State agrees can the placement order be made,[61] if such consent is requested for placing the child in domestic cases. Member States are required to establish clear rules and procedures for the purposes of the consent referred to in Article 56, in order to ensure legal certainty and expeditiousness. The procedures must enable the court which is considering the placement to easily identify the competent authority and enable that competent authority to promptly grant or refuse its consent.[62] The consent must be given before the placement takes place.[63] The procedures for consultation or consent are governed by the national law of the requested state (Article 56 (3)). In practice, as stated in the report by Carpaneto on this topic, this implies that the State of origin sends the Central Authority of the receiving State a written request under Article 56, providing information on the situation of the child and on the appropriate care solution envisaged. Next, the Central Authority of the receiving Member State will send the request to the competent judicial authorities will commence a sort of investigation on the solution to be adopted. The Central Authority will prepare a report for the judicial authority which decides whether consent should be given by means of a decision.[64]

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[58] Carpaneto, 'Cross-border placement of children in the European Union', *op. cit.*, p. 26.
[59] CJEU Case C-92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, paras 56-66.
[60] Carpaneto, 'Cross-border placement of children in the European Union', *op. cit.*, p. 26.
[61] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht, op. cit.*, p. 363.
[62] CJEU Case C‑92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255.
[63] 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; CJEU Case C‑92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, paras 81-82.
[64] Carpaneto, 'Cross-border placement of children in the European Union', *op. cit.*, p. 28.

The competent authority should be identifiable under the public law of the Member State and consent must be given before the placement takes place.[65] The procedures for consultation or consent are governed by the national law of the requested state (Art. 56 (3)).

In Member States in which public authority intervention is not needed for the placement of a child with a foster family a simple procedure can be followed. Where placement in institutional care or with a foster family does not require public authority intervention in the State of placement for domestic cases of child placement, a court of another Member State which decides on such a placement must inform the Central Authority or another competent authority in the State of placement.[66] The Member State where the child will be placed is not entitled to ask for any intervention by a public authority and no consent is required. The State of origin is under a duty to inform the receiving State of the placement of the child.[67]

Concerning costs regarding cross-border placements, Brussels IIbis contains no specific provisions. The general provision of Article 57 is to be applied, which states that assistance will be free of costs and that each Central Authority bears its own costs.

5.1 Difficulties in application – relevant literature

One of the problems that remains to some extent unresolved in the EU concerns the placement of children in institutional care or with a foster family in another Member State. There is a growing number of cases in which children are being placed in alternative care across frontiers.[68] Apart from the problems relating to the scope and definitions of relevant terms of Brussels IIbis (see *supra* in this Chapter, under 5 '*Placement of a child in another Member State – Article 56*'), a number of other difficulties have been reported in the literature.

An important concern is the cooperation between Member States and Central Authorities. It has been suggested that the respective tasks of Member States and authorities involved should be clarified.[69] Better co-operation between the Central Authorities and local authorities in different Member States is needed. In this respect, it follows from Brussels IIbis that consultation between the Central Authorities is required, but in practice this consultation is not always effective.[70] It is unclear which information should be provided by the requesting State to the State of placement. Unclear is also which kind of investigation the requested State may put into place. Issues about the financial aspects of cross-border placement rise as well.[71] Specific disruptions in the cooperation process involve a great variety of child welfare

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[65] Lamont, 'Care proceedings with a European dimension under Brussels IIa: jurisdiction, mutual trust and the best interest of the child', *op. cit.*, p. 81; CJEU Case C‑92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, paras 81-82.
[66] Stone, *op. cit.*, p. 427; Setright, *et. al.*, *op. cit.*, p. 419.
[67] Judicial cooperation in civil matters in the European Union, a guide for legal practitioners, http://ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf, p. 51.
[68] Carpaneto, 'Cross-border placement of children in the European Union', *op. cit.*, p. 44; Miranda, *op cit.*, p. 36.
[69] Carpaneto, 'Cross-border placement of children in the European Union', *op. cit.*, p. 11-12; Miranda, *op cit.*, p. 36.
[70] Miranda, *op cit.*, p. 36.
[71] Carpaneto, 'Cross-border placement of children in the European Union', *op. cit.*, p. 54.

authorities in different countries in conjunction with Central Authorities not being well or appropriately coordinated. [72]

As a result of the effectivity problems in the cooperation process between the different countries and authorities, the procedures can be lengthy. This procedure is thus considered to be inadequate with regard to the urgency that is involved in most cases of the placement of children in other Member States. Some 60% of the respondents in the Impact Assessment have stated that the current provisions do not function in a satisfactory manner and, moreover, several stakeholders and experts have called for a revision in this regard as a key priority.[73] As a result of the practical difficulties regarding cooperation, children are in practice already being placed with a foster family or in institutional care before permission has been received.[74] An obligatory time-limit for the approval of all transnational placings of children with foster families or in institutional care could be helpful.

The *exequatur* procedure is required by Brussels IIbis for a placement judgment to be enforced. Although it is not only largely disregarded in practice, it is also perceived as not particularly useful in the Member States where consent of the (Central) authority is necessary.[75]

It has also been pointed out that there is a need for more clarity on the relationship between Articles 15 and 56; the definition should include specific obligations for Central Authorities regarding the timing of responses to requests, communication between Central Authorities and local authorities, and support for the physical transfer of children.[76]

When placement abroad is intended, children's rights entail another important problematical point to be addressed. A revised or a new provision should address this issue because the whole procedure to be instituted must respect the rights of children living in residential institutions or in foster care. For that reason, there should be a specific reference in a revised Article 56 Brussels IIbis not only to guarantee the child's best interests when making decisions on the placement or provision of care abroad, but also to provide respect for children's rights when residing in residential institutions or with a foster family.[77]

The European Parliament's Women's Committee amended Article 56 to encourage the Central Authorities to establish guidelines for cases generally, including those which involve domestic violence. Experience with Brussels IIbis demonstrates that the strategy has had a limited impact on the child abduction provisions where there is evidence of a gender dimension to the law, but it also highlights some of the difficulties in achieving gender-sensitive legislation and the wider aim of equality. There is no clear evidence that any gender perspective was incorporated in the proposals for Brussels IIbis and the final legislation contains no specific

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[72] Miranda, *op. cit.*, p. 36.
[73] Impact Assessment, p. 53.
[74] Frohn, L., 'Herschikking Brussel IIbis', (2016) 349 NIPR, p. 441-444; Carpaneto, 'Cross-border placement of children in the European Union', *op. cit.*, p. 54.
[75] Carpaneto, 'Cross-border placement of children in the European Union', *op. cit.*, p. 55.
[76] Lamont, 'Care proceedings with a European dimension under Brussels IIa: jurisdiction, mutual trust and the best interest of the child', *op. cit.*, p. 81.
[77] Miranda, *op. cit.*, p. 40.

child abduction provisions that address gender. Even if explicitly gender-focused legislation were to be adopted, it still remains subject to interpretation by the courts.[78]

Finally, a remark in the context of a child's physical placement in another Member State which may be coupled with a transfer of the public law proceedings that have been taking place concerning that child to the Member State in which the child is to be placed. The timing of these two transfers will need to be carefully looked at.[79] If the public law proceedings are transferred in their entirety to another Member State which has accepted jurisdiction, before the child physically moves to his or her Article 56 placement, the courts of the sending Member State will not have any jurisdiction to deal with the practicalities of the child's move.

5.2 Difficulties in application – CJEU case law

The case law of the CJEU has been significant for the clarity of Article 56. In Case *C,*[80] the judgment stated that the scope of Article 56 includes the placement of a child with a foster family or in institutional care even when public law is involved. The expression 'civil matters' in Article 1 of the Brussels IIbis Regulation had to be treated as extending to those measures which, from a domestic perspective, 'fall under public law'.[81] Furthermore, in the *Health Service Executive* case,[82] the CJEU has ruled that Article 56 also includes situations where the placement of children in a secure institution providing therapeutic and educational care situated in another member state entails that, for the child's own protection, he or she will be deprived of his or her liberty for a specified period.

In the leading case C-92/12 PPU *Health Service Executive*, the CJEU interpreted how the requirement of consent in Article 56(2) regarding the placement of a child in another Member State can be fulfilled and what a competent authority is.[83]

In 2002 the child S.C., of Irish nationality, was placed in the voluntary care of the Health Service Executive (HSE). Since the child was particularly vulnerable and had exceptional protection needs, it was in the child's best interests to be placed as a matter of urgency in a secure care institution in England. The Irish Health Service Executive requested the High Court to order the child's placement, and on 29 September 2011 the Health Service Executive informed the Irish Central Authority of the proceedings before the High Court pursuant to Article 56 and insisted that consent be obtained from the Central Authority for England and Wales.

On 25 October 2011, the Central Authority for England and Wales sent its consent to the Irish Central Authority, on notepaper bearing the heading of the secure institution and the

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[78] Lamont, R., 'Mainstreaming Gender into European Family Law? The Case of International Child Abduction and Brussels II Revised' (2011) 17 3 European Law Journal, p. 378.
[79] Setright, *et. al.*, *op. cit.*, p. 213.
[80] CJEU Case C-435/06 *C.* [2007] ECR I-10141.
[81] CJEU Case C-435/06 *C.* [2007] ECR I-10141, para 47. See also Dutta and Schulz, *op. cit.*, p. 6.
[82] CJEU Case C‑92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255.
[83] *Ibid.*, the first question in this case, regarding the material scope of the Regulation, has been addressed *supra* in Chapter 1, under 2.3 '*Difficulties in application – CJEU case law*'.

local authority of the town where that institution was located. This was confirmed by a letter from that secure care institution on 10 November 2011.

