European Commission

Practice Guide for the application of the

Brussels IIb Regulation

Justice and

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1. General Introduction

1.1. Objective and purpose of the Regulation

The Regulation[1], known colloquially as the Recast of Brussels IIa Regulation, Brussels IIb or Brussels IIter, is the cornerstone of the judicial cooperation in family matters with cross-border implications in the European Union (EU). The Regulation is an instrument dealing with the jurisdiction and the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, including international child abduction and cooperation in matters of parental responsibility. It does not unify the determination of the applicable law[2], nor the national substantive family law.

The Regulation is part of the Action Plan of the EU[3] to create, maintain and develop an area of freedom, security, and justice, in which the free movement of persons and access to justice are ensured (see Article 67(1)(3) Treaty on the functioning of the EU (TFEU) and Recital (3) of the Regulation). To fulfil the objectives set out in the TFEU and the Action Plan, the Regulation strives to reinforce the rights of persons, in particular children, in legal procedures, to facilitate the cooperation of judicial and administrative authorities and the enforcement of decisions in family law matters with cross-border implications (see Recital 3). Furthermore, the Regulation aims to enhance the mutual recognition of decisions in civil matters, simplify access to justice and improve exchanges of information between the authorities of the Member States (see Recital 3). In particular, the Regulation is intended to strengthen legal certainty and increase flexibility, to ensure that access to court proceedings is improved and to ensure that such proceedings are made more efficient (Recital 2). Nevertheless, the smooth and correct functioning of a Union area of justice should respect the Member States' different legal systems and traditions (see Recital 3).

[1] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019.

[2] For the applicable law see the part on the relation with other instruments. See also Recital 92 of Council Regulation (EU) 2019/1111, *supra* note 1.

[3] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, OJ C 19, 23.1.1999.

1.2. Historical Background

The Regulation has quite long history. Its oldest predecessor[4], the Brussels II Regulation, was adopted on 29 May 2000 and applied in the period from 1 March 2001 to 28 February 2005[5]. The Brussels II Regulation was repealed by Brussels IIa or Brussels IIbis[6], the latter being applicable as of 1 March 2005[7] until 31 July 2022 (see Article 104(1)).

The Regulation builds upon Brussels IIa and applies from 1 August 2022.

The continuity between the Regulation and the previous instruments in the field of jurisdiction and recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility requires continuity in the interpretation, especially as regards the jurisprudence of the Court of Justice of the EU (CJEU), i.e., the previous case law in this area remains relevant with regard to the Regulation so long as the Regulation does not legislate otherwise.

1.3. Territorial applicability

1.3.1. General – Recitals 95 and 96

The Regulation applies in all the Member States of the EU with the sole exception of Denmark[8].

[4] 1998 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ C 221, 16.7.1998, p. 1, drawn up on the basis of Article K.3 of the Treaty on European Union that never entered into force.

[5] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30.6.2000.

[6] 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, OJ L 338, 23.12.2003.

[7] From 1 January 2007 in Bulgaria and Romania and from 1 July 2013 in Croatia.

[8] For the application of the Regulation in the oversea territories of some Member States consider Consolidated version of the Treaty on the Functioning of the European Union 2012/C 326/1, Article 349, OJ C 326, 26.10.2012. The Regulation does not apply in those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control provided for by Article 1(1) of Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded.

1.3.2. Cross-border implications – Recitals 2 and 3

The Regulation applies in principle to cases with cross-border implications (see Recitals 2 and 3 and Article 17). Proceedings including only persons habitually resident in one Member State will normally be not falling into the scope of the Regulation. However, it is possible that cross-border implication arises in proceedings of this type (for example in case of *lis pendens* and dependent actions (Article 20) or exclusive jurisdiction of another Member State (Article 12(5)).

To determine the jurisdiction, it is not necessary that all cross-border implications are linked solely to EU Member States. The grounds of jurisdiction may even apply to disputes involving relations between the courts of a single Member State and those of a third country[9].

However, the system of recognition and enforcement of the Regulation only applies between Member States where decisions delivered in a third country do not fall within its geographical scope (see Article 30(1), Article 34(1) and *Sahyouni*[10]). The decision of one Member State subject to recognition and enforcement in another Member State may be given in cases with or without cross-border implication.

1.3.3. Relation with national law

The Regulation is directly applicable in the Member States which are bound by it and as such prevails over national law (see Article 288(2) TFEU). However, the Regulation expressly refers to the national law in certain matters; for example, concerning the procedure of hearing the child, i.e., who will hear the child and how the child is heard (see Article 21(1) and Recital 39) or when determining whether the grounds for refusal of recognition and enforcement may be raised by a party or *ex officio* (see Recital 54 and 62). However, the national law should be applied provided, first, that the national rules are not less favourable than those governing similar domestic actions without cross border implications (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Regulation and the relevant EU law (principle of effectiveness).

[9] CJEU judgment of 17 October 2018 in Case C-393/18, *PPU UD* ECLI:EU:C:2018:835, para. 41 and in Case C-572/21 *CC* ECLI:EU:C:2022:562, para. 29.

[10] CJEU order of 12 May 2016 in Case C-281/15, *Sahyouni* ECLI:EU:C:2016:343, para. 22 and 23.

1.3.4. Relation with other instruments

For the relation of the Regulation with other bilateral and multilateral conventions and with instruments of EU law see Chapter 9 "Relation with other instruments".

1.4. Applicability in time

1.4.1. Commencement provision – Article 100 (1)

The Regulation applies from 1st August 2022. The Regulation applies in its entirety to:

- legal proceedings instituted
- authentic, instruments formally drawn up or registered
- agreements registered

on or after 1 August 2022 (see Article 100 (1)).

1.4.2. Transitional provision – Article 100 (2)

The Brussels IIa Regulation continues to apply to decisions given in legal proceedings instituted before 1 August 2022 and to authentic instruments formally drawn up or registered, and to agreements which have become enforceable in the Member State where they were concluded before 1 August 2022 and which fall within the scope of that Regulation (see Article 100(2)).

Thus, the Brussels IIa Regulation will continue to apply to decisions issued before and even after 1 August 2022[11] where the first instance court was seized before that date. In the case of authentic instruments, the previous Brussels IIa Regulation applies if the document was formally drawn up or registered before 1 August 2022.[12] The decisive moment for agreements falling within the scope of the Regulation is the time when they become enforceable[13] in the Member State where they were concluded. If the time when they become enforceable was

[11] European Commission, Directorate-General for Justice, Practice guide for the application of the Brussels IIa Regulation, Publications Office, 2016, https://data.europa.eu/doi/10.2838/28781.

[12] See Article 100 (2) and point 12.2 of Annex IX of Council Regulation (EU) 2019/1111, *supra* note 1.

[13] See Article 100 (2) and point 14 of Annex IX of Council Regulation (EU) 2019/1111, *supra* note 1.

before 1 August 2022 – Brussels IIa Regulation applies, if on and after 1 August 2022 – the Regulation is applicable.

2. Matrimonial Matters

2.1. Introduction

The provisions of the Regulation concerning matrimonial matters (see Articles 3-6) are little changed in relation to the equivalent provisions of the Brussels IIa Regulation[14], the Brussels II Regulation[15] and the Brussels II Convention of 28 May 1998[16] on the same subject matter which never entered into force. Literature devoted to the Convention and to the Regulations can therefore also serve as guidance for the present Regulation as regards matrimonial matters. For example, the Explanatory report concerning the Convention[17] , the recitals of the Brussels II Regulation on matrimonial matters, and the Practice Guide for the application of the Brussels IIa Regulation18 could be useful in this context.

2.2. Material scope in matrimonial matters -Article 1(1)(a) and Recitals 9 and 12

The Regulation contains rules on jurisdiction, recognition and enforcement in civil matters relating to divorce, legal separation, and marriage annulment ("matrimonial matters"), including the annulment of a marriage brought by a third party following the death of one of the spouses[19].

The Regulation does not deal with the grounds for divorce or applicable law in divorce[20] nor to ancillary issues, such as

[14] Council Regulation (EU) 2019/1111, *supra* note 1.

[15] Council Regulation (EC) No 1347/2000, *supra* note 5.

[16] 1998 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ C 221, 16.7.1998, p.1, drawn up on the basis of Article K.3 of the Treaty on European Union that never entered into force.

[17] See 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 (approved by the Council on 28 May 1998) prepared by Dr Alegría Borrás Professor of Private International Law University of Barcelona OJ C 221, 16.7.1998, p. 27.

[18] See Practice Guide for the application of Brussels IIa Regulation of 2016, *supra* note 11.

[19] CJEU judgment of 13 October 2016 in Case C-294/15, *Mikołajczyk* ECLI:EU:C:2016:772, para. 37.

[20] See 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, OJ L 343, 29.12.2010, p. 10, which is not applied in all Member States The regulation applies to 17 Member States which participate in enhanced cooperation on this issue: Belgium, Bulgaria, Germany, Estonia, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, and Slovenia

maintenance obligations[21], the property consequences of marriage[22] or of registered partnership[23], and matters of succession[24]. Nor does it apply to preliminary questions linked to the status of the persons such as the existence, validity, or recognition of a marriage, which continue to be covered by the national law of the Member States (see Recital 12). Decisions refusing divorce, legal separation and marriage annulment are excluded from the material scope as regards the provisions on recognition (see Recital 9).

2.3. Which courts have jurisdiction in matrimonial matters?

2.3.1. Jurisdiction rules introduction – Articles 3-5

The jurisdiction rules in Article 3-5 determine in which Member State the courts have jurisdiction but not the court which is competent within that Member State. The determination of the local jurisdiction is left to the domestic law of each Member State. Article 3 contains the general jurisdiction rules, whereas Article 4 and Article 5 are devoted to the rather rare situations of counterclaims and conversion of legal separation to divorce.

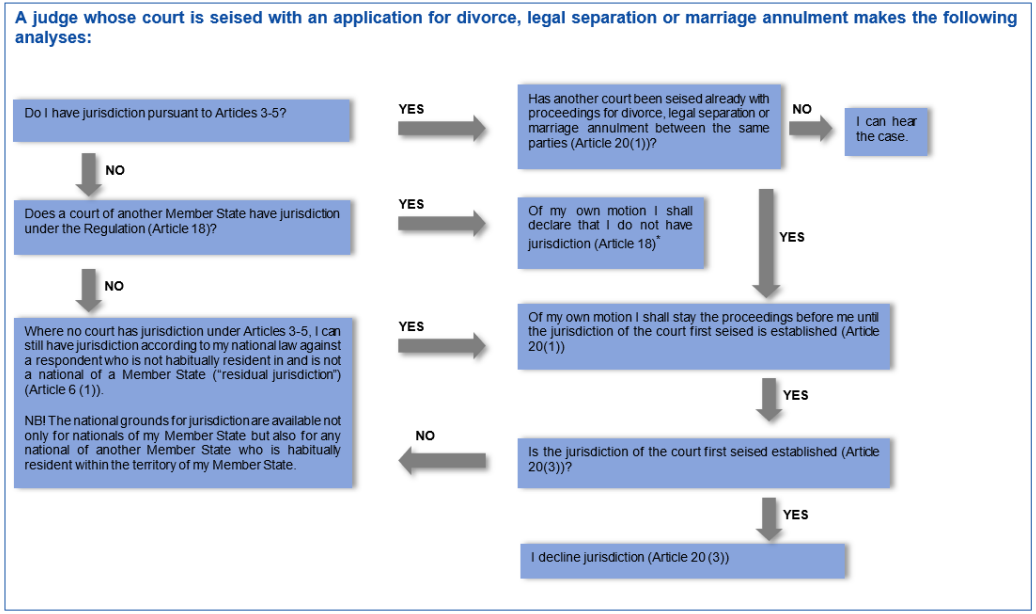
[21] See Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1.

[22] See Council Regulation (EU) 2016/1103 of 24 June 2016, OJ L 183, 8.7.2016, p. 1, which is not applied in all Member States. The regulation applies to the 18 EU Member States which participate in enhanced cooperation on this issue: Belgium, Bulgaria, Cyprus, Czechia, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland, and Sweden.

[23] See Council Regulation (EU) 2016/1104 of 24 June 2016, OJ L 183, 8.7.2016, p. 30, which is not applied in all Member States. This Regulation applies to the 18 EU Member States which participate in enhanced cooperation on this issue: Belgium, Bulgaria, Cyprus, Czechia, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland, and Sweden.

[24] See Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012, OJ L 201, 27.7.2012, p. 107, which is not applied in all Member States. The regulation applies to all Member States, except Ireland and Denmark.

2.3.2.Jurisdiction rules – judicial analysis



***** See paragraph 2.3.6

2.3.3.General jurisdiction – Article 3

2.3.3.1. The seven grounds of jurisdiction

Article 3 enumerates seven grounds of jurisdiction in matrimonial matters. Spouses may raise an application for divorce, legal separation, or marriage annulment in the courts of the Member State of:

(a) their common actual habitual residence (see Article 3(a)(i)), or

(b) their last common habitual residence if one of them still resides there (see Article 3(a)(ii)), or

(c) the habitual residence of the respondent (see Article 3(a)(iii)), or

(d) the habitual residence of either spouse in case of a joint application (see Article 3(a)(iv)), or

(e) the habitual residence of the applicant, provided that he or she has resided there for at least one year immediately before making the application (see Article 3(a)(v)), or

(f) the habitual residence of the applicant, provided that he or she has resided there for at least six months immediately before making the application and he or she is a national of that Member State (see Article 3(a)(vi)), or

(g) their common nationality (see Article 3(b)).

According to the CJEU in *Mikołajczyk,* the term 'applicant' within the meaning of fifth and sixth indents of Article 3(1)(a), does not extend to persons other than spouses. The third party may rely on all other grounds of jurisdiction provided for in Article 3. The case concerned an action for annulment of a marriage brought by a daughter from a previous marriage following the death of her father. CJEU concluded that so long as all jurisdiction rules laid down in Article 3 are designed to protect the interests of spouses, the third party must be bound by the jurisdiction rules from that perspective. Thus, the third party cannot rely on connecting factors linked to his or her own habitual residence as applicant[25].

2.3.3.2. The notion of habitual residence

The Regulation does not define the notion 'habitual residence' of a spouse. The CJEU continuously states that it has to be given an autonomous and uniform interpretation, taking into

[25] Case C-294/15, *Mikołajczyk supra* note 19.

account the context of the provisions referring to that concept and the objectives of the Regulation[26].

In IB[27] the CJEU provides some guidance for the interpretation of the term "habitual residence" of a spouse while being asked in essence whether a spouse who divides his or her time between two Member States may be habitually resident in both Member States.

In the case IB is a French national married to FA, an Irish national. The family settled in Ireland in 1999 where the family home was situated. In 2010 IB started to work in France and has been doing so on a stable and permanent basis since 2017. During the stay in France IB used to live in the apartment of his father. Nevertheless, IB continued to travel to the family home in Ireland and to lead the same life there until the end of 2018, when he filed for divorce in France. The CJEU held that while it cannot be ruled out that a spouse may have several residences at the same time, he or she may have, at a given time, only one habitual residence for the purposes of Article 3(1)(a) of the Regulation (para. 51). That interpretation was justified among others with a referral to the adjective 'habitual' indicating that the residence must have a certain permanence or regularity and that the transfer of a person's habitual residence to a Member State should reflect the intention of the person concerned to establish there the permanent or habitual centre of his or her interests, with the intention that it should be of a lasting character (paragraph 41). In addition, this argumentation was supported as balancing between the free movement of persons within the European Union and legal certainty, as well as considering the consequences which go beyond the dissolution of matrimonial ties for example in the area of maintenance (paragraphs 44-48).

When determining the notion of 'habitual residence' of a spouse the CJEU referred first to the same notion used in relation to the parental responsibility matters concerning children at a young age28. In this regard the CJEU has already stated that the habitual residence of the parents is an essential criterion for determining the child's habitual residence. Thus, the court seised has to determine the place where the parents were present on a stable basis and were integrated into a social and family environment and the intention thus to settle in that place, where that intention was

[26] CJEU judgment of 28 June 2018 in Case C-512/17, *HR* ECLI:EU:C:2018:513, para. 40, CJEU judgment of 25 November 2022 in Case C-289/20, *IB* ECLI:EU:C:2021:955, para. 39 and CJEU judgment of 1 August 2022 in Case C-501/20, *MPA* ECLI:EU:C:2022:619.

[27] Case C-289/20, *IB supra* note 26.

[28] See for further explanations of the habitual residence of the child Chapter 3 "Parental responsibility".

manifested by tangible steps29. Nevertheless, the CJEU stated that the particular circumstances characterising the place of habitual residence of a child are not identical in every respect to those which make it possible to determine the place of habitual residence of a spouse (paragraph 54). The spouse may decide to leave the couple's former habitual residence in order to settle in another Member State and in general the environment of an adult is necessarily more varied, composed of a significantly wider range of activities and diverse interests, concerning, inter alia, professional, sociocultural and financial matters in addition to private and familial matters. In that regard, it cannot be required that those interests be focused on the territory of a single Member State (paragraph 56). The CJEU concluded that the concept of 'habitual residence' is characterised, in principle, by two factors, namely, first, the intention of the person concerned to establish the habitual centre of his or her interests in a particular place and, secondly, a presence which is sufficiently stable in the Member State concerned. Thus, a spouse who seeks to rely on the ground of jurisdiction provided for in the fifth or sixth indents of Article 3(1)(a) of the Regulation must necessarily have transferred his or her habitual residence to the territory of a Member State other than that of the former common habitual residence and thereby, first, must have manifested an intention to establish the habitual centre of his or her interests in that other Member State and, secondly, must have demonstrated that his or her presence in the territory of that Member State shows a sufficient degree of stability (para. 58).

In *MPA*[30] CJEU builds upon the notion of habitual residence of a spouse provided for in *IB*[31] while deciding on a case related to divorce proceedings of spouses that were members of the contract staff for the European Commission and had been assigned to an EU delegation to a third State.

In *MPA*[32] the wife was of Spanish nationality and the husband was of Portuguese nationality. They married in Guinea-Bissau in 2010 and resided there and then in Togo. While neither of the spouses has left Togo, the wife brought divorce proceedings in Spain in 2019. The CJEU held that the spouses at issue were not habitually resident on the territory of that Member State as they have been physically absent permanently from the territory of Spain since 2010. Thus, no sufficiently stable presence in the territory of the Member

[29] Case C-512/17, *HR*, *supra* note 26, para. 45 and 46.

[30] Case C-501/20, *MPA supra* note 26.

[31] Case C-289/20, *IB supra* note 26.

[32] Case C-501/20, *MPA supra* note 26.

State of the claimed habitual residence can be satisfied. In addition, nothing in the case suggested that either of the spouses or at the very least the wife have decided, despite their constant physical distance from the territory of Spain for several years, to establish the permanent or habitual centre of their interests in that Member State. Even if one of those spouses had expressed the intention to settle in Spain in the future that cannot be sufficient having in mind that neither of the spouses have left Togo and the posts they hold in the delegations of the European Union were deliberately requested by them. The CJEU stated further that the fact that there is no habitual residence in the Member State of the court seised is sufficient for it to be held that that court does not have jurisdiction under Article 3(1)(a) of Brussels IIa Regulation irrespective of whether the spouses at issue in the main proceedings enjoy, in Togo, any immunity before the civil courts of that third State. In light of these considerations the CJEU concluded that the status of the spouses as members of the contract staff of the European Union, working in the latter's delegation to a third country and in respect of whom it is claimed that they enjoy diplomatic status in that third State, is not capable of constituting a decisive factor for the purposes of determining habitual residence, within the meaning of this provision.

2.3.3.3. The notion of nationality

The determination of the nationality of the spouses is left to the national law of the Member State. This stems from the international law providing for that each State is free to determine the acquisition and the loss of nationality[33]. In the case of Ireland, the concept of 'domicile' replaces 'nationality' and it has the same meaning as under the law of Ireland (see Article 2(3)).

If both spouses hold the nationality of the same two Member States, he or she may decide to choose one of the two in the realm of Article 3(b), there being no need to take into account the 'effective' nationality[34].

2.3.3.4. The alternative nature of the grounds of Jurisdiction in Article 3

The grounds of jurisdiction in matrimonial matters are alternative, implying that there is no hierarchy, hence no order

[33] CJEU judgment of 7 July 1992 in Case C-369/90, *Micheletti and Others v Delegación del Gobierno en Cantabria* ECLI:EU:C:1992:295, para. 10.

[34] CJEU judgment of 17 July 2009 in Case C-168/08, *Hadadi* ECLI:EU:C:2009:474, para. 51.

of precedence, between them, as the CJEU held in In *Hadadi*[35] Thus, where the spouses were both nationals of the same two Member States and habitually resident in one of them, the divorce petition can be brought before the courts of either MS.

2.3.4. Residual grounds of jurisdiction – Article 6

Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 or 5, the national jurisdiction rules in the Member State of the seised court apply (see Article 6(1)). However, these national provisions may not be relied on against a spouse who is habitually resident in the territory of a Member State or is a national of a Member State (see Article 6 (2)). Thus, whenever a court in one Member State has jurisdiction pursuant to Articles 3, 4 or 5, above, there is no room for application of the national jurisdiction rules of another Member State. Only where Articles 3 to 5 do not confer jurisdiction, and against a respondent who is not habitually resident nor a national of a Member State, recourse to national law is possible[36]. Thus, where the respondent is habitually resident or national of a Member State other than that of the court seised, the recourse to the residual jurisdiction laid down in Article 6(1) to establish the jurisdiction of that court is excluded. However, as it stems from *MPA*[37] the courts of the Member State of which the respondent is a national are not prevented from having jurisdiction to hear an application for dissolution of matrimonial ties pursuant to the latter Member State's national rules on jurisdiction[38].

In the case that the court seised may avail itself of the residual grounds of jurisdiction the access to the national heads of jurisdiction against a respondent who is not habitually resident in nor a national of a Member State is also open for any national of another Member State who is habitually resident in the Member State of the seised court (see Article 6(3)).

2.3.5. Prorogation

The Regulation, like all its predecessors, does not allow the parties to choose jurisdiction for actions relating to divorce, legal separation and marriage annulment. However, the spouses have some room for manoeuvre in the event of a joint application to choose either of the spouses' habitual residence

[35] Case C-168/08, *Hadadi supra* note 34.

[36] See, on this point, example 5 in paragraph 2.3.7 and CJEU judgment of 29 November 2007 in Case C-68/07, *Sundelind Lopez* ECLI:EU:C:2007:740.

[37] Case C-501/20, *MPA supra* note 26.

[38] See on this point, example 6 in paragraph 2.3.7 Examples of the application of the jurisdiction rulesand Case C-501/20, *MPA supra* note 26.

or to make use of their double common nationality (see Article 3(a)(iv) and 3(b)).

2.3.6. Examination as to jurisdiction – Article 18

Where a court of a Member State is seised of an application in a matrimonial matter in respect of which it has no jurisdiction under the rules in the Regulation and a court of another Member State does have jurisdiction then it must of its own motion declare that it has no jurisdiction. The Regulation does not require that the case be transferred to a court of another Member State. It is for the interested party to bring the proceedings before the court of the other Member State.

2.3.7. Examples of the application of the jurisdiction rules

Example 1: Spouses habitually resident in the same Member State

A man who is a national of Greece is married to a woman who is a national of Cyprus. The couple is habitually resident in France. After a few years, the wife wants to divorce. Either spouse can apply for divorce only before the courts of France pursuant to Article 3(a)(i) on the basis that they have their common actual habitual residence there. The wife cannot seise the courts of Cyprus on the basis that she is a national of this State, since Article 3(b) requires the common nationality of both spouses.

Example 2: Spouses habitually resident in different Member States

Spouses, who previously habitually resided together in Ireland, split up. H, a national of that Member State, remains in Ireland whilst W goes to Finland of which she is a national. The options for the spouses are as follows: Both H and W can make an application in the courts of Ireland, on the ground that that was the last habitual residence of both spouses and H still resides there (see Article 3(a)(ii)); H can also apply in the courts of Finland once W is habitually resident there (see Article 3(a)(iii)). W can also make an application in the courts of Ireland on the ground that H is habitually resident there (see Article 3(a)(iii)) and of Finland of which she is a national and where she is habitually resident if she resided there for at least six months immediately before the application was made (see Article 3(a)(vi)).

Example 3: Spouses with joint nationality of one Member State

Spouses H and W are both nationals of Portugal but have been living in a non-EU state - Canada. Either spouse can make an application before the courts of Portugal on the grounds of their common nationality (see Article 3(b)).

If they both leave Canada, with H moving to Spain and W to Italy, either spouse can make an application before the courts of Portugal on the grounds of their joint nationality (see Article 3(b)); alternatively, each could do so before the courts of their respective new habitual residence once each has been resident there for at least a year immediately before the application was made (see Article 3(a)(v)). The other spouse may also proceed before the courts of the respondent's habitual residence (see Article 3(a)(iii)).

If H stays in Canada and W moves to Italy, either spouse can make an application before the courts of Portugal, as in the previous scenario. Either of them will be able to make an application in the courts of Italy, but W only once she has been resident there for at least a year before the application was made.

Example 4: Spouses nationals of different Member States

Spouses W and H, living in Sweden are nationals respectively of Member States Germany and Hungary. After they separate W returns to Germany whilst H goes to another Member State – the Netherlands. In this case the following options arise: W can apply for divorce to the courts in the Netherlands once H has acquired habitual residence there (see Article 3(a)(iii)); W can apply for divorce in Germany, the Member State of her nationality, once she has acquired habitual residence there and resided there for six months immediately before the application was made (see Article 3(a)(vi)). H can apply for a divorce in Germany also once W has acquired habitual residence there (see Article 3(a)(iii)); H can only apply for a divorce in the Netherlands once he has resided there for a year and has acquired habitual residence there (see Article 3(a)(v)).

Example 5: One spouse is not a national of an EU Member State

Before they separated spouses K and M lived together and had their joint habitual residence in France. Whilst K is a national of a Member State - Sweden, M is a national of a non-EU State - Cuba. After the couple splits up K remains in France and M returns to live in Cuba. Both K and M can make an application in the courts of France, on the ground that that was the last habitual residence of both spouses and K still resides there (see Article 3(a)(ii)).

If K had left France and gone to live in Sweden of which she is a national, she could have lodged an application when she is habitually resident there if she resided there for at least six months immediately before the application was made (see Article 3(a)(vi)).

Aspects of this situation were dealt with in a case before the CJEU[39] in which the wife claimed that there was no ground of jurisdiction under the Regulation because the husband was neither habitually resident in, nor a national of a Member State of the European Union. She argued that under the national law of Sweden the courts of that Member State of which she is a national were competent by virtue of the operation of Articles 6 and 7 of the Brussels IIa Regulation.

The CJEU held that so long as a court in a Member State has jurisdiction under the Regulation another court seised has to declare of its own motion under Article 17 Brussels IIa Regulation [now Article 18 of the Regulation] that it has no jurisdiction and so that Articles 6 and 7 of the Brussels IIa Regulation cannot be used to enable jurisdiction rules under the national law of a Member State to determine which court is competent. The same interpretation is to be followed in the application of Article 6 of the Regulation.

Example 6: Spouses nationals of different Member States with habitual residence in a third country

M is a national of Spain and L is a national of Portugal, but they are habitually resident in Togo.

No court of a Member State has jurisdiction to rule on an application for the dissolution of matrimonial ties pursuant to Articles 3 to 5 of the Regulation. The courts of Spain cannot avail themselves of the residual jurisdiction as they are prevented to do so by Article 6(2). However, the court of Portugal of which the respondent is national may have jurisdiction to hear such an application pursuant to the latter Member State's national rules on jurisdiction based on Article 6(1).

This scenario raised a request for preliminary ruling in the case *MPA*[40] presented above in section 2.3.3.2. as regards Article 6 and 7 of Brussels IIa Regulation. The findings of CJEU are still relevant to the application of Article 6 of the Regulation.

[39] Case C-68/07, *Sundelind Lopez supra* note 36.

[40] Case C-501/20, *MPA supra* note 26.

2.4. Lis pendens or what happens if proceedings are brought in two Member States? – Article 20 (1) and Recital 38

Situations occur in practice where proceedings relating to divorce, legal separation or marriage annulment between the same parties are initiated in different Member States. The resulting conflict is resolved with the "*lis pendens"* rule of Article 20(1). The aim of this "*lis pendens*" rule is to ensure legal certainty, avoid parallel actions and the possibility of irreconcilable decisions.

The *lis pendens* rule in matrimonial matters applies irrespective of the cause of action of the applications. It covers situations where the causes of action are the same (two divorce claims in two Member States) as well as where they defer (claim for divorce and claim for legal separation in two Member States). It is sufficient that the main subject matter of the claims concern divorce, legal separation, or marriage annulment. This particularity of the *lis pendens* in matrimonial matters is confirmed by the case-law of CJEU.

In *A,*[41] the CJEU had to decide on the case where two sets of proceedings have been brought before the courts of different Member States between the same spouses – one for divorce and one for legal separation. It concluded that contrary to the rules on *lis pendens* applicable to civil and commercial matters under the Brussels Ia Regulation[42], in matrimonial matters applications brought before the courts of different Member States are not required to have the same cause of action. While the proceedings must involve the same parties, they may have a different cause of action, provided that they concern judicial separation, divorce or marriage annulment. That interpretation is supported further by a comparison with the *lis pendens* provision in parental responsibility matters (see Article 20(2)), where the two sets of proceedings should have the same cause of action.

In any case, there cannot be *lis pendens* between proceedings in matrimonial matter and proceedings concerning parental responsibility.

[41] CJEU judgment of 06 October 2015 in Case C-489/14, *A* ECLI:EU:C:2015:654, para. 33.

[42] 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 judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1–32.

The *lis pendens* provision in matrimonial matters requires that the parties to the two set of proceedings be the same, regardless of their procedural positions in the different Member States.