On 2 December 2011, the High Court, acting on its jurisdiction to exercise parental responsibility, made an order to place the child in such a specialised institution in England on a short-term interlocutory basis. This prompted the referring court to ask the CJEU to ascertain the extent of the obligations under Article 56 in relation to the nature of consultation and the mechanism for obtaining consent for the placement of a child, as well as what constitutes a 'competent authority'.[84]

Pursuant to Article 56(1), consultation of the Central Authority of the requested Member State or another authority having jurisdiction is mandatory where public authority intervention is required for domestic cases of child placements, such as in the underlying case. Where this intervention is not required, there is merely an obligation to inform the Central Authority pursuant to Article 56(4).[85]

Provisions of Articles 56(1) and 56(2) must be interpreted as meaning that a 'competent authority' covers either a 'central authority' or any 'other authority having jurisdiction' and that a decentralised system in which there are a number of competent authorities is permitted under Article 56.[86]

Article 56(3) expressly provides that the procedures for obtaining consent are to be governed by national law. It implies that Member States have a margin of discretion as regards the consent procedure. Member States are required to establish clear rules and procedures for the purposes of consent under Article 56.[87]

Regarding the concept of a 'competent authority' it must be observed that, as a general rule, the term 'authority' refers to an authority governed by public law, which is also clear from the wording of Article 56.[88] Consent emanating from an institution which admits children in return for payment cannot constitute the consent of a competent authority because it is not in a position to make an independent determination, which constitutes an essential measure for the protection of the child.[89]

Another question referred to the CJEU was whether *a posteriori* correction is possible in cases where it is shown that steps have been taken to obtain consent, but where the court ordering the placement is uncertain whether the consent required by Article 56 has been validly granted by the competent authority of the requested Member State.[90] The Commission would see no objection to an interpretation of the Regulation as meaning that the court dealing with the enforcement proceedings should stay those proceedings and that consent could be obtained at that time. In cases where authority is completely lacking, on the other hand, the procedure

[84] *Ibid*., paras 67 and 69.
[85] *Ibid*., para 70.
[86] *Ibid*., para 73.
[87] *Ibid*., paras 77-78, 82.
[88] *Ibid*., paras 84-86.
[89] *Ibid*., para 88.
[90] *Ibid*., para 90.

for obtaining consent should be recommenced and the court of the requesting Member State should make a fresh placement order after it has determined that consent has been validly obtained.[91]

Summing up, consent, as referred to in Article 56(2), must be given

- prior to the making of the judgment on the placement of a child,
- by a competent authority,
- governed by public law; and
- in cases where there is uncertainty as to the validity of the consent, this may be corrected *a posteriori*.

Additionally, the referring court asked the following question: whenever a court of a Member State which has ordered the placement of a child in institutional care in another Member State for a specified period under Article 56 of the Regulation and adopts a new decision aimed at extending the duration of the placement, is it necessary on each occasion to obtain the consent of the competent authority in the requested Member State referred to in Article 56(2) of the Regulation and a declaration of enforceability under Article 28 of the Regulation?[92] The CJEU held that a court of a Member State can only give a judgment ordering the placement of a child in a care institution situated in another Member State if the competent authority in the requested State has first consented to that placement. It follows that, where the competent authority of the requested Member State has given its consent to a placement by the court having jurisdiction which is limited in time, that placement cannot be extended unless that authority has given further consent.[93] Thus, an application for a new consent must be made.

Another problem that has been solved by the *Health Service Executive* judgment is that once an order has been registered for enforcement or declared enforceable it cannot actually be enforced until the relevant time limits for appealing against its registration have expired. The CJEU held that the Regulation must be interpreted as meaning that a placement order is to become enforceable at the point in time when the court of the requested Member State declares, in accordance with Article 31, that that order is enforceable.

The *Health Service Executive* judgment clarifies that where consent to placement under Article 56(2) Brussels IIbis has been given for a specified period of time that consent does not apply to orders which are intended to extend the duration of the placement. In such circumstances, an application for a new consent must be made. A judgment on placement made in a Member State and declared to be enforceable in another Member State can only be enforced in that other Member State for the period of time stated in the judgment on the placement.[94]

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[91] *Ibid*., paras 91-93.
[92] *Ibid*., para 134.
[93] *Ibid*., para 138.
[94] CJEU Case C‑92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255.

GUIDELINES – Summary

Family Mediation

A working group created within the framework of the European Judicial Network has been mandated with proposing efficient means to improve the use of family mediation in cases of international parental child abduction, as was proposed by the Stockholm Programme.[95]

Article 55

Despite their overall positive functioning, the provisions on cooperation have not been considered to be sufficiently specific. This is particularly so in connection with the obligation to collect and exchange information on the situation of the child, Article 55(a).

Article 55 – absence of a time frame

The implementation of a time frame where the Central Authorities are involved in child abduction cases could be useful, as delays work in favour of the abductor and are potentially harmful to the child.

Article 55(c) with regard to provisional or protective measures

The CJEU has held in case *A*[96] that the protection of the best interests of the child may require that the national court which has taken provisional or protective measures should inform, directly or through the Central Authority designated under Article 53 of the Regulation, the court of another Member State having jurisdiction.

Article 56

Article 56 – deprivation of liberty for the child's own protection

The placement of a child in a secure institution providing therapeutic and educational care in another Member State, entailing the deprivation of liberty for the child's own protection, falls within the material scope of the Regulation by virtue of this express inclusion. However, the CJEU has stated in the *Health Service Executive* case that in accordance with

[95] Council document 16121/10, JUSTCIV 194, of 12 November 2010, Conclusions of the ministerial seminar organised by the Belgian Presidency concerning international family mediation in cases of international child abduction, available at http://register.consilium.europa.eu.
[96] CJEU Case C-523/07 *A.* [2009] ECR I-02805.

the exclusion of measures for criminal offences set out in Article 1(3)(g), such a deprivation of liberty must not be intended to punish the child.[97]

Article 56 – requirements and safeguards

In Member States where, according to their domestic law, public authority intervention is prescribed in the context of domestic child placements, the court of the original Member State must first consult the Central Authority or the relevant authority with jurisdiction in the other Member State.

The requirements of Article 56 are:

- Member States must establish clear rules and procedures for the purposes of the consent referred to in Article 56, in order to ensure legal certainty and expeditiousness;
- The procedures must enable the court which is considering the placement to easily identify the competent authority and enable that competent authority to promptly grant or refuse its consent;
- The consent must be given before the placement is carried out.

The procedures for consultation or consent are governed by the national law of the requested state (Article 56 (3)).

In Member States in which public authority intervention is not required, a simple procedure can be followed. In this case, a court of another Member State which decides on such a placement must inform the Central Authority or another competent authority in the State of placement. No consent is required; however, there is a duty to inform the receiving State of the placement of the child.

Article 56 – scope

In Case *C*,[98] the CJEU held that the scope of Article 56 includes the placement of a child with a foster family or in institutional care even when public law is involved. The term 'Civil Matters' in Article 1 of Brussels IIbis had to be treated as extending to those measures which, from a domestic perspective, 'fall under public law'.[99]

Article 56(2) – requirement of consent

In the case of *Health Service Executive*,[100] the CJEU clarified that the consent referred to in Article 56(2) must be given:

[97] CJEU Case C-92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, paras 56-66.
[98] CJEU Case C-435/06 *C.* [2007] ECR I-10141.
[99] *Ibid*., para 47.
[100] CJEU Case C‑92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255.

- prior to the making of the judgment on the placement of a child,
- by a competent authority,
- governed by public law; and
- in cases where there is uncertainty as to the validity of the consent, this may be corrected *a posteriori*.

Additionally, the Court held that, where the competent authority of the requested Member State has given its consent to a placement by the court having jurisdiction and that placement is for a limited time, the placement cannot be extended unless that authority has given further consent. Thus, an application for a new consent must be made. Also, according to the CJEU, the Regulation must be interpreted as meaning that a placement order is to become enforceable at the point in time when the court of the requested Member State declares, in accordance with Article 31, that that order is enforceable.

CHAPTER 11: Relations with Other Instruments, Transitional and Final provisions

Vesna Lazić and Wendy Schrama

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1. Relations with other instruments – Articles 59-61

The relevant provisions of Articles 59-61 define the relationship between the Regulation and other legal instruments concluded by the Member States before the Regulation entered into force. They mainly provide that the Regulation shall have prevalence over these Conventions, with some notable exceptions. Thus, it prevails over (1) conventions regulating the same private international aspects and concerning the same matters as those within the scope of the Regulation, with the exception of the 1931 Convention[1] (Article 59), (2) conventions listed in Article 60 that regulate certain issues falling under the scope of the Regulation, and (3) the 1996 Hague Convention (Article 61).

The Nordic Family Law Convention is the only legal instrument which prevails over the Regulation in Finland and Sweden since both states have made use of the opportunity given in Article 59(2) and 59(3). Thus, they declared that the Convention, together with the Final Protocol thereto, would apply in whole or in part in their mutual relations, instead of the rules of the Regulation. The declaration is provided in the Annex VI of the Regulation and was published in the Official Journal of the EU. However, any future agreements between Finland and Sweden concerning rules on jurisdiction in divorce matters and guardianship must be in line with the Regulation's rules.[2] Judgments rendered by the courts in Finland and Sweden are enforceable in all EU Member States under the rules of the Regulation, provided that the courts have established their jurisdiction on the basis of rules which are compatible with those under the Regulation.[3] Finland and Sweden are under an obligation to inform the Commission of the declaration and any future agreement, as well as of uniform laws implementing them. These declarations, which both Sweden and Finland have signed, are provided in Annex VI of the Regulation.

Article 60 governs the relationship with specific multilateral conventions[4] which only partly deal with matters governed by the Regulation. The latter prevail over the conventions insofar as these matters are concerned. Indeed, the relevant provisions of these conventions dealing with other matters remain applicable. The reference to the 1980 Hague Child Abduction Convention in paragraph (e) must always be read in the context of Article 11(1) of the Regulation. Where the Regulation provides for specific rules, those rules will prevail over the applicable 1980 Hague Convention provisions. In matters not governed by the Regulation, the 1980 Hague Convention continues to apply, as provided by Article 62. The provisions laid down in Article 11 can only be applied when the child has been removed from an EU Member State in which he or she was habitually resident before the wrongful removal or retention to

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[1] Convention of 6 February 1931 between Norway, Denmark, Finland, Iceland and Sweden containing international private law provisions on marriage, adoption and guardianship with final protocol (hereinafter – the Nordic Family Law Convention).
[2] Brussels IIbis Regulation, Article 59(2)(c).
[3] Brussels IIbis Regulation, Article 59(2)(d).
[4] Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants; Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages; Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children; 1980 Hague Convention.

another Member State. In all other situations, only the 1980 Hague Child Abduction Convention will govern, providing of course that both States are parties to the Convention.[5] The relationship and the scope of application under the two legal sources has already been extensively discussed *supra* in Chapter 4, under 3 '*Jurisdiction under Article 11(1)-(5)*' and 4 '*Jurisdiction under Article 11(6)-(8)*'.

Article 61 deals specifically with the relationship between the Regulation and the 1996 Hague Convention. It provides that the Regulation takes precedence over the 1996 Convention regarding the rules on jurisdiction when the child has his or her habitual residence in an EU Member State. A judgment rendered by the court of an EU Member State will be enforceable under the Regulation, regardless of the habitual residence of the child, thus also even if the child has his or her habitual residence in a non-EU state which is a party to the 1996 Hague Convention. Thus, we can conclude that the courts in the EU Member States shall always apply the rules of jurisdiction under the Regulation as soon as the child has his or her habitual residence in an EU Member State. As for recognition and enforcement, judgments rendered by the courts of EU Member States will be recognised and enforced according to the rules of the Regulation, regardless of the habitual residence of the child.

The 1996 Hague Convention is only mentioned in Article 12(4) of the Regulation. When this is considered together with Article 61 we can conclude that the Convention shall have precedence over the Regulation only in the context of the-so called prorogation of jurisdiction as provided in Article 12(4). Thus, this is the only aspect where the 1996 Hague Convention would be given prevalence. Article 12(4) introduces a limited prorogation option for a party to choose to seise a court of a Member State in which a child is not habitually resident, but with which the child nevertheless has a substantial connection. This option also applies when the child has his or her habitual residence in a third state that is not a contracting party to the 1996 Hague Convention. Jurisdiction shall then be deemed to be in the child's best interests, in particular, but not only, if it is found impossible to hold proceedings in the third state in question.[6] The presumption provided for in that Article will not apply if the third state where the child has his or her habitual residence is a party to the 1996 Hague Convention. Article 12(4) deems jurisdiction to be in the best interests of the child when, in case the child has his or her habitual residence in the territory of a third State which is *not* a contracting party to the 1996 Hague Convention, 'in particular if it is found impossible' to hold proceedings in the third State in question. Thus, this presumption under Article 12(4) will not apply for the purposes of the prorogation of jurisdiction if the child has his/her habitual residence in a non-EU state which is a contracting party to the 1996 Hague Convention. In other words, if the child is habitually resident in the territory of a third state which is a contracting party to the Convention, the rules of the Convention will prevail.[7]

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[5] Magnus/Mankowski/Mantout, *op. cit.*, Article 11, note 15.
[6] Lowe, Everall, Nicholls, *op. cit*., pp.166.
[7] *Ibid.*

The 1996 Hague Convention remains relevant with respect to the applicable law in cases of parental responsibility, as this is not a private international law issue which is covered by the Regulation. As for the rules on jurisdiction, the Regulation applies whenever a child has his/her habitual residence in an EU Member State, thus it has prevalence over the 1996 Hague Convention as expressly provided for in Article 61(a). The same holds true when the recognition or enforcement of a judgment on parental responsibility has been issued by a court of an EU member State. The Regulation applies to enforcement and recognition regardless of the habitual residence of the child, i.e. even when a child has his/her habitual residence in a third state which is a contracting state to the 1996 Hague Convention as expressly provided in Article 61(b).

The Practice Guide 2014[8] suggests that when considering Article 61(a), two questions must be asked when assessing which of the two instruments prevails in deciding on jurisdiction in matters of parental responsibility:

(i) Does the case concern a matter covered by the Regulation?[9]
(ii) Does the child concerned have his or her habitual residence on the territory of an EU Member State?

If both questions can be answered affirmatively, the Regulation's rules on jurisdiction prevail over the rules of the 1996 Hague Convention.[10] This strict geographical interpretation without any examination of the issues could lead to what appear to be odd results. Namely, it does not seem to be in the best interests of the child for an important protective instrument to be excluded, thereby depriving certain children of the protection it provides.[11] A narrower interpretation of 'matters covered by the Regulation' would acknowledge that the relationship and/or interaction between Member States and Contracting States would not fall within that restrictive clause and would thus allow the courts of Member States to apply the 1996 Hague Convention when considering cases involving the relationship between a Member State and a Contracting State.[12]

Article 61(b) operates as an extension of the more general rule provided by Article 61(a). The recognition, enforcement and registration scheme of the Regulation will be applicable wherever the courts of the Member States are asked to enforce a judgment rendered by the courts of another member State, regardless of where the child has his or her habitual residence.[13]

A significant difference arises where a judgment has been issued by a court in the exercise of its urgent protective jurisdiction under either Article 20 of the Regulation or

[8] Practice Guide 2015.
[9] This question is derived from the application of Article 62 of the Regulation.
[10] Practice Guide 2015, paras 8.3.1. and 8.3.2, p. 89.
[11] Setright, H., Williams, D., Curry-Sumner, I., Gration, M., Wright, M., *International Issues in Family Law, The 1996 Hague Convention on the Protection of Children and Brussels IIa* (Jordan Publishing 2015), p. 13.
[12] *Ibid.* See also Chapters 5 and 8 of that book.
[13] *Ibid*., p. 122.

Article 11 of the 1996 Hague Convention. The CJEU has held that judgments rendered on the basis of Article 20 cannot be recognised and/or enforced pursuant to Chapter III of the Regulation,[14] whereas judgments made pursuant to the jurisdiction available under Article 11 of the 1996 Hague Convention can be enforced and recognised under that Convention.[15] This distinction has significant consequences, particularly in the context of a judgment requiring the return of a child in proceedings brought under the 1980 Hague Convention.[16]

As for the 1980 Hague Convention, it remains applicable when an application has been made for the return of a child who has been wrongfully retained in a country other than the country of his/her habitual residence or has been removed from the country of his/her habitual residence. However, the Regulation makes a number of adjustments in Article 11(2)-(8) and they prevail over the relevant provisions of the Convention. This follows from Article 11(1), as well as from Article 60. The latter provision lists treaties over which the Regulation prevails as far as they regulate matters governed by the Regulation. The Regulation supplements the international rules with specific provisions aiming at ensuring the prompt return of the child. In relations between Member States, the prevailing character of the Regulation over the 1980 Hague Convention, as laid down by Article 60 of the Regulation, results in a joint application of the two instruments.[17] The 1980 Hague Convention is amongst these treaties, together with the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors, the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages, the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separation and the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

2. Transitional provisions and entry into force

2.1 Explanation of the concept and the way it is currently regulated and Scope of application *ratione temporis*

The Regulation applies, as of the 1 March 2005, in all Member States of the European Union, with the exception of Denmark. The Regulation does not contain any general provision on the *territorial scope* of its rules on jurisdiction. In matters of jurisdiction over parental responsibility the Regulation is applicable when the child, regardless of his or her nationality, has his or her habitual residence in a Member State or resides in a Member State. Further, Article 12 provides for jurisdiction not based on habitual residence in a Member State, but based on prorogation. Hence, the jurisdiction rules apply where a child is not habitually resident in a Member State but parental responsibility proceedings are brought in conjunction with matrimonial proceedings for which Article 3 provides jurisdiction or in the case of other

[14] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, paras 76-83 and 86-91.
[15] Setright, *et al*., *op. cit.*, p. 123.
[16] *Ibid*., see also Chapter 9 of that book.
[17] Viarengo, I., and Villata F.C., (eds) 'Planning the Future of Cross-Border Families: a path through coordination. First assessment Report on the case-law collected by the Research Consortium' (2014) Project JUST/2014/JCOO/AG/CIVI/7729, p. 113.

proceedings instituted in a Member State, under certain conditions, when the child has a substantial connection with that Member State.

In a separate Chapter VI, entitled 'Transitional provisions', Brussels IIbis deals with issues of its temporal scope in just one provision, namely Article 64. This provision is based on the transitional provisions of the Brussels II Regulation (Article 42). Brussels II came into force on 1 March 2001 and Brussels IIbis entered into force on 1 August 2004. The latter is applicable as from 1 March 2005 (Article 72). Non-retroactivity is the leading principle, but there is an exception for more favourable rules of recognition and enforcement in specified circumstances.[18] A distinction can be made between the temporal scope of application concerning the rules on jurisdiction and the rules on the recognition and enforcement of decisions. Thus, Article 64 of the Regulation contains some rules that constitute the main rule on the temporal scope of the Regulation, thereby making a distinction between rules on jurisdiction and rules on recognition and enforcement of judgments.

2.1.1 Scope of application *ratione temporis* regarding rules on jurisdiction

Regarding the question of whether a court has to determine its jurisdiction on the basis of Brussels IIbis Regulation, a situation which is governed by Article 64(1), the answer is generally clear.[19] The main principle is that the Brussels IIbis Regulation only applies to 'new' cases. Article 64(1) states that the provisions of the Regulation shall apply only to legal proceedings instituted after its date of application as defined in Article 72.[20] Decisive is the date of application of Brussels IIbis as defined in Article 72 and not its entry into force on 1 August 2004. Namely, the repealing of the Brussels II Regulation took effect as of the date of application of the Brussels IIbis Regulation and not as of the date of its entry into force. Accordingly, there is no intertemporal gap.[21]

From Article 64(1) it follows that in proceedings instituted after 1 March 2005, the Brussels IIbis jurisdictional grounds have to be applied in the first fourteen original Member States. When the ten new Member States joined the European Community on 1 May 2004, in these Member States Brussels IIbis became applicable from 1 March 2005 to proceedings instituted after that date. Regarding Romania and Bulgaria the relevant date is 1 January 2007 and for Croatia it is 1 July 2013.[22] If the proceedings at stake were commenced before the date of the effective application of the Regulation in that country, the jurisdictional provisions of Brussels IIbis do not apply and jurisdiction over such proceedings has to be determined in accordance with the rules previously in force in the respective Member State, including the

[18] Mostermans, P.M.M., 'The Impact and Application of Brussels IIbis in The Netherlands' in Boele-Woelki and Beilfuss, *Brussels IIbis: Its Impact and Application in the Member States* (2007), *op. cit.*, p. 225; Mankowski/Magnus/Mankowski, *op. cit.*, Article 64, note 1.
[19] Althammer, *Kommentar zu den Verordnungen (EG) 2201/2003 und (EU) 1259/2010*, *op. cit.*, Article 64, p. 245.
[20] For more particular on the temporal scope, see Boele-Woelki and Gonzales Beilfuss, *Brussels IIbis: its impact and application in the Member States* (2007), *op. cit.*, pp. 36.
[21] Mankowski/Magnus/Mankowksi, *op. cit.*, Article 72, note 1.
[22] Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*, *op. cit.*, p. 382, note 3; Act of Croatian Accession, Article 2; [2012] OJ L112.