The concurrence between the parallel proceedings is resolved considering the chronological precedence. The court second seised has of its own motion to stay its proceedings until such time as the jurisdiction of the court first seised is established (see Article 20(1)). Where jurisdiction of the court first seised is deemed to be established under the rules of the Regulation, the court second seised is to decline jurisdiction in favour of the court first seised, in accordance with Article 20(3).

The courts may cooperate and communicate directly with, or request information directly from each other on pending proceedings in compliance with Article 86(1). The Central Authorities may also facilitate the communication between courts in *lis pendens* situation as expressly envisaged in Article 79(e). The judges may avail themselves further of the contact points under European Judicial Network in Civil and Commercial Matters[43].

Further explanations on the operation of Article 20 can be found in section 3.4 of Chapter 3 "Parental responsibility".

[43] European e-Justice Portal, European Judicial Network in Civil and Commercial Matters.

2.5. Recognition and enforcement of decisions in matrimonial matters - General introduction

This part of Chapter 2 presents only the main provisions and principles underlying the recognition and enforcement of decisions in matrimonial matters. Further explanations can be found in Chapter 5 "Enforcement".

2.5.1. No special procedure required for recognition of a decision – Article 30 and Recital 54

Recognition in one Member State of the EU of a decision given in another does not require any special procedure. In particular, when presented with a decision given in another Member State and granting divorce, legal separation or marriage annulment which can no longer be challenged the competent authorities of the requested Member State should recognise the decision by operation of law without any special procedure being required and update their civil status records accordingly (see Recital 54). This is important since, for practical purposes, it means that

if a person wishes to marry someone else after a divorce it should only be necessary to produce the decision itself to the authorities in the Member State where the new marriage is to take place to attest the civil status of that person as having been divorced and, thus, free to marry.

A party who wishes to *invoke* in a Member State a decision given in another Member State shall produce a copy of the decision which satisfies the conditions necessary to establish its authenticity and the certificate issued in the form set out in Annex II to the Regulation (see Article 31(1)(b) and Article 36(1)(a)). In absence of these documents the court or competent authority may specify a time for their production, accept equivalent documents such as translation of the decision instead of the annex, or, if it considers that it has sufficient information before it, dispense with their production (see Article 32(1)).

The translation is not obligatory. The court or competent authority may, where necessary, require the party invoking the decision to provide a translation or transliteration of the translatable content of the free text fields of the certificate. A translation or transliteration of the decision may be required in addition to a translation or transliteration of the translatable content of the free text fields of the certificate if the court or competent authority is unable to proceed without such a translation or transliteration.

2.5.2. No special procedure required for enforcement – Article 34(1)

Decisions relating to divorce, legal separation and marriage annulment rarely have enforceable content, but if this is the case, for example in the part of the decision concerning costs[44], the Regulation simplifies cross-border enforcement by abolishing the declaration of enforceability or the registration of enforcement that was needed under the Brussels IIa Regulation, prior to the actual enforcement. As a result, subject to the Regulation, a decision given in one Member State is to be treated for the purposes of enforcement as if it had been given in the Member State of enforcement.

The documents to be produced for the enforcment are a copy of the decision which satisfies the conditions necessary to establish its authenticity and the certificate issued in the form set out in Annex II to the Regulation (see Article 31(1)(b) and Article 36(1)(a)).

[44] See, on the point of enforcement of penalty payments imposed in a decision falling into the material scope of application of Brussels IIa Regulation, CJEU judgment of 9 September 2015 in Case C-4/14, *Bohez* ECLI:EU:C:2015:563.

2.5.3. Refusal of recognition and enforcement – Articles 30 (3), 40 and 59-62

The recognition and the enforcement are accompanied by appropriate safeguards. According to the Regulation, any interested party may apply for a decision that there are grounds or there are no grounds for refusal of recognition or enforcement of a decision in matrimonial matters. The application is to be made to the competent court or authority in the Member State in which recognition and actual enforcement is invoked. The courts and the authorities designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[45]. The courts and the authorities must act without undue delay.

The parties may challenge or appeal against the first instance decision. The appeal shall be lodged with the courts or authority designated by the Member that can be found on the e-Justice Portal[46] (see Article 61). Further challenge or appeal is possible only if permitted under the law of the Member State of recognition and enforcement. If this is the case, that courts can be found on the e-Justice Portal[47].

Explanations concerning the documents for recognition and enforcement as well as the procedure are presented in Chapter 5 "Enforcement".

2.5.4. Grounds of refusal of recognition of a decision – Article 38

There are limited grounds on the basis of which recognition of a decision in matrimonial matter may be refused. These are –

- that recognition would be manifestly contrary to the public policy of the Member State in which recognition is invoked[48]
- where the respondent does not appear if the initiating documents were not served in time for the respondent to arrange for a defence unless the respondent has clearly accepted the decision

[45] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[46] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[47] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[48] See on this point Article 70 of Council Regulation (EU) 2019/1111, *supra* note 1 and section 2.5.5.

- if the decision is irreconcilable with a decision between the same parties in the Member State where recognition is invoked, or
- if it is irreconcilable with a decision between the same parties in another State which is capable of being recognised in the Member State where recognition is invoked.

2.5.5. Restrictions concerning review by the court where recognition is invoked

The court or authority where recognition of a decision in matrimonial matter is invoked may not:

- review the basis of jurisdiction of the court of the Member State of origin which issued the judgment – Art 69;
- apply the test of public policy to the jurisdiction rules set out in Articles 3 to 6 of the Regulation – Art 69;
- refuse to recognise the decision because the law of the Member State of recognition would not have allowed a decision in matrimonial matters on the same facts – Art 70; or
- in any event review the decision as to its substance – Art 71.

2.5.6. Authentic Instruments and agreements – Article 65(1)

Authentic instruments and agreements on legal separation and divorce which have binding legal effect in the Member State of origin shall be recognised in other Member States without any special procedure being required. The general provisions concerning the recognition of decisions apply unless the special rules of Section 4, Chapter IV Recognition and Enforcement prevail. The specific regime, including the procedural safeguards, are presented in Chapter 5 “Enforcement”.

The Regulation defines ‘authentic instrument’ in Article 2(2)(2) and ’agreement’ in Article 2(2)(3). The authorities engaged with the establishment of authentic instruments and with registration of agreements designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[49].

[49] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

A person who wishes to invoke in a Member State an authentic instrument or agreement from another Member State shall produce an authenticated copy of the authentic instrument or agreement and the certificate issued in the form set out in Annex VIII[50] (see Article 66(1)).

The certificate is issued by the court or competent authority of the Member State of origin upon application by a party. The court or competent authority designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[51].

The certificate is issued only if the following requirements are met:

- the Member State which empowered the public authority or other authority to formally draw up or register the authentic instrument or register the agreement had jurisdiction under Chapter II of the Regulation (point 2 of Annex VIII);
- the authentic instrument or agreement has binding legal effect in that Member State (points 7.5 and 8.4 of Annex VIII[52] and Recital 70);

The certificate is issued in the language of the authentic instrument or agreement. It may also be issued in another official language of the institutions of the European Union requested by the party. The court may automatically translate the certificate once completed in the language of the decisions using the online forms on the E-Justice Portal[53]. Nevertheless, this does not create any obligation for the court or competent authority issuing the certificate to provide a translation or transliteration of the translatable content of the free text fields (see Article 66(4)).

The certificate can be rectified where, due to a material error or omission, there is a discrepancy between the authentic instrument or agreement and the certificate. The rectification is executed upon application or *ex officio* by the court or competent authority of the Member State of origin designated by the Member States pursuant to Article 103 that can be found on the e-Justice Portal[54] (see Article 67(1)). The same courts or competent authority are permitted to withdraw the certificate where it was wrongly granted, having regard to the requirements of Article 66 upon application or of its own motion. In the case of withdrawal, no specific overriding certificate is to

[50] See Article 66(1) of Annex VIII of Council Regulation (EU) 2019/1111, *supra* note 1.

[51] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[52] See points 7.5 and 8.4 of Annex VIII of Council Regulation (EU) 2019/1111, *supra* note 1.

[53] European e-Justice Portal, Online forms.

[54] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

be issued. The procedure, including any appeal, regarding the rectification or withdrawal of the certificate is governed by the law of the Member State of origin.

2.5.7.Legalisation – Article 90

No formality of legalisation is required for documents related to recognition or enforcement of decisions in matrimonial matters including a decision or certificate.

3. Parental Responsibility

3.1. Material Scope

The Regulation deals with jurisdiction, recognition and enforcement, and international child abduction.

3.1.1. Matters covered by the Regulation

The Regulation lays down rules on jurisdiction (see this Chapter and Chapter II of the Regulation), recognition and enforcement (see Chapter IV of the Regulation and Chapter 5 "Enforcement" of this Practice Guide) and cooperation between Central Authorities (see Chapter V of the Regulation and Chapter 7 "Cooperation in matters of parental responsibility" of this Practice Guide) in matters of parental responsibility. It contains specific rules on international child abduction (see Chapter III of the Regulation and Chapter 4 "International child abduction" of this Practice Guide).

The Regulation applies to all civil matters concerning the "attribution, exercise, delegation, restriction or termination of parental responsibility".

3.1.1.1. Children covered by the Regulation – Article 2(2)(6) and Recitals 7 and 17

Consistently with the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement, and co-operation in respect of parental responsibility and measures for the protection of children ("the 1996 Hague Convention")[55] , the Regulation applies to all children up to the age of 18 even in cases where they have acquired capacity before that age under the law governing their personal status, for example through emancipation by reason of marriage (see Recital 17). However, the 1980 Hague Convention only applies to children up to the age of 16 also when complemented and clarified by this Regulation. For persons from the age of 18 onwards who are in

[55] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (HCCH 1996 Child Protection Convention).

need of legal protection because of their vulnerability, the 2000 Hague Convention on the International Protection of Adults applies[56] for State Parties to that Convention.

The Regulation applies to all children born in or out of wedlock (see Recital 7).

3.1.1.2. Meaning of 'parental responsibility' – Articles 1 (1) (b), 1 (2), 2 (2), (7), (8), (9), (10) and Recital 11 and 18

The term "parental responsibility" is defined widely in Article 1(2) and covers all rights and duties of a holder of parental responsibility relating to the person or the property of the child. These rights and duties may arise by a court decision (for example allocating the custody and access rights in case of divorce or separation of the parents), by operation of law (for example as a result of established parenthood) or by any agreement having legal effect under the law of the Member State where the child is habitually resident (see Recital 18). The list of matters within the meaning of "parental responsibility" pursuant to the Regulation is not exhaustive, but merely illustrative[57].

It includes –

- rights of custody and rights of access
- guardianship and curatorship and the like
- designation and functions of a person or body having charge of the person or property of a child or who represents or assists the child
- the placement of a child in institutional or foster care[58], measures for protection of a child in relation to the administration, conservation, or disposal of the property of a child[59].

"Rights of custody" are defined autonomously in the Regulation as including rights and duties relating to the care of the person of a child and in particular the right to determine the place of residence of a child (see Article 2(2)(9)). The last part of the definition means that if the holder of parental responsibility cannot decide on the child's place of residence without the consent of another person (other parent, holder of parental responsibility) this other person whose consent is needed for determining the child's place of residence should be considered

[56] Convention of 13 January 2000 on the International Protection of Adults (HCCH 2000 Protection of Adults Convention). See also: Lagarde, P., Proceedings of the Special Commission of a diplomatic character (1999), available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=2951.

[57] CJEU judgment of 27 November in Case C-435/06, *C* ECLI:EU:C:2007:714, para. 30.

[58] See section 3.1.1.3 of this Practice Guide.

[59] See section 3.1.1.4 of this Practice Guide.

as a holder of rights of custody under the autonomous meaning of the Regulation, regardless of the terms used under national law (see Recital 18). Hence, the rights of custody may often belong to several persons, for example in case of joint rights of custody or where, as is the case in some legal systems, the non-custodial parent retains important responsibilities for decisions concerning the child which go beyond a mere right of access, such as deciding on the place of residence of the child or on travelling abroad (see Recital 18 and *Gogova*[60], para. 11 and 35). Therefore, the content of the respective rights is decisive not the national terminology used. The same applies to the meaning of "rights of access" that are also legally determined in the Regulation as covering the rights of access to a child, including the right to take a child to a place other than that of his or her habitual residence for a limited period of time (see Article 2(2)(10)). Hence, the person who has the right of access may also have the right of custody.

Whether a matter qualifies as "parental responsibility" should be made based on the object of the application. The case-law of the CJEU provides examples for some ambiguous situations. The essence is given in the box below.

Gogova – Case C-215/15

In *Gogova*[61] the CJEU ruled in a case in which one parent asked the court of Bulgaria to remedy the lack of agreement of the other parent to their child travelling outside this Member State and to a passport being issued in the child's name. The court held that the object of such an 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 the Brussels IIa Regulation. It held that these provisions cover not only actions related to all the conditions of the exercise of parental rights, but also specific decisions concerning a child. This interpretation does not change by the fact that the decision has 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 a passport.

Bohez – Case C-4/14

In *Bohez*[62] the CJEU decided on whether a penalty payment imposed in a decision, given in Belgium, ensuring that the holder of the rights of custody complied with rights of access, is a matter of parental responsibility. In answering the question, the CJEU followed the approach for interim

[60] CJEU judgment of 21 October 2015 in Case C-215/15 *Gogova*, ECLI:EU:C:2015:71.

[61] Case C-215/15, *Gogova supra* note 60.

[62] Case C-4/14, *Bohez supra* note 44.

measures in the Brussels Ia Regulation. The subject matter for those types of cases is determined not by the nature of the interim measures but by the nature of the rights that they serve to protect. In the given case, the penalty payment is considered to be an ancillary measure which aims to exert financial pressure on the person who has custody of the child so that person cooperates in giving effect to the rights of access. Thus, the matter at stake concerns rights of custody and rights of access, i.e., parental responsibility.

Further examples are presented below (see cases C-435/06, *C*, C-523/07, *A*, C-404/14, *Matoušková*, and C–565/16, *Saponaro*).

The holder of parental responsibility may be any person, institution or other body - usually social welfare authorities in a Member States engaged with the protection and assistance of children (see Article 2(2)(8)). Obviously, parental responsibility is reserved not only for the parents of a child. The CJEU held in *Valcheva*[63] that the grandparents' rights of access to their grandchildren are covered by the notion "parental responsibility" and thus come within the material scope of the Regulation. Although the Regulation defines autonomously the terms "parental responsibility", "rights of custody", "rights of access" and indicates who can be a holder of parental responsibility, the national law of the Member State in which the child is habitually resident, will determine, in a concrete case, which rights a given person may have[64].

The Regulation applies in "civil matters".

3.1.1.3. Meaning of civil matter – Article 1(1), (2) and Recital 4 and 11

The Regulation applies in "civil matters" of attribution, exercise, delegation, restriction or termination of parental responsibility", whatever the nature of the court or tribunal. The term 'civil matters' should be interpreted autonomously by referring, first, to the objectives and scheme of the Regulation and, second, to the general principles, which stem from the national legal systems. The term 'civil matters' may thus equally extend also to measures, which, from the point of view of the legal system of a Member State, might be considered measures of public law (see Recital 4). An example of this situation is given in the adjacent box.

[63] CJEU judgment of 31 May 2018 in Case C-335/17, *Valcheva* ECLI:EU:C:2018:359, para. 34.

[64] CJEU judgment of 5 October 2010 in Case C-400/10, *PPU McB* ECLI:EU:C:2010:582, para. 43.

The question whether the placement of a child in a foster family is a civil matter for the purpose of the Regulation was considered by the CJEU *C*[65] and *A*[66]. In each of these cases, the CJEU had to decide if such a placement in a foster family under public law fell within the scope of application of the Regulation. Both cases resulted from situations where children had been taken into care and placed with foster families.

In *C,* two children had been the subject of an order by the childcare authorities in Sweden. Shortly after the order was made the children's mother took them to Finland and attempted to resist the enforcement of the order. She appealed to the Supreme Court in Finland on a number of grounds including that the order fell outside the scope of the Regulation because it was not a civil matter but rather an order taken under public law. The CJEU held that the order fell within the scope of the Regulation as a civil matter both as regards that part relating to the taking into care of the children and the part relating to the placement of the children with a foster family.

In *A,* three children lived with their mother and stepfather in Sweden. They moved for the summer to Finland and later that year were ordered by the Finnish child protection authorities to be taken into care and placed with a foster family on the ground that their mother and stepfather had abandoned them. The mother then appealed to the Finnish Supreme Court against the order on the grounds amongst other things that it fell outside the definition of civil matters of the Regulation. That Finnish court referred the matter to the CJEU for interpretation of the Brussels IIa Regulation. The CJEU ruled that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters' for the purposes of that provision, even where that decision was adopted in the context of public law rules relating to child protection.

Recital 11 confirms that any type of placement of a child in foster care with one or more individuals, or institutional care, for example in an orphanage or a children's home, in another Member State and that is made according to national law and procedure should fall within the scope of the Regulation.

However, this is not the case if expressly excluded under the national law. For example, the case for placement with a view to adoption, placement with a parent or, where applicable, with any other close relative as declared by the receiving Member State.

[65] Case C-435/06, *C supra* note 57.

[66] CJEU judgment of 2 April 2009 in Case C-523/07, *A* ECLI:EU:C:2009:225.

As a result, also "educational placements" ordered by a court or arranged by a competent authority with the agreement of the parents or the child or upon their request following deviant behaviour of the child falls within the scope of the Regulation. Only a placement – whether educational or punitive – ordered or arranged following an act of the child which, if committed by an adult, could amount to a punishable act under national criminal law, regardless of whether in the particular case this could lead to a conviction, should be treated as public law measure and be excluded from the Regulation. Thus, a placement of a child accompanied by measures involving deprivation of liberty for therapeutic and educational purposes falls within the scope of the Regulation where that placement is ordered for the protection of the child, and not to punish the child[67].

The Regulation applies to protective measures concerning the property of the child.

3.1.1.4. Measures relating to the property of a child – Article 1(2)(c), (e) and Recital 10

When a child owns property, it may be necessary to take certain measures, such as to appoint a person or a body to assist and represent the child with regard to the property. The Regulation applies to any such measure, which may be necessary for the administration, conservation, or disposal of the child's property if, for example, the child's parents are in dispute as regards such a question or the child becomes an orphan.

In contrast, other issues that relate to the child's property, but which do not concern the protection of the child´s interests in that property, are not covered by the Regulation, but by the Brussels Ia Regulation. It is for the judge to assess whether a measure relating to the child's property concerns parental responsibility or not. The case-law of the CJEU provides examples in this regard.

[67] CJEU judgment of 26 April 2012 in Case C-92/12, *PPU Health Service Executive* ECLI:EU:C:2012:255, para. 63-65.

Matoušková – Case C-404/14

In *Matoušková*[68] , the CJEU ruled whether the approval of an agreement on the sharing-out of an estate concluded by a guardian *ad litem* on behalf of minor children constituted a measure relating to the exercise of parental responsibility or, rather, a measure relating to succession. The CJEU concluded that this is a measure taken with regard to the legal capacity of a minor, which aims to protect the best interests of the child. The needed approval is a direct consequence of the status and capacity of the child 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 Article 1(1)(b) and 2(e) of the Brussels IIa Regulation.

Saponaro – Case C-565/16

In *Saponaro*[69], the CJEU had to decide on a case where the mother and the father of a child who were all habitually resident in Italy applied for authorisation to renounce the inheritance from the maternal grandfather of their child Greece. In line with *Matoušková*[70], above, the CJEU ruled that that matter concerns the status and capacity of the minor and thus is a protective measure relating to the administration, conservation, or disposal of the child's property. Due to this reasoning, the claim does not fall within the law on succession.

Although these issues are considered by the CJEU as parental responsibility matters, the Regulation now expressly allows also courts seised with matters falling outside its scope (for example succession matters) to decide on these matters, but only as incidental questions (see Article 16 and section 3.1.1.6) and for the purpose of those proceedings only.

The Regulation does not prevent courts from taking provisional, including protective, measures in urgent cases.

[68] CJEU judgment of 6 October 2015 in Case C-404/14, *Matoušková* ECLI:EU:C:2015:653.

[69] CJEU judgment of 19 April 2018 Case C-565/16, *Saponaro* ECLI:EU:C:2018:265.

[70] Case C-404/14, *Matoušková supra* note 68.

3.1.1.5. Provisional, including protective measures – Article 15 and Recitals 30 and 31

Article 15 makes it clear that the courts of a Member State have jurisdiction in urgent cases to take provisional, including protective measures, which may be available under the law of that Member State in respect of a child or the property of a child situated on its territory even if a court of another Member State has jurisdiction under the Regulation as to the substance of the parental responsibility.

3.1.1.5.1. Uniform ground for jurisdiction

Article 15 is a rule which confers jurisdiction. This differs from Brussels IIa Regulation and the case-law thereon according to which Article 20 of Brussels IIa Regulation is not a provision determining jurisdiction for the purposes of that Regulation[71]. This question being for the national law.

Article 15 of the present Regulation establishes a uniform ground for jurisdiction for granting provisional, including protective measures. As an exception to the system of jurisdiction laid down by the Regulation, this article must be interpreted narrowly (strictly)[72]. Nevertheless, the concrete type of measures that may be taken pursuant to Article 15 is left to the national law. In any case, the granting of the measures is subject to the conditions stemming from the Regulation and the case-law of the CJEU as described below.

3.1.1.5.2. Conditions for granting provisional, including protective measures

The case-law of the CJEU establishes three cumulative conditions to be met before the court lacking jurisdiction as to the substance of the matter to grant provisional, including protective measures which may be available under its national law [73].The existence of these three cumulative conditions has to be made out in the decision.

- The measure must be provisional

[71] CJEU judgment of 15 July 2010 in Case C-256/09, *Purrucker* ECLI:EU:C:2010:437, para. 61.

[72] CJEU judgment of 22 December 2009 in Case C-403/09, *Detiček* ECLI:EU:C:2009:810, para. 38.

[73] Case C-523/07, *A supra* note 66 and Case C-403/09, *Detiček supra* note 72, para.39.

Provisional, including protective, measures are those that aim to preserve factual or legal situations so as to safeguard rights, which are or could be subject to proceedings before the court of the Member State having jurisdiction as to the substance of the matter. In this sense, these are (national) measures of provisional nature, for example, temporary order on custody or access rights, temporary placement with foster family or temporary order on preservation of child's assets.

- The measure must be urgent

Urgency 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 substance74. The CJEU stated in A that the urgency of the measures must be determined having regard to the child's circumstances, his or her likely development, and the effectiveness of the provisional or protective measures to be adopted. In this regard, urgency will exist in a situation where the children who have their habitual residence in one Member State but are staying temporarily or intermittently in another Member State are in a situation which can likely and seriously endanger their welfare, including their health or their development75. On the other hand, urgency is not present where a provisional sole custody is granted in favour of the abducting parent in the State of refuge based on the argument of change in circumstances due to the fact that the child has settled well into the new environment and the possible return could seriously harm his or her welfare76. In the view of the judgement of the CJEU, such an interpretation of a situation of urgency will run against the principle of mutual trust, will delay, or even prevent, the enforcement of decisions in parental responsibility matters rendered by the court with jurisdiction as to the substance and jeopardise the functioning of the entire Regulation, including its aim of deterring the wrongful removal or retention of children between Member States77. Measures which prevent the maintenance on a regular basis of a personal relationship and direct contact with both parents are not completely excluded but need to be justified by other prevailing interests of the child[78].

- The measure must be taken in respect of a child or property of a child situated in the Member State of the court seised

The access to provisional, including protective, measures pursuant to Article 15 is possible only where a territorial link

[74] Case C-403/09, *Detiček supra* note 72, para 42.

[75] Case C-523/07, *A supra* note 66, para. 48 and 60.

[76] Case C-403/09, *Detiček supra* note 72, para 43.

[77] Case C-403/09, *Detiček supra* note 72, para 425-47 and CJEU judgment of 11 July 2008 in Case C-195/08, *PPU Rinau* ECLI:EU:C:2008:406, para. 52.

[78] Case C-403/09, *Detiček supra* note 72, para 59.

exists between the Member State of the court seised and the child or the child's property. The limitation of the measures only in respect to a child and his or her property situated in the Member State of the court seised is in line with Article 12 of the 1996 Hague Convention.

These measures may not circulate between the Member States under the Regulation[79] and are effective only within the territory of the Member State where they were granted (see Article 2(1) where they are not treated as "decisions" and Recital 30). There is only one exception - measures ordered in the State of refuge in accordance with Article 27(5) to protect the child from a grave risk as referred to in point (b) of Article 13(1) of the 1980 Hague Convention (see Chapter 4 "International Child Abduction").

3.1.1.5.3. Relation with measures ordered by the court with jurisdiction as to the substance

As the provisional, including protective, measures are of temporal nature, they cease to have effect when the court of the Member State having jurisdiction under the Regulation as to the substance of the matter has ordered measures it considers appropriate (see Article 15(3) and the CJEU's ruling in Case C-523/07, A, ECLI:EU:C:2009:225, para. 48). The provisional, including protective, measures ordered by the court with jurisdiction as to the substance may be recognised and enforced under the Regulation (see Article 2(1)(b) and Chapter 5 "Enforcement"). Nevertheless, a measure falling within the scope of Article 15 may, in the Member State of the court which granted it, prevail over a measure stemming from an earlier decision of a court of another Member State with jurisdiction on the merits, however only in the territory of the former Member State. The priority over such an earlier decision may be effective only if the conditions for granting provisional, including protective measures have been met[80]. In any case, if the court engaged with granting provisional, including protective, measures under Article 15 is seised additionally with an application concerning the substance of the matter, it should decide only on the provisional or protective measures and declare of its own motion that it has no jurisdiction on the merits if a court of another Member State has jurisdiction as to the substance of the matter (see Recital 31).

The CJEU suggests, consequently, that as a matter of good practice and in order to make clearly evident the grounds of

[79] They may circulate pursuant to international instruments or the national legislation as far as compatible with the Regulation, see Case C-256/09, *Purrucker supra* note 71, para. 92.

[80] Case C-256/09, *Purrucker supra* note 71, para. 81.

jurisdiction on the basis of which a court takes a measure, that this court should state in the decision whether or not it has jurisdiction under the Regulation on the substance of the matter[81]. This is now reflected in a rule – Article 35(2)(b) envisages that the certificate accompanying the enforceable decision should contain information that the court of origin has jurisdiction as to the substance of the matter or has ordered the measure in accordance with Article 27(5) in conjunction with Article 15[82]. If it is not evident from the decision whether the court had jurisdiction as to the substance, the court in another Member State in which recognition and enforcement is sought is entitled to assume that the court that ordered the provisional measure did not have jurisdiction on the substance[83].

3.1.1.5.4. Cooperation and communication

Provisional, including protective, measures can be taken by a court or by an authority competent in matters falling within the scope of the Regulation (see Article 2(1)). A welfare authority, child protection or youth authority, for instance, may be competent to take provisional measures under national law. The Central Authorities may, upon request made with supporting reasons from another Member State, ask the court or competent authority of their Member State to consider the need to take measures for the protection of the person or property of the child (see Article 80 (1)(c), Chapter 7 "Cooperation in matters of parental responsibility" and Chapter 8 "Collection and transmission of information, data protection and non-disclosure of information").

If the court grants provisional or protective measures under its national law, in so far as the protection of the best interests of the child so requires, that court shall, without delay, inform of this the court or competent authority of the Member State having jurisdiction pursuant to Article 7 or, where appropriate, the court of a Member State exercising jurisdiction under the Regulation as to the substance of the matter, either directly in accordance with Article 86 or through the Central Authorities as allowed by Article 76 (see Article 15(2)). The judges may avail themselves also of the contact points of the European Judicial Network in civil and commercial matters ("EJN-civil)[84] to discharge this obligation.

In the case where the child is exposed to a serious danger, the court or competent authority contemplating or having taken measures for the protection of the child, if it is aware that the

[81] See for comments about the need for clarity as to the jurisdictional basis on which a court takes provisional and protective measures, Case C-256/09, *Purrucker supra* note 71, para. 70 – 76.

[82] The court may use the free text field of point 9.2 of Annex III of Council Regulation (EU) 2019/1111, *supra* note 1.

[83] Case C-256/09, *Purrucker supra* note 71, para. 78.

[84] European e-Justice, EJN-Civil.

child's residence has changed to, or that the child is present in, another Member State, shall inform the courts or competent authorities of that other Member State about the danger involved and the measures taken or under consideration. This information may be transmitted directly or through the Central Authorities (see Article 80(2) and Chapter 7 "Cooperation in matters of parental responsibility" and Chapter 8 "Collection and transmission of information, data protection and non-disclosure of information")). EJN-civil may also provide support, if needed (see Chapter 7 "Cooperation in matters of parental responsibility").

Example:

A family habitually resident in Germany is travelling by car to Croatia for their summer holidays. In Croatia, they are victims of a traffic accident, where they are all injured. The child is only slightly injured, but both parents arrive at the hospital in a coma. The authorities in Croatia urgently need to take provisional measures to protect the child who has no relatives there. The fact that the courts of Germany have jurisdiction under the Regulation as to the substance does not prevent the courts or competent authorities of Croatia from taking provisional measures to protect the child. Nevertheless, the courts or competent authorities in Croatia must inform the court or the competent authority of Germany directly or via the Central Authority about the imposed measures. These measures cease to apply once the courts of Germany have taken the measures which they consider to be appropriate.

The Regulation allows courts to decide on incidental questions relating to parental responsibility where the main subject matter is excluded from the material scope of application of the Regulation.

3.1.1.6. Incidental questions- Article 16 and Recitals 32 and 33

Article 16, devoted to incidental questions is an innovation introduced as a reaction to the judgments of CJEU in *Matoušková*, and in *Saponaro*.