Brussels II Regulation and international treaties.[23] When legal proceedings are considered to have been instituted has to be determined according to Article 16.[24] Thus, the Regulation applies from 1 March 2005 with the exception of a number of provisions, which apply from 1 August 2004. According to Article 64 paragraph 1, it only applies to legal proceedings instituted after its date of application, which is 1 March 2005. Besides, it applies only to documents formally drawn up or registered as authentic instruments and to agreements concluded on or after this date. Thus, Article 64 (1) applies to documents, authentic instruments and agreements. If they are drawn up after 1 March 2005, Brussels IIbis applies. It is not relevant when such a document might have become enforceable. If an authentic instrument was effected the relevant point of time is when its registration as an authentic instrument took place.[25] If the document predates 1 March 2005, the Brussels II Regulation might be relevant, even though Article 71(1) repeals this instrument with immediate effect.[26]

For those Member States which joined the EU after this date, the Regulation applies to legal proceedings instituted and documents drawn up or registered as authentic instruments and to agreements concluded from the date of their accession. Thus, such documents and agreements originating in 'new' Member States will only be recognised in other Member States in accordance with the Regulation if they have been drawn up or registered or concluded after these States have become EU Member States. In the same vein, new Member States will apply the Regulation only with respect to such documents and agreements drawn up, registered, or concluded in other Member States if they have been drawn up, registered or concluded on or after the date when they have become a Member State. The question of the existence of an agreement on the choice of forum is only present concerning Article 12 in relation to jurisdiction over parental responsibility for the judge deciding on the divorce. Article 64(1) only requires them to be 'agreements concluded between the parties after its date of application in accordance with Article 72'. If a choice of court is generally accepted, a more detailed rule will be necessary, in particular as to when the spouses stipulate that the agreement should become effective.[27]

As already explained, Article 64 deals with both the temporal scope of application of the Regulation's jurisdictional rules (Article 64(1)), as well as the recognition and enforcement of judgments (Article 64, paras (2)-(4)). Concerning both issues, the temporal scope of application is limited in the sense that the Regulation does not have retroactive effect, i.e., it does not apply to events that occurred before it became applicable.[28]

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[23] Mankowski/Magnus/Mankowksi, *op. cit.,* Article 64, note 3 and the case law mentioned there. See also Stone, *op. cit*., p. 451.
[24] Rauscher, *op cit*., p. 382, note 5; Mankowski/Magnus/Mankowksi, *op. cit*., Article 64, note 5.
[25] Mankowski/Magnus/Mankowksi, *op. cit.,* Article 64, notes 7-8.
[26] *Ibid*., Article 64, note 11.
[27] Borrás, A., 'Grounds of jurisdiction in matrimonial matters: recasting the Brussels IIa Regulation' (2015) 1 NIPR, p. 9. Also, the author expresses the view that a problem of transience that is not solved by the Brussels IIbis Regulation refers to *lis pendens.* In her view, the essential problem is what happens when one of the proceedings was instituted before the date of application of the new instrument and the other after this date. For these reasons the author suggest introducing a rule on this matter.
[28] De Boer, 'What we should *not* expect from a recast of the Brussels IIbis Regulation', *op. cit.,* p. 12.

2.1.2 Scope of application *ratione temporis* regarding rules on the recognition and enforcement of judgments

In contrast to a clear wording of paragraph (1), the provisions in paragraphs (2)-(4) of Article 64 are rather ambiguous. Consequently, the picture on the temporal scope of application concerning the recognition and enforcement of judgments is rather complicated. According to Article 64(2), a judgment rendered after the Regulation's date of application may be enforced under the Regulation even if the proceedings were instituted before that date provided that the court of a Member State has based its jurisdiction on the rules in the Brussels II Regulation or in a treaty entered into by the state where the judgment is rendered and the state where the enforcement is sought which was applicable at the moment when the proceedings were instituted. The same holds true for judgments rendered before the application of the Regulation in proceedings instituted after the entry into force of the Brussels II Regulation provided that they relate to divorce, legal separation or marriage annulment or parental responsibility for the child of both spouses within these matrimonial proceedings.[29] Judgments rendered before the date of the Regulation's application but after the date of application of the Brussels II Regulation in proceedings commenced before the entry into force of the Brussels II Regulation are enforceable under the Regulation if jurisdiction was based on rules which are in accordance with the rules in the Brussels IIbis Regulation or the Brussels II Regulation or in a treaty between the state of origin and the state where the enforcement is sought provided that it was in force at the moment of the commencement of the proceedings in which the judgment was rendered.

In practice, however, the relevance of these provisions is currently rather limited considering that the Regulation has now been applicable for over ten years. As for states that became a Member State after 1 March 2005 or 1 August 2004, these provisions are of no relevance as the application of these provisions is connected with the entry into force of the Brussels II Regulation. Thus, it bears no relevance for judgments rendered in Romania, Bulgaria and Croatia, as they became Members States after 1 March 2005 (in 2007 and 2013 respectively). Accordingly, the Brussels II Regulation has never been in force in those jurisdictions.

Yet it is not entirely clear whether the same line of reasoning is to be followed when the recognition and enforcement of a judgment is requested in Bulgaria, Romania and Croatia and that judgment was rendered by a court of an EU Member State *after* they became Member States, but when the proceedings had been instituted *before* their accession. The wording 'the entering into force of Regulation 1347/2000' may imply that the extension of the application of the Regulation is 'linked' to the applicability of the Brussels II Regulation in the 'country of origin', i.e., where the judgment was rendered. Therefore, it remains circumspect in our view whether the provisions of paragraphs (2)-(4) could be applied *analogously* so that the 'new

[29] Brussels IIbis Regulation, Article 64(2).

Member States' would be required to apply the Regulation to judgments rendered after they became Member States, but the proceedings were instituted before that moment.

Thus, Article 64 deals in its three paragraphs with different circumstances. In the Practice Guide for the Brussels II Regulation a flow chart illustrates how this provision is supposed to operate.[30] On the basis of the interpretation of Article 64(2) the recognition and enforcement of decisions which have been instituted after the date of application fall within the temporal scope of the Brussels IIbis Regulation.[31] In the situations covered by paragraphs (2)-(4) of Article 64 both the date of the judgement and the date when the proceedings were commenced are relevant. The general idea is that all judgements from the date of application of Brussels IIbis are subject to a regime of automatic recognition in the other Member States, if the jurisdiction of the court meets certain requirements. These require that the court has jurisdiction on a jurisdictional basis which was agreed upon by both Member States and an equivalent to one of the jurisdictional bases of Brussels II or Brussels IIbis.[32]

Some of the difficulties involved are demonstrated *infra* in this Chapter, under 2.2 '*Difficulties in application – relevant literature*'. The wording of Article 64 of the Brussels IIbis Regulation is unclear and rather confusing. Regrettably, it differs from the clear wording used in Article 66 of the Brussels I Regulation. Therefore, the 2016 Commission's Proposal suggests drafting the temporal scope of application along the lines of Article 66 of the Brussels Ibis Regulation. As such, this suggestion is to be met with approval, as explained in the Recommendations, under 8 '*General and Final Provisions*'. Considering that the provisions in both Brussels Ibis and Brussels IIbis Regulations regulate the same private international law aspects – jurisdiction and the enforcement of judgements – presumably they should express similar considerations. This is probably the reason why the Commission suggests to follow the same line of reasoning regarding the temporal scope of application. From the practical point of view, it could be desirable that the current complicated provision of Article 64(2)-(4) could be subject to an analogous interpretation of Article 66 of the Brussels I Regulation. Namely, there is no reason why a judgment based on criteria for jurisdiction under the Brussels IIbis Regulation which was rendered after a Member State of enforcement has acquired membership should not be enforced under the Regulation. However, it seems that the wording of paragraphs (2)-(4) of Article 64, in particular the reference to the Brussels II Regulation, implies that the provisions of paragraphs (3) and (4) do not apply to judgments with respect to Member States that have never applied the Brussels II Regulation,[33] so that Romania, Bulgaria and Croatia are not requested to apply the Regulation to judgments rendered after their succession in proceedings instituted before succession.

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[30] The European Commission's Practice Guide for the application of the new Brussels II Regulation (2005), p. 9, available at: http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf.
[31] Mankowski/Magnus/Mankowksi, *op. cit.*, Article 64, note 11.
[32] Stone, *op. cit*., p. 388.
[33] Magnus/Mankowski/Mankowski, *op. cit.*, Article 64, notes 19 and 25, which take the view that Bulgaria and Romania do not feature in this context since their accession was as of 1 January 2007 so that they have never been Members of the Brussels II Regulation.

Regarding recognition under Article 64(2) – (4) the date of the application of both the Brussels IIbis and Brussels II Regulations are relevant. In the literature it is pointed out that this concerns the date on which the respective Regulation became applicable for *both* the State of origin *and* the State addressed.[34]

With respect to the possible concurrence of the Regulation with other relevant instruments,[35] in relation to the 1996 Hague Convention, the Regulation applies when the child has his or her habitual residence in a Member State. In relation to the 1980 Hague Convention, in the field of jurisdiction there is no confluence since the Regulation does not provide for jurisdiction regarding the request for the return of the child. In matters that concern both instruments, however, the Regulation prevails.

2.2 Difficulties in application – relevant literature

As stated before, the transitional provision of Article 64 is not clear in every respect. In the literature a number of problems have been identified. In National Reports, no problems have been reported, but no specific questions on this topic have been posed in the questionnaire. It will no doubt have been difficult at times for national courts to apply the difficult transitional provision, in particular the situations which have not been explicitly covered by Article 64.

In the literature a number of issues have been raised. One of them is that of *lis pendens* and transitional law. Borrás suggests that the recast provides a good opportunity to introduce a rule for the situation where one of the proceedings was instituted before the date of application of the new instrument and the other after this date.[36] If both proceedings started either before or after 1 March 2005, Brussels IIbis is not applicable. The scenario where one of the proceedings is initiated before and the other after the entry into force is problematic. In *Von Horn v. Cinnamond*, the CJEU attempted to solve the issue along the lines of what was then Article 54(2) of the 1968 Brussels Convention.[37]

The complicated nature of the transitional provision is often pinpointed in the legal literature, and the drafting of Article 64 has been called disgraceful[38] and 'extremely complicated'.[39] A number of scenarios have been identified in which it is not clear what would be applicable.[40] In order to create some clarity tables with the various situations and outcomes have been developed in the doctrine, demonstrating that Article 64 contains no rule for a number of situations.[41] As suggested in the literature, it seems to be sufficient either that the original court had explicitly assumed jurisdiction on a ground which was similar or comparable to one

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[34] Stone, *op. cit*., p. 437.
[35] Brussels IIbis Regulation, Article 61.
[36] Borrás, 'Grounds of jurisdiction in matrimonial matters: recasting the Brussels IIa Regulation', *op. cit*., pp. 3-9.
[37] CJEU Case C-163/95 *Elsbeth Freifrau von Horn v Kevin Cinnamond* [1997] ECR I-5451, paras 14-25.
[38] Stone, *op cit*., p. 450; Mankowski/Magnus/Mankowksi, *op. cit*., Article 64, note 11.
[39] Stone, *op. cit*., p. 450.
[40] *Ibid.*, pp. 388-390. The same author at p. 426 states that: '[i]t seems that, where a decision at first instance granting a divorce decree (or making a custody order) is subsequently affirmed on appeal, the date of grant (or making) for the purposes of the transnational provisions is that of the decision at first instance and not that of the decision on appeal'; See also D v D [2007] EWCA Civ 1277 (CA). See also, Ni Shúilleabháin, *op. cit.*, p. 97.
[41] Stone, *op. cit.*, p. 388-390; Curry-Sumner, I., 'Rules on the recognition of parental responsibility decisions: A view from the Netherlands' (2014) 4 NIPR, pp. 545-558. See also Vlas, Ibili, *op. cit.*, p. 263, 271.

applicable under the Brussels IIbis Regulation or on the ground in a relevant convention which was in force when the proceedings were instituted, or that the court addressed finds that a ground of jurisdiction accepted in the Brussels IIbis Regulation or in a relevant convention had in fact existed.[42]

2.3 Difficulties in application – CJEU case law

The facts of *Hadadi* case[43], have already been presented *supra* in Chapter 2, under 3.7.1 '*Difficulties in the application of Article 3(1)(b) – CJEU case law*'. It involved the interpretation of the transitional provision of Article 64(4). The spouses, who had double French-Hungarian nationality, both instituted divorce proceedings, one in France and the other in Hungary. The Hungarian court issued the judgment granting a divorce on 4 May 2004, after Hungary became a Member State.[44] Thus, the judgment postdated the application of Brussels II in Hungary, but it was rendered before the date of application of Brussels IIbis. The proceedings were instituted before the date of the entry into force of Brussels II Regulation in Hungary Accordingly, these are the circumstance in which Article 64(4) applies. In order to determine whether to apply the Regulation on the recognition of the judgment, the French court had to decide whether the jurisdiction of the Hungarian court could be based on the common Hungarian nationality of the spouses. The common nationality is one of the rules on jurisdiction contained in Article 3(1)(b) of the Regulation Brussels IIbis. In accordance with Article 64(4), the Hungarian divorce judgment is to be recognised pursuant to Brussels IIbis if the jurisdiction of the Hungarian court was founded on rules which were in accordance with those provided for either in Chapter II of Brussels IIbis, Brussels II or in a convention concluded between Hungary and France, which was in force when the proceedings were instituted. In this context, the CJEU ruled that it is not necessary that the granting court actually relied on an equivalent ground at the time of accepting jurisdiction. It is enough that the jurisdiction of the court in question 'was able to be established by applying Article 3(1) of Brussels IIbis, whatever rules on jurisdiction were in fact applied by them'.[45] In those circumstances, the question of the recognition of that judgment must be assessed by applying Article 64(4), since proceedings were instituted and the judgment was delivered within the period set out in that provision.[46]

Where the spouses have the same dual nationality, the court seised cannot overlook the fact that the individuals concerned had the nationality of another Member State. On the contrary, in the context of Article 64(4), where the spouses hold both the nationality of the Member State of the court seised and that of the same other Member State, that court must take into account the fact that the courts of that other Member State could have been properly seised of the case under Article 3(1)(b) of the Brussels IIbis Regulation since the persons concerned had the nationality of the latter State.

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[42] *Ibid*., pp. 451. See also CJEU Case C-435/06 *C.* [2007] ECR I-10141 (dealing with a finding of 'residence' as being similar to habitual residence) and CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871 (especially at paras 29-30, in which it was considered sufficient that both spouses were nationals of the State of origin).
[43] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871.
[44] Hungary became a member on 1 May 2004.
[45] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871, paras 27-30.
[46] *Ibid*., paras 27-28.

The CJEU case of *C*,[47] addressed the question of the moment when the judgment is rendered. For the purposes of applying Article 64, it is important to determine the date when the judgment was rendered. In some jurisdiction there might be a difference in the date of the ruling and the date when the decision becomes enforceable. The relevant point of time is when the judgment becomes effective and not when it eventually becomes *res judicata* or gains enforceability.[48] When a judgment is deemed to be rendered is not a matter regulated by EU law. Instead it is governed by the rules of the respective *lex fori processus* of the court which has delivered its judgment.[49] For the purpose of recognition within the meaning of Article 64, the term 'judgment' relates to the original judgment brought at last instance in the country of origin. Any kind of subsequently entered order declaring the judgment enforceable is irrelevant in this context.

In the case of *C*,[50] a Swedish Social Welfare Board had ordered two children to be taken into care. This decision was subsequently confirmed by a Swedish administrative court.[51] The CJEU assumed that the date of the latter and not the former was decisive for the purposes of recognition pursuant to Article 64.[52] The Advocate General had also supported this viewpoint holding that 'a judgment has only been given for the purposes of Article 64 where it is enforceable and has external consequences under the law of the granting state.'[53]

2.4 Conclusion

The provision of Article 64 is unclear, incomprehensive and inconclusive. In some instances, becoming rarer as time goes by, there are still gaps.[54] The most important one relates to judgments given after 1 March 2005 stemming from proceedings instituted before 1 March 2001. The Commission in its Proposal suggests appropriate changes in Article 78 which would remedy the deficiencies under the current provision of Article 64. The suggested amendments are detailed in the Recommendations, under 8 '*General and Final Provisions*'.

3. Final provisions in Chapter VII

The final chapter of Brussels IIbis contains a number of different issues, ranging from reporting by the Commission on the application of the Regulation to the date of repealing the Brussels II Regulation.[55] From the perspective of this Guide for Application, many of these provisions do not require specific attention as they either speak for themselves, and/or have been dealt with in the past or are not relevant for the everyday application issues of the Regulation.[56] In this section we will focus on Articles 65 and 66, which are the most interesting from a practical

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[47] CJEU Case C-435/06 *C.* [2007] ECR I-10141.
[48] Dilger, J. in: Geimer/Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen (C.H. Beck 2017), Article 64, note 9; Kaller-Pröll in: Fasching/Konecny, Article 64, note 8.
[49] Mankowski/Magnus/Mankowksi, *op. cit.*, Article 64, note 6.
[50] CJEU Case C-435/06 *C.* [2007] ECR I-10141.
[51] *Ibid*., para 16.
[52] *Ibid*., para 71.
[53] *Ibid*., Opinion of Advocate General Kokott, paras 64-66.
[54] Mankowski/Magnus/Mankowksi, *op. cit.*, Article 64, note 26.
[55] Brussels IIbis Regulation, Article 65.
[56] It concerns Articles 67-72 which do not appear to raise any problems. Some of the provisions are to some extent rephrased in the proposal for the recast.

perspective. In National Reports no issues have been identified concerning any of these provisions.

Article 65 requires an 'inspection' by the European Commission with regard to the application of the Regulation during a five-year period.

In the 2016 Commission's Proposal a number of changes are foreseen. First, the currently recurring five-year period is to be replaced by a once-only evaluation after ten years. In the literature the introduction of an ongoing duty for the Commission to monitor, evaluate and adapt the application of the Regulation in 2005 was perceived to be an improvement, since it requires the Commission to keep track of developments.[57] It is not clear why a different choice has been made. This decision could be called into question, taking into account the fact that the proposed recast is already in its second revision thereby demonstrating that things might need to change quite regularly.

What is new is the duty for the Member States to collect data and provide this information to the European Commission. It concerns: the number of decisions in both matrimonial matters and parental responsibility in which jurisdiction was based on the Recast; the number of Article 32 cases on the enforcement of parental responsibility decisions, where enforcement has not occurred within the prescribed time limit of six weeks; the number of applications to refuse the recognition of an Article 39 decision and, if possible, how many of these applications have been granted; the number of applications to refuse the enforcement of an Article 41decision and, if possible, how many of these applications have been granted; and the number of appeals lodged against the refusal of an enforcement decision pursuant to Articles 44 and 45.

One may wonder whether the Member States are in the position to provide these data, in particular regarding the number of decisions in which the jurisdictional grounds of the recast have been used.

Thirdly, a minor change concerns the terminology in the heading that changes to 'monitoring and evaluation' which is definitely a better heading than the current 'review.'

Article 66 provides, just like Brussels II did, a specific rule for Member States in which two or more systems of law or sets of rules exist concerning matters governed by the Regulation. It only applies to Member States with more than one set of rules or systems of law from the point of view of judicial procedure, such as the UK or Spain.[58] Article 66 makes clear which habitual residence, domicile and authority in a member State have to be read as in a particular territorial unit of that Member State. This provision is relevant since it means that it is the Regulation which determines jurisdiction within a particular Member State. Thus, national law of that Member State do not apply for this purpose.[59]

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[57] Magnus/Mankowski/Mankowski, *op.cit.*, Article 65, note 5.
[58] Borrás, 'Grounds of jurisdiction in matrimonial matters: recasting the Brussels IIa Regulation', *op. cit.*, p. 126.
[59] Rauscher, *op. cit.*, Article 67, note 3.

In UK case law and literature there is a debate as to how Article 66 is to be determined. The first approach is that if a case has internal connections only, jurisdiction is to be determined by national law only and the Regulation is irrelevant. If, however, the case has multiple connections, thus also with another Member State (for example, to England and Wales, Scotland, and France), then Brussels IIbis applies, and if it allocates jurisdiction to the UK, Article 66 on internal allocation (to England and Wales or Scotland) must be observed. Adherents to the second approach would consider Brussels IIbis to be applicable in both scenarios. The essential difference is that 'first approach' considers Article 66 to be inapplicable in purely internal cases whereas 'second approach' suggests it to be applicable in internal cases as well as in cases with an international dimension. It seems that the first approach enjoys considerable support, but there is room for interpretation.[60]

No suggestions for changes have been made in the literature and in the proposal for the Recast no changes are foreseen.