The CJEU stated in *Matoušková*[85]- that the approval by a court dealing with guardianship matters of an agreement on the sharing out of an estate concluded by a guardian *ad litem* on

[85] Case C-404/14, *Matoušková supra* note 68.

behalf of minor children constitutes a measure relating not to succession but to the exercise of parental responsibility, and thus falls within the scope of the Brussels IIa Regulation. The need to obtain approval from the court dealing with guardianship matters is a direct consequence of the status and capacity of the minor children and to constitute 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 Article 1(1)(b) and 2(e) of the Brussels IIa Regulation (para. 31). Thus, only a court with jurisdiction under the Regulation could decide on that type of approval.

Article 16(1) and (2) provides an alternative practical solution allowing a court of a Member State deciding on a matter not falling within the scope of the Regulation to determine the incidental question with effect only for the specific proceedings even if that court does not have jurisdiction under the Regulation. Thus, if the merits of the proceedings are, for instance, a succession dispute in which the child is involved and a guardian *ad litem* needs to be appointed to represent the child in those proceedings, the courts of the Member State having jurisdiction for the succession dispute should, pursuant to Article 16(1), be allowed to decide on this appointment for the pending proceedings, regardless of whether these courts have jurisdiction to decide on matters of parental responsibility under the Regulation. Parental responsibility matters may be an incidental question in other proceedings for example regarding parenthood, maintenance obligations, change of names or marriage of minor.

The same concept is followed in Article 16(3) in situations where the substance matter is of an indisputably legal nature. An example is acceptance or rejection of inheritance or an agreement between the parties on the sharing-out or the distribution of the estate (so called "legal acts", see Recital 33). If the validity of such legal acts undertaken or to be undertaken on behalf of a child in succession proceedings before a court of a Member State requires permission or approval by a court, a court in that Member State is able to decide whether to permit or approve such a legal act even if it does not have jurisdiction under the Regulation. This legislative solution mitigates consequences of *Saponaro*[86] ruling classifying an application lodged by parents in the name of their minor child for authorisation to renounce an inheritance as being concerned with parental responsibility and not with the law on succession (para. 18). The courts in the Member State having jurisdiction in succession matter are now allowed to decide also on such an authorisation to renounce an inheritance pursuant to Article 16(3)[87].

[86] Case C-565/16, *Saponaro supra* note 69.

[87] The competent court in succession matters will determine the applicable law pursuant to Article 15 of the HCCH 1996 Child Protection Convention, *supra* note 55 (see Recital 92 of Council Regulation (EU) 2019/1111 *supra* note 1).

In so far as the protection of the best interests of the child so requires, the court deciding on the incidental question shall, without delay, inform the court or competent authority of the Member State having jurisdiction pursuant to Article 7 or, where appropriate, the court of a Member State exercising jurisdiction under the Regulation as to the substance of the matter, either directly in accordance with Article 86 or through the Central Authorities designated pursuant to Article 76. The judges may avail themselves also of the contact points of the EJN-civil.

3.1.2. Matters excluded from the Regulation

3.1.2.1. Matters to which the Regulation does not apply – Article 1(4) and Recitals 11, 12 and 92

Article 1(4) enumerates the matters excluded from the scope of the Regulation even though they may be closely linked to parental responsibility (for example, parentage, other questions linked to the status of persons, adoption, emancipation, trust, succession and the name and forenames of the child). Whilst the Regulation applies to measures of protection in relation to children it does not apply to such measures taken as a result of criminal law offences committed by children (see Art 1(4)(g) and Recital 11).

The Regulation does not contain rules on the law applicable to parental responsibility. Nevertheless, Recital 92 clarifies that this it to be determined in accordance with the provisions of Chapter III of the 1996 Hague Convention. When the Convention is being applied in proceedings before a court of a Member State, the reference in Article 15(1) of that Convention to “the provisions of Chapter II” of that Convention should be understood as referring to “the provisions of this Regulation”.

The Regulation does not apply to maintenance obligations.

3.1.2.2. Maintenance obligations – Article 1(4) and Recital 13

Maintenance obligations and parental responsibility are often dealt with at the same time or in the same court proceedings between parents. Maintenance obligations are, however, not covered by the Regulation since they are governed by the

Maintenance Regulation[88]. Thus, the court seised with both types of claims will need to establish jurisdiction for each of them independently. However, the court which is competent pursuant to the Regulation will generally have jurisdiction to rule also on maintenance matters by virtue of Article 3(d) of the Maintenance Regulation. This provision allows a court which has jurisdiction in a matter of parental responsibility to decide upon maintenance if that question is ancillary to the question of parental responsibility. If an application is brought in respect of both spousal and child maintenance only the claim for child maintenance is considered to be ancillary to the proceedings concerning parental responsibility[89]. Although the two issues would be dealt with in the same proceedings, the respective verdicts in the decision would be recognised and enforced according to different rules. The part of the decision relating to maintenance would be recognised and enforced in another Member State pursuant to the rules of the Maintenance Regulation whereas the part of the decision relating to parental responsibility would be recognised and enforced pursuant to the rules of the Regulation. The two different parts of the decision need to be accompanied with two appropriate certificates issued pursuant to the Maintenance Regulation and this Regulation.

The Regulation applies to all decisions on parental responsibility.

3.1.3. Which decisions are covered by the Regulation? – Article 1(1)(b) and Recital 7

The Regulation applies to all decisions issued by a court of a Member State in matters of parental responsibility, regardless of whether the parents are or were married and whether the parties to the proceedings are or are not both biological parents of the child in question.

The Regulation is not confined to court decisions.

[88] Council Regulation (EC) No 4/2009, *supra* note 21.

[89] CJEU judgment of 16 July 2015 in Case C-184/14, *A* ECLI:EU:C:2015:479.

3.1.3.1. Meaning of decision and court – Article 2(1), 2(2)(1) and Recital 14

The Regulation applies to court decisions, whatever the decision may be called (including decree, order, and judgment). The definition of "decisions" extends further to agreements approved by the court following an examination of the substance in accordance with national law and procedure (see Recital 14). The examination of the substance means that the court has to examine whether the conditions set by national law for concluding the agreement on parental responsibility have been fulfilled[90]. The definition of "decision" for the purposes of Chapter IV of the Regulation is clarified further in Chapter 5 "Enforcement" (see section 5.2.1).

The expression "court" applies to any authority having jurisdiction in matters falling under the Regulation (Article 2(2)(1). Recital 14 claims 'court' should be given a broad meaning so as to also cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility. Nevertheless, the definition of 'court' does not cover "public authorities" or "other authorities" engaged with the formal intervention by the provision of binding legal effect of authentic instruments or with the registration of agreements like "notaries registering agreements, even where they are exercising a liberal profession" (see Recital 14). These administrative or other authorities cannot adjudicate in a dispute between the parties according to their national law, they are not treated as courts and their acts are not decisions. However, these authorities may be engaged with drawing up or registering of authentic instruments or agreement.

The specific competence of the administrative authorities, or other authorities, such as notaries, depends on national law. In some Member States they may act as courts, in other as authority drawing up or registering authentic instruments or agreements. The administrative authorities, or other authorities, such as notaries, designated by the Member States for drawing up or registering authentic instruments or agreement can be found on the e-Justice Portal[91].

The Regulation applies to "authentic instruments".

[90] To consider the outcome of CJEU judgment of still in progress Case C-646/20, *Senatsverwaltung für Inneres und Sport* if relevant for the PG.

[91] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

3.1.3.2. Authentic instruments – Article 2(2)(2) and Recital 15

Furthermore, the Regulation applies to documents which have been formally drawn up or registered as "authentic instruments" in any Member State in matters falling within the scope of the Regulation. The authenticity regarding signature and the content of the document has to be established by a public authority or other authority empowered by the respective Member State. Such documents include, for example, documents drawn up by or before notaries and documents registered in public registers. The public authority or other authority designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[92].

The definition of "authentic instruments" is used horizontally in other EU instruments and has to be interpreted in accordance with them and in light of the purposes of the Regulation[93].

The Regulation applies to agreements between parties.

3.1.3.3. Agreements – Article 2(2)(3) and Recital 14

Another important feature of the Regulation is that it also covers agreements concluded between parties that are enforceable but neither a decision nor an authentic instrument but have been registered by a public authority competent to do so. Thus, the Regulation applies to agreements concluded by the parties without the involvement of public authority at the stage of the conclusion of the agreement but afterwards – in the course of its registration. The public authorities designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[94].

[92] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast

[93] For a general indication of the meaning of 'authentic instrument' which describes the nature and effect thereof see CJEU judgment of 17 June 1999 in Case C-260/97, *Unibank v Christensen* ECLI:EU:C:1999:312; there is also a definition to be found in Article 2.3 of the Council Regulation (EC) No 4/2009 *supra* note 21, as well as in Article 3(1)(c) of Council Regulation (EU) 2016/1103 *supra* note 22, PB L 183 van 8.7.2016 in Council Regulation (EU) 2016/1104, *supra* note 23, and in Article 3(1)(i) of Regulation (EU) 650/2012, *supra* note 24.

[94] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast

However, the Regulation does not apply to purely private agreements concluded without participation of a court or public authority.

3.2. Which Member State's Courts have Jurisdiction in Parental Responsibility?

3.2.1. System of Jurisdiction rules in Parental Responsibility

Articles 7 to 11 set out a system of jurisdiction rules to determine the grounds on which the courts of a Member State are competent in matters of parental responsibility. These rules establish only the distribution of jurisdiction between Member States and do not designate the courts which are competent within the given Member States as that is dealt with under the relevant national law. More information on this can be found on the factsheets produced by EJN-civil on national law accessible through the E-Justice Portal [95].

All grounds of jurisdiction of the Regulation are shaped in the light of the best interests of the child and should be applied in accordance with them. Any reference to the best interests of the child has to be interpreted in light of Article 24 of the Charter of Fundamental Rights of the European Union ('the Charter') and the United Nations Convention on the Rights of the Child of 20 November 1989 ('UN Convention on the Rights of the Child')[96] as implemented by national law and procedure[97].

3.2.2. Analysis by Court of Jurisdiction in Parental Responsibility

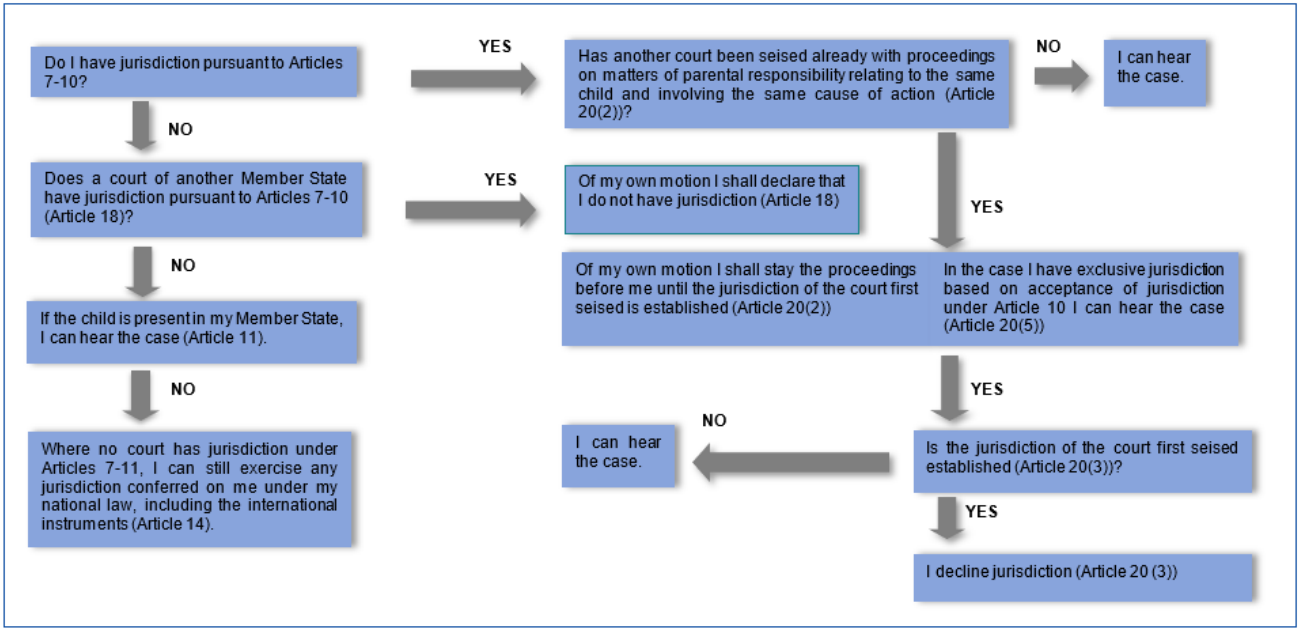
Where a court is seised of a case concerning a matter of parental responsibility it has to make the following analysis:

[95] See European e-Justice Portal, Parental responsibility - child custody and contact rights.

[96] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407, and United Nations Convention on the Rights of the Child, 1989 (UNCRC 1989). See also UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html.

[97] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html.

Parental Responsibility



As a matter of good practice, courts should always make clear in their decisions the basis on which they assumed jurisdiction in parental responsibility in cross-border family cases [98]. The jurisdiction of the court in matters of parental responsibility must be established in each specific case where a court is seised of proceedings, which implies that it does not continue after pending proceedings have been brought to a close[99].

3.2.3. General jurisdiction rule – Article 7 and Recitals 20 and 21

3.2.3.1. The State of the habitual residence of the child

The fundamental principle of the jurisdiction rules of the Regulation in matters of parental responsibility is that the most appropriate forum is the court of the Member State of the habitual residence of the child at the time the court is seised. The habitual residence of the child is determined according to the criterion of proximity and aims to safeguard the best interests of the child.

The concept of "habitual residence" has in recent years been used increasingly as a connecting factor in international instruments particularly those concerning family law[100].

While habitual residence is not defined by the Regulation its meaning should be interpreted in accordance with the objectives and purposes of the Regulation. The interpretation of habitual residence is not determined by reference to particular national law but has an "autonomous" meaning for the purposes of the Regulation. Whether or not in any particular case a child has his or her habitual residence in any particular Member State has to be determined by the court in each case on the basis of all circumstances relevant to the situation of that particular child and with the guidance of the principles developed by the CJEU in its now extensive jurisprudence[101] .In any case the habitual residence is not identical to the domicile or the registered address of the child.

[98] Case C-256/09, *Purrucker supra* note 71, para 73.

[99] CJEU judgment of 1 October 2014 in Case C-436/13, *E* ECLI:EU:C:2014:2246, para. 40.

[100] For example, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (HCCH 1980 Child Abduction Convention); HCCH 1996 Child Protection Convention, *supra* note 55; Council Regulation (EC) No 4/2009, *supra* note 21.

[101] CJEU judgment of 15 February 2017 in Case C-499/15, *W and V* ECLI:EU:C:2017:118, para. 54.

3.2.3.2. Case law of the CJEU on interpretation of the meaning of habitual residence

It can sometimes be difficult to determine where a child has his or her habitual residence especially where there is frequent movement from one Member State to another or the move is relatively recent. The CJEU has given some guidance as to the factors which should be taken into account in determining the habitual residence of a child for the purposes of the Regulation. It has also stated that there may be situations where the habitual residence cannot be established and in those cases, jurisdiction would have to be determined on the basis of the criterion of the child's presence, under Article 11 of the Regulation (see section 3.2.7)

A — Case C-523/07

In *A*[102], the Court said that the 'habitual residence' of a child, within the meaning of Article 8(1) of the Brussels IIa Regulation, must be established based on all the circumstances specific to each individual case. In that case, the children concerned had been moved by their parents from Sweden to Finland and were taken into care shortly after the move. The question which arose was whether their habitual residence had also shifted even though a relatively short time had elapsed – a matter of a few weeks.

The CJEU held that mere physical presence is not enough to establish habitual residence. In addition to the physical presence of the child in a Member State, other factors must be taken into consideration which can show that that presence is not temporary or intermittent, and that the residence of the child reflects some degree of integration 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.

The parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State or lodging an application for social housing, may constitute an indicator of the transfer of the habitual residence.

[102] Case C-523/07, *A supra* note 66.

It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

Mercredi – Case C-497/10

In *Mercredi*[103], the CJEU reaffirmed its statement in *A* by saying that the concept of 'habitual residence' of a child, for the purposes of Articles 8 and 10 of the Brussels IIa Regulation corresponds to the place which reflects some degree of integration by the child in a social and family environment.

This case concerned a baby girl aged just two months at the time that she was removed by her mother from England to France.

For the CJEU, the child's age is liable to be of particular importance. As a general rule, the environment of a young child is essentially a social and family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

That environment is fundamental in determining the place where the child is habitually resident and comprises various factors which vary according to the age of the child so the factors to be taken into account in the case of a child of school age are not the same as those to be considered in the case of an older or younger child.

Where the situation concerns an infant who has been staying with her mother for only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors to 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.

As in *A*, the CJEU held that it was for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.

HR – Case C-512/17

In *HR*[104] the CJEU had to determine the habitual residence of an 18-months-old child who was born and lived with both of her parents in Belgium. The mother was a Polish national who

[103] CJEU judgment of 22 December 2010 in Case C-497/10, *PPU Mercredi* ECLI:EU:C:2010:829.

[104] Case C-512/17, *HR supra* note 26.

had been living in Belgium for 10 years and was working on the basis of an employment contract of indefinite duration. She claimed to have settled in Poland with the child who visited Poland several times. The father was a Belgian national who lived and worked in Brussels. He exercised the parental responsibility rights jointly with the mother and since the couple separated, he took care of his child once a week. The Polish court seised with a parental responsibility claim by the mother, needed additional guidelines for the determination of the habitual residence.

In line with its previous judgments, the CJEU held that the child's place of habitual residence must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of the child in the territory of a Member State, other factors must be chosen which can show that that presence is not in any way temporary or intermittent and that it reflects some degree of integration of the child into a social and family environment.

However, the Court gave much more specific guidance than in *Mercredi* considering the fact that in the given case the family environment of the child comprised both parents and the child was clearly living in Belgium. In these circumstances the CJEU formulated a list with decisive and non-decisive factors to be taken into consideration when determining the habitual residence of a child at that young age.

The view of the CJEU is that the following, taken together, are decisive factors:

- the fact that, from its birth until its parents' separation, the child generally lived with those parents in a specific place;
- the fact that the parent who, in practice, has had custody of the child since the couple's separation continues to stay in that place with the child on a daily basis and is employed there under an employment contract of indefinite duration; and
- the fact that the child has regular contact there with the other parent, who is still resident in that place.
- The following are non-decisive factors:
- the stays which the parent who, in practice, has custody of the child has spent in the past with that child in the territory of that parent's Member State of origin in the context of leave periods or holidays;
- the origins of the parent in question, the cultural ties which the child has with that Member State as a result, and the parent's relationships with family residing in that Member State; and
- any intention the parent has of settling in that Member State with the child in the future.

Essentially the CJEU confirmed its approach to look at the actual centre of the child's life that prevails over the nationality of the parent and his or her intentions for settling in the future in another Member State.

MPA - Case C-501/20

The focus on the centre of the child's life was also maintained in *MPA*[105] where the CJEU decided on the habitual residence of children of nationals of Spain and Portugal residing in a third State – Togo. The application for the determination of custody was brought by the mother, a national of Spain, before the Spanish court. CJEU established that in the given case for the purposes of determining the habitual residence of the minor children the connecting factor of their mother's nationality and her residence in Spain prior to the marriage and the birth of the children are irrelevant and cannot be taken into consideration. By contrast, the Spanish nationality of the minor children, the fact that they were born in Spain and shared the culture of that State with one of his or her parents, may constitute relevant factors, although they are not decisive in the case at stake. CJEU held that this finding is all the more compelling where, as in the given case, there is nothing to show that the children were physically present, on a non-occasional basis, in the territory of the Member State of the court seised and, in view of their age, enjoyed a certain degree of integration there, in particular, in an educational, social and family environment. Thus, the fact that the minor children were born in that Member State and hold the nationality of that Member State was considered as insufficient.

C – Case C-376/14

In *C*[106] the CJEU ruled on the criteria for determination of the habitual residence of a child, who was removed from France to Ireland, in accordance with a decision which was provisionally enforceable, and which was thereafter overturned by a decision which fixed the residence of the child at the home of the parent living in France. The CJEU referred to the assessment criteria provided so far in its case-law. In the given case, the CJEU went on saying that, when examining the reasons for the child's stay in Ireland and the intention of the parent who took the child there, it is necessary to consider the provisional nature of the decision and the appeal which was lodged. Those factors do not support the conclusion that the child's habitual residence was transferred from France to Ireland as they point at the interim nature of the legal ground. Nevertheless, the seised court has to consider matters of fact which might demonstrate a degree of integration of the child in a social and family environment since the removal and in particular the time which elapsed between that removal and the decision which set aside the decision of the first instance and fixed the residence of the

[105] Case C-501/20, *MPA supra* note 26.

[106] CJEU judgment of October 2014 in Case C-376/14, *PPU CvM* ECLI:EU:C:2014:2268.

child at the home of the parent living in the Member State of origin. However, the time which has passed since that last decision should not in any circumstances be taken into consideration.

W and V - Case C-499/15

In *W*[107], the CJEU had to decide on the question of whether the Member State courts which had given a decision that had become final concerning parental responsibility should retain jurisdiction to rule on an application for amendment of that decision, even though the child was habitually resident in the territory of another Member State. The referring court was of a Member State where the child had never lived in or visited, in this case, Lithuania. The CJEU held that jurisdiction must be established in each specific case where a court is seised of proceedings, which implies that it does not continue after proceedings have been brought to a close. Thus, the habitual residence of the child was to be determined at the time the court was seised with the application for amendment of the decision. As regards the habitual residence, the CJEU reaffirmed its findings in the *Mercredi* case. The best interests of the child, the criterion of proximity and the place that reflects some degree of integration of the child in a social and family environment must be taken into consideration. Special attention was paid to the concept that in addition to the physical presence of the child in a Member State, other factors must make it clear that that presence is not in any way temporary or intermittent. Thus, the CJEU said that 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. The fact that one of the nationalities of the child was of the seised court was not sufficient to change the settled case-law presented above.

OL - Case C-111/17 PPU

The case *OL*[108] concerned a scenario where a child was born and had been living continuously with her mother in Greece in accordance with the joint wishes of the parents. The child never left the territory of that Member State. Before the birth the parents were habitually resident in Italy and have agreed that the mother and the child will return to Italy after the birth. When determining the habitual residence, the CJEU reaffirmed that the physical presence of a child in a Member State is a prerequisite and in addition other factors must also

[107] CJEU judgment of 6 May 2021 in Case C-499/18, *W and V* ECLI:EU:C:2021:367.

[108] CJEU judgment of 8 June 2018 in Case C-111/17, *PPU OL* ECLI:EU:C:2017:436.

make it clear that that 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. Nevertheless, the intention of the parents cannot as a general rule by itself be crucial to the determination of the habitual residence of a child but constitutes an 'indicator' complementing a body of other consistent evidence. This being said, the CJEU pointed out that the concept of 'habitual residence' is essentially a question of fact. Consequently, the initial intention of the parents that a child should reside in one given place cannot take precedence over the fact that the child has continuously resided since birth in another state.

UD – Case C- 393/18 PPU

In *UD*[109], the CJEU clearly stated that whatever the circumstances, a child cannot be habitually resident in a country where he or she has never been. In the given case the mother – a Bangladeshi national - married a British national in Bangladesh, where both lived for 3 years before moving to the United Kingdom. The couple then returned to Bangladesh, where a child was born. The father then returned to the United Kingdom. The child remained in Bangladesh with the mother and consequently has never been to the United Kingdom. The father returned to the United Kingdom. The mother claimed that she has been tricked into going to a third state and then unlawfully detained by coercion in that state by the father. The intention of the mother to return, along with the father's habitual residence in the United Kingdom, were not deemed by the CJEU as sufficient to disregard the objective geographical location of the child.

3.2.3.3. Acquisition of a new habitual residence

If a child moves from one Member State to another, other than where this occurs as a result of a wrongful removal or retention[110], the acquisition of habitual residence in the 'new' Member State, will often coincide with the 'loss' of habitual residence in the former Member State, but this is not necessarily the case. In this sense, a habitual residence may be lost before another was acquired (for example in the case of a refugee). Consideration by the court of the factual elements of each individual case will lead to a determination as to whether the child in question has become habitually resident in the 'new'

[109] Case C-393/18, *PPU UD supra* note 9.

[110] See Chapter 4 of this Practice Guide.

Member State and, if so, at what point in time this may have happened.

Although use of the adjective 'habitual' would tend to indicate that the residence must be of a certain duration before this can be characterised as 'habitual', a child might nevertheless acquire habitual residence in a Member State on, or not long after, the day of arrival there.

The question of jurisdiction is determined as of the moment that the court is seised. Once a competent court is seised it retains jurisdiction even if the child acquires habitual residence in another Member State during the course of the proceedings (under the principle of "*perpetuatio fori*"). A change of habitual residence of the child while the proceedings are pending does therefore not itself entail a change of jurisdiction in a pending case[111].

However, if it is in the best interests of the child, Articles 12 and 13 provide for the possibility of transferring the case, or of a part thereof, subject to certain conditions, from the court with jurisdiction on the substance, to a court of a Member State to which the child has moved[112].

Nevertheless, the *perpetuatio fori* principle does not apply if the child changes his or her habitual residence during the proceedings from a Member State to a third country which is a party to the 1996 Hague Convention. The case-law of the CJEU provides an example in this regard.

CC-Case C-572/21

CC[113] concerned a case where a court in Sweden was hearing a dispute in matters of parental responsibility. The child, however, began to attend a boarding school on the territory of the Russian Federation. Thus, his habitual residence was lawfully transferred, during the proceedings, from a Member State (Sweden) to the territory of a third State that is a party to the 1996 Hague Convention (the Russian Federation).

CJEU stated that under Article 8(1) of the Brussels IIa Regulation, jurisdiction in matters of parental responsibility is conferred on the courts of the Member State in which the child is habitually resident at the time the court is seised. Therefore, the court seised should not lose jurisdiction even if there is a change in the place of habitual residence of the child concerned during the proceedings. However, Article 61(a) of the same Regulation provides that, as concerns the relation with the 1996 Hague Convention, that Regulation is to apply "where the child concerned has his or her habitual residence

[111] Case C-497/10, *Mercredi supra* note 103, para. 42.

[112] See section 3.3 of this Practice Guide.

[113] Case C-572/21, *CC supra* note 9.

on the territory of a Member State". CJEU pointed out that in this particular scenario the habitual residence has to be established at the time when the court having jurisdiction gives its ruling. Thus, in the given case Article 8(1) of Brussels IIa Regulation does not apply, and the provisions of 1996 Hague Convention must apply instead. The court of Sweden does not retain jurisdiction to rule on that dispute under Article 8(1) of Brussels IIa Regulation if the transfer of the habitual residence has taken place before the decision was given. This judgment of CJEU clearly states that the Regulation may not be interpreted in such a way that it would require Member States to breach their obligations under the 1996 Hague Convention (see Article 52(3) of the 1996 Hague Convention and para. 39-42 of *CC*).

3.2.4. Exceptions to the general rule

Articles 8, 9, 10 and 11 set out the exceptions to the general rule, indicating where jurisdiction may lie with the courts of a Member State other than the one in which the child is habitually resident or in case the habitual residence of the child cannot be established.

3.2.4.1. Continuing jurisdiction of the child's former habitual residence in access cases– Article 8

When a child moves from one Member State to another it is often necessary to review access rights or other contact arrangements so as to adapt them to the new circumstances. The policy background to the rule in Article 8 is that holders of parental responsibility are encouraged to agree on the necessary adjustments of previously ordered access rights and arrangements before the move takes place and, if this proves impossible, to apply to the court of the country of the child's former habitual residence to resolve the dispute.

This does not in any way prevent a person from moving within the European Union, but provides a guarantee that the person, who can no longer exercise access rights as before, does not have to seise the courts of the new Member State. On the contrary, the latter can apply for an appropriate adjustment of access rights before the court that granted them, during a period of three months following the move.

3.2.4.2. Article 8 is subject to the following conditions:

3.2.4.2.1. The access rights to be modified must have been conferred in a decision.

Article 8 applies only to the situation where it is wished to modify a previous decision on access rights issued by the courts in a Member State before the child moved. If the access rights were not conferred in a decision, Article 8 does not apply. Thus, the courts of the 'new' Member State would have jurisdiction pursuant to Article 7 to decide on matters of access rights once the child had acquired habitual residence in that Member State.

3.2.4.2.2. It applies only to "lawful" moves of a child from one Member State to another.

What is a 'lawful' move must be determined according to any judicial decision or the law applied in the Member State of origin (including its rules on private international law)[114]. Such a move may occur where the holder of parental responsibility is allowed to move with the child to another Member State without the consent of another holder of parental responsibility or where such consent is given. If the child moves as the result of an unlawful removal, perhaps through a unilateral decision by a holder of parental responsibility, Article 8 does not apply. In that case, Article 9 comes into play. If, on the other hand, a change of the child's habitual residence results from a lawful move of the child to another Member State (for example, by application of the Dublin III Regulation)[115], Article 8 applies if the further conditions set out below are fulfilled.

3.2.4.2.3. It applies only during the three-month period following the child's move

The three-month period is to be calculated from the date on which the child physically moved from the Member State of origin to the 'new' Member State. The date of the move should not be confused with the date when the child acquires habitual residence in the 'new' Member State. If a court in the Member State of origin is seised after the expiry of the three-month period from the date of the move, it does not have jurisdiction under Article 8.

[114] See on this point: European e-Justice Portal, EJN-Civil, factsheets on Moving/settling abroad with children.

[115] CJEU judgment of 2 August 2021 in Case C-262/21, *PPU* A ECLI:EU:C:2021:640, para. 48.