The final part of the Regulation relates to the role of the Commission in receiving the necessary information from the Member States, pursuant to Articles 67 and 68 of the Regulation, and the way the Commission is assisted by the committee as provided for in Article 70. This Article also declares that Articles 3 and 7 of Decision 1999/468/EC[61] apply in this context, meaning the rules of procedure of the committee and its advisory procedure.

Article 67 deals with where the courts and practitioners should turn to in order to gather information about the central authorities in other Member States.[62] Pursuant to Article 72 of the Regulation, the Regulation entered into force on 1 August 2004 and has been applicable from 1 March 2005, with the exception of Articles 67, 68, 69 and 70 which have been applicable from 1 August 2004.[63]

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[60] Ni Shúilleabháin, *op. cit*., p. 86; Beevers, K., and McClean, D., 'Intra-UK Jurisdiction in Parental Responsibility Cases: Has Europe Intervened?' [2005] International Family Law, p. 129; Fawcett, J., and Carruthers, J., Cheshire, *North & Fawcett: Private International Law* (14th edn., OUP 2008) p. 1085; Lowe, N., 'Negotiating the Revised Brussels II Regulation' [2004] International Family Law, 205, pp. 208–209.

[61] COUNCIL DECISION of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC) OJ L 184/23, p. 23.

[62] Mankowski/Magnus/Mankowksi, *op. cit*., Article 67, note 1; the current list of information can be found at https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-en.do?clang=en.

[63] Mankowski/Magnus/Mankowksi, *op.cit*., Article, 72 note 1.

GUIDELINES – Summary

Brussels IIbis and the 1996 Hague Convention

When Article 12(4) is considered together with Article 61 we can conclude that the Convention shall only have precedence over the Regulation in the context of the so-called prorogation of jurisdiction as provided for in Article 12(4). The presumption provided therein will not apply if the third state where the child has his or her habitual residence is a party to the 1996 Convention.

The 1996 Hague Convention remains relevant with respect to the applicable law in cases of parental responsibility, as this is not a private international law aspect which is covered by the Regulation.

Brussels IIbis and the 1980 Hague Convention

It follows from Article 11(1), as well as from Article 60, that the 1980 Hague Convention remains applicable when an application has been made for the return of a child who has been wrongfully retained in or removed from a country other than the country of his/her habitual residence. However, when a party applies to obtain the return of a child who has been wrongfully removed or retained in a EU Member State other than the Member State where the child habitually resided immediately before his/her wrongful removal or retention, the Regulation makes a number of adjustments in Article 11(2)-(8) and they prevail over the relevant provisions of the Convention.

A very important alteration from the 1980 Hague Convention is that judgments rendered by the courts of the EU Member State where the child habitually resided immediately before his/her wrongful removal or retention (thus, the judgments rendered in the so-called 'second chance' procedure under Article 11(8) of the Regulation) are directly enforceable in all EU Member States. Thereby the reason under Article 47(2) is the only reason that may be invoked to oppose their enforcement.

<u>Article 64</u>

The transitional provision of Article 64 is not clear in every respect, but the underlying principle is to favour recognition and enforcement, even if the date of instituting proceedings predates the date of application of the relevant Regulation.

The judgment postdates the entry into force of Brussels II, but predates its date of application

For the purposes of application of Article 64(4), a judgment is to be recognised pursuant to Brussels IIbis if the jurisdiction of the court was founded on rules which are in accordance with those provided for in the Regulation. In this context, it is sufficient that the jurisdiction of the court in question 'was able to be established by applying Article 3(1) of Brussels IIbis, whatever rules on jurisdiction were in fact applied by them'. In those circumstances, the question of the recognition of that judgment must be assessed by applying Article 64(4), since proceedings were instituted and the judgment was delivered within the period set out in that provision (see the *Hadadi* case[64]).

[64] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871.

Bibliography

TABLE OF CASES

Court of Justice of the European Union

C-43/77 Industrial Diamonds Supplies v. Riva [1977] ECR 2175

C-143/78 Jacques de Cavel v Louise de Cavel [1979] ECR 1055

C-166/80 Klomps v Michel [1981] ECR 1593

C-129/83 Siegfried Zeiger v Sebastiano Salinitri [1984] ECR 2397

C-145/86 Hoffmann v Krieg [1988] ECR 645

C-89/91 Shearson Lehman Hutton [1993] ECR I-00139

C-474/93 Hengst Import BV v. Anna Maria Campese [1995] ECR I-2113

C-78/95 Hendrikman and Feyen v. Magenta Druck & Verlag [1996] ECR I-4943

C-163/95 Elsbeth Freifrau von Horn v Kevin Cinnamond [1997] ECR I-5451

C-391/95 Van Uden [1998] ECR I-7091

C-99/96 Mietz [1999] ECR I-2277

C-7/98 Krombach v. Bamberski [2000] ECR I-01935

C-38/98 Renault v. Maxicar [2000] ECR I-02973

C-122/99 and C-125/99 P – D and Kingdom of Sweden v Council of the European Union [2001] ECR I-4319

C-271/00 Baten [2002] ECR I-10489

C-281/02 Andrew Owusu v N. B. Jackson [2005] ECR I-01383

C-443/03 Gotz Leffler v. Berlin Chemie AG [2005] ECR I-9611

C-435/06 C. [2007] ECR I-10141

C-435/06 C. [2007] ECR I-10141, Opinion of AG Kokott

C-68/07 Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo [2007] ECR I-10403

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

C-195/08 PPU Inga Rinau [2008] ECR I-5271, Opinion of AG Sharpston

C‑420/07 Apostolides [2009] ECR I-03571

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

C-523/07 A [2009] ECR I-2805, Opinion of AG Kokott

C-168/08 Hadadi v Hadadi [2009] ECR I-6871

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

C-497/10 PPU Mercredi v. Chaffe [2010] ECR I-14309

C-497/10 PPU Mercredi v. Chaffe [2010] ECR I-14309, Opinion of AG Cruz Villalon

C-400/10 PPU McB [2010] ECR I-08965

C-296/10 Bianca Purrucker v Guillermo Vallés Pérez II [2010] ECR I-11163

C-406/09 Realchemie Nederland [2011] ECR I-09773

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

C-92/12 PPU Health Service Executive [2012] ECLI:EU:C:2012:255

C-267/12 Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres [2013] ECLI:EU:C:2013:823

C-251/12 Van Buggenhout and Van de Mierop [2013] ECLI:EU:C:2009:474

C-386/12 Schneider [2013] ECLI:EU:C:2013:633

C-157/13 Nickel & Goeldner Spedition [2014] ECLI:EU:C:2014:2145

C‑4/14 Bohez v Wiertz [2014] ECLI:EU:C:2015:563

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

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

C-656/13 L v M [2014] ECLI:EU:C:2014:2364

C-112/13 A. v B. and others [2014] ECLI:EU:C:2014:2195

C-1/13 Cartier parfums-lunettes and Axa Corporate Solutions assurances [2014] ECLI:EU:C:2014:109

Opinion of the Court (Grand Chamber) of 14 October 2014 1/13, 11 October 2014, ECLI:EU:C:2014:2303

C-215/15 Vasilka Ivanova Gogova v Ilia Dimitrov Iliev [2015] ECLI:EU:C:2015:710

C-455/15 PPU P v Q [2015] ECLI:EU:C:2015:763

C-184/14 A v B [2015] ECLI:EU:C:2015:479

C-404/14 Matoušková [2015] ECLI:EU:C:2015:653

C-404/14 Matoušková [2015] ECLI:EU:C:2015:428, Opinion of AG Kokott

C-498/14 PPU David Bradbrooke v Anna Aleksandrowicz [2015] ECLI:EU:C:2015:3

C-489/14 A v B [2015] ECLI:EU:C:2015:654

C-489/14 A v B [2015 ECLI:EU:C:2015:559, Opinion of AG Cruz Villalon

C-507/14 P v M [2015] ECR OJ C 65

C‑681/13 Diageo Brands [2015] ECLI:EU:C:2015:471

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

C-281/15 Soha Sahyouni v Raja Mamisch [2016] ECLI:EU:C:2016:343

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

C-428/15 Child and Family Agency v J. D. [2016] ECLI:EU:C:2016:458, Opinion of AG Wathelet

C-173/16 M.H. v M.H. [2016] ECLI:EU:C:2016:542

C-67/17 Todor Iliev v Blagovesta Ilieva [2017] ECLI:EU:C:2017:459

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

C-111/17 PPU OL v PQ [2017] ECLI:EU:C:2017:436

C-111/17 PPU OL v PQ [2017] ECLI:EU:C:2017:375, Opinion of Advocate General Wahl

C-499/15 W and V v X [2017] ECLI:EU:C:2017:118

C-335/17 Neli Valcheva v Georgios Babanarakis [2018] ECLI:EU:C:2018:359

C-335/17 Neli Valcheva v Georgios Babanarakis [2018] ECLI:EU:C:2018:242, Opinion of AG Szpunar

C-604/17 PM v AH [2018] ECLI:EU:C:2018:10

C-673/16 Coman and Others [2018] ECLI:EU:C:2018:385

European Court of Human Rights

Karoussiotis v Portugal App no. 23205/08 (ECtHR, 1 February 2011)

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

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

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

TABLE OF LEGISLATION

EU legislation

Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32

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 [1995] OJ C 316/49

Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2000] OJ L 160/37

Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L 160/19

COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L 12/1

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

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77

Protocol (No. 4) on the position of the United Kingdom and Ireland (1997) [2006] OJ C321E/198

Protocol (No. 5) on the position of Denmark (1997) [2006] OJ C321E/201

Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000 [2007] OJ L 324/79

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1

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

Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343/11

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47

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 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) [2012] OJ L 351/1

Charter of Fundamental Rights of the European Union [2016] OJ C 202/389

International and Regional Conventions

Convention of 6 February 1931 between Norway, Denmark, Finland, Iceland and Sweden containing international private law provisions on marriage, adoption and guardianship with final protocol

Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms

Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants

Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents

Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages

Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations

European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children

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

SECONDARY SOURCES

Books

Althammer C and others, *Brüssel IIa Rom III, Kommentar zu den Verordnungen (EG) 2201/2003 und (EU) 1259/2010* (Verlag C.H. Beck 2014)

Andrae M, *Internationales Familiesrecht* (Nomos 2014)

Baarsma NA, *The Europeanisation of International Family Law* (T.M.C. Asser Press 2011)

Beaumont P and others, *Cross Border Litigation in Europe* (Hart Publishing 2017)

Boele-Woelki K, *Brussels II bis: its impact and application in the Member States* (Intersentia 2007)

Bogdan M, *Concise introduction to private international law* (2nd edn, Europa law publishing 2012)

— — *Concise introduction to private international law* (3rd edn., Europa law publishing 2016)

Bonomi and Wautelet, *Le droit européen des successions: commentaire du Règlement n 650/2012 du 4 juillet 2012* (Bruylant 2013)

Bülow and others, *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (Verlag C.H. Beck 2016)

Calvo Caravaca AL and Carrascosa González J, *Derecho internacional privado* (16th edn., Comares 2016)

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

Dicey and Morris, *The Conflict of Laws* (13th edn, Sweet & Maxwell 1999)

Fawcett J and others *North & Fawcett: Private International Law* (14th edn OUP 2008)

Fulchiron H and Nourissat C, *Le nouveau droit communautaire du divorce et de la responsabilité parentale* (Dalloz 2005)

Garcia RA, *Crisis matrimoniales internacionales. Nulidad matrimonial, separación y divorcio en el nuevo derecho internacional privado español* (Universidade de Santiago de Compostela 2004)

Heyvaert A, *Belgisch internationaal privaatrecht – een inleiding* (Mys & Breesch 2001)

Hodson D, *The International Family Law Practice 2013-2014* (3rd edn, Family Law 2013)

Holzmann C, *Brussel IIa VO: Elterliche Verantwortung und internationale Kindesentfuhrungen* (Janeaer Wissenschaftliche Verlagsgesellschaft 2008)

Jonker M and others, *International Kinderontvoering: De uitvoeringspraktijk van inkomende zaken in Nederland,Engeland & Wales, Zweden en Zwitserland* (Boom Juridische Uitgevers 2015)

Jost F, *Recht in Europa. Festschrift für Hilmar Fenge zum 65. Geburtstag Broschiert* (1st edn.,Verlag Dr. Kovac 1996)

Layton A and Mercer H, *European Civil Practice* (Sweet & Maxwell 2004)

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)

McEleavy P, *The Hague Convention on International Child Abduction* (OUP 1999)

Meeusen J and Schmidt EG, *Mededelingen van de Nederlandse Vererniging voor Internationaal Recht* (Asserpress 2006)

Mosconi F and Campiglio C, *Diritto internazionale privato e processuale* (UTET Giuridica 2013)

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

Rauscher T, *Europeisches Kollisions – und Zivilprozessrecht (vol. I)* (3rd edn, Otto Schmidt Verlag 2011)

— — *Europäisches Zivilprozess – und Kollisionsrecht EuZPR/EuIPR* (Sellier European Law Publishers 2015)

Schuz R, *The Hague Child Abduction Convention: A Critical Analysis (vol 13)* (Hart Publishing 2013)

Setright H and others, *International Issues in Family Law, The 1996 Hague Convention on the Protection of Children and Brussels IIa* (Jordan Publishing 2015)

Stone P, *EU Private International Law: Harmonization of Laws* (1st edn., Elgar European Law 2006)

— — *EU Private International Law* (2nd edn, Elgar European Law 2010)

Trimmings K, *Child abduction within the European Union* (Hart Publishing 2013)

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

Verhellen J, *Brussel IIbis Verordening – Huwelijkszaken* (Intersentia 2015)

Vonken P, *Internationaal Privaatrecht,* (Asser Series 10 II, Wolters Kluwer 2016)

Wiwinius JC, *Le droit international privé au Grand-Duché de Luxembourg* (3rd edn., Editions Paul Bauler 2011)

Contributions to edited books

Beaumont P, Holliday J, ‘Recent developments on the meaning of ‘habitual residence’ in alleged child abduction cases’ in Župan M. (ed), Private International Law in the Jurisprudence of European Courts – Family at Focus (Osijek 2015)

Boele-Woelki K and Gonzalez Beilfuss C,'Impact and Application of the Brussels IIbis Regulation: comparative synthesis' in Boele-Woelki K and Gonzalez Beilfuss C (eds), *Brussels IIbis: Its Impact and Application in the Member States* (Intersentia 2017)

Borrás A, 'From Brussels II to Brussels II bis and Further' in Boele-Woelki K and Gonzalez Beilfuss C (eds), *Brussels II bis: Its Impact and Application in the Member States* (Intersentia 2007)

— — 'Lights and Shadows of Communication of Private International Law: Jurisdiction and Enforcement in family Matters with regard to Relations with Third States' in Malatesta A and others (eds), *The External Dimension of EC Private International Law in Family and Succession Matters* (CEDAM 2008)

Brijs S, 'Nieuwe Europese uitvoerbare titels: wie ziet het bos nog door de bomen?' in Dirix E (ed), *Recente ontwikkelingen insolventierecht, beslagrecht en zekerheden (Themis reeks)* (Die Keure 2010)

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)

Chalas C, 'Article 21' in Corneloup S (ed), *European Divorce Law* (LexisNexis 2013)

Couwenberg I, 'Tenuitvoerlegging in België van buitenlandse beslissingen' in Pertegas M, Brijs S and Samyn L, *Betekenen en uitvoeren over de grenzen heen* (Intersentia 2008)

Devers A, 'Les enlèvements d'enfants et le règlement Bruxelles II bis' in Fulchiron H, Perben D, *Les enlèvements d'enfants à travers les frontières* (Bruylant 2004)

Dilger J in Geimer/Schütze, *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (C.H. Beck 2017)

Farrugia R, 'The Impact and Application of Brussels II bis in Malta' in Boele-Woelki K and Gonzalez Beilfuss C (eds), *Brussels II bis: Its Impact and Application in the Member States* (Intersentia 2007)

Fawcett J, 'Part III Jurisdiction, Foreign Judgments and Awards, Ch.16 Recognition and Enforcement of Judgments Under the Brussels/Lugano System' in Cheshire and others *Private International Law* (14th edn., Oxford 2008)

Forder C, 'Seven Steps to Achieving Full Participation of Children in the Divorce Process' in Willems MVJ (ed), *Developmental and Autonomy Rights of Children; Empowering Children, Caregivers and Communities* (Intersentia 2002)

Gallant E, 'Compétence, reconnaissance et exécution (Matières matrimoniale et de responsabilité parentale)' in X, *Répertoire de droit européen (no. 243)* (Dalloz 2013)

Garau Sobrino F, 'La interpretación contra legem de la normativa de Derecho internacional privado por el Tribunal de Justicia de la Unión Europea. ¿Una usurpación de la función legislativa?' in Esplugues Mota C and Palao Moreno G (eds), *Nuevas fronteras del derecho de la Unión Europea – Liber Amicorum José Luis Iglesias Buhigues* (Tirant lo Blanch 2011)

Georgouleas N, ‘International Abduction of Children’ in Chrysapho T (ed), *International Family Law* (Nomiki Vivliothiki 2016)

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

Hekin M, ‘The Impact and Application of Brussels II bis in Finland’ in Boele-Woelki K and Gonzalez Beilfuss C (eds), *Brussels II bis: Its Impact and Application in the Member States* (Intersentia 2007)

Kaller-Pröll in Fasching/Konecny, *Kommentar zu den Zivilprozessgesetzen* (Manz Verlag 2015)

Kohler C, ’Die Revision des Brüsseler und des Luganer Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil – und Handelssachen – Generalia und Gerichtsstandsproblematik‘ in Gottwald, *Revision des EuGVÜ – Neues Schiedsverfahrensrecht* (Verlag Ernst und Werner Gieseking 2000)

Lazić V, ‘Legal Framework for International Child Abduction in the European Union – The Need for Changes in the Light of Povse v. Austria’ in Župan M (ed), *Private International Law in the Jurisprudence of European Courts – Family at Focus* (Osijek 2015)

— — ‘Family Private International Law Issues Before the European Court of Human Rights: Lessons to Be Learned from Povse v. Austria in Revising the Brussels IIa Regulation’ in Paulussen C and others (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (Asserpress 2016)

— — ‘Multiple Faces of Mutual Recognition: Unity and Diversity in Regulating Enforcement of Judgements in the European Union’ in Fletcher M, Herlin-Harnell E and Matera C (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2017)

Martiny D, ‘Hague Conventions in Private International Law and on International Civil Procedure’ in *Max Planck Encyclopaedia of Public International Law* (vol. 4, OUP 2012)

Mostermans PMM, ‘The Impact and Application of Brussels II bis in The Netherlands’ in Boele-Woelki K and Gonzalez Beilfuss C (eds), *Brussels II bis: Its Impact and Application in the Member States* (Intersentia 2007)

Murphy J, ‘Other child-centered conventions’ in Murphy J, *International dimensions in family law* (Manchester University Press 2005)

Pertegas Sender M, ‘La responsabilité parentale, l’enlèvement d’enfants et les obligations alimentaires’ in Wautelet P (ed), *Actualités du contentieux familial international* (Larcier 2005)

Shannon G, ‘The Impact and Application of Brussels II bis in Ireland’ in Boele-Woelki K and Gonzalez Beilfuss C (eds), *Brussels II bis: Its Impact and Application in the Member States* (Intersentia 2007)

Stalford H, ‘EU Family Law: a Human Rights Perspective’ in Meeusen J, *International family law for the European Union* (Intersentia 2007)

Storme H in Erauw J, *Handboek Belgisch internationaal privaatrecht* (Kluwer 2006)

Swennen F, ‘Atypical families in EU (private international) family law’ in Meeusen J and others (eds), *International family law for the European Union* (Intersentia 2007)

Teixeira de Sousa M, ‘Article 22’ in: Corneloup S (ed), *European Divorce Law* (LexisNexis 2013)

Tenreiro M, ‘L’espace judiciaire européen en matière de droit de la famille, le nouveau règlement Bruxelles II bis’ in Fulchiron H (ed), *Les enlèvements d’enfants à travers les frontières* (Bruylant 2004)

Vandenbosch A and Muylle M, ‘Commentaar bij Artikel 22 en 23’ in Couwenberg I and others, *Duiding Internationaal Privaatrecht* (Larcier 2014)

Vanderkerckhove, ‘Voorlopige of bewarende maatregelen in de EEX-Verordening, in de EEX-II en in de Insolventieverordening’ in de Leval/Storme (eds), *Le Droit Processuel & Judiciaire Européen* (2003)

Vassilakakis E and Kourtis V, ‘The impact and application of the Brussels IIbis Regulation in Greece’ in Boele-Woelki K and Gonzalez Beilfuss C, *Brussels IIbis . Its impact and application in the Member States* (Intersentia 2007)