3.2.4.2.4. The child must have acquired habitual residence in the 'new' Member State during the three-month period.

Article 8 applies only if the child has acquired habitual residence in the 'new' Member State during the three-month period. If the child has not acquired habitual residence there within that period, the courts of the Member State of origin would, in principle, retain jurisdiction pursuant to Article 7. If the child, having moved from and having ceased to have her or his habitual residence in the 'old' Member State, has not acquired a habitual residence in the 'new' Member State, not only will Article 8 not apply but neither can jurisdiction be founded on Article 7. In such a scenario, the provisions of Article 11 may have to be relied upon to give jurisdiction to the courts of the Member State where the child is present.

3.2.4.2.5. The holder of access rights must still be habitually resident in the Member State of origin.

If the holder of access rights has ceased to be habitually resident in the Member State of origin, Article 8 does not apply and the courts of the new Member State will become competent once the child has acquired habitual residence there.

3.2.4.2.6. The holder of access rights must not have accepted the change of jurisdiction.

Since the aim of this provision is to guarantee that the holder of access rights can continue to seise the courts of the Member State of her or his habitual residence for three months following the move of the child to the 'new' Member State, Article 8 does not apply if she or he has accepted the jurisdiction acquired by the courts of the 'new' Member State.

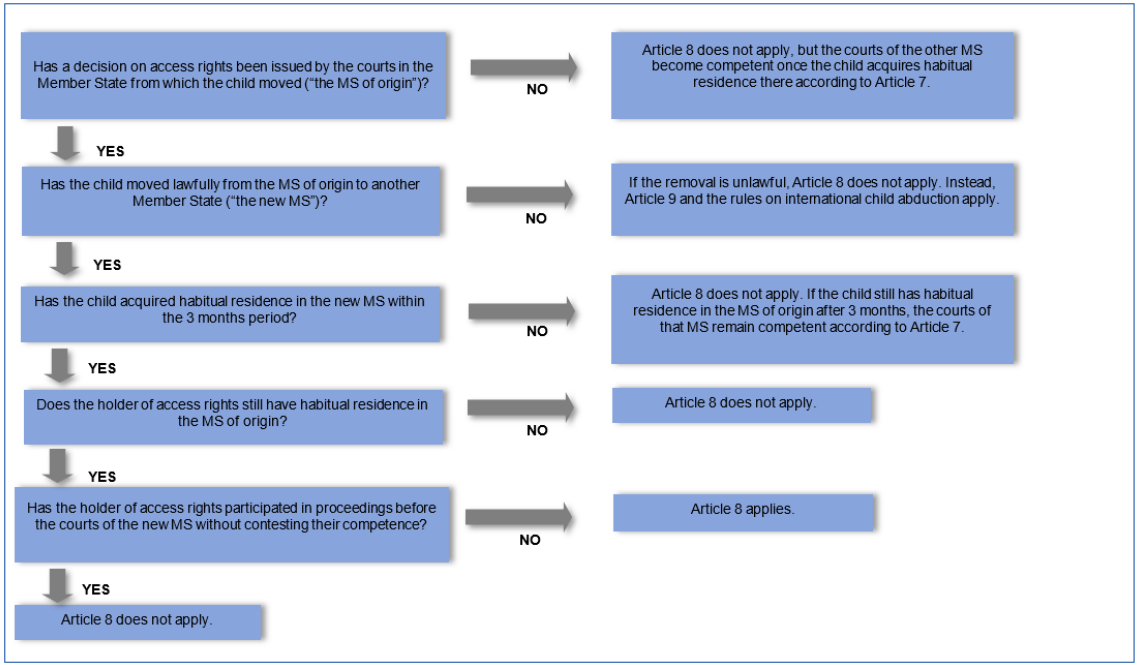
Hence, if the holder of access rights participates in proceedings before a court in the 'new' Member State without contesting the jurisdiction of that court, Article 8 does not apply and the court of the new Member State exercises jurisdiction under Article 7. Furthermore, Article 8 does not prevent the holder of access rights from seising the courts of the 'new' Member State for review of the question of access rights.

3.2.4.2.7. It does not prevent the courts of the new Member State from deciding on matters other than access rights.

Article 8 deals only with jurisdiction to rule on access rights and thus does not apply to other matters of parental responsibility such as custody rights. Therefore Article 8 does not prevent a holder of parental responsibility who has moved with the child to the 'new' Member State, from seising the courts of that

Member State on any other question of parental responsibility during the three-month period following the move.

3.2.4.2.8. Continuing jurisdiction of the courts of the child's former habitual residence (Article 8 8)



3.2.5. Jurisdiction issues as regards child abduction cases – *Article 9 and Recital 22*

3.2.5.1. Courts of the Member State of origin to retain jurisdiction

To deter parental child abduction between Member States, Article 9 ensures that the courts of the Member State where the child was habitually resident before the wrongful removal or retention ("Member State of origin") remain competent to decide on the substance of the case. Jurisdiction may be attributed to the courts of the new Member State ("the Member State of refuge") only under very specific conditions which must be interpreted strictly[116].

Article 9 does not apply where the child had been wrongfully removed to or retained in a third country[117]. In this case, the court of the Member State concerned will have to establish whether it has jurisdiction on the basis of any relevant bilateral or multilateral international conventions, or, in the absence of such an international convention, on the basis of the rules of its national law, in accordance with Article 14 of the Regulation[118].

3.2.5.2. Restricted situations where courts in the requested Member State acquire jurisdiction

The Regulation allows for the attribution of jurisdiction to the courts of the Member State of refuge in three situations only:

Situation 1:

- The child has acquired habitual residence in the Member State of refuge, and
- All those with rights of custody have acquiesced in the removal or retention.

Situation 2:

- The child has acquired habitual residence in the Member State of refuge and has resided there for at least one year after those with rights of custody learned or should have learned of the whereabouts of the child, and
- The child has settled in the new environment, and, additionally, at least one of the following conditions is met:

[116] CJEU judgment of 1 July 2010 in Case C-211/10, *Povse* ECLI:EU:C:2010:400, para. 45.

[117] CJEU judgment of 24 March 2021 in Case C-603/20, *PPU MCP* ECLI:EU:C:2021:231, para. 57.

[118] Case C-603/20, *MCP supra* note 117.

- no request for the return of the child has been lodged within the year after the left-behind holder of rights of custody knew or should have known the whereabouts of the child;
- a request for return was made but has been withdrawn and no new request has been lodged within that year;
- the application for return was refused by a court of the Member State of refuge on grounds other than point (b) of Article 13(1) or Article 13(2) of the 1980 Hague Convention and that decision is no longer subject to ordinary appeal;
- a decision on non-return has been issued in the Member State of refuge and no court was seised as referred to in Article 29(3) and (5) in the Member State of origin;
- a decision on rights of custody that does not entail the return of the child has been given by the courts of the Member State of origin. It should be noted in this connection that the CJEU has made clear that this condition is to be construed strictly and the decision referred to must be a final decision. Thus, a decision granting a provisional and protective measure does not fulfil this condition nor can such a decision effect a transfer of jurisdiction to the courts of the Member State to which the child was removed [119].

Situation 3:

- The jurisdiction of the court of the Member State of refuge is **agreed upon or accepted by the parties**[120] pursuant to the Regulation in matters of parental responsibility in the course of the return proceedings, where the parties may agree either on the return or the non-return of the child.

[119] Case C-211/10, *Povse supra* note 116, para. 39 to 49.

[120] The choice of court pursuant to Article 9(1) in conjunction with Article 10 of the Council Regulation (EU) 2019/1111, *supra* note 1, does not violate Article 16 of the HCCH 1980 Child Abduction Convention, *supra* note 100, as based on the mutual agreement of the parties and being in the interest of the mediation.

3.2.5.3. Jurisdiction in child abduction cases – effect of Article 9

Example:

A child is abducted from Member State A to Member State B and remains there. Which court has jurisdiction to decide on the substance of the case?

The courts of Member State A have jurisdiction

NO

SITUATION 1:

The child has acquired habitual residence in Member State B and all those with rights of custody have acquiesced in the removal or retention acquiesced in the removal or retention

YES

The courts of Member State B have jurisdiction

NO

SITUATION 2:

The child has acquired habitual residence in Member State B and has resided there for more than 1 year since those with rights of custody learned or should have learned of her or his whereabouts
and the child is settled in her/his new environment...
and one of the five following conditions is fulfilled:

- The relevant holder of rights of custody has not requested the return of the child within a year after he/she learned or should have learned of the whereabouts of the child or
- the custody holder has withdrawn a request for return within a year and no new request has been lodged within that time or
- the application for return was refused by a court of the requested Member State on grounds other than point (b) of Article 13(1) or Article 13(2) of the 1980 Hague Convention and that decision is no longer subject to ordinary appeal or
- a decision on non-return has been issued in the requested Member State and no court was seised as referred to in Article 29(3) and (5) in the Member State of origin or
- a decision on rights of custody that does not entail the return of the child has been given by the courts of the Member State of origin .

YES

SITUATION 3:

The jurisdiction of the court of the requested Member State is agreed upon or accepted by the parties pursuant to the Regulation in matters of parental responsibility in the course of the return proceedings, **where:**

If return is agreed, the child should return to the Member State of origin. Jurisdiction for any future custody proceedings there shall be determined on the basis of the habitual residence of the child in that Member State unless otherwise agreed by the parties.

If non-return is agreed, the child should remain in the Member State of the new habitual residence. Jurisdiction for any future custody proceedings there shall be determined on the basis of the new habitual residence of the child unless otherwise agreed by the parties.

3.2.6. Choice of court– Article 10 and Recitals 23 and 24

3.2.6.1. Limited possibility to choose a court

The Regulation contains a limited possibility, and subject to certain specific conditions, for a court of a Member State other than that in which the child is habitually resident to be chosen in any matter of parental responsibility where the child has a substantial connection with that other Member State. The conferral of jurisdiction is possible where, for instance, the parental responsibility application is connected with an application for divorce, legal separation or marriage annulment between the parents, or where the matter of parental responsibility is to be decided independently (see Recital 23). Despite the fact that at first glance the ancillary jurisdiction of the divorce court in matters of parental responsibility of Article 12(1) Brussels IIa Regulation seems to have been removed, it is still possible to establish jurisdiction in those situations under Article 10 of the Regulation subject to its conditions.

The choice of court is an exception to the general rule of jurisdiction in Article 7 based on the habitual residence of the child and thus must be interpreted strictly.

The choice of court in favour of one Member State may be exercised not only where the court of the other Member State could have general jurisdiction based on the habitual residence of the child (see Article 7), but also when other grounds of jurisdiction may be relied on – jurisdiction in case of lawful move of a child from one Member State to another (see Article 8), in case of wrongful removal of retention of a child (see Article 9) and jurisdiction linked to the presence of the child (see Article 11). Article 10 aims at promoting the amicable dispute settlement at the level of the access to justice but may inspire the parties to go further and to reach an agreement as to the substance of the case.

3.2.6.2. Conditions for choosing a court of a Member State

3.2.6.2.1. The child should have substantial connection with the Member State of the chosen court

The choice of court in parental responsibility matters is possible only in situations where the child has a substantial connection with the Member State of the chosen court, while his or her habitual residence is in a different Member State. The substantial connection may stem in particular from the fact that at least one of the holders of parental responsibility is habitually resident in the Member State of the chosen court, that Member State is the former habitual residence of the child or that the child is a national of that Member State. These circumstances are not exclusive; thus, it is possible to base the connection on other factors (for example where the property of the child is

located in case of an application concerning the administration, conservation or disposal of that property or the former presence of the child in case he or she has acquired habitual residence[121].

3.2.6.2.2. The parties to the proceedings, as well as any other holder of parental responsibility should agree or accept jurisdiction

- Who?

The choice of court agreement may be concluded by the parties to the proceedings (most often – the parents) and by other holders of parental responsibility (for example – grandparents – CJEU C-335/17 *Valcheva*, - see Article 10(1) and Recital 23). Who is a parent, or a holder of parental responsibility is a preliminary question determined by the national law of the court seised[122].

Further persons who could become a party to the proceedings under the national law of the forum must also accept jurisdiction in parental responsibility matters (like the prosecutor in Greece as in *Saponaro*[123]- see Article 10(2)(2), the child protection officials or the children where they are parties to the proceedings under the national law) in order for the choice of court agreement to be effective

However, a legal representative, appointed by the court of its own motion to defend the defendant's interests cannot consent to the jurisdiction when the defendant cannot be served with the document instituting the proceedings. This impossibility is due to the fact that the defendant is not aware of the proceedings and the legal representative acts without his authority (see C-215/15, *Gogova*, para.47). Though, in case of prior agreement between the applicant and the defendant the access to the chosen court should be possible.

- At what time?

The choice of court may be agreed upon in advance and at the latest at the time the court is seised (see Article 10(1)(b)(i)). After that moment the jurisdiction may be accepted expressly in the course of the proceedings (see Article 10(1)(b)(ii)). The typical case will be where one of the parties seises a court that could have jurisdiction pursuant to Article 10, without obtaining the agreement of the other party beforehand, and that other

[121] Case C-111/17, *PPU OL supra* note 108.

[122] See, on this point: European e-Justice Portal, EJN-Civil, factsheets on Parental responsibility - child custody and contact rights.

[123] Case C-565/16, *Saponaro supra* note 69.

party expressly accepts the jurisdiction. The conferral of jurisdiction tacitly or by not entering an appearance is not possible.

Only persons who become parties to the proceedings after the court was seised may agree implicitly by refraining from opposing to the choice of court (see Article 10(2)(2) and C-565/16 *Saponaro*).

The possibility of a party to accept jurisdiction after a court is seised is new. Under the Brussels IIa Regulation and the case-law of CJEU agreement had to be given at the latest at the time when the document instituting the proceedings, or an equivalent document was lodged with the court chosen[124].

- Form of the agreement

Article 10(2) introduces specific requirements regarding the form of the choice of court. The agreement must be in writing, dated and signed by the parties concerned or included in the court record in accordance with national law and procedure. The acceptance of jurisdiction in the course of the proceedings should also be recorded by the court in accordance with national law and procedure. Any communication by electronic means which provides a durable record of the agreement is to be treated as equivalent to 'in writing'. The form requirements point out that the agreement is binding for the parties. They need to be fulfilled even in case of joint application by the parties, where the court most probably will ensure the proper recording of the consent**.** If the form requirements are not complied with and if the parties do not expressly agree on the choice of court in front of the court the choice of court agreement is ineffective, and the court must decline jurisdiction.

If the parties or any other holder of parental responsibility contemplate expressly accepting jurisdiction in the course of the proceedings, the court has to ensure that they were informed of their right not to accept the jurisdiction (see Article 10(1)(b)(ii)). This rule was inspired by the Article 26(2) of the Brussels Ia Regulation. The obligation of the court must be fulfilled prior to the express acceptance of the jurisdiction and its recording in accordance with national law and procedure. If one of the parties opposes the acceptance, jurisdiction in accordance with Article 10 cannot be established. The information obligation is envisaged only for the express acceptance and thus is not applicable to situations of implicit acceptance in accordance with Article 10(2)(2). If the court breaches its obligation, this should be a ground for appeal allowing reconsideration of the validity of the express acceptance.

Save the aspects covered expressly by Article 10, the Regulation does not provide for a rule for determination of the applicable law to the substantial validity of the choice of court

[124] CJEU judgment of 12 November 2014 in Case C-656/13, *L* ECLI:EU:C:2014:2364, para. 56.

agreement like Article 25 of the Brussels Ia Regulation. Thus, this question is left to the national private international law. In addition, the court has to examine whether the agreement or acceptance was based on an informed and free choice of the parties concerned and is not a result of one party taking advantage of the predicament or weak position of the other party (see Recital 23).

3.2.6.2.3. The best interests of the child - Article 10(1)(c)

The last condition for the choice of court in parental responsibility matters requires that the exercise of jurisdiction be in the best interests of the child (see Article 10(3)). The chosen court that is not the court of the habitual residence of the child but nevertheless has a substantial connection with the child must assess in every case whether exercising jurisdiction would in any way prejudice the best interests of the child[125].

The potential difficulties linked to the hearing of the child may not *per se* base a conclusion that the choice of court is not in the best interests of the child. The court may use all means available under its national law to organise the hearing as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast).

3.2.6.3. Effect

The jurisdiction of the chosen court is to be established at the time the court is seised in case of prior agreement, or at the time of recording the acceptance in the course of the proceedings. After that moment the parties cannot withdraw from the agreement or acceptance. However, the prorogation of jurisdiction may be precluded by an express opposition of the person that would become a party to the proceedings under the national law of the forum.

The express acceptance of jurisdiction made in the course of the proceedings pursuant to Article 10(1)(b)(ii) is exclusive (see Article 10(4)). Although not explicitly stated, the Regulation does not seem to exclude the possibility of the parties to agree expressly on an exclusive choice of court agreements as per Article 10(1)(b)(i) – where the prorogation is agreed freely in advance and, at the latest, at the time the court is seised[126]. For the chosen court this exclusive nature means two things: the court cannot transfer jurisdiction to the court of another

[125] Case C-656/13, *L supra* note 124, para. 49 and 58.

[126] See the wording of Article 20(4) and the last sentence of Recital 38 that support this interpretation.

Member State (Article 12(5)) and in *lis pendens* scenario this court has the priority to proceed once its jurisdiction is confirmed even when second seised (Article 20 (4)).

Any agreed or accepted jurisdiction should cease, unless otherwise agreed by the parties, as soon as a decision resulting from those proceedings on matters of parental responsibility is no longer subject to ordinary appeal or the proceedings have come to an end for another reason. The rationale behind this solution is the need to respect the requirement of proximity for any new proceedings in the future (Article 10 (3) and Recital 24). The possibility for the parties to agree otherwise by virtue of Article 10(3) is a novelty in comparison to the judgment of CJEU in the case C-436/13, *E v B*, ECLI:EU:C:2014:2246. There CJEU held that the prorogation of jurisdiction ceases following the final decision in the proceedings where it was relied on, without providing for the possibility for the parties to agree otherwise.

3.2.7. Presence of the child – Article 11 and Recital 25

If it proves impossible to determine the habitual residence of the child and Article 10 does not apply, Article 11 (1) allows a judge of a Member State to decide on matters of parental responsibility with regard to children who are present in that Member State.

Example:

A child is born in Portugal where the mother is temporarily present while the father is habitually resident in Romania. If the child has never been physically present in Romania, he or she cannot have habitual residence there. In the case the Portuguese court cannot establish that the child has acquired habitual residence in Portugal, its jurisdiction may be based on Article 11(1)[127].

The ground of jurisdiction based on the presence of the child applies also to refugee children and children internationally displaced because of disturbances occurring in their Member State of habitual residence (see Article 11(2)). Where the habitual residence of the child before the displacement was in a third State, the jurisdiction rule of the 1996 Hague Convention on refugee children and internationally displaced children should apply (see Recital 25). The jurisdiction under Article

[127] See, on this point Case C-111/17, *PPU OL supra* note 108, and Case C-393/18, *PPU UD supra* note 9.

11(2) is concurrent with that conferred by Article 7(1) linked to the habitual residence of the child in a Member State.

3.2.8. Residual jurisdiction – Article 14 and Recitals 29 and 34

If no court of a Member State has jurisdiction pursuant to Articles 7 to 11, the court may base its jurisdiction on the laws of that Member State. Decisions resulting from such proceedings are to be recognised and enforced in other Member States pursuant to the rules of the Regulation. The term 'laws of that Member State' includes international instruments in force in that Member State, in particular the 1996 Hague Convention (see Recital 29).

Examples:

A couple with a child, all being nationals of Austria, settled in Switzerland. After several years the parents separated, and the father returned to Austria. He asked the court in that Member State to grant him sole custody over the child who continued to live in Switzerland. Since the child is habitually resident in a non-EU State Party to the 1996 Hague Convention, the court of the Member State must apply that convention. In this example, the courts of Switzerland have jurisdiction in accordance with Article 5 of the 1996 Hague Convention (see Recital 29 and Article 97(1)) and the Austrian court must decline jurisdiction.

If the couple with the child settled in Qatar (not a party to the 1996 Hague Convention), in the same scenario the court of Austria may apply its national law for determining if it has jurisdiction.

The recourse to the residual jurisdiction is not precluded by the fact that the respondent is a national of a Member State other than that of the court seised. This clarification stems from the *MPA*[128] judgment of CJEU.

In *MPA*[129] the mother was of Spanish nationality and the father of Portuguese nationality. Their children had dual Spanish and Portuguese nationality. The couple resided since 2010 first in Guinea-Bissau and then in Togo. While still residing in Togo the mother brought an application for custody in Spain. CJEU concluded that the habitual residence of the children cannot be established in Spain as among others the

[128] Case C-501/20, *MPA supra* note 26.

[129] Case C-501/20, *MPA supra* note 26.

children were never physically present, on a non-occasional basis, in that Member State[130]. In the given case no court of a Member State had jurisdiction to rule on an application relating to parental responsibility pursuant to the other heads of jurisdiction. Thus, the Spanish court may avail itself of the residual jurisdiction of Article 14 of Brussels IIa Regulation [Article 14 of the Regulation]. According to CJEU this provision did not preclude the court seised from applying rules of national law in order to establish its own jurisdiction, including, as the case may be, that based on the nationality of the child concerned, even where the father of that child, the respondent, is a national of a Member State other than that of the court seised.

Where jurisdiction under the Regulation cannot be exercised due to diplomatic immunity in accordance with international law, the court of the Member State in which the person concerned does not enjoy such immunity may exercise jurisdiction in accordance with its national law (see Recital 34). This recital concerns the situation in which the court of a Member State, despite having jurisdiction under the provisions of Regulation, cannot exercise that jurisdiction by reason of the existence of diplomatic immunity[131]. In this regard it is important to assess if the person enjoys immunity only in respect of acts performed in an official capacity. If this is the case, that immunity will not cover relationships of a private nature, such as applications between spouses in matrimonial matters and in matters of parental responsibility[132].

3.2.9. Examination of jurisdiction – Article 18 and Recital 37

Where a court of a Member State is seised of an application for parental responsibility matters in respect of which it has no jurisdiction under the rules in the Regulation and a court of another Member State does have jurisdiction then it must of its own motion declare that it has no jurisdiction. However, if the court seised has a particular connection with the child in accordance with Article 12(4) of the Regulation it has the discretion to request a transfer of jurisdiction under Article 13, but not an obligation to do so (see Recital 37).

The Regulation does not provide for a transfer of the case to a court of another Member State if the court seised cannot establish jurisdiction. It is for the interested party to bring the

[130] For further details see section 3.2.3.2.

[131] Case C-501/20, *MPA supra* note 26, para 65.

[132] Case C-501/20, *MPA supra* note 26, para 66.

proceedings before the court of the other Member State. In *A*[133], the CJEU gave the following guidance the court

> "However, 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 […], the court of another Member State having jurisdiction."

The decision on the examination of jurisdiction may be subject to appeal in accordance with the national law and procedure.

3.3. Transfer of jurisdiction – Articles 12 and 13, Recitals 21, 26, 27, 28 and 37

The Regulation structures the different ways of transferring jurisdiction, existing in Article 15 of the Brussels IIa Regulation, in two different provisions: the transfer of jurisdiction initiated by a court wishing to transfer its jurisdiction (Article 12) and the transfer of jurisdiction on a request by a court wishing to obtain jurisdiction (Article 13). The legislative technique of the Regulation in this regard follows the example of Article 8 and Article 9 of the 1996 Hague Convention.

The courts under the Regulation transfer "jurisdiction" and not the "case" meaning that the court file itself is not transferred and that the transfer provides the ground for jurisdiction of the court in the other Member State

It is not necessary to have pending cases in different Member States to transfer jurisdiction. The Regulation contains rules guiding the court in finding the competent court in the other Member State (see section 3.3.4.1).

3.3.1. In what circumstances is it possible to transfer jurisdiction?

The Regulation contains a rule which allows, only in exceptional circumstances, a court which has jurisdiction on the substance to request the transfer to a court of another Member State if the latter would be better placed to assess the best interests of the child in the particular case. The court may transfer the jurisdiction of the entire proceedings or a specific part thereof. The court of the other Member State may accept the transfer of jurisdiction, if it considers that due to the specific circumstances

[133] Case C-523/07, *A supra* note 66.

of the case such a transfer is in the best interests of the child. Either court may but is not obliged to transfer or accept jurisdiction, nor stay the pending proceedings.

According to the general rule jurisdiction lies with the courts of the Member State of the child's habitual residence at the time the court was seised (Article 7). Therefore, jurisdiction does not shift automatically in a case where the child acquires habitual residence in another Member State during the court proceedings (see Recital 21). However, there may be circumstances where, exceptionally, the court which has been seised and has jurisdiction is not the best placed to assess the best interests of the child. In such circumstances Articles 12 permits the court with jurisdiction to request a court of another Member State lacking jurisdiction to assume jurisdiction provided that this is in the best interests of the child.

The court with jurisdiction may transfer it in accordance with Article 12 when it is based not only on Article 7, but also on Article 8, on non-exclusive choice of court as per Article 10 and on Article 11.

The request for obtaining jurisdiction under Article 13 may be made only to the court of the Member State of the habitual residence of the child.

The transfer of jurisdiction constitutes a special rule of jurisdiction that derogates from the general rule of Article 7(1) of the Regulation, and consequently must be interpreted strictly[134]. The transfer of jurisdiction to the court of another Member State is not allowed in case of exclusive jurisdiction under Article 10 of the chosen court (Article 12 (5)). In addition, the transfer of jurisdiction cannot be requested from a court retaining jurisdiction as per Article 9 in cases of wrongful removal or retention of a child (Article 13(1) and Recital 27).

The transfer of jurisdiction can take place only between courts where one of them has jurisdiction as to the substance of the matter and the other does not have any jurisdiction. The initiative for the transfer may be taken by the court with jurisdiction under Article 12 as well as by the court lacking jurisdiction under Article 13. According to the case-law of the CJEU, if both courts have jurisdiction as to the substance of the matter (for example the court first seised is prorogated by the parents and the second one is of the habitual residence of the children) Article 20 on *lis pendens* and dependent actions should apply instead[135].

The transfer is subject to three conditions:

[134] CJEU judgment of 27 October 2016 in Case C-428/15, *D* ECLI:EU:C:2016:819, para. 48.

[135] CJEU judgment of 4 October 2018 in Case C-478/17, *IQ* ECLI:EU:C:2018:812, para. 40 and 44.

- The child must have a particular connection with another Member State

The child must have a "particular connection" with another Member State. Article 12(4) contains an exhaustive list of five alternative decisive factors where such connection exists[136]. The child is considered to have a particular connection with another Member State if:

- he or she has acquired habitual residence there after the court of origin was seised; or
- the other Member State is the former habitual residence of the child; or
- it is the place of the child's nationality; or
- it is the habitual residence of a holder of parental responsibility; or
- the child owns property in the other Member State and the case concerns measures for the protection of the child relating to the administration, conservation, or disposal of this property.

The CJEU states that these factors are considered evidence of a relation of proximity between the child and the respective Member State. Nevertheless, the court that considers transferring its jurisdiction should not establish existence of a "particular connection" formalistically. It should compare the extent and degree of the relation of 'general' proximity that links the child concerned with the Member State of the court having jurisdiction, with the extent and degree of the relation of 'particular' proximity demonstrated by one or more of the factors set out in Article 12(4) of the Regulation that exists, in the particular case, between that child and certain other Member States[137].

Cases where none of the factors enlisted in Article 12(4) are present are immediately excluded from the transfer mechanism[138].

- A court of another Member State should be better placed to assess the best interests of the child in the particular case

The court wishing to transfer its jurisdiction (Article 12(1)) as well as the court wishing to obtain jurisdiction (Article 13 (1)) should evaluate which court would be better placed to assess the best interests of the child in the particular case The CJEU provides guidelines for the courts in this regard stating that

[136] Case C-428/15, *D supra* note 134, para. 35, and CJEU order of 10 July 2019 in Case C-530/18, *EP* ECLI:EU:C:2019:583, para. 28.

[137] Case C-428/15, *D supra* note 134, para. 52. and Case C-530/18, *EP supra* note 136, para. 33.

[138] Case C-428/15, *D supra* note 134 para. 51, Case C-478/17, *IQ supra* note 135, para. 35 and Case C-530/18, *EP supra* note 136, para. 28.

they should establish whether the transfer of jurisdiction to that other court is such as to provide genuine and specific added value, with respect to the decision to be taken in relation to the child, as compared with the possibility of the case remaining before that court, where it is pending. In that context, the court requesting to transfer or obtain jurisdiction may take into account, among other factors, the rules of procedure in the other Member State, such as those applicable to the taking of evidence required for dealing with the case[139]. However, it must be noted that this jurisprudence is based on the different wording of the Article 15 of the Brussels IIa Regulation[140].

The CJEU clarified further that the court with jurisdiction may take into consideration the rules of procedure applicable under the legislation of another Member State if they have a specific impact on the ability of the court of the latter Member State to deal with the case better, in particular by facilitating the gathering of evidence and testimony, and, in doing so, provide added value to the resolution of the case in the interests of the child. On the other hand, the CJEU rules out the possibility to take a view, in a general and abstract way, that the rules of law of another Member State, relating to the examination of the case in camera by specialised judges, constitute a factor to be taken into consideration[141].

Usually, the factors that could be taken into consideration include the possible access to information concerning the child and the parents, access to evidence, witnesses, social reports, hearing of the child, better assessment of the linguistic, cultural, religious, ethnic, or other specifics of the child's situation. The passage of time and the prospects for execution in both Member States may also play a role.

However, within such an assessment, the substantive law of the Member State where the jurisdiction could be transferred to should not be taken into consideration. Doing so would be in breach of the principles of mutual trust between Member States and mutual recognition of judgments that are the basis of Regulation (see Recital 3)[142].

- The transfer of jurisdiction should be in the best interests of the child

The court that considers accepting jurisdiction (Article 12(2)) as well as the court that considers to accept transferring its jurisdiction (Article 13(2)) must establish that a transfer is in

[139] Case C-428/15, *D supra* note 134.