Verhellen J, ‘Brussel IIbis Verordening – Huwelijkszaken’ in Allemeersch B and Kruger T (eds), *Handboek Europees Burgerlijk Procesrecht* (Intersentia 2015)

Vlaardingerbroek P, ‘Changing Parenthood after Divorce’ in Erauw J and others (eds), *Liber Memorialis Petar Šarčević: Universalism, Tradition and the Individual* (Sellier European Law Publishers 2006)

Wautelet P, ‘La dissolution du marriage en droit international privé – Compétence, droit applicable et reconnaissance des decisions étrangères’ in Wautelet P, *Actualité du contentieux familial international* (Larcier 2005)

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

Beaumont P, ‘The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction’ (2008) 335 Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law

— — ‘International Family Law in Europe – The Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity’ [2009] 73(3) Rabels Zeitschrift für ausländisches und internationales Privatrecht

— — and others, ‘Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU’ [2016] 12(2) J Priv Int L

— — *and* Walker L, Holliday J, ‘Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings’ [2016] 4 IFL

Beevers K and McClean D, ‘Intra-UK Jurisdiction in Parental Responsibility Cases: Has Europe Intervened?’ [2005] IFL 129

Borrás A, ‘Grounds for jurisdiction in matrimonial matters: recasting the Brussels IIa Regulation’ [2015] 1 NIPR

Briggs A, ‘Decisions of British Courts during 2005 Involving Questions of Public or Private International Law’ [2006] 76(1) BYIL

Buckley L, ‘European Family Law: the Beginning of the End for “Proper” Provision?’ [2012] I.J.F.L.

Crawford EB, ‘The uses of Putativity and Negativity in the Conflict of Laws’ [2005] 54 ICLQ

Currry-Sumner I, ‘Rules on the recognition of parental responsibility decisions: a view from the Netherlands’ [2014] 32(4) NIPR

de Boer TM, ‘Enkele knelpunten in de toepassing van de Verordening Brussel II-bis’ [2005] 27 FJR

— — ‘What we should not expect from a recast of the Brussles II bis regulation’ [2015] 33(1) NIPR

De Vareilles-Sommières P, ‘La libre circulation des jugements rendus en matière matrimoniale en Europe’ [1997] Gazette du Palais

Dickinson A, ‘Provisional Measures in the “Brussels I” Review: Disturbing the Status Quo?’ [2010] 6 JPIL

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

Frohn L, ‘Herschikking Brussel IIbis’ (2016) 349 NIPR

Gallagher E, ‘A House is not (necessarily) a home: a discussion of the common law approach to habitual residence’ [2014] 47 N.Y.U. J. Int’l L. & Pol

Gaudemet-Tallon H, ‘Le Règlement 1347/2000 du Conseil du 29 mai 2000: Compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs’ [2001] JDI

Gruber UP, ‘Die “auslandische Rechtshangigkeit” bei Scheidungsverfahren’ [2000] FamRZ

Hammje P, ‘Le divorce par consentement mutuel extrajudiciaire et le droit international privé. Les aléas d’un divorce sans for’ (2017) Revue critique de droit international privé

Hazelhorst M, ‘The ECtHR’s decision in Povse: Guidance for the future of the abolition of exequatur for civil judgments in the European Union’ [2014] 1 NIPR 2014

Helms T, ‘Die Anerkennung ausländischer Enscheidungen im Europäischen Eheverfahrensrecht’ [2001] FamRZ

Hess B, ‘The Integrating Effects of European Civil Procedural Law’ [2002] E.J.L.R.

Honorati C, ‘The Commission’s Proposal For A Recast Of Brussels IIa Regulation’ [2017] 2 IFL

Jänterä-Jareborg M, ‘A European Family Law for Cross-border Situations – Some Reflections Concerning the Brussels II Regulation and its Planned Amendments’ [2002] Yrbk Priv Intl L

Končina Peternel M, ‘Mednarodna ugrabitev otrok’ [2013] 3 Pravosodni bilten

Kruger T, ‘Kinderhandel: welke rechters moeten/mogen de zaak horen?’ [2006] Tijdschrift voor Vreemdelingenrecht

— — and Samyn L, ‘Brussels II bis: successes and suggested improvements’ [2016] J Priv Int L

— — ‘The Disorderly Infiltration of EU Law in Civil Procedure’ [2016] 63(1) NILR (2016)

— — ‘Brussels IIa Recast moving forward’ [2017] 3 NIPR

Lamont R, ‘Mainstreaming Gender into European Family Law? The Case of International Child Abduction and Brussels II Revised’ (2011) 17(3) ELJ

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

Langdale R and Robottom J, ‘The Participation and Involvement of Children in Family Proceedings’ [2012] Family Law Week

Lenaerts K, ‘The best interests of the child always come first: The Brussels IIbis Regulation and the European Court of Justice’ [2013] 20(4) Jurisprudence (Jurisprudencija)

Llerranz Ballesteros M, ‘International Child Abduction in the European Union: the Solutions incorporated by the Council Regulation’ [2004] 34(2) Revue générale de droit

Lowe N, ‘Negotiating the Revised Brussels II Regulation’ [2004] IFL

— — ‘Some moot points on the 1980 Hague abduction convention’ [2015] VUWLR

Lupsan G, ‘Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges applying Regulation Brussels II bis’ [2014] 7(1) Baltic Journal of Law and Politics

— — ‘Reflections on the Abolition of Exequatur in the Cross-Border Cases Regarding the Return of the Child’ [2015] 5 Acta U. Danubius Jur.

Marín Pedreño C, ‘Brussels II bis Regulation Five Years On and Proposals for Reform’ [2010] IAFL

McEleavy P, ‘The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership’ [2005] J Priv Int L

— — ‘The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?’ [2015] NILR

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

Mostermans PMM, ‘Nieuw Europees echtscheidingen onder de loep: de rechtsmacht bij echtscheiding’ [2001] NIPR

— — ‘De wederzijdse erkenning van echtscheidingen binnen de Europese Unie’ [2002] NIPR

Oberhammer P, ‘The Abolition of Exequatur’ [2010] IPRAX

Peers S, ‘Bosphorus. European Court of Human Rights. Limited Responsibility of European Union Member States for Actions within the Scope of Community Law. Judgment of 30 June 2005 [2006] *European Constitutional Law Review*

Rauscher MT, ‘Parental Responsibility Cases under the new Council Regulation “Brussels IIA”’ [2005] (1) The European Legal Forum

Renton C, ‘Orders Relating To Children Within The European Union Under BIIR’ [2009] Family Law Week

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

Rutten S, ‘Perpetuatio fori in ouderlijk gezagskwesties’ [2005] NIPR

Schulz A, ‘The new Brussels II Regulation and the Hague Convention s of 1980 and 1996’ [2004] IFL

— — and Dutta A, ‘First Cornerstones of the eu Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation From C to Health Service Executive’ [2014] 10(1) J Priv Int L

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

Stumpe F, ‘Torpedo-Klagen im Gewand obligatorischer Schlichtungsverfahren – Zur Auslegung des Art. 27 EGBGB’ [2008] IPRax

Vlaardingerbroek P, ‘Internationale Kinderontevoering en het EHRM’ [2014] NIPR

Vlas P and Ibili F, ‘Echtscheiding en ouderlijke verantwoordelijkheid volgens de nieuwe EG-Verordening Brussel IIbis’ [2005] 6616 WPNR

Wagner R, ‘Die Anerkennung und Vollstreckung von Entscheidungen nach der Brüssel II-Verordnung’ [2001] IPRax

Walker L and Beaumont P, ‘Shifting The Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice’ [2011] J Priv Int L

Weller M, ‘Mutual Trust: in search of the future of European Union private international law ‘ [2015] 11(1) J Priv Int L

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

Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in the matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance, COM (2002) 222 final

Commission staff working paper, *Annex to the Green Paper on applicable law and jurisdiction in divorce matters*, COM (2005) 82 final

Commission, Practice Guide for the application of the new Brussels II Regulation (2005) (available at: http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf)

Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM (2006) 399 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, Practice Guide for the application of the Brussels IIa Regulation (2015) (available at: https://publications.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed/language-en)

Commission, Judicial cooperation in civil matters in the European Union. A guide for legal practitioners (2015) (available at: https://publications.europa.eu/en/publication-detail/-/publication/a9da11b8-0a6a-491e-8ae9-a0ff9d7e8535/language-en)

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 responsability, 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 Council's documents

COUNCIL DECISION of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC) OJ L 184/23

Tampere European Council 15-16 October 1999. Presidency conclusions (available at: http://www.europarl.europa.eu/summits/tam_en.htm)

Council Decision of 2 December 2007 amending the Protocol on the Statute of the Court of Justice [2008] OJ L24/42

Council document 16121/10, JUSTCIV 194, of 12 November 2010, Conclusions of the ministerial seminar organised by the Belgian Presidency concerning international family mediation in cases of international child abduction (available at http://register.consilium.europa.eu)

Explanatory reports, studies and opinions by experts and stakeholders

Akandji-Kombe JF, Positive obligations under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights (Human Rights Handbooks, No. 7) (2007) (Council of Europe) (available at: https://rm.coe.int/168007ff4d)

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)

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)556945_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)583158_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)

Hess B and Pfeiffer T, 'Interpretation of the public policy exception as referred to in EU Instruments of Private International and Procedural Law' (2011) (Directorate General for internal policies policy department C: Citizens' rights and constitutional affairs) (available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf)

Jenard P, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters' [1979] OJ C 59/1

Kramer X, *et. al.*, 'A European Framework for private international law: current gaps and future perspectives' (2012) (Directorate General for internal policies policy department C: Citizens' rights and constitutional affairs) (available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2012/462487/IPOL-JURI_ET(2012)462487_EN.pdf)

Lagarde P, Explanatory Report on the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1998) (available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=2943)

Viarengo I and Villata FC (eds), 'Planning the Future of Cross-Border Families: a path through coordination' (2014) Project JUST/2014/JCOO/AG/CIVI/7729 (available at: http://www.eufams.unimi.it/wp-content/uploads/2017/12/EUFams-Final-Study-v1.0.pdf)

Websites and blogs

Muir Watt, H on Abolition of Exequatur and Human Rights (2013) (available at: http://conflictoflaws.net/2013/muir-watt-on-povse/)

X., Comment on EC Regulation Brussels II, Article 21 (available at: www.europeancivillaw.com)

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

<https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do>

<www.eufams.unimi.it>