[140] The court of the other Member State under Article 15(1) of Council Regulation (EU) 2019/1111, *supra* note 1 had to be "better placed to *hear the case*".

[141] Case C-530/18, *EP supra* note 136, para 41.

[142] Case C-428/15, *D supra* note 134, para 57 referring to judgments, Case C-403/09, *Detiček supra* note 72, para 45 and Case C-256/09, *Purrucker supra* note 71, para. 70 and 71, as well as Case C-530/18, *EP supra* note 136, para. 39.

the best interests of the child (Article 12(2) and Article 13(2)). The assessment should be based on the principle of mutual trust and on the assumption that the courts of all Member States are in principle capable to deal with a case.

The CJEU helps with clarifying the assessment of 'best interests of the child' in the transfer of jurisdiction in its judgment of 27 October 2016 in Case C-428/15, D[143]. The CJEU states that the courts must be satisfied, having regard to the specific circumstances of the case, that the envisaged transfer of jurisdiction is not liable to be detrimental to the situation of the child concerned. To that end, the court must assess any negative effects that such a transfer might have on the familial, social, and emotional attachments of the child concerned in the case or on that child's material situation. In that context, the court having or requesting jurisdiction may also decide on the basis of Article 12(1) of the Regulation, to transfer or request, not of the whole proceedings, but only of a specific part of it, if the particular circumstances justify it. That option may, in particular, be envisaged when the relation of proximity with another Member State does not directly concern the child as such, but one of the holders of parental responsibility, on the ground stated in Article 12(4)(d) of the Regulation.

The judges may cooperate to assess the best interests of the child on the basis of the "specific circumstances of the case". They should do this either directly in compliance with Article 86 (2)(a) or through the respective Central Authorities using the tools provided for in Article 80. The judges may avail themselves further of the contact points under EJN-civil[144].

The three cumulative conditions - particular connection, better placed court to assess the best interests of the child and the best interests' considerations - are to be evaluated independently. The existence of one of them does not *a priori* mean that the other conditions are met. Therefore, the existence of a 'particular connection' between the child and another Member State does not, in itself, prejudge neither the question whether a court of that other Member State is better placed to assess the best interests of the child than the court having jurisdiction, nor, if that other court is in fact better placed, whether the transfer of jurisdiction to that other court is in the best interests of the child[145].

3.3.2.Who initiates the transfer?

The transfer may take place:

[143] Case C-428/15, *D supra* note 134, para.55.

[144] European e-Justice Portal, EJN-Civil.

[145] Case C-428/15, *D supra* note 134, para.55.

- on application from a party, or
- of the court's own motion, or
- on request of a court of another Member State.

3.3.3. What procedure applies?

A court which is faced with an application for a transfer, or which wants to transfer the jurisdiction of its own motion has first to stay the proceedings or a specific part thereof and use one of the two options:

- It may invite one or more of the parties to inform the court of the other Member State of the pending proceedings and the possibility to transfer jurisdiction and to introduce an application before that court, or
- It may directly request the court of the other Member State to assume jurisdiction.

The court with jurisdiction should make the request to the court of another Member State only if its prior decision to stay the proceedings and make a request for transfer of jurisdiction has become final where that decision can be appealed under national law (see Recital 26). This rule should apply irrespectively of whether the court of the other Member State is approached directly by the court having jurisdiction or by a party.

If the transfer is initiated by one or more of the parties, the court with jurisdiction should set a time limit to seise the courts of the other Member State. If the party does not seise the other court within the time limit, the jurisdiction is not transferred and the court initially seised should continue to exercise its jurisdiction. The Regulation does not prescribe a specific time limit, but it should be sufficiently short to ensure that the transfer does not result in unnecessary delays to the detriment of the child and the parties. Nevertheless, it is the court that sets the time limit, it can be possible to extend it, if appropriate in the concrete case.

The court which has received the request for a transfer must decide, within six weeks of being seised by a party or requested by the court, whether or not to accept the transfer. In case of acceptance, it should inform the court with jurisdiction without delay (see Article 12(2)(2)). That court must decline jurisdiction relying on the information about the acceptance provided by the court of the other Member State, also with the help of the parties.

The court second seised or requested by the court with jurisdiction may expressly decline the transfer of jurisdiction and inform the court first seised thereof. The court with jurisdiction must continue to exercise its jurisdiction if that happens or if it has not received the acceptance of jurisdiction by the court second seised or requested within seven weeks after (a) the time limit set for the parties to introduce an application before that court has expired, or (b) that court has received the request for transfer of jurisdiction (Article 12(3)).

When the transfer of jurisdiction is initiated by the court lacking jurisdiction the court with jurisdiction has six weeks following the receipt of the request to accept to transfer its jurisdiction (see

Article 13(2)). If the court with jurisdiction accepts to transfer the jurisdiction it has to inform the other court without delay but in any case, within the six weeks' time limit as in the absence of an acceptance within that timeframe, the court lacking jurisdiction will not be able to obtain it (see Article 13(2)).

A transfer made of the court's own motion or by application of a court of another Member State does not need to be accepted by any of the parties unlike under Article 15 (2) Brussels IIa Regulation.

A transfer of jurisdiction, whether requested by a court wishing to transfer its jurisdiction or by a court wishing to obtain jurisdiction, should have effects only for the particular case in which it is made. Once the proceedings for which the transfer of jurisdiction was requested and granted have come to an end, the transfer should not produce any effect for future proceedings (see Recital 28).

3.3.4. Certain practical aspects

3.3.4.1. How does a judge, who would like to transfer jurisdiction, find out which is the competent court of the other Member State?

The European Judicial Atlas in Civil Matters available at the E-Justice Portal can be used to find the competent court of the other Member State[146]. The Judicial Atlas identifies the territorially competent court in the various Member States with contact details of the different courts (such as names, telephone numbers, e-mail addresses and so on). The Central Authorities appointed under the Regulation can also assist the judges in finding the competent court in the other Member State as they are required to do under the terms of Article 79(e)[147]. The judges may avail themselves further of the contact points under EJN-civil [148]. For further details, see Chapter 7 "Cooperation in matters of parental responsibility" and Chapter 8 "Collection and transmission of information, data protection and non-disclosure of information").

3.3.4.2. How should the judges communicate?

Article 86 (1) allows the courts to cooperate and communicate directly with, or request information directly from, each other provided that such communication respects the procedural

[146] European e-Justice Portal, European Judicial Atlas in civil matters.

[147] See Chapter 7.

[148] European e-Justice Portal, EJN-Civil.

rights of the parties and the confidentiality of information. This possibility is envisaged expressly for the purpose of the transfer of jurisdiction as per Article 12 and 13. It may be particularly useful for the judges concerned to communicate to assess whether in the specific case the requirements for a transfer are fulfilled, in particular if it would be in the best interests of the child.

The best approach would be for the courts to get in contact before the transfer in order to avoid delays and futile procedural activities. If the two judges speak and/or understand a common language, they should not hesitate to contact each other directly by telephone or e-mail[149]. Other forms of modern technology may be useful, such as video or conference calls. If there are language problems, the judges may rely, so far as resources allow, on interpreters. The Central Authorities will also be able to assist the judges (Article 79 (e)) as well as EJN-civil or International Hague Network of Judges ("IHNJ").

The judges will wish to keep the parties and their legal advisers informed, but it will be a matter for the judges to decide for themselves what procedures and safeguards are appropriate in the context of the particular case.

3.3.4.3. Who is responsible for the translation of documents?

The mechanisms of translation are not covered by Articles 12 and 13. Judges should try to find a pragmatic solution which corresponds to the needs and circumstances of each case. Subject to the procedural law of the State addressed, translation may not be necessary if the jurisdiction is transferred to a judge who understands the language of the case. If a translation proves necessary, it could be limited to the most important documents. Some Central Authorities may also be able to assist in providing informal translations.

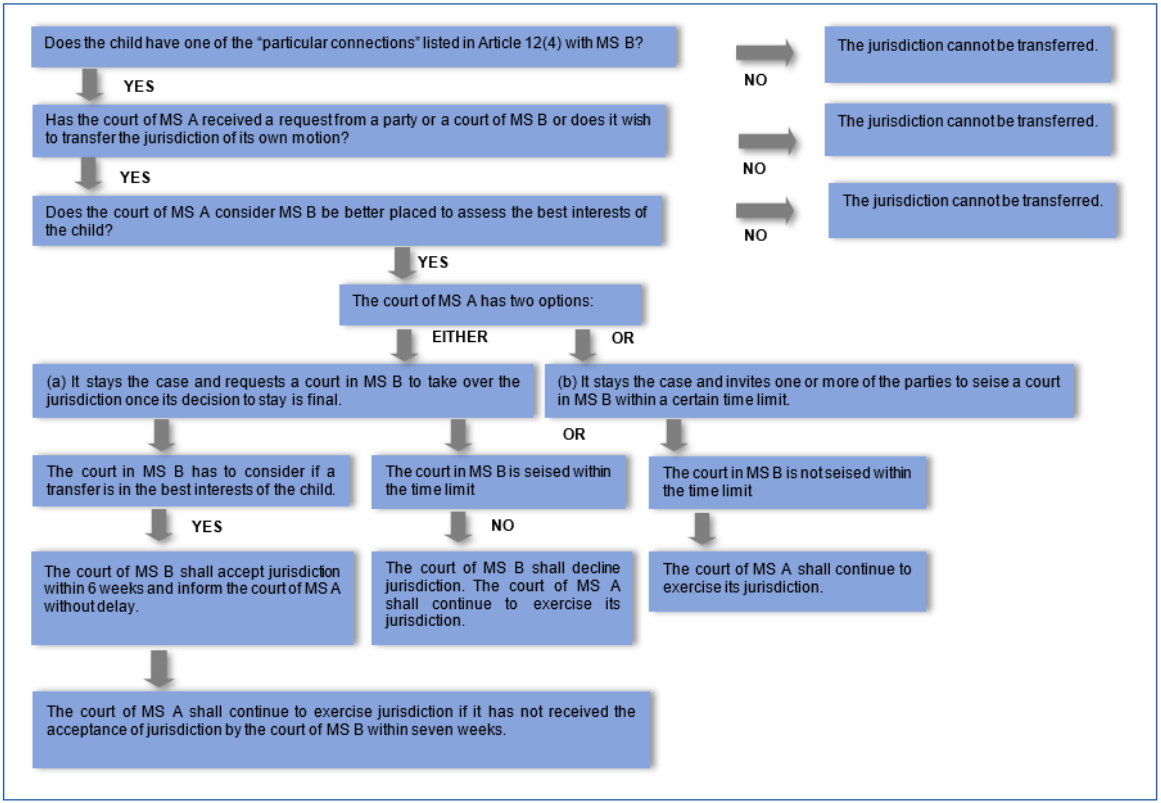
It must be, however, stressed that the court is not transferring its case, only the jurisdiction, thus it will not be sending its court file to the foreign court.

3.3.4.4. Transfer of jurisdiction – Article 12

When a court in a Member State ("MS A") has been seised of a case in respect of which it has jurisdiction pursuant to Articles 7, 8, non-exclusive jurisdiction under Articles 10 and

[149] The Hague Conference on Private International Law has led the creation of the International Hague Network of Judges one of whose aims is to facilitate direct communication between judges in the context of International Family Law. The Hague Conference has developed some general guidance for judicial communications. See for instance: http://www.hcch.net/upload/haguenetwork.pdf and the general website of the International Hague Network of Judges (IHNJ).

11 of the Regulation, it may, as an exception, transfer the proceedings, or a specific part of it, to a court of another Member State ("MS B"), if the following conditions are met:


Does the child have one of the "particular connections" listed in Article 12(4) with MS B?
NO
The jurisdiction cannot be transferred.
YES
Has the court of MS A received a request from a party or a court of MS B or does it wish to transfer the jurisdiction of its own motion?
NO
The jurisdiction cannot be transferred.
YES
Does the court of MS A consider MS B be better placed to assess the best interests of the child?
NO
The jurisdiction cannot be transferred.
YES
The court of MS A has two options:
EITHER
OR
(a) It stays the case and requests a court in MS B to take over the jurisdiction once its decision to stay is final.
(b) It stays the case and invites one or more of the parties to seise a court in MS B within a certain time limit.
OR
The court in MS B has to consider if a transfer is in the best interests of the child.
The court in MS B is seised within the time limit
The court in MS B is not seised within the time limit
YES
NO
The court of MS B shall accept jurisdiction within 6 weeks and inform the court of MS A without delay.
The court of MS B shall decline jurisdiction. The court of MS A shall continue to exercise its jurisdiction.
The court of MS A shall continue to exercise its jurisdiction.
The court of MS A shall continue to exercise jurisdiction if it has not received the acceptance of jurisdiction by the court of MS B within seven weeks.

3.3.5. Examples of the application of the transfer of jurisdiction

Example 1: Separation of parents

Parents, habitually resident in Hungary with their child, separate. One applies for custody before the Hungarian court. The other subsequently relocates to France with the child in compliance with the joint wish of the parents. The court having jurisdiction in Hungary may consider transferring its jurisdiction to the French court as the Member State on the child's new habitual residence.

Example 2: Intervention of child protection authority

Two nationals of Poland relocate to Sweden together with their child. The child is ill-treated, and the parents disappear. The local child protection authority applies for placing the child in institutional care. The court of Sweden may consider transferring its jurisdiction to the court of Poland where the child's grandparents, who are interested in becoming guardians, live[150].

Example 3: Exclusive choice of court agreement

A family with two children all being nationals of Latvia have habitual residence in Germany. The father returns to his home country Latvia and lodges a claim for divorce and parental responsibility there. The mother expressly accepts jurisdiction in the course of the proceedings. If the jurisdiction of the chosen court in Latvia is confirmed, from that point the chosen court is not allowed to transfer jurisdiction to the court of the Member State of the habitual residence of the children - Germany.

Example 4: Wrongful removal of a child

A child with habitual residence in Slovenia is wrongfully removed to Greece. Return proceedings under the 1980 Hague Convention are pending before the court in Greece. Parental responsibility proceedings are initiated in Slovenia. The court of Greece is not allowed to request transfer of jurisdiction from the court in Slovenia, but it does not have to if it is chosen by the parties.

[150] The court in Sweden may also consider placement of the child in Poland pursuant to Article 82 of the Regulation, see section 7.3 of Chapter 7 "Cooperation in parental responsibility matters".

3.4. *Lis pendens* - what happens if proceedings are brought in two Member States? – Article 20(2)-(5) and Recitals 35, 36 and 38

3.4.1. Parallel proceedings brought in two different States concerning the same child – Article 20(2)

Parties may initiate court proceedings on parental responsibility concerning the same child and the same cause of action in different Member States. This may result in parallel actions and consequently the possibility of irreconcilable decisions.

Article 20(2) regulates the situation where proceedings relating to parental responsibility are brought in different Member States concerning:

- the same child and
- the same cause of action.

In that situation, Article 20(2) stipulates that the court second seised has to stay its proceedings and wait for the court first seised to decide whether it has jurisdiction. If the jurisdiction of the court first seised is established, the other court must decline jurisdiction (see Article 20(3)). The second court may only continue its proceedings if the first court comes to the conclusion that it does not have jurisdiction.

The court of the Member State second seised is bound by the decision of the court of the Member State first seised regarding both its jurisdiction and the time of seising[151].

There is however, an exception, from this "first come first served" principle in cases where the jurisdiction of the court second seised is based on the exclusive choice of court agreement (see point 3.4.3).

3.4.2. Different types of proceedings in two different States concerning the same child – Articles 20(2)

For the mechanism in Article 20(2) to have effect the proceedings in the two Member States must both be proceedings on the substance in relation to the matters of

[151] CJEU judgment of 15 November 2012 in Case C-456/11, *Gothaer Allgemeine Versicherung and Others* EU:C:2012:719, para. 41, CJEU judgment of 9 September 2021 in Case C-422/21, *RK* ECLI:EU:C:2021:718, para. 44-49, CJEU judgement of 9 November 2010 in Case C-296/10, *Purrucker* ECLI:EU:C:2010:665, para. 85, and CJEU judgment of 16 January 2019 in Case C-386/17, *Liberato* ECLI:EU:C:2019:24, para. 45 and 51.

parental responsibility raised. If however the proceedings in the first Member State are for provisional and protective measures under Article 15, then any proceedings in another Member State raised subsequently which deal with the substance of parental responsibility in relation to the same child will not be subject to the rule in Article 20(2). This is expressly envisaged in Article 20(2). The reasoning behind this is that the provisional measures pursuant to Article 15 are taken by a court not having jurisdiction on the substance, where a child is in urgent need of protection and they are in principle not enforceable in the other Member State, so there is no risk of conflicting decisions.

The legislative change in the Regulation follows the case-law of CJEU in the two *Purrucker* cases[152].Two children were born in Spain; the father was from that Member State and the mother from Germany. Shortly after the birth the relationship between the parents deteriorated and the mother wanted to return to Germany with the children. They entered into an agreement whereby the mother was to be able to take both children to Germany; once one of the children, a boy, was able to travel – the other, a girl, had to remain in hospital as she was seriously ill; the mother left for Germany taking the boy with her.

However, the father considered that he was no longer bound by the agreement as it had not been approved by the appropriate authorities and raised proceedings in a court in Spain seeking an order for provisional measures, namely interim custody, in respect of both children; this was granted. Later the mother raised, separately in a court in Germany, substantive proceedings for custody of the boy.

The first question was whether the provisions of Article 19(2) Brussels IIa Regulation dealing with *lis pendens* and related actions (Article 20 (2) of the present Regulation) applied where, as was apparently the case, the court - in this case in Spain - was seised only of an action to obtain an order for provisional measures within the meaning of Article 20 Brussels IIa Regulation and where a court of another Member State which has jurisdiction as to the substance of the matter within the meaning of Brussels IIa Regulation– in this case in Germany - was second seised by the other party of an action with the same object seeking to obtain a decision as to the substance of the matter of parental responsibility whether on a provisional or on a final basis. The CJEU answered that the provisions of Article 19(2) Brussels IIa Regulation (Article 20(2) of the present Regulation) are not applicable in such circumstances.

[152] Case C-256/09, *Purrucker supra* note 71 and Case C-296/10, *Purrucker supra* note 151.

The CJEU was also asked how long the court second seised should wait before taking a decision as regards the question whether the court first seised has jurisdiction on the substance of the matters raised. The Court indicated that where, as had happened in this case, the court in Germany which was second seised in the substance, despite the efforts made by it to obtain information by enquiry of the party claiming *lis pendens*, the court first seised and the Central Authority, lacked any evidence enabling it to determine the cause of action of proceedings brought before the court in Spain, in particular, to demonstrate the jurisdiction of that court in accordance with the Brussels IIa Regulation, and where, because of specific circumstances, the interest of the child required that the court in Germany issue a decision which might be recognised in Member States other than that of the court second seised, it was the duty of that court, after the expiry of a reasonable period in which answers to the enquiries made were awaited, to proceed with consideration of the action brought before it. The duration of that reasonable period had to take into account the best interests of the child in the specific circumstances of the proceedings concerned.

3.4.3.*Lis pendens* in case of exclusive choice-of-court– Recital 38

Articles 20(4) and 20(5), similarly to Article 31(2) and (3) of the Brussels Ia Regulation, enhance the effectiveness of the exclusive choice-of-court agreement. The court onwhich an acceptance of jurisdiction as referred to in Article 10 confers exclusive jurisdictionshall in any case decide on its jurisdiction, even when second is seised. The courts of any other Member State must stay the proceedings until such time as the court seised on the basis of the agreement or acceptance declares that it has no jurisdiction under the agreement or acceptance (see Article 20(4)). Where the chosen court establishes exclusive jurisdiction, any court of another Member State shall decline jurisdiction in favour of that court (see Article 20(5)). The principle of the priority of the court first seised is replaced with the right of the court with exclusive jurisdiction to decide first.

3.4.4.Seising of a court – Article 17 and Recital 35

The Regulation defines at what time a court is deemed to be seised for the purposes of its application. In light of the two different systems existing in the Member States, which either require the document instituting the proceedings to be served upon the respondent first, or to be lodged with the court first, it should be sufficient for the first step under national law to have been taken, provided that the applicant has not subsequently failed to take any steps that he or she was required to take under national law in order to have the second step effected (see Recital 35). If the proceedings are instituted of the court's own motion, the court is considered seised at the time when the decision to institute the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court (see Article 17(c)).

A court is also deemed to be seised at the time when the document instituting the proceedings or an equivalent document is lodged with the court in cases where the proceedings have in the meantime been suspended, with a view to finding an amicable solution (for example mediation or conciliation), upon application of the party who instituted them, without the document instituting the proceedings having yet been served upon the respondent and without the respondent having had knowledge about the proceedings or having participated in them in any way, provided that the party who instituted the proceedings has not subsequently failed to take any steps that he or she was required to take to have service effected on the respondent (see Recital 35)[153]. According to the case-law of the CJEU, in the case of *lis pendens*, the date on which a mandatory conciliation procedure was lodged before a national conciliation authority should be considered as the date on which a 'court' is deemed to be seised[154].

The cross-border service of documents between Member States has to take place in accordance with Regulation (EU) 2020/1784 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Service of documents) (recast).

3.4.5. Cooperation and communication between courts

The courts may cooperate and communicate directly with, or request information directly from each other on pending proceedings in compliance with Article 86(1). The Central Authorities may also facilitate the communication between courts in *lis pendens* situation as expressly envisaged in Article 79(e). The judges may avail themselves further of the contact points under EJN-civil [155]. For further details, see Chapter 7 "Cooperation in matters of parental responsibility" and Chapter 8 "Collection and transmission of information, data protection and non-disclosure of information").

How can a decision be recognised and enforced in another Member State?

[153] CJEU order of 16 July 2015 in Case C-507/14, *P* ECLI:EU:C:2015:512.

[154] CJEU judgment of 20 December 2017 in Case C-467/16, *Schlömp* ECLI:EU:C:2017:993, para. 58.

[155] European e-Justice Portal, EJN-Civil.

3.5. Recognition and Enforcement – General

The recognition and enforcement of decisions is based on the principle of mutual trust.

3.5.1. No special procedure required for recognition of a decision-Article 30(1), (2) and Recital 54

As a rule, it is not necessary for any special procedure to be used to achieve the recognition in one Member State of a decision given in another. For example, when presented with a decision given in another Member State allowing one of the parents to apply for issue of a passport for the child the competent authorities of the requested Member State should recognise the decision by operation of law without any special procedure. Another example may be registration in a public register of guardianship or curatorship over a child. The decision should, however, not be subject to further appeal under the law of the Member State of origin (see Article 30(2)).

3.5.2. No declaration of enforceability required – Article 34(1) and Recital 58

The Regulation simplifies the cross-border enforcement of decisions in matters of parental responsibility by abolishing the declaration of enforceability or the registration of the decision, as the case may be, as was required under the Brussels IIa Regulation, prior to the enforcement procedure. That Regulation abolished the declaration of enforceability only for certain decisions granting rights of access and entailing the return of a child. The current Regulation abolishes it for the cross-border enforcement of all decisions in matters of parental responsibility while still retaining an even more favourable treatment of certain decisions granting rights of access and certain decisions entailing the return of a child (see section 3.6 and 4.4.7 of Chapter 4 “International child abduction”). As a result, subject to the Regulation, a decision given in one Member State is to be treated as if it had been given in the Member State of enforcement (see Recital 58).

3.5.3. Documents to be produced for recognition and enforcement

A party who wishes to *invoke* in a Member State a decision given in another Member State shall produce a copy of the decision which satisfies the conditions necessary to establish its authenticity and the certificate issued in the form set out in

Annex III to the Regulation (see Article 31(1)(b) and Article 36(1)(b)). In absence of these documents the court or competent authority may specify a time for their production, accept equivalent documents such as translation of the decision instead of the annex, or, if it considers that it has sufficient information before it, dispense with their production (see Article 32(1)).

In order to be *enforced* in another Member State the decision in matters of parental responsibility needs to be enforceable in the Member State of origin. A party seeking enforcement in a Member State of a decision given in another Member State shall provide the authority competent for enforcement with a copy of the decision which satisfies the conditions necessary to establish its authenticity and with the certificate issued in the form set out in Annex III to the Regulation (see Article 35(1)(b) and Article 36(1)(b)). The authority competent for enforcement cannot proceed without these documents.

In principle, the decision does not need to be translated. However, the court, competent authority, or authority competent for enforcement may, where necessary, require the party invoking the decision or seeking enforcement to provide a translation or transliteration, in accordance with Article 91, of the translatable content of the free text fields of the certificate (for enforcement – the field which specifies the obligation to be enforced). The free text fields are those that are not automatically translated using the online forms at the E-Justice Portal[156]. If the court, competent authority or authority competent for enforcement is unable to proceed without a translation or transliteration of the decision this could be required in addition to the translated or transliterated free text of the certificate (see Article 32(2), (3) and Article 35(3), (4)).

3.5.4. Refusal of recognition and enforcement – Articles 30 (3), 40 and 59-62, Section V of Chapter IV and Chapter VI, Recital 54, 62

The simplified recognition and enforcement are accompanied by appropriate safeguards, respecting *inter alia* the rights of the defence (see Recital 62). Any interested party may apply for a decision that there are or there are no grounds for refusal of recognition of a decision in matters of parental responsibility (see Article 30(3), Article 33(b) and Recital 54). The national law of the Member State where such application is made determines who is considered as an interested party entitled to make such application (see Recital 54).

The person against whom enforcement is sought may apply for refusal of enforcement either before or after the enforcement procedure has started in the Member State of enforcement (see

[156] European e-Justice Portal, Online forms.

Article 59). The application is to be made to the competent court or authority in the Member State in which the recognition is invoked or the enforcement proceedings takes place. The courts and the authority designated by the Member States for this purpose pursuant to Article 103 can be found on the e-Justice Portal[157]. They shall act without undue delay (see Article 60).

The parties may challenge or appeal against the first instance decision. The appeal shall be lodged with the courts or authority designated by the Member that can be found on the e-Justice Portal[158] (see Article 61). Further challenge or appeal is possible only if permitted under the law of the Member State of recognition and enforcement. If this is the case, that courts can be found on the e-Justice Portal[159].

Further explanations concerning the enforcement procedure, including its suspension and refusal are presented in Chapter 5 "Enforcement".

3.5.5. Grounds for refusal in matters of parental responsibility – Article 39 and Article 41, Recitals 54, 55, 56, 57, 62

Recognition and enforcement of a decision in matters of parental responsibility given in one Member State *shall* be refused in other Member State if:

- the recognition and enforcement would be manifestly contrary to the public policy in the Member State addressed, taking into account the best interests of the child;
- the decision was given in the absence of a person who was not served with the documents instituting the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence, unless it is determined that he or she has accepted the judgment unequivocally;
- the person claiming that the decision infringes his or her parental responsibility has not been given an opportunity to be heard;

[157] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast

[158] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast

[159] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast

- the decision is irreconcilable with another later decision, in the conditions set out in Article 39(d)(e) with effect for the future to the extent that these decisions are irreconcilable (see Recital 56);
- the case concerns the placement of a child in another Member State and the procedure prescribed in Article 82 has not been complied with;

In addition, the recognition and enforcement of a decision in matters of parental responsibility given in one Member State *may* be refused in other Member State if:

- the decision was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance with Article 21, except where:
- the proceedings only concerned the property of the child and provided that giving such an opportunity was not required in light of the subject matter of the proceedings; or
- there were serious grounds taking into account, in particular the urgency of the case (for instance, where there is imminent danger for the child's physical and psychological integrity or life and any further delay might bear the risk that this danger materialises – see Recital 57).

It is not possible to refuse recognition of a decision on the sole ground that the court of origin used a different method to hear the child than a court in the Member State of recognition would use (see Recital 57).

At the level of the enforcement procedure there are two more options for refusal linked to a situation of grave risk of a lasting nature (see Article 56(6)) and to grounds stemming from the national law of the Member State of enforcement if compatible with the Regulation (see Article 57). Further explanations concerning the enforcement procedure are presented in Chapter 5 “Enforcement”. The national law of the Member State of recognition or enforcement determines whether the grounds for refusal may be raised by a party or *ex officio* (see Recital 54).

The list of grounds for refusal of recognition is exhaustive. It is not possible to invoke as grounds for refusal, grounds which are not listed in the Regulation, such as, for example, a violation of the *lis pendens* rule (see Recital 56).

3.5.6. Restrictions concerning review by the court where recognition or enforcement is invoked

The court or authority where recognition or enforcement is invoked may not:

- review the basis of jurisdiction of the court of the Member State of origin which issued the decision – Article 69;
- apply the test of public policy to the jurisdiction rules set out in Articles 7 to 14 of the Regulation – Article 69, or

- in any event, review the decision as to its substance – Article 71.

3.5.7. Legal aid and other assistance – Articles 74 (1) and 79(c)

When applying for refusal of recognition or enforcement as per Article 30(3) or Article 40 and Article 59, a person who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses is 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. Such a person may also be assisted by the Central Authorities, which should inform and assist holders of parental responsibility who seek the recognition and enforcement of a decision on parental responsibility in another Member State.

3.5.8. Authentic instruments and agreements – Articles 65(2) and 66

Authentic instruments and agreements in matters of parental responsibility which have binding legal effect and are enforceable in the Member State of origin shall be recognised and enforced in other Member States without any special procedure being required. The general provisions concerning the recognition and enforcement of decisions apply unless the special rules of Section 4, Chapter IV Recognition and Enforcement prevail. The specific regime, including the procedural safeguards are presented in Chapter 5 "Enforcement"

A person who wishes to invoke or enforce in a Member State an authentic instrument or agreement from another Member State shall produce an authenticated copy of the authentic instrument or agreement and the certificate issued in the form set out in Annex IX[160] for matters of parental responsibility (see Article 66(1)).

The certificate is issued by the court or competent authority of the Member State of origin upon application by a party. The

[160] See Article 66(1) of Annex IX of Council Regulation (EU) 2019/1111, *supra* note 1.

court or competent authority designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[161].

The certificate is issued only if the following requirements are met:

- the Member State which empowered the public authority or other authority to formally draw up or register the authentic instrument or register the agreement had jurisdiction under Chapter II of the Regulation (point 2 of Annex IX);
- the authentic instrument or agreement has binding legal effect in that Member State (points 12.5 and 13.4 of Annex IX[162] and Recital 70);
- in matters of parental responsibility if there are no indications that the content of the authentic instrument or agreement is contrary to the best interests of the child (see Article 66(3) and Recital 71).

The certificate is issued in the language of the authentic instrument or agreement. It may also be issued in another official language of the institutions of the European Union requested by the party. The court may automatically translate the certificate once completed in the language of the decisions using the online forms on the E-Justice Portal[163]. Nevertheless, this does not create any obligation for the court or competent authority issuing the certificate to provide a translation or transliteration of the translatable content of the free text fields (see Article 66(4)).

The certificate can be rectified where, due to a material error or omission, there is a discrepancy between the authentic instrument or agreement and the certificate upon application or *ex officio* by the court or competent authority of the Member State of origin as communicated to the European Commission pursuant to Article 103 (see Article 67(1)). The same courts or competent authority are permitted to withdraw the certificate where it was wrongly granted, having regard to the requirements of Article 66 upon application or of its own motion. In the case of withdrawal, no specific overriding certificate is to be issued. The procedure, including any appeal, regarding the rectification or withdrawal of the certificate is governed by the law of the Member State of origin.

[161] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[162] See points 12.5 and 13.4 of Annex IX of Council Regulation (EU) 2019/1111, *supra* note 1.

[163] European e-Justice Portal, Online forms.

3.5.9. No requirement for legalisation of documents – Article 90

Where recognition or enforcement of a decision in matters of parental responsibility is sought under the Regulation there is no requirement to legalise any of the documents required for these purposes. This applies, for example, to decision on custody, or a certificate attached to such a decision under the Regulation.

3.5.10. Exceptions to the general procedure for recognition and enforcement of privileged decisions on access (contact) or entailing the return of children under Article 29(6) – Article 42

The procedure described above applies generally to decisions on parental responsibility, such as in matters of custody. There are, however, two situations where the Regulation provides for more favourable treatment regarding the recognition and the enforcement procedure. The exceptions concern decisions on access rights (see section 3.6) and decisions on the substance of the rights of custody which entail the return of the child taken after the decision refusing the return of an unlawfully removed or retained child under Article 29(6) (see section 4.4.7 of Chapter 4 “International child abduction”). In each of these situations not only is there no need for a declaration of enforceability but also the grounds for refusal of recognition and enforcement set out in Article 39 do not apply. Only one ground for refusal may be raised, namely the existence of a later irreconcilable decision on parental responsibility concerning the same child given in the Member State in which recognition is invoked or in another Member State or in a non-Member State of the habitual residence of the child provided that such later decision fulfils the conditions necessary for its recognition in the Member State in which the recognition is invoked (see Article 50).

There is no difference, however, at the level of the enforcement procedure of such decision in comparison with the decisions that are not privileged falling within the scope of the Regulation. The same two options apply for refusal linked to a situation of grave risk of a lasting nature (see Article 56(6)) and to grounds stemming from the national law of the Member State of enforcement if compatible with the Regulation (see Article 57). Further explanations concerning the enforcement procedure are presented in Chapter 5 “Enforcement”.

A procedure is established whereby a certificate is issued by the court of origin subject to special conditions and this together with a copy of the decision to which the certificate relates are sufficient to allow direct enforcement. For more on these certificates see respectively section 3.6.3 et seq. as regards access (contact) and 4.4.7 et seq. as regards the return of the child.

3.6. Decisions on Rights of Access (Contact) – Recognition and Enforcement – Articles 42(1)(a), 45(1) and Section 2 of Chapter IV

3.6.1. Recognition and enforcement of rights of access (contact) under the Regulation – Articles 42(1)(a) and 45(1)

One of the main policy objectives of the Regulation is to ensure that a child throughout her or his childhood can maintain contact with all holders of parental responsibility even after a separation and when they live in different Member States. In this way the Regulation expresses the principles of Articles 9 and 10 of the UN Convention of the Rights of the Child and of Article 24(3) of the Charter of Fundamental Rights of the European Union.

The Regulation facilitates the exercise of cross-border access rights by ensuring that a decision on access rights issued in one Member State is recognised and enforceable in another Member State without the possibility to oppose recognition, provided that it is accompanied by a certificate issued by the court which granted the decision[164]. This does not prevent holders of parental responsibility from seeking recognition and enforcement of a decision on access in accordance with the general provisions on recognition and enforcement laid down in Section 1 of Chapter IV of the Regulation if they wish to do so (see Article 42(2) and section 3.5). This general procedure applies also to decisions on access rights which cannot be certified in accordance with Article 47.

3.6.2. Which rights of access are concerned? – Article 2(10)

"Access rights" include in particular the right to take a child to a place other than that of his or her habitual residence for a limited period of time. "Access rights" can include any form of contact between the child and the other person, including for instance, contact in person or by telephone, Internet or e-mail.

The rules on access rights apply to any access rights, irrespective of who is the beneficiary thereof. Depending on national law access rights may be attributed to the parent with whom the child does not reside, or to other family members, such as grandparents, or to third persons.

These rules on recognition and enforcement apply only to decisions in so far as they grant rights of access either where

[164] See section 3.6.3 of this Practice Guide.

the access is the sole subject matter of the decision or where it is decided along other aspects of parental responsibility. On the other hand,, recognition of a decision whereby a request for access rights is refused is governed by the general rules on recognition and enforcement.

3.6.3.The Certificate – Article 47

A decision granting access rights is recognised and enforceable in another Member State provided that it is accompanied by a certificate, which is issued by the court of origin that granted the decision. The certificate purports to guarantee that certain procedural safeguards have been respected during the procedure in the Member State of origin. The Certificate concerning certain decisions granting rights of access is set out in Annex V to the Regulation.

3.6.3.1. What are the conditions for issuing a certificate? – Articles 47(3) and Annex V

The court of origin issues the certificate once it has verified that the following procedural safeguards have been respected:

- all parties have been given the opportunity to be heard;
- the child has been given an opportunity to express his or her views in accordance with Article 21;
- where the decision was given in default, the defaulting party has been served with the document instituting the proceedings or with an equivalent document in sufficient time and in a manner enabling that person to prepare his or her defence, or if the person was served with the document but not in compliance with these conditions, it is nevertheless established that the person has accepted the decision unequivocally.

If the procedural safeguards have not been respected, the certificate must not be issued. The certificate does not have a “no” field at these sections for that specific purpose in order to make it clear that the certificate cannot be issued (see point 11 and point 13 of Annex V).

It is not possible to appeal against the issuance of a certificate. However, the decision on non-issuance may be appealed in accordance with the national law.

If the issuance of the certificate set out in Annex V is refused, the court may still issue a certificate set out in Annex III and the parties may seek recognition and enforcement of the decision on access in accordance with the general provisions on recognition and enforcement (see section 3.5).

3.6.3.2. Language of the certificate – Article 47 (2)

The court of origin shall issue the certificate in the language of the decision by using the standard form in Annex V. The certificate may also be issued in another official language of the institutions of the European Union requested by a party. This does not create any obligation for the court issuing the certificate to provide a translation or transliteration of the translatable content of the free text fields of the certificate. The court may automatically translate the certificate once completed in the language of the decisions using the online forms at the E-Justice Portal[165].

3.6.3.3. When should the court of origin issue the certificate? – Article 45(2), Article 47(1) and Article 49, Recital 66

The court of origin should issue the certificate upon application by a party when the decision becomes enforceable, even if only provisionally (see Article 47(1) and Article 45(2)).

The issue of the certificate may be requested during the proceedings after the decision has become enforceable and after the proceedings if the access rights will be exercised across national borders in another Member State.

The court is not obliged to issue the certificate *ex officio*. The national laws of many Member States provide that such decisions on access rights are "enforceable" notwithstanding appeal. If national law does not enable a decision to be enforceable whilst an appeal against it is pending the Regulation confers this right on the court of origin. The aim is to prevent dilatory appeals from unduly delaying the enforcement of a decision and to cater for situations of urgency (see Article 45(2) and Recital 66).

Where the decision has ceased to be enforceable, or its enforceability has been suspended or limited in the Member State of origin, any interested party may apply for a certificate concerning the lack or limitation of enforceability before the court of origin (see Article 49(1)). The application for withdrawal of the certificate may be used as a ground for suspension of the enforcement procedure under Article 56(2)(d).

In this case, the certificate is issued in the standard form set out in Annex VII in the language of the decision. The certificate may also be issued in another official language of the institutions of the European Union requested by a party. This does not create any obligation for the court issuing the certificate to provide a translation or transliteration of the translatable content of the

[165] European e-Justice Portal, Online forms

free text fields (see Article 49(2)). This certificate (Annex VII) will prevail over the certificate for recognition and enforcement of the decision granting rights of access (Annex V) and allow for the termination of the enforcement proceedings.

3.6.3.4. Rectification of the certificate – – Article 48(1)

If the court of origin has committed a material error or omission, where there is a discrepancy between the decision and the certificate, it is possible to apply for rectification to the court of origin (see Article 48(1)). The court is allowed to rectify the certificate also of its own motion. The national law of the Member State of origin applies in that case including for the appeal regarding the rectification. In case the application for issue of the certificate is dismissed, it is, however, possible to appeal.

3.6.3.5. Withdrawal of the certificate – Article 48(2) and Article 49

The court of origin may, upon application or of its own motion, withdraw the certificate where it was wrongly granted, having regard to the requirements laid down in Article 47 (see Article 48(2)). The national law of the court of origin applies in that case including for the appeal regarding the withdrawal.

If the withdrawal is granted any interested party may apply for a certificate concerning the lack or limitation of enforceability (Annex VII).

The application for withdrawal of the certificate may be used as a ground for suspension of the enforcement procedure under Article 56(2)(d).

3.6.3.6. What are the effects of the certificate? – Articles 43(1), 45(1) and 50

A decision on access rights, which is accompanied by a certificate, is recognised and enforceable in other Member States without the possibility to oppose its recognition with the exception of its irreconcilability with a later decision.

The fact that the decision on access rights is accompanied by a certificate entails that the holder of access rights may request that the decision is recognised and enforced in another Member State without any intermediate procedure (“exequatur”). In addition, the other party may not oppose the recognition and enforcement of the decision on the basis of the grounds for refusal of recognition listed in Article 39. The recognition and enforcement may be refused in case of irreconcilable later

decision concerning the same child given in the Member State of recognition or another Member State or in the non-Member State of the habitual residence of the child provided that the later decision fulfils the conditions necessary for its recognition in the Member State in which the recognition is invoked (see Article 50). The procedure for refusal in case of irreconcilable decision is presented in Chapter 5 "Enforcement".

At the level of the enforcement procedure there are two more options for refusal linked to a situation of grave risk of a lasting nature (see Article 56(6)) and to grounds stemming from the national law of the Member State of enforcement if compatible with the Regulation (see Article 57). Further explanations concerning the enforcement are presented in Chapter 5 "Enforcement".

3.6.4. Decision to be treated as equivalent to a decision of the Member State of enforcement – Articles 44 and 47

The certificate ensures that the decision is treated for the purpose of recognition and enforcement in the other Member State as equivalent to a decision issued there.

The fact that a decision is recognised and enforceable in another Member State means that it is to be treated as a matter of principle as if it were a "national" decision and be recognised and enforced under the same conditions as a decision issued in that Member State. If a party does not comply voluntarily with a decision on access rights, the other party may directly request the authorities in the Member State of enforcement to enforce it. The enforcement procedure is governed by national law so long as the Regulation does not contain uniform rules (see Chapter 5 "Enforcement").

3.6.5. The power of the courts in the Member State of enforcement to make practical arrangements for the exercise of access rights – Article 54 and Recital 61

Enforcement can be rendered difficult or even impossible if the decision contains no or insufficient information on the arrangements for organising the exercise of access rights. To ensure that the access rights can nevertheless be enforced in such situations, the Regulation gives to the courts or the authorities competent for enforcement the power to make the necessary practical arrangements for organising the exercise of access rights, whilst respecting the essential elements of the decision. The authorities competent for enforcement or the courts can specify details regarding practical circumstances or legal conditions required under the law of the Member State of enforcement in order to make a vague decision more concrete and precise. In the same way other arrangements may be made to comply with legal requirements under the national enforcement law of the Member State of enforcement, such as, for example, the participation of a child protection authority or a

psychologist in the enforcement. In any case, the court of enforcement is not allowed to replace measures that are unknown in the law of the Member State of enforcement, with different measures (see Recital 61).

Article 54 does not confer jurisdiction as to the substance on the court of enforcement. Therefore, any practical arrangements ordered pursuant to this provision will cease to apply once a court of the Member State having jurisdiction as to the substance of the matter has issued a decision subsequently.

4. The Rules on International Child Abduction within the EU

4.1. Introduction

4.1.1. Relations with the 1980 Hague Convention – Articles 1(3), 22, 96, 98 and Recital 40

The 1980 Hague Convention[166] has been ratified by all the Member States of the European Union and continues to apply in relation to cases of child abduction between Member States. However, the 1980 Hague Convention is complemented by certain provisions of the Regulation, which come into play in such cases. Thus, as regards the operation of the 1980 Hague Convention in relations between Member States, the rules of the Regulation prevail over the rules of the 1980 Hague Convention in so far as it concerns matters governed by the Regulation.

For the purpose of the 1980 Hague Convention and the Regulation, child abduction covers both wrongful removal and wrongful retention[167]. What follows applies to both types of situations.

If a child abduction takes place between a Member State and non-EU State party to the 1980 Hague Convention, only the 1980 Hague Convention applies. If the abduction concerns a Member State and a State that is not a party to the 1980 Hague Convention, the national law, including any (bilateral) treaties of that Member State apply.

4.1.2. Deterrence of parental child abduction and prompt return

The 1980 Hague Convention and the Regulation share the aim of deterring parental child abduction between Member States. However, if this nevertheless takes place, both the 1980 Hague Convention and the Regulation seek to ensure the prompt return of the child to the Member State of his or her habitual residence immediately before the abduction.

The Regulation enhances the cooperation between the Member States and provides additional tools to speed up and secure the prompt return, while in some cases reserving for the court of the Member State of the habitual residence of the child prior the abduction the final say on the whether the child will remain in

[166] HCCH 1980 Child Abduction Convention, *supra* note 100.

[167] See Article 2(9) and (11) of Council Regulation (EU) 2019/1111, *supra* note 1 and Articles 3, 4 and 5 of HCCH 1980 Child Abduction Convention, *supra* note 100.

the Member State of abduction or will return to the Member State of his or her habitual residence.

In addition, the Regulation permits decisions ordering the return of a child to another Member State pursuant to the 1980 Hague Convention to benefit from the recognition and enforcement system provided for in the Regulation when such decisions need to be enforced in another Member State due to a further abduction after return was ordered (see Article 1(3) and Recital 16).

The deterrence of parental child abduction and the prompt return is also in the focus of the jurisprudence of the ECtHR presented in section 5.6. of Chapter 5 “Enforcement”.

If the court in the Member State of refuge decides to return the chikd it shall issue upon application by a party a certificate concerning decisions ordering the return of a child to another Member State pursuant to the 1980 Hague Convention and any provisional, including protective, measures taken in accordance with article 27(5) of the Regulation accompanying them using the form set out in Annex IV[168] of the Regulation.

4.1.3. The main principles of the rules on child abduction

1. Where a child is abducted from one Member State (“the Member State of origin”) to another Member State (“the Member State of refuge”), the Regulation ensures in principle that the courts of the Member State of origin retain jurisdiction to determine matters of parental responsibility, including on the question of custody, notwithstanding the abduction (see section 4.2).
2. Once an application for the return of the child is lodged before a court in the Member State of refuge, this court applies the 1980 Hague Convention as complemented by the Regulation. The courts of the Member State of refuge shall ensure the prompt return of the child (see section 4.3).
3. If the court of the Member State of refuge decides to return the child its decision is enforceable in this Member State in accordance with national law. In case of a further abduction to another Member State this decision may be recognized and

[168] See Annex IV of Council Regulation (EU) 2019/1111, *supra* note 1.

enforced there, and thus the persons seeking the return do not need to initiate new return proceedings under the 1980 Hague Convention (see Article 2(1)(a), Recital 16 and Article 36(1)(c))[169].

4. If the court of the Member State of refuge decides not to return the child on the grounds set out in point (b) of Article 13(1)[170], or on Article 13(2)[171], or both, of the 1980 Hague Convention, the court of the Member State of origin still has the right to examine the substance of the rights of custody and thus influence whether the child shall return or not (see section 4.4.).

5. In such circumstances, if the court of the Member State of origin gives a decision on the substance of rights of custody entailing the return of the child, this decision may override the prior decision refusing the return given in the Member State of refuge. It may further benefit from the special privileged treatment regarding its recognition and enforcement in the Member State of refuge and in any other Member State, thus being called "privileged decision" (see Recital 52, the title of Section 2 of Chapter IV of the Regulation and section 4.4.7).

6. Alternatively, the child abduction case may be resolved by mediation or other means of alternative dispute resolution (see Article 25 and section 4.3.8.), by an agreement of the parties reached in the course of the return proceedings (see Articles 9 and 10 and Recital 22) or by the enforcement of a decision on parental responsibility[172], either pre-existing or rendered after a refusal to return the child under the 1980 Hague Convention which cannot be qualified as privileged[173] (see Chapter 5 "Enforcement'). It is up to the interested party to decide which path to choose as all of them are not mutually exclusive.

[169] This shall not prevent the interested party from following the rules of the 1980 Convention and re-applying in the new Member State of abduction (HCCH 1980 Child Abduction Convention, *supra* note 100).

[170] Where there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[171] Where the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

[172] CJEU judgment of 19 September 2018 in Case C-325/18, *PPU C.E. and N.E.*, ECLI:EU:C:2018:739, para. 49-53.

[173] Case C-376/14, *PPU C v M supra* note 106, para. 65.

7. The two courts[174] shall communicate and cooperate (see section 7.4 of Chapter 7 "Cooperation in matters of parental responsibility" and Chapter 8 "Collection and transmission of information, data protection and non-disclosure of information").

8. The Child Abduction Central Authorities of the Member State of origin and the Member State of refuge shall co-operate with each other and assist the courts in their tasks[175] (see section 7.2 of Chapter 7 "Cooperation in matters of parental responsibility" and Chapter 8 "Collection and transmission of information, data protection and non-disclosure of information").

9. The Child Abduction Central Authorities, the court deciding on the return, as well as the authority competent for enforcement shall act expeditiously (see sections 4.3.2 and 4.3.6.).

4.1.4. Importance of the role of the judiciary – Recital 41

As a general remark, it is appropriate to recall that the complexity and nature of the issues addressed in the various international instruments in the field of child abduction call for specialised or well-trained judges. Although the organisation of courts falls outside the scope of the Regulation, the experiences of Member States which have concentrated jurisdiction to hear cases under the 1980 Hague Convention in a limited number of courts or judges are positive and show an increase of quality and efficiency. In order to conclude the return proceedings under the 1980 Hague Convention as quickly as possible the Regulation encourages Member States to consider, in coherence with their national court structure, concentrating jurisdiction for those proceedings upon as limited a number of courts as possible. Jurisdiction for child abduction cases could be concentrated in one single court for the whole country or in a limited number of courts, using, for example, the number of appellate courts as point of departure and concentrating jurisdiction for international child abduction cases upon one court of first instance within each district of a court of appeal (see Recital 41).

[174] HCCH 1980 Child Abduction Convention, *supra* note 100 refers to "competent authorities" that also includes courts.

[175] For the Central Authorities under the 1980 Hague Convention see: https://www.hcch.net/en/instruments/conventions/authorities1/?cid=24.

International cooperation between family judges has developed increasingly in recent years. There is now a growing network of judges who are able to assist in optimising the functioning of the 1980 Hague Convention and the Regulation as concerns child abduction and other issues involving children. In many countries liaison judges have been appointed who can assist judicial communication and provide advice and support to colleagues in their own and in other States as regards issues arising in such cases[176].

4.2. Jurisdiction issues as regards child abduction cases

The jurisdiction in cases of wrongful removal or retention of a child is governed by the special rule of Article 9 retaining as a general principle the jurisdiction of Member State of origin to rule on matters of parental responsibility, including on the question of custody, notwithstanding the abduction or by Article 10 on choice of court.

These provisions are presented in section 3.2.5 and 3.2.6 of Chapter 3 “Parental Responsibility”.

4.3. Rules to ensure the prompt return of the child

4.3.1. The court applies the 1980 Hague Convention as complemented by Articles 22 to 29, Chapter VI and Recital 40

Where a person, institution or other body alleging a breach of rights of custody applies, either directly or with the assistance of a Child Abduction Central Authority, to the court in a Member State for a decision on the basis of the 1980 Hague Convention ordering the return of a child under 16 years, Articles 23 to 29 and Chapter VI of the Regulation apply and complement the 1980 Hague Convention (see Article 22). To this end, the judge may find it useful to consult the relevant case-law which is available at the INCADAT database set up by the Hague Conference on Private International Law[177]. The Explanatory

[176] See https://www.hcch.net/en/instruments/conventions/authorities1/?cid=24 for details of the International Hague Network of Judges, and https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_ for the European Network of Family Judges functioning as a part of the European Judicial Network in civil and commercial matters.

[177] http://www.incadat.com/; the INCADAT data base now also includes cases under the Regulation and also in CJEU and ECtHR.

Report and the Guides on Good Practice concerning the 1980 Hague Convention can also be of use (see website of the Hague Conference on Private International Law)[178]. Also, the European Judicial Network in Civil Matters has prepared a Practice Guide giving information about the methods for processing and hearing of incoming return cases.[179]

4.3.2. The Central Authority shall act expeditiously – Article 23

In case a Child Abduction Central Authority of a Member State receives an application based on the 1980 Hague Convention it shall act expeditiously. This requires *inter alia* to acknowledge receipt within five working days from the date of receipt of the application. It must also, without undue delay, inform the other Central Authority or the applicant, as appropriate, what initial steps have been or will be taken to deal with the application and may request any further necessary documents and information (see Article 23).

Further explanations on cooperation and communication can be found in Chapter 7 "Cooperation in matters of parental responsibility" and in Chapter 8 "Collection and transmission of information, data protection and non-disclosure of information".

4.3.3. The court assesses whether a wrongful removal or retention has taken place – Article 2(2)(11)(a) and (b)

The court, once seised with an application for return, shall first determine whether a "wrongful removal or retention" within the meaning of Article 3 of the 1980 Hague Convention has taken place. This covers a removal or retention of a child in breach of actually exercised custody rights under the law of the Member State where the child was habitually resident immediately before the abduction. The definition in Article 2(2)(11) of the Regulation is very similar to Article 3 of the 1980 Hague Convention.

Thus, three cumulative conditions have to be fulfilled:

1) the child must have been removed to or retained in a Member State other than the Member State of his or her habitual residence prior to the removal or retention,

2) the removal or retention is in breach of rights of custody and

[178] HCCH 1980 Child Abduction Convention, *supra* note 100.

[179] European e-Justice Portal, EJN-Civil, Best practice guide.

3) the rights of custody have been actually exercised, either jointly or separately, or would have been so exercised but for the removal or retention.

4.3.3.1. Removal to or retention in another Member State

The court must first establish whether the child has been removed from the Member State of his or her habitual residence to another Member State or retained there. This requires ascertaining the habitual residence of the child at the moment of the alleged removal or retention. The notion of "habitual residence" of a child is elaborated by the CJEU and is presented in detail in section 3.2.3.2 of Chapter 3 "Parental Responsibility". It has to be applied in the same way whether removal or retention is in issue. There is only an international child abduction where the child was habitually resident in another Member State prior to the removal or retention. If the child did not have habitual residence in the Member State from which the alleged abduction or retention occurred, the application for return must be dismissed[180].

4.3.3.2. Breach of rights of custody

Secondly, the court seised with a request for return has to determine whether the removal or retention was in breach of rights of custody of a person, institution or other body, acquired by decision, 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 (see Article 3 of the 1980 Hague Convention).

4.3.3.2.1. Meaning of custody – Article 2(9) and (11)

The concept of custody is central to whether there has been a wrongful removal or retention. This expression has to be given an autonomous interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question[181]. 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 place of residence of a child (see Article 2(2)(9) of the Regulation and similarly Article 5(a) of the 1980 Hague Convention). This latter aspect is usually the most important. On this point, Recital 18 of the Regulation states that a person should be deemed to have "rights of custody" where "a holder of parental responsibility cannot

[180] Case C-376/14 *PPU C v M supra* note 106, para. 65.

[181] Case C-400/10, *McB supra* note 64 , para. 41.

decide on the child's place of residence without the consent of that person, regardless of the terms used under national law". In some Member States which retain the language of 'custody' and 'access' in their legal systems, the non-custodial parent might retain important responsibilities for decisions concerning the child's place of residence which go beyond a mere right of access (see Recital 18). Thus, any person whose consent is needed for determining the child's place of residence should be considered as holder of custody rights. Hence, the custody rights will often belong to more than one person, i.e. not only in the situation of joint rights of custody. Custody also covers the case where the children are made wards of court by a decision so long as this notion involves the exercise of rights in relation to the welfare and education of the children that would ordinarily be exercised by the parents[182].

Neither the Regulation nor the 1980 Hague Convention determines who holds the rights of custody. Both instruments refer this question to the law of the Member State where the child was habitually resident immediately before the removal or retention[183].

Example:

A court decision in parental responsibility matters grants the exercise of the parental rights to the mother and envisages access rights for the father. Nevertheless, if under the substantive law of the Member State of habitual residence of the child the father retains the right to consent to the place of residence of the child he shall be considered as a holder of custody rights as per Article 2(2)(9) and (11) of the Regulation and Article 5(a) of the 1980 Hague Convention.

The existence and exercise of custody rights may have to be considered also in terms of provisions of the Charter of Fundamental Rights of the European Union ("Charter") given that Article 7 thereof provides like Article 8 of the ECHR, that everyone has the right to respect for his or her family life. By virtue of Article 51 of the Charter, in the implementation of EU law, the EU institutions and the Member States are to respect the rights, observe the principles and promote the application thereof.

McB — Case C-400/10

In McB[184] CJEU decided on a case where the father and the mother of three children were habitually resident in Ireland. The

[182] Case C-325/18, *PPU C.E. and N.E. supra* note 171, para. 58-61.

[183] Case C-400/10, *McB., supra* note 64.

[184] Case C-400/10, *McB supra* note 64.

mother removed the children to the UK without the father's consent. The father brought return proceedings under the 1980 Hague Convention. Since he was not married to the mother, he did not, pursuant to Irish law, have rights of custody without a court order or an agreement. However, the father argued that in the light of Article 7 of the Charter to the effect that the Regulation should be interpreted as meaning that such rights (of custody) are acquired by a natural father by operation of law in a situation where he and his children have a family life which is the same as that of a family based on marriage. On that basis the removal of the children would be wrongful within the meaning of the Regulation and the 1980 Convention.

The CJEU held that the Charter was not to be interpreted so as to assess the national law but only the interpretation of the Regulation. On this basis and taking into account the jurisprudence of the ECtHR the father had not been deprived of the opportunity to acquire rights of custody. He could go to court to do so, and the court would be able to assess whether these rights should be granted taking into account the best interests of the children. Thus, the CJEU held that a Member State is not precluded, on the basis of Article 7 of the Charter, from requiring under its national law that an unmarried father must have had previously obtained a court's order granting him custody in order to claim that the removal of his child from the Member State of its habitual residence is unlawful for the purposes of Article 2(2)(11).

4.3.3.2.2. Unilateral removal or retention of the child

The rights of custody, including the right to decide on the place of residence of the child, may be acquired by decision (for example on custody and access rights); by operation of law (for example rules regulating parental responsibility); 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. If the unilateral removal or retention of the child to another Member State by only one parent or other holder of parental responsibility is not allowed by law, by a court's decision or by an agreement having legal effect, it is to be deemed a breach to the rights of custody[185].

The court seised with a request for return must establish the content of the foreign law, consider a foreign decision or the legal effect of the foreign agreement.. In doing so, it may avail itself of the information provided by the Central Authorities or

[185] Case C-262/21 *PPU A supra* note 115.

collect additional information, if needed, in cooperation with EJN-civil or the Hague liaison judges[186].

If the removal or retention is not contrary to the law, a court decision or an agreement having legal effect it will not constitute a breach of the rights of custody of the left-behind parent. Thus, the child's removal to a Member State other than that of the child's habitual residence, performed by virtue of the mother's right of custody and effective care while executing a transfer decision based on Article 29 (1) of the Dublin III Regulation[187], is not wrongful[188].

4.3.3.3. Actual exercise of the rights of custody and joint custody – Article 2(2)(11)(b)

The removal or retention is wrongful provided that the custody rights, be it sole or joint custody, were actually exercised at the time of the unlawful removal or retention or would have been so exercised but for the removal or retention (Article 2(2)(11)(b) of the Regulation and similarly Article 3(1)(b) of the 1980 Hague Convention). As already stated, the Regulation adds that custody is considered to be exercised jointly when one of the holders of parental responsibility cannot decide on the child's place of residence without the consent of the other holder of parental responsibility (see section 4.3.3.2.1). In these cases, the removal of a child from one Member State to another without the consent of the relevant person constitutes child abduction under the Regulation and the 1980 Hague Convention. If the removal is lawful under national law, Article 8 of the Regulation may apply for access rights (see section 3.2.4.1).

Example:

if both parents have joint custody under the law of the state of the child's habitual residence, none of them can decide on the child's place of residence without the consent of the other. If, however, one of the parents has been completely absent in

[186] It may under Article 15 of HCCH 1980 Child Abduction Convention, *supra* note 100, prior to the making of an order for the return of the child, also request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful where such a decision or determination may be obtained in that State, if available. The above-mentioned Article 15 should not be applied regularly but rather as a last resort – on this point see the para. 6 and 7 of the Conclusions and Recommendations of the 7th Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, available at https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf

[187] Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III).

[188] Case C-262/21 *PPU A supra* note 115, para. 48.

the child's life and has never showed any interest whatsoever, this parent will be considered to not actually having exercised his or her custody rights. Thus, the removal or retention of the child by the other parent will not be unlawful.

The court shall provide the child and the party seeking the return an opportunity to express his or her views– Article 26 in conjunction with Article 21 and Article 27 (1) and Recital 39

The Regulation reinforces the right of the child to express his or her own views during the procedure through Article 21 of the Regulation which is also applicable to return proceedings under the 1980 Hague Convention (see Article 26 and similarly Article 13(2) of the 1980 Hague Convention). This obligation is in line with Article 12(2) of the UN Convention on the Rights of the Child and Article 24(1) of the Charter. Hence, the court shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body (see Article 21(1) and section 4.4.6.4).[189]

The court evaluates first the capability of the child to form his or her own views. The court's assessment at this stage is not bound by the age or degree of maturity of the child that were referred to in Article 11(2) of the Brussels IIa Regulation. If in the views of the court the child is capable to form own views, then he or she should be given a genuine and effective opportunity to express them. If the child is given this opportunity and the child makes use of it the court shall give due weight to the views of the child in accordance with his or her age and maturity when deciding on the return (see Article 21(2) in conjunction with Article 26; see also Article 13(2) of the 1980 Hague Convention). The subject matter of the case, in particular the return of the child to the Member State of his or her habitual residence prior to the abduction, determines the subject of the hearing of the child.

In addition, the court cannot refuse to return the child without first giving the person who is seeking the return the opportunity to be heard (see Article 27(1)).

Having regard to the strict time limit, the hearing should be carried out in the quickest and most efficient manner available.

[189] Article 12(2) of the UNCRC 1989, *supra* note 96 contains a similar provision; see also Article 24(1) of the Charter, *supra* note 96 and consider Article 13(2) of the HCCH 1980 Child Abduction Convention, *supra* note 100.

Further explanations on the right of the child to express his or her views be found in Chapter 6 “Right of the child to express his or her views”.

4.3.4. The court may ensure the contact between the child and the person seeking the return – Article 27(2)

The wrongful removal or retention of a child usually results in depriving one of the parents of contacts with his or her child. Despite the best efforts, return proceedings may last quite some time, which may ultimately negatively affect the enjoyment of the right to family life, of the person seeking the return and of the child. To this extent, the Regulation introduces uniform legal ground for the court in the Member State of refuge to examine at any stage of the proceedings, in accordance with Article 15, whether contact between the child and the person seeking the return of the child should be ensured. In doing so the best interests of the child must be taken into account (see Article 27(2)). Thus, the court deciding on the return may take provisional, including protective measures, available under its national law in respect of a child with the aim of ensuring contact with the person seeking the return. This is a possibility for the court, not an obligation, and it is to be exercised within the margin of appreciation of courts having due regard to the importance of the best interests of the child.

As these measures are of a provisional nature they end with the return or non-return decision. They may cease to apply earlier if they become incompatible with adequate arrangements under Article 27 (3) or other provisional, including protective measures, based on Article 27(5). Measures ordered by the court of origin may also take precedence (see Article 15(3)).

4.3.5. The court shall always order the return of the child if he or she can be protected in the Member State of origin – Article 27(3), (4), (5) and Recitals 44, 45, 46

The Regulation reinforces the principle that the court shall order the immediate return of the child by restricting the possibility to apply the exceptions of Article 13(1)(b) of the 1980 Hague Convention to a strict minimum. Under Article 13(1)(b) of the 1980 Hague Convention, the court is not obliged to order the return if it would expose the child to physical or psychological harm or put him or her in an intolerable situation. The Practice

Guide VI on Article 13(1)(b) of the 1980 Hague Convention [190] provides guidance to judges, Child Abduction Central Authorities, attorneys, and other practitioners in applying the grave risk exception of Article 13(1)(b).

The Regulation goes a step further by extending the obligation to order the return of the child in cases where a return could expose the child to such harm, but it is nevertheless established that adequate arrangements have been made to secure the protection of the child after the return (see Article 27(3) and section 4.3.6.1) and/or provisional, including protective measures have been adopted to secure the safe return of the child to the Member State or origin (see Article 27(5) and section 4.3.6.2).

4.3.5.1. Adequate arrangements – Article 27(3) and Recital 45

4.3.5.1.1. When are "adequate arrangements" to be considered?

Where a court of the Member State of refuge considers refusing the return of a child solely on the basis of Article 13(1)(b) of the 1980 Hague Convention, it shall assess whether appropriate measures of protection have been put in place in the Member State of the habitual residence of the child prior the abduction or might be taken there to protect the child from the grave risk referred to in this provision.

Adequate arrangements may be considered by the court of first instance or by the court of the higher instance in the Member State of refuge. It is up to the national procedural law of that Member States to determine how the possibility that the court might apply Article 13(1)(b) of the 1980 Hague Convention is to be shared with the parties before considering adequate arrangements.

4.3.5.1.2. What are "adequate arrangements"? – Recital 45

"Adequate arrangements" are measures, ordered by courts or competent authorities of the Member State of the habitual residence of the child before the wrongful removal or retention aiming to secure the protection of the child in that Member State after his or her return. Examples for such arrangements include a court order from that Member State prohibiting the party seeking the return to come close to the child, a provisional,

[190] See HCCH, 1980 Child Abduction Convention, Guide to Good Practice, Part VI, Article 13(1)(b), available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=7059.

including protective measure from that Member State allowing the child to stay with the abducting parent who is the primary carer until a decision on the substance of rights of custody has been made in that Member State following the return or the demonstration of available medical facilities for a child in need of treatment (see Recital 45). Other examples could be the provision of secure accommodation for the parent and the child, the termination of criminal proceedings against the abducting parent, or covering the costs for living of the abducting parent, involving childcare authority for supervision. In any case, it is not sufficient that procedures for the protection of the child exist in the Member State of origin. The arrangements must be sufficiently established, so legally valid, proven and – if in doubt – also enforceable. However, in case of court measures those only need to be enforceable, but not necessarily final.

The type of arrangement considered adequate in each particular case should depend on the concrete grave risk to which the child is likely to be exposed by the return without such arrangements (see Recital 45).

The adequate arrangements might exist until the court of the Member State of origin has taken measures or decisions it considers appropriate after the return.

4.3.5.1.3. Proof of the arrangements and their adequacy

It may be difficult for the judge to establish what possible arrangements exist in the Member State of origin, if they have been *de facto* taken and whether they are adequate to deal with the circumstances that could develop after the return.

It is generally for the party seeking the return of the child to provide sufficient evidence to satisfy the court of the Member State of refuge that adequate arrangements have been made to secure the protection of the child after his or her return (see Article 27(3)). The court may also be "otherwise satisfied" and thus act *ex officio* or rely on evidence provided by other parties to the proceedings, including by the abducting parent (see Recital 45).

Nevertheless, the court of the Member State of refuge may play an active role in establishing the arrangements in the Member State of origin and in the verification of their adequacy. It can do so by communicating with the courts or competent authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention, either directly in accordance with Article 86 or with the assistance of Central Authorities (see Article 27(4)). Where necessary and appropriate, it may also request the assistance of Central Authorities or network judges, in particular within the EJN-civil and the International Hague Network of Judges (see Recital 45).

4.3.5.2. Provisional, including protective measures in case of "grave risk"-

Article 2(1)(b) and Article 27(5) and Recital 46

Article 27(5) of the Regulation provides for additional possibility for the court of the Member State of refuge to secure the safe return of the child to the Member State of origin in case of grave risk referred to in point (b) of Article 13(1) of the 1980 Hague Convention. Where appropriate, when ordering the return of the child this court may order any provisional, including protective measures in accordance with Article 15, which it considers necessary to protect the child from the grave risk of physical or psychological harm entailed by the return which would otherwise lead to a refusal of return (see Article 27(5) and Recital 46).

Provisional, including protective measures, are measures available under the law of the Member State of refuge. These measures will be effective in that Member State so long as the return has not taken place and could be recognised and enforced afterwards in the Member State of origin provided that the other party has been summoned to appear or at least the decision containing the measure was served on that party prior to enforcement. Those measures may be recognised and enforced in all other Member States, if needed (see Article 2(1)(b)). In any case, all provisional, including protective measures of the Member State of refuge will cease to apply once the court of the Member State with jurisdiction as to the substance of the matter has taken measures or decisions it considers appropriate after the return (see Article 9, Article 15(3) and Recital 46).

The access to these provisional, including protective measures under Article 27(5) does not change the concept that the court of the Member State of refuge may decide only on the return, save when the parties have agreed otherwise under Article 10(1), and cannot claim jurisdiction over the substance of parental responsibility (see Recital 46).

The court that considers ordering provisional, including protective measures under Article 27(5) has to assess if the examining and taking of such measures, as well as their circulation do not unduly delay the return proceedings (see Recital 46). It should also be recalled that any protective matter should not go further than necessary to avoid a grave risk that would otherwise lead to a non-return decision.

If necessary, the court seised with the return proceedings under the 1980 Hague Convention should consult with the court or competent authorities of the Member State of the habitual residence of the child, with the assistance of Central Authorities or network judges, in particular within the EJN-civil and the International Hague Network of Judges.

The court in the Member State of refuge shall issue upon application by a party a certificate concerning decisions ordering the return of a child to another Member State pursuant to the 1980 Hague Convention and any provisional, including protective, measures taken in accordance with article 27(5) of

the Regulation accompanying them using the form set out in Annex IV[191] of the Regulation.

4.3.6. Expeditious court and enforcement proceedings– Articles 24, 27(6) and 28

The Regulation, the 1980 Hague Convention and the ECHR (see section 5.5.2 of Chapter 5 "Enforcement") attach importance to the swiftness of the return procedure and the effective and timely enforcement of the return decision. Urgent handling of all abduction cases is fundamental since the passage of time can have irremediable consequences for the relationship between the children and the parent who does not live with them.

For this reason, the Regulation introduces rules concerning the court procedure (Article 24), the provisional enforceability (Article 27(6)) and the enforcement of decisions ordering the return of a child (Article 28).

The requirement for a speedy procedure described below should also apply *mutatis mutandis* to decisions for non-return in order to quickly clarify the child's situation.

4.3.6.1. Expeditious court proceedings – Article 24 and Recital 42

The Regulation stipulates that the court of the Member State of refuge must act expeditiously and apply the most expeditious procedures available under national law. In addition, it introduces specific time limits for delivering the decision. In principle, the courts at each instance should give their decision within six weeks, except where exceptional circumstances make this impossible[192]. The six-week period for the first instance court starts at the moment the court is seised (see Article 24 (3) and section 3.4.4 of Chapter 3 "Parental responsibility"). The deadline for the court of higher instance begins after all the required procedural steps have been taken and the court is in a position to examine the appeal, whether by hearing or otherwise (see Article 24 (3)). The required procedural steps could include, depending on the legal system concerned, service of the appeal upon the respondent, either within the Member State where the court is located or within another Member State, transmission of the file and the appeal to the appellate court in Member States where the appeal has to be lodged with the court whose decision is appealed, or an application by a party to convene a hearing where such an application is required under national law (see Recital 42).

[191] See Annex IV of Council Regulation (EU) 2019/1111, *supra* note 1.

[192] See also Article 11(2) of the HCCH 1980 Child Abduction Convention, *supra* note 100.

The 6+6-week timeframe may be exceeded only where exceptional circumstances arise, for instance in cases which are extremely legally or factually complex. Exceptional circumstances might arise while using means of alternative dispute resolution or as a result of them. The mere use of those means should not as such be considered an exceptional circumstance allowing the period to be exceeded (see Recital 42). The judicial vacations or the lack of diligence by the defendant's representative are also not covered by the concept of "exceptional circumstances"[193].

4.3.6.2. Limitation of appeals and provisional enforcement of a decision ordering return– Article 27(6) and Recital 47

Another tool to speed up the procedure of return is the limitation of the number of appeals possible against a decision granting or refusing the return of a child under the 1980 Hague Convention. Recital 42 encourages Member States to consider having only one appeal for those types of procedures.

In addition, the Regulation introduces a uniform rule permitting the court ordering the return of the child to declare its decision provisionally enforceable, notwithstanding any appeal, where the return of the child before the decision on the appeal is required by the best interests of the child (see Article 27(6)). It is left open by the Regulation whether the decision to declare the return order provisionally enforceable can be taken by the court of first instance or by the court of appeal or by both, leaving this question to the national law of the Member States (see Recital 47).

4.3.6.3. Enforcement of decisions ordering the return of a child-Article 28

The authority competent for enforcement to which an application for the enforcement of a decision ordering the return of a child to another Member State is made shall also act expeditiously in processing the application. In cases where this decision has not been enforced within six weeks of the date when the enforcement proceedings were initiated, the party seeking enforcement, or the Central Authority of the Member State of enforcement shall have the right to request a statement of the reasons for the delay from the authority competent for enforcement (see Article 28 and Article 11(2) of the 1980 Hague Convention).

[193] CJEU judgment of 7 November 2019 in Case C-555/18, *K.H.K. (Account Preservation)* ECLI:EU:C:2019:937 and CJEU order of 21 March 2013 in Case C-324/12, *Novontech-Zala* ECLI:EU:C:2013:205, para. 21.

The way how to achieve effective and timely enforcement is a matter of national law. In any case the concrete national procedure has to comply with the ECHR (see section 5.5.1 of Chapter 5 “Enforcement”).

4.3.7. Alternative dispute resolution- Article 25 and Recital 43

As early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, should invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, is not appropriate in the particular case (for example in cases of domestic violence), or would unduly delay the proceedings. The court may refer to existing networks and support structures for mediation in cross-border parental responsibility disputes (see Recital 43)[194].

The mediation or the other means of alternative dispute resolution may take place in the Member State of origin or in the Member State of refuge, remotely or in presence. The parties may agree on the return or non-return, and also on matters of parental responsibility (for example custody, access, place of residence). The court of the Member State of origin has jurisdiction to give binding legal effect to the agreement based on Article 7. The court of the Member State of refuge can do this if chosen by the parties pursuant to Article 10. Both courts may either incorporate the agreement of the parties into a decision, approve it or use any other form provided by their national law and procedure.

It is most likely that the parties will avail themselves of the court of the Member State of refuge as the child is located there, and the agreement will directly end the pending return proceedings. In order to achieve this result, the Member States which have concentrated jurisdiction should consider enabling the court seised with the return proceedings under the 1980 Hague Convention to also exercise the jurisdiction agreed upon or accepted by the parties pursuant to the Regulation in matters of parental responsibility where agreement of the parties was reached in the course of mediation and other means of alternative dispute resolution (see Recital 43).

4.3.8. The prompt return of the child – The rules of the 1980 Hague

[194] See, on this point: European e-Justice Portal, Family mediation.

Convention and Regulation compared

NB: The rules of the Regulation (Articles 24-28) prevail over the relevant rules of the 1980 Hague Convention in cases where the child has been abducted from one Member State to another.

Obligation	Relevant rules of the 1980 Hague Convention	Relevant rules of the Regulation
The obligation to order the return of the child	Article 12: The court of the Member State of refuge ("the court") shall in principle order the immediate return of the child if less than a year has elapsed from the abduction.	Articles 24, 25, 26, 27 and 28: The Regulation confirms and reinforces this principle.
The exception to this obligation	Article 13(1)(b): The court is not obliged to order the return if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.	Article 27(3): The court cannot refuse to order the return of the child on the ground that it would put the child at risk, if it is established that the authorities in the Member State of origin have made adequate arrangements to secure the protection of the child upon his or her return. and Article 27(5): Where appropriate, when ordering the return of the child, the court may order any provisional, including protective measures on accordance with Article 15 which it

Obligation	Relevant rules of the 1980 Hague Convention	Relevant rules of the Regulation
		considers necessary to protect the child from the grave risk of physical or psychological harm entailed by the return which would otherwise lead to a refusal of return.
Hearing the child	Article 13(2): The court may refuse to order the return of the child if he or she objects to being returned and has attained an age and maturity at which it is appropriate to take account of his or her views.	Article 26 and 21: The court shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views and give due weight to the views of the child in accordance with his or her age and maturity.
The hearing of the party seeking the return	(no provision)	Article 27(1): The court cannot refuse to return the child unless the person seeking the return has been given an opportunity to be heard.
The time limit for handling requests for return by the court	Articles 2 and 11: Article 2: Contracting States shall take all appropriate measures to secure the implementation of the objects of the Convention. For this purpose, they shall use the most expeditious procedures available. Article 11: The court shall act expeditiously in proceedings for the return of the child. If the court has not reached a decision within 6 weeks, it may be requested to state the reasons for the delay.	Article 24: The court shall use the most expeditious procedures available in national law. The courts at every instance should give their decision within six weeks, except where exceptional circumstances make this impossible

Obligation	Relevant rules of the 1980 Hague Convention	Relevant rules of the Regulation
Expeditious enforcement	Article 2: Contracting States shall take all appropriate measures to secure the implementation of the objects of the Convention. For this purpose, they shall use the most expeditious procedures available.	Article 28: The authority competent for enforcement shall act expeditiously. In case the return decision has not been enforced within six weeks of the date when the enforcement proceedings were initiated, the party seeking enforcement, or the Central Authority of the Member State of enforcement shall have the right to request a statement of the reasons for the delay from the authority competent for enforcement.
Expeditious Central Authority	Article 2: Contracting States shall take all appropriate measures to secure the implementation of the objects of the Convention. For this purpose, they shall use the most expeditious procedures available.	Article 23: The Central Authority shall act expeditiously in processing an application. It shall, within five working days from the date of receipt of the application, acknowledge receipt. It shall, without undue delay, inform the Central Authority of the requesting Member State or the applicant, as appropriate, what initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information.

4.4. What happens if the court refuses to order the return of the child? – Article 29 and Recitals 48-53

4.4.1. Special procedure only in case of non-return decision based on point (b) of Article 13(1), Article 13(2), or both, of the 1980 Hague Convention – Article 29 and Recital 48

Having regard to the strict conditions set out in Article 13 of the 1980 Hague Convention and Articles 24 to 27 of the Regulation, the courts are likely to decide to order the return of the child in the majority of cases[195].

However, in some exceptional cases where a court nevertheless decides to refuse the return of the child under certain provisions of the 1980 Hague Convention, the Regulation triggers a special procedure in Article 29 of the Regulation allowing the court of the Member State of the child's habitual residence prior to the abduction to take a decision on the substance of the rights of custody which may or may not entail the return of the child to that Member State. If that decision does entail the return of the child, it is treated by the Regulation as a "privileged decision" which is overriding the non-return decision.

The Regulation limits this procedure to cases where the Member States of refuge decides not to return the child solely on point (b) of Article 13(1), Article 13(2), or both, of the 1980 Hague Convention, and not in all cases of Article 13, as it used to be under the Brussels IIa Regulation.

Thus, the special procedure will not apply where the return is refused under Article 12(2)[196], Article 12(3)[197], Article 13(1)(a)[198]

[195] See, on this point the statistics collected by the Hague Conference of Private International Law on the 1980 Hague Convention at https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=24

[196] Where the proceedings have been commenced after the expiration of the period of one year from the date of the wrongful removal or retention and the judicial or administrative authority establish that the child has settled in his or her new environment.

[197] Where the court has reason to believe that the child has been taken to another State.

[198] Where the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention or had consented to or subsequently acquiesced in the removal or retention.

or Article 20[199] of the 1980 Hague Convention or where it is established that no abduction took place. It will also not apply in the case of more than one ground for refusal including other grounds than point (b) of Article 13(1) or Article 13(2).

As the ground for refusal is of the essence, the court of the Member State of refuge should refer explicitly to the relevant articles of the 1980 Hague Convention on which the refusal is based (see Recital 48). This reference should be made in the decision as well as in the certificate issued by the court of the Member State of refuge *ex officio* in the form set out in Annex I[200] (see point 7 of Annex I). The principle of mutual trust requires the court of the Member State of origin to respect the ground(s) for refusal stated by the court of the Member State of refuge and not to review if they were correctly applied and stated.

The special procedure under Article 29 of the Regulation in the Member State of origin is available as soon as the non-return decision in the Member State of refuge has been taken, regardless of whether this decision is final or still subject to appeal (see Recital 48). In light of *Rinau*[201] 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 been replaced by a decision ordering return, in so far as the return of the child has not actually taken place.

4.4.2. Transmission of the decision on non-return and of all relevant documents between the courts – Article 29(3) and (5)

The decision on non-return based on point (b) of Article 13(1), Article 13(2), or both, of the 1980 Hague Convention and all relevant documents have to reach the court of the Member State of origin. The Regulation distinguishes the manner in which that decision shall reach this court depending on the fact whether or not the court which issued the non-return decision is aware of ongoing proceedings on substance in the Member State of origin.

Usually, the court of the Member State of origin has already been seised of proceedings to examine the substance of rights of custody. The court that gives the non-return decision may be aware of these proceedings. The information about the pending case in the Member State of origin can be brought to its attention by the parties or be established *ex officio* in the course of the

[199] Where the return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

[200] See point 7 of Annex I of of Council Regulation (EU) 2019/1111, *supra* note 1.

[201] Case C-195/08, *PPU Rinau supra* note 77, para. 89.

cooperation and communication between the courts when applying the Regulation and the 1980 Hague Convention. In any event there is no obligation for the court of refuge to actively look for a pending case on the substance of the rights of custody in the Member State of origin.

The transmission of the decision of non-return shall take place either directly between the courts or through the Central Authorities (see Article 29(3) and Article 86).

The determination of the national court in the Member State of origin is a matter of choice by that Member States, even in a situation where, at the time when a decision on the non-return of a child is notified, a court or a tribunal has already been seised of substantive proceedings relating to parental responsibility over a child[202].

If the court that refuses the return of the child is not aware of proceedings on the substance of rights of custody in the Member State of origin, it is up to the parties to identify the competent court in that Member State, to seise it and to transmit the decision refusing the return and all relevant documents.

4.4.3. Which documents, in which terms and in which language? – Article 29(3) and (5)

In case where the documents are to be transmitted by the court which has issued the decision on non-return, it shall transmit a copy of the decision, the certificate issued in the from set out in Annex I[203], and "where applicable, a transcript, summary or minutes of the hearings before the court and any other documents it considers relevant" (see Article 29(3)). The purpose of the certificate in this case is to communicate to the court of the Member State of origin the relevant documents relating to the return proceedings (see Recital 49). These documents may include any documents which contain information that might have a bearing on the outcome of those custody proceedings, if such information is not already contained in the decision refusing return (see Recital 50). It is for the judge who has refused to return the child to decide which documents are relevant. To this end, the judge shall give a fair representation of the most important elements highlighting the factors influencing the decision. In general, this would include the documents on which the judge has based his or her decision, including for example any reports drawn up by social welfare authorities concerning the situation of the child. The

[202] CJEU judgment of 9 January 2015 in Case C-498/14, *PPU RG* ECLI:EU:C:2015:3, para. 49.

[203] See Annex I of Council Regulation (EU) 2019/1111, *supra* note 1.

documents must be transmitted within one month of the date of the decision by the court of the Member State of refuge.

In cases where the documents are to be transmitted by a party, this party shall submit a copy of the decision, the certificate issued in the form set out in Annex I[204] and "where applicable, a transcript, summary or minutes of the hearings before the court which refused the return of the child'' (see Article 29(5)). The purpose of the certificate in these situations is to inform the parties of the possibility to seise a court in the Member State where the child was habitually resident immediately before the wrongful removal or retention, and to point out at the procedural deadline for doing so - within three months of the notification of the decision refusing the return of the child (see Recital 49). Article 29(5) does not preclude the court of the Member State of origin from asking for any additional documents it considers relevant and which contain information that might have a bearing on the outcome of the proceedings on the substance of rights of custody, if such information is not already contained in the decision refusing return (see Recital 51).

The court which has issued the decision on non-return is not obliged to translate the documents that are subject to transmission. Article 29(2) of the Regulation expressly states that the certificate shall be completed and issued in the language of the decision, but it may also be issued in another official language of the institutions of the European Union requested by a party. The court may automatically translate the certificate once completed in the language of the decisions using the online forms at the E-Justice Portal[205]. This does not create any obligation for the court issuing the certificate to provide a translation or transliteration of the translatable content of the free text fields of the certificate (the fields that are not automatically translated). Thus, it is up to the interested party to secure the translation/transliteration of the certificate. However, the court of origin may, where necessary, require a party to provide a translation or transliteration of the decision and any other document attached to the certificate (see Article 29(4)). The translation may not be necessary if the judge in the Member State of origin considers the information in the certificate to be sufficient or understands the language of the decision and other documents.

Where the party seises the court in the Member State of origin, it shall proceed regarding the translation in accordance with the procedural law of that Member State. This party may avail itself of Article 29(2) requesting the certificate as per Annex I[206] to also be issued in the official language of the Member State of origin.

[204] See Annex I of Council Regulation (EU) 2019/1111, *supra* note.

[205] European e-Justice Portal, Online forms.

[206] See Annex I of Council Regulation (EU) 2019/1111, *supra* note 1.

4.4.4. The court of origin shall decide on the substance of the rights of custody – Article 29 (6) and Recital 52

The court of origin seised after a non-return decision is competent pursuant to Article 29(6) to deal with the substance of the rights of custody in full as the court of the habitual residence of the child immediately before the wrongful removal or retention. Its jurisdiction is therefore not limited to reviewing the question of whether the child shall return or not but to resolve the issue of custody of the child. The competent court of origin has much broader subject matter to decide on in comparison to the return matter subject to the proceedings in the Member State of refuge. Thus, the court of origin shall decide on the substance of the rights of custody. The purpose of the proceedings is not to order a return, but to end with a decision with the result of the attribution or redistribution of custody rights which may entail a return. The need for the return of the child will thus result from the attribution of the custody.

That judge of origin should, in principle, be in the position that he or she would have been in if the abducting parent had not abducted the child but instead had seised the court of origin to render or modify a previous decision on custody or to ask for an authorisation to change the habitual residence of the child. It could be that the person seeking the return of the child did not have the same residence as the child before the abduction, or even that that person is willing to accept a change of the habitual residence of the child in the other Member State provided that his or her rights of contact with the child are modified accordingly. Nevertheless, only decisions on the substance of rights of custody entailing the return of the child to the Member State of origin may claim to qualify as privileged decisions as per Article 42(1)(b), thereby enjoying the more favorable recognition and enforcement regime and override the non-return decision of the court in the requested Member State (see Article 29(6)).

Thus, the Regulation overturns some aspects of *Povse*, where the CJEU stated, *inter alia*, that a decision under Article 11(8) of the Brussels IIa Regulation ordering the return of a child need not be on the custody of that child[207].

Accordingly, under the Regulation decisions of the court of origin that only entail a return order without deciding on the substance of the rights of custody will not qualify as privileged decisions as per Article 42(1)(b). The same is also true where the return is ordered only as a provisional, including protective measure, as such measures do not qualify as "decision on the substance of the rights of custody"[208].

[207] Case C-211/10, *PPU Povse supra* note 116, para. 53, Case C-498/14, *PPU RG supra* note 200, para. 47.

[208] Case C-498/14, *PPU RG supra* note 200.

Nevertheless, this solution does not preclude the possibility of triggering the overriding mechanism before the decision of the substance of the rights of custody has become final (see point 8 of Annex VI[209]).

4.4.5. The procedure before the court of origin – Articles 29(6) and 47

The court of origin must apply certain procedural rules compliance with which will later allow this court to deliver the certificate referred to in Article 47(1)(b) in the from set out in Annex VI[210]. This certificate is required in order to attest that the decision is a privileged one.

The court of origin must ensure that:

- all parties concerned are given the opportunity to be heard (see Article 47(3)(a));
- the child is given a genuine and effective opportunity to express his or her views in accordance with Article 21 (see Article 47(3)(b));
- where the decision is to be given in default of appearance either:
  - the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence, or
  - it is established that the person defaulting accepted the decision unequivocally (see Article 47(3)(c));
- the decision takes into account the reasons for and facts underlying the decision on non-return (see Article 47(4)) and
- all the circumstances, including, but not limited to, the conduct of the parents, are thoroughly examined, taking into account the best interests of the child (see Recital 48).

4.4.6. Procedure before the court of origin - certain practical aspects

4.4.6.1. Thorough examination of all circumstances and taking into

[209] See point 8 of Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

[210] See Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

account the best interests of the child – Recital 48

In the course of the procedure following a refusal to return the child under point (b) of Article 13(1) or Article 13(2), or both, of the 1980 Hague Convention, the court of origin must thoroughly examine all the circumstances, including, but not limited to, the conduct of the parents, taking into account the best interests of the child (see Recital 48). *Šneersone e Kampanella vs Italy* judgment of the ECtHR stated that the court in the Member State of origin following non-return decision under Article 11(7) of the Brussels IIa Regulation must conduct an in-depth examination of the entire family situation and of a whole series of factors. Thus, procedures that are cursory are not consistent with the notion that the best interests of the child must be a primary consideration in the assessment of the relevant circumstances[211].

4.4.6.2. Opportunity to hear and subject of the hearing

The court of origin must give all parties concerned an opportunity to be heard (see Article 47(3)(a)) and an opportunity to the child to express his or her views in accordance with Article 21 (see Article 47(3)(b) and Article 24 of the Charter).

According to Article 21(1) the court must provide in accordance with national law and procedure, any child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views, the court shall give due weight to the views of the child in accordance with his or her age and maturity (see Article 21(2)).

Further explanations on the provision of the child with an opportunity to express his or her views can be found in Chapter 6 "Right of the child to express his or her views".

The hearing in the court of origin is conditioned by the subject matter of the case – the substance of the rights of custody. Thus, the court is not allowed to skip this obligation relying on the views expressed before the court of refuge during the return proceedings under the 1980 Hague Convention, where the subject matter was limited only to the return.

4.4.6.3. How will it be possible for the court in the Member State of origin to

[211] *Šneersone e Kampanella v Italy*, ECtHR Application no. 14737/09, Judgment 12 October 2011, para. 85, 93-98.

hear the parent and the child who are not in that Member State?

The fact that the person who has unlawfully removed or retained the child and the abducted child are not likely to travel to the Member State of origin to attend the proceeding requires in some cases that their evidence can be given from the Member State of refuge. In this case the provision of genuine and effective opportunity for the child to express his or her views requires the court to take all measures which are appropriate to the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case (see Recital 39 and CJEU in *Aguirre Zarraga*[212]). The Regulation allows the court to use all means available to it under its national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters ("Taking of Evidence Regulation")[213] . This instrument can be used in so far as possible and always taking into consideration the best interests of the child (see Recital 39). The tools for collecting evidence are also accessible when the person opposing the return must be given an opportunity to be heard. The use of the Taking of Evidence Regulation is possible even if national law does not treat the hearing of the child or of the parties as taking of evidence.

A court may either request the competent court of another Member State to take evidence or take evidence directly in the other Member State. Given that the court must decide within 6 weeks on the return of the child, the request must necessarily be executed without any delay, and considerably within the general 90 days' time limit, prescribed by Article 12(1) of the Evidence Regulation. The use of video-conference and tele-conference, which is stipulated in Article 12(4) of the Evidence Regulation, can be particularly useful for taking evidence in cases involving children.

The Regulation envisages one additional option, applicable without prejudice to the Taking of Evidence Regulation. In Recital 53 it is expressly stated that, where it is not possible to hear a party or a child in person, and where the technical means are available, the court might consider holding a hearing through videoconference or by means of any other communication technology unless, on account of the particular circumstances of the case, the use of such technology would

[212] CJEU judgment of 22 December 2010 in Case C-491/10, *PPU Aguirre Zarraga* ECLI:EU:C:2010:828, para. 66.

[213] The Taking of Evidence Regulation repeals and replaces the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters from 1 July 2022, OJ L 174, 27.6.2001.

not be appropriate for the fair conduct of the proceedings. Having in mind that the matter at stake is to hear remotely the child or not to hear the child at all, it should be extremely difficult to reconcile the non-hearing with the fairness of the proceedings[214].

4.4.6.4. How can the court of origin take account of the reasons and facts underlying the decision on non-return? – Article 47(4)

Mutual trust between the Member States requires that the court of origin takes into account the reasons and the facts underlying the decision on non-return as it stems from the decision, and all other relevant documents related to those proceedings submitted in the proceedings on the substance of the rights of custody. In doing so, it may prove necessary for the court seised to gain more information and clarifications in this regard. Thus, the courts may cooperate in order for the court of origin to be able properly to take account of the reasons for and the facts underlying the decision on non-return (see Article 86 and Chapter 7 "Cooperation in parental responsibility matters). If the two judges speak and/or understand a common language, they should not hesitate to make contact directly by telephone or e-mail for this purpose[215]. If there are language problems, the Central Authorities will be able to assist (see Chapter 7 "Cooperation in parental responsibility matters") as well as the International Hague Network of Judges. The judges may avail themselves further of the contact points under EJN-civil[216].

4.4.6.5. Mitigation of the effects of criminal sanctions in the Member State of origin

The fact that child abduction constitutes a criminal offence in certain Member States should also be taken into account[217]. Those Member States should take appropriate measures to ensure that the person who has removed or retained the child unlawfully can participate in the court proceedings in the Member State of origin without risking criminal sanctions. Another solution could be to provide for special arrangements to ensure free passage for that person to and from the Member

[214] See, on this point also the Proposal for a Regulation on Digitalisation of Judicial Cooperation and Access to Justice in Cross-Border Civil, Commercial and Criminal Matters, and Amending Certain Acts in the Field of Judicial Cooperation COM(2021) 759 final.

[215] See European e-Justice Portal, European Judicial Atlas in civil matters.

[216] European e-Justice Portal, EJN-Civil.

[217] CJEU judgment of 19 November 2020 in Case C-454/19, *ZW* ECLI:EU:C:2020:947.

State of origin to facilitate their participation in the procedure before the court of that Member State.

4.4.6.6. Parallel proceedings in the requested Member State and the Member State of origin – Article 29 (3) and (6), Recital 48

Article 29(3) provides that where there are parallel proceedings concerning a return in the Member State of refuge and proceedings on the substance in the Member State of origin, and the requested court refuses return on a ground set out in point (b) of Article 13(1) or Article 13(2) or both of the 1980 Hague Convention, the decision and all relevant documents must be sent forthwith to the court of origin under Article 29(3), notwithstanding the possibility of an appeal against the non-return order. Recital 48 expressly states that regardless of whether a refusal decision is final or still subject to appeal, it might however be replaced by a subsequent decision given in custody proceedings by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. This is in principle not a problem because of the terms of Article 29(6) since if the courts in the Member State of origin give a decision entailing the return of the child that decision will still have to be enforced. The term "replaced" is generic and does not imply that the non-return decision of the Member State of refuge is procedurally overturned by a decision of the Member State of origin but means that the decision on the substance of custody entailing the return of the child is prevailing over the non-return decision.

The possibility of a conflict in the enforcement of two decisions is avoided because either the decisions of both courts will amount to the return, in which case the applicant has a choice as to which to enforce, or only the decision of the court of origin shall require enforcement and shall be enforceable under Article 29(6). If a court of origin grants custody to the abducting parent before the return proceedings in the Member State of refuge have concluded, this will be taken into account in the return proceedings and is likely to lead to a refusal of the application.

Finally, where, as in *Rinau*, the return proceedings ultimately lead to a return decision after the court of origin has handed down a decision entailing the return of the child there should be no conflict either as both decisions will be enforceable, the latter under the Regulation and the former under the national law of the Member State of refuge; this aspect is not dealt with in the Regulation.

4.4.7. Recognition and enforcement of the privileged decision pursuant to Article 29(6) on the substance of

the rights of custody entailing the return of the child

4.4.7.1. Main principles

If the return of a child is refused on a ground set out Article 13(1)(b), Article 13(2) or both, of the 1980 Hague Convention (see Recital 48) and the court of origin subsequently takes a decision on the substance of the rights of custody which entails the return of the child, that decision may be recognised and enforced in the Member State where the child was wrongfully removed or retained or in any other Member State in accordance with Section 2 "Recognition and enforcement of certain privileged decisions" of Chapter IV of the Regulation. In this case, no special procedure is required provided that the decision is accompanied by the certificate issued in the form set out in Annex VI[218] (see section 4.4.7 and the chart in paragraph 4.4.9)[219]. In addition, it is not possible to oppose the recognition and enforcement of that privileged decision unless and to the extent that irreconcilability with a later decision relating to parental responsibility concerning the same child is found to exist. This later decision may be handed down either (a) in the Member State in which recognition was invoked or (b) in another Member State or in the non-Member State of habitual residence of the child provided that the later decision fulfils the conditions of recognition in that Member State (see Article 50 and Recital 52).

Nevertheless, Article 42(2) states that it is not compulsory for the interested persons to have recourse to the procedure for recognition and enforcement of certain privileged decisions regulated in Section 2 of Chapter IV. They may resort to the general provisions on recognition and enforcement established by Section 1 of Chapter IV instead.

If the court of origin takes a decision on the substance of the rights of custody which does not entail the return of the child, the jurisdiction to decide on the question of substance for future proceedings is then attributed to the courts of the Member State to which the child has been abducted if the child has acquired habitual residence there, has resided in that other Member State for a period of at least one year 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 the child is settled in his or her new environment (see Article 9(b)(v) and charts in section 4.4.9) or if the parties choose a court in that Member States in accordance with Article 10. If the court having jurisdiction on the substance of rights of custody is seised after the period of three months as per Article 29(5) has expired, or if

[218] See Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

[219] Case C-195/08, *PPU Rinau supra* note 77, in which the circumstances were that an order refusing return of the child was reversed after the left behind parent had obtained a custody order in the court of origin requiring return of the child.

the conditions for issuing a certificate for such privileged decisions are not met, the resulting decision on the substance of rights of custody cannot be qualified as privileged but may still be recognised and enforced in other Member States in accordance with Section 1 of Chapter IV of this Regulation (see Recital 52).

4.4.7.2. The privileged certificate as per Annex VI

The recognition and enforcement of the privileged decision pursuant to Article 29(6) entailing the return of the child is only possible if accompanied by the certificate produced in the form set out in Annex VI[220] by the court that has issued the decision. Since the content of the certificate cannot be challenged in the Member State of enforcement the court issuing it has a special duty of care to ensure that the information that it contains is accurate. However, the Regulation provides some remedies in the Member State of origin.

4.4.7.2.1. Issuance of the certificate as per Annex VI

The decision shall be certified if it meets the procedural requirements of Article 47(3) and (4) listed above in section 4.4.5. The Regulation does not require that the decision on the substance of the rights of custody entailing the return of the child be final in order to circulate according to the procedure for recognition and enforcement of certain privileged decisions regulated in Section 2 of Chapter IV. It is important that the part of the decision entailing the return of the child is enforceable in the Member State of origin (see Article 29(6) and point 9 of Annex VI).

The court of origin shall issue the certificate by using the standard form set out in Annex VI[221] upon application by a party. It is not possible to appeal against the issuance of a certificate (see Article 47(6)). Conversely, the non-issuance of a certificate can be appealed upon in accordance with the national law as there are no restrictions in this regard in the Regulation.

The certificate has to be completed and issued in the language of the decision. It may also be issued in another official language of the institutions of the European Union requested by a party. This does not create any obligation for the court issuing the certificate to provide a translation or transliteration of the translatable content of the free text fields (see Article 47(2)). The court may automatically translate the certificate except the free

[220] See Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

[221] See Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

text fields once completed in the language of the decisions using the online forms at the E-Justice Portal[222].

4.4.7.2.2. Rectification of the certificate as per Annex VI – Article 48(1) and (3)

The court of origin shall, upon application, and may, of its own motion, rectify the certificate where, due to a material error or omission, there is a discrepancy between the decision and the certificate. The procedure, including any appeal, with regard to the rectification of the certificate is governed by the law of the Member State of origin.

4.4.7.2.3. Withdrawal of the certificate as per Annex VI – Article 48(2) and Article 49

The Regulation introduces one new remedy against the certificate that may be relied upon in the Member State of origin – the withdrawal of the certificate. The case-law of the CJEU consistently stated that in order to secure the expeditious enforcement of the decisions under Article 11(8) of the Brussels IIa Regulation and to ensure that the effectiveness of the provisions of this Regulation is not undermined by abuse of the procedure, any appeal against the issuing of a certificate pursuant to Article 42 of that Regulation, other than an action seeking rectification of the certificate, was excluded, even in the Member State of origin[223]. These limitations should be considered obsolete.

Article 48(2) introduces a uniform opportunity for withdrawal of the certificate where it was wrongly granted, having regard to the conditions for its issuance laid down in Article 47. The withdrawal may be requested upon application or by the court of origin of its own motion. The procedure, including any appeal, with regard to the withdrawal of the certificate is governed by the law of the Member State of origin.

The application for withdrawal of the certificate may be a ground for suspension of the enforcement procedure under Article 56(2)(d) in the Member State in which the recognition is invoked (see section 5.3.2 of Chapter 5 “Enforcement”).

The application for withdrawal of the certificate is a separate procedure different from the appeal against the decision itself. The statement of the CJEU in *Povse* and *Aguirre Zarraga* that questions relating to the lawfulness of the decision ordering return as such, and in particular whether the necessary conditions enabling the court with jurisdiction to hand down those decisions are satisfied, must be raised before the courts

[222] European e-Justice Portal, Online forms.

[223] Case C-195/08, *PPU Rinau supra* note 77, para. 85, and Case C-491/10, *PPU Aguirre Zarraga supra* note 210, para. 50.

of the Member State of origin, in accordance with the rules of its legal system is still relevant under the Regulation[224].

4.4.7.2.4. Certificate concerning lack or limitation of enforceabilityas per Annex VII

The privileged decision set out in Article 29(6) may be effective if certified in accordance with Article 47 and to the extent it is enforceable in the Member State of origin. Where and to the extent that this decision has ceased to be enforceable or its enforceability has been suspended or limited, the Regulation introduces one new tool that can trump the already circulating duly certified decision – a certificate indicating the lack or limitation of enforceability (see Article 49). This certificate is to be issued in the standard form set out in Annex VII[225] at any time upon application to the court of the Member State of origin. The courts designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[226]. This certificate shall be completed and issued in the language of the decision but also in another official language of the institutions of the European Union requested by a party without obligating the court to provide a translation or transliteration of the translatable content of the free text fields (see Article 49(2)). The court may automatically translate the certificate except the free text fields once completed in the language of the decisions using the online forms at the E-Justice Portal[227].

For example, if the certified decision has ceased to be enforceable and therefore withdrawal of the certificate as per Annex VI[228] is granted any interested party may apply for a certificate concerning the lack or limitation of enforceability in the form set out in Annex VII[229] to the Regulation. The certificate may also be issued in cases where the higher instance in the Member State of origin suspends or limits the enforcement of the decision on return or rules against the return of the child.

4.4.7.3. Limited grounds for refusal – Article 50

The privileged decision as per Article 29(6) shall be recognised in the other Member States without any special procedure being

[224] Case C – 211/10, *PPU Povse supra* note 116, para. 74, Case C-491/10, *PPU Aguirre Zarraga supra* note 210, para. 51.

[225] See Annex VII of Council Regulation (EU) 2019/1111, *supra* note 1.

[226] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[227] European e-Justice Portal, Online forms.

[228] See Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

[229] See Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

required and without any possibility of opposing its recognition unless and to the extent that the decision is found to be irreconcilable with a later decision as referred to in Article 50 (see Article 43(1)). This ground for refusal may also be raised against the enforcement of the same decision in the other Member State (see Article 50). However, the enforcement there takes place without any declaration of enforceability being required (see Article 45(1)).

An irreconcilable later decision that can block the recognition and enforcement of the privileged decision must relate to parental responsibility concerning the same child and may be given in the Member State in which recognition is invoked or in another Member State or even in a non-Member State of the habitual residence of the child, provided that the later decision fulfils the conditions necessary for its recognition in the Member State in which the recognition is invoked (see Article 50). Similar ground was foreseen in Article 47(2) of Brussels IIa Regulation stipulating that a privileged decision could not be enforced if it was irreconcilable with a subsequent enforceable decision, but CJEU in *Povse*[230] limited this concept to a subsequent decision adopted by the court of origin and thus not by the court in the Member State of the enforcement. Article 50 overrules this aspect of *Povse*. However, since Article 9 retains jurisdiction with the court of the Member State of the habitual residence of the child prior the abduction, the court of the Member State of refuge or the courts of other Member States may have only limited possibilities to establish jurisdiction. One possibility could be jurisdiction stemming from an agreement or the situation of a long period between the decision under Article 29(6) and its enforcement, where the parent who was seeking the return consents to the change of the child's habitual residence. At the level of enforcement procedure there are two more options for refusal linked to a situation of grave risk of a lasting nature (see Article 56(6)) and to grounds stemming from the national law of the Member State of enforcement if compatible with the Regulation (see Article 57).

Further explanations concerning the enforcement procedure are presented in Chapter 5 "Enforcement".

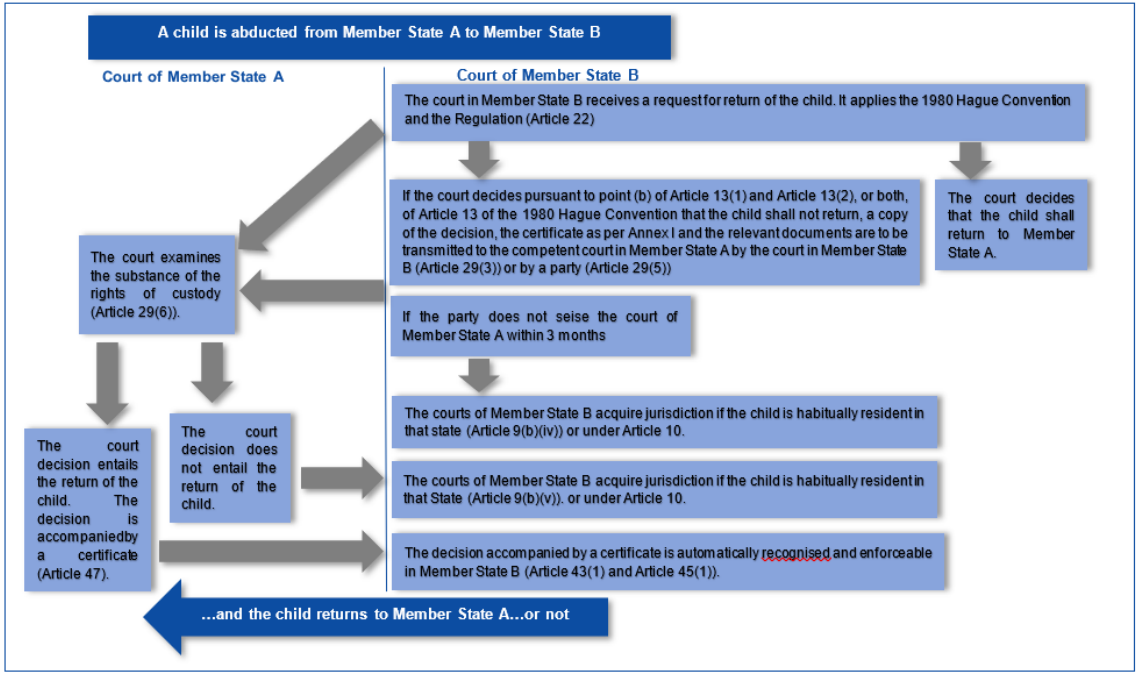
4.4.8. New removal of the child to another Member State – Article 45(1)

The decision of the court of origin is enforceable in all Member States and not only in the Member State in which the decision of non-return was pronounced. This is clear from the wording of Article 45(1) and corresponds to the objectives and spirit of the Regulation. A removal of the child to another Member State has therefore no effect on the decision of the court of origin entailing the return to that Member State. It is up to the applicant to decide if he or she prefers to start a new procedure for the return

[230] Case C-211/10, *Povse supra* note 116.

of the child pursuant to the 1980 Hague Convention or to enforce the return decision of the court of origin or to enforce a decision entailing the return given by the Member State of origin if such a decision was already given at the time of the new removal.

4.4.9.Schema of procedure in child abduction cases after non-return decision – Article 29



5. Enforcement

5.1. The main principles of the rules on enforcement

Chapter IV of the Regulation is devoted to the recognition and enforcement. It consists of several sections: general provisions on recognition and enforcement (Section 1 of the Regulation), recognition and enforcement of certain privileged decisions (Section 2 of the Regulation), common provisions on enforcement (Section 3 of the Regulation), provisions on recognition and enforcement of authentic instruments and agreements (Section 4 of the Regulation) and miscellaneous provisions (Section 5 of the Regulation). The system of enforcement follows in general the model of the Brussels Ia Regulation, harmonising more aspects of the enforcement procedure in comparison to the Brussels IIa Regulation.

This chapter of the Practice Guide focuses on the last three Sections of Chapter IV of the Regulation building upon the general observations on recognition and enforcement raised above, in relation to matrimonial matters (see section 2.5 of Chapter 2 “Matrimonial Matters”), parental responsibility matters (see section 3.5 of Chapter 3 “Parental Responsibility”) and international child abduction (see section 4.4.7 of Chapter 4 “International Child Abduction”).

The main principles of the rules on enforcement

- Enforcement of all decisions in matrimonial matters[231] and in matters of parental responsibility given in one Member State (“the Member State of origin”) in another Member State ("the Member State of enforcement”) takes place without any interim procedure for declaration of enforceability or registration of enforcement (see Article 34(1), section 2.5.2 of Chapter 2 “Matrimonial Matters” and section 3.5.2 of Chapter 3 “Parental Responsibility”)
- Enforcement of the privileged decisions under Article 42(1) enjoys even more favourable treatment (see Article 45(1) and section 4.4.7 of Chapter 4 “International Child Abduction”).
- Enforcement of authentic instruments and agreements is regulated by the provision applicable to the decisions that are not privileged, subject to several special rules (see Articles 65-68, Section 4

[231] They rarely have enforceable content, as the dissolution of marriage has an effect produced *ex lege,* but they may be enforceable for example concerning the costs, see Article 73. Thus, the explanation below will focus in principle on parental responsibility matters.

Enforcement

of Chapter IV of the Regulation and section 5.5.1.1.2).

- A decision of the Member State of origin is treated as if it had been given in the Member State of enforcement and is enforced in compliance with the procedure for enforcement of decisions governed by the law of the Member State of enforcement, unless otherwise provided for in the Regulation (see Article 51(1)).
- The enforcement of decisions that are not privileged may be refused before or after its start, on grounds similar to those that existed in the Brussels IIa Regulation (see Articles 38, 39 and 41 and section 5.5.1.1.1).
- The enforcement of privileged decisions may be refused before or after its start if irreconcilable with a later decision given in the Member State of enforcement or in another Member State or in non-Member State (see Article 50 and section 5.5.1.1.1).
- The enforcement of authentic instruments and agreements may be refused before or after its start, on grounds listed separately in the Regulation (see Article 68 and section 5.5.1.1.2).
- The enforcement of all decisions, authentic instruments and agreements may also be refused on grounds not related to their recognition but arising from the actual enforcement or from the national law of the Member State of enforcement if not incompatible with the Regulation (see Article 56-57 and section 5.5.1.1.3).
- Under no circumstances may a decision given in another Member State be reviewed as to its substance and as to the jurisdiction of the court of origin (see Article 69 and Article 71).
- The court of the Member State of origin may request the courts or competent authorities of the Member State of enforcement to assist in the implementation of decisions in matters of parental responsibility given under the Regulation (see Article 81 and Chapter 7 “Cooperation in matters of parental responsibility” and Chapter 8 “Collection and transmission of information, data protection and non-disclosure of information”).
- The procedure for making an application for refusal of enforcement and all related provisions apply accordingly to an application for a refusal of recognition, or for a declaration that there are no

grounds for a refusal of recognition (see Article 30(3) and Article 40(1))[232].

Although subject to the provisions of the Regulation, as stated in Article 51(1), the enforcement procedure is not governed by the Regulation but by national law, it is of the essence that national authorities apply rules which secure efficient and speedy enforcement of decisions issued under the Regulation so as not to undermine its objectives. The importance of the efficient and speedy enforcement has also been emphasised in a number of judgments delivered by the CJEU as well as by the ECtHR (see section 5.6)[233].

In applying the terms of Article 51(1), to the effect that a decision given in one Member State should be enforced in another "under the same conditions as a decision given in that Member State", courts have to be careful to observe the very strict limits implicit in the terms of the provision and should not go so far as to second guess or circumvent the decision in the court of origin. In reality, enforcement of a decision given in another Member State in the "same conditions" as if it had been given in the Member State of enforcement can refer only to the procedural arrangements under which the return of the child must take place and can on no account provide substantive grounds of opposition to the decision of the court which has jurisdiction.

5.2. Which titles may be enforced?

The enforcement system of the Regulation applies not only to decisions, but also to authentic instruments and agreements.

5.2.1. Decisions – Article 2(1) and Recital 14

Enforcement requires that the matters falling within the scope of the Regulation have been determined by the court of the Member State of origin in a "decision", whatever the decision may be called (including decree, order and judgment, see Article 2(1)).

The decision must have been handed down by a "court" defined as any authority in any Member State with jurisdiction in the matters falling within the scope of this Regulation. This term also

[232] Thus, in this chapter of the Practice Guide, the reference to "enforcement" may also include "recognition" for situations where only recognition is the sought, and accordingly the reference to a "Member State of enforcement" may be a reference to a "Member State of recognition".

[233] For more on enforcement issues, particularly in relation to child abduction cases, see the Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement, available at http://www.hcch.net/upload/guide28enf-e.pdf

covers administrative authorities, or other authorities, such as notaries, which or who exercise jurisdiction in certain matrimonial matters or matters of parental responsibility (see Article 2(2)(1) and Recital 14). However, if these administrative or other authorities have no powers to adjudicate in a dispute between the parties according to their national law, they are not treated as courts and their acts are not decisions for the purposes of the Regulation[234].

The definition of "decisions" extends further to agreements (or court settlements) approved by the court following an examination of the substance in accordance with national law and procedure (see Recital 14). The examination of the substance means that the court has to examine whether the conditions set by national law for concluding the agreement have been fulfilled[235].

The jurisdiction of the court may be based on the Regulation but also in specific scenarios on the residual rules of jurisdiction under national law, where applicable (see Article 6 and Article 14).

Chapter IV of the Regulation applies to all decisions granting divorce, legal separation, or annulment of marriage. However, the decisions refusing dissolution of matrimonial ties are excluded from the scope of the Regulation (see Recital 9).

Chapter IV of the Regulation also covers decisions on the substance of parental responsibility. Article 2(1) explicitly includes in its scope: a) a decision given in one Member State and ordering the return of a child to another Member State pursuant to the 1980 Hague Convention, which has to be enforced in a Member State other than the Member State where the decision was given, b) provisional, including protective, measures ordered by a court which by virtue of the Regulation has jurisdiction as to the substance of the matter[236] and c) provisional, including protective, measures ordered in accordance with Article 27(5) to protect the child from grave risk, where the court orders the return of the child.

In order to be enforced in another Member State, decisions must be enforceable in the Member State of origin (see Article 34(1) and Article 45(1)).

The decision shall be provided to the authority competent for enforcement in a copy which satisfies the conditions necessary to establish its authenticity. The authenticity is determined by the law of the Member State of origin of the decision.

[234] Consider the outcome of Case C-646/20, if needed. At the time of writing the CJEU has yet to give its judgment.

[235] Consider the outcome of Case C-646/20, if needed. At the time of writing the CJEU has yet to give its judgment.

[236] For the purposes of Chapter IV, "decision" does not include provisional, including protective, measures ordered by a court with jurisdiction as to the substance of the matter without the respondent being summoned to appear, unless the decision containing the measure is served on the respondent prior to enforcement (see Article 2(1)).

5.2.2. Authentic instruments and agreements – Article 2(2)(2) and (3)

The Regulation permits cross-border recognition and enforcement of documents which are neither decisions nor court settlements, but that have been drawn up by or registered with a public authority. The Regulation leaves it to the national law of the Member States of origin if such documents can be drawn up and/or registered in their jurisdiction. Therefore, some Member States avail themselves of such authentic instruments and agreements, while others do not.

There are two types of documents covered: authentic instruments and agreements.

"Authentic instruments" are documents which have been formally drawn up or registered as authentic instruments in any Member State, in matters falling within the scope of the Regulation (see Article 2(2)(2) and Section 4 of Chapter IV of the Regulation). The authenticity regarding the signature and the content of the document has to be established by a public authority or other authority empowered by the respective Member State. The public authorities or other authorities designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[237].

Such documents include, for example, documents drawn up by or before notaries as well as documents registered in public registers. The definition of "authentic instruments" is used horizontally in other EU instruments and has to be interpreted in accordance with them and in light of the purposes of the Regulation[238]. The Regulation also covers "agreements" concluded between parties that are neither a decision (including court settlement) nor an authentic instrument but have been registered by a public authority competent to do so. Thus, the Regulation applies to agreements concluded by the parties without the involvement of a public authority at the conclusion stage of the agreement but afterwards – in the course of its registration. The public authorities designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[239].

[237] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[238] For a general indication of the meaning of "authentic instrument" which describes the nature and effect thereof, see Case C-260/97 *Unibank v Christensen* *supra* note 93; there is also a definition to be found in Article 2.3 of Council Regulation (EC) No 4/2009, as well as in Article 3(1)(c) of Council Regulation (EU) 2016/1103 *supra* note 22, in Article 3(1)(d) of Council Regulation (EU) 2016/1104, *supra* note 23, and in Article 3(1)(i) of Regulation (EU) 650/2012, *supra* note 24.

[239] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

However, the Regulation does not apply to purely private agreements concluded without the intervention of a court or public authority (see Recital 14).

To be recognised and enforced in another Member State, the authentic instrument or agreement on legal separation and divorce must have binding legal effect in the Member State of origin (see Article 65(1)). The authentic instruments and agreements in matters of parental responsibility must, in addition to having binding legal effect, also be enforceable in the Member State of origin (see Article 65(2)).

The Regulation permits cross-border circulation of authentic instruments and agreements only where the authority that draws up the authentic instrument or which registers the authentic instrument or agreement exercises jurisdiction under Chapter II of the Regulation. If this is not the case, these authentic instruments or agreements will be effective only in the Member State of origin and cannot be recognised and enforced in the other Member States under the Regulation.

The authentic instrument or agreement shall be provided to the authority competent for enforcement in a copy which satisfies the conditions necessary for establishing its authenticity. The authenticity is determined by the law of the Member State of origin of the authentic instrument or agreement.

In the case of a complex authentic instrument or an agreement concerning not only matrimonial matters or parental responsibility but also, for example, other matters like maintenance or matrimonial property, the Regulation applies only to the matters falling within its scope of application. The parties should make recourse to other instruments such as the Maintenance Regulation or the Regulation on matrimonial property regimes if they want to enforce these parts of the authentic instrument or agreement.

5.2.3. Accompanying certificates

The enforcement under the Regulation can take place only where the decision or the authentic instrument or agreement is accompanied by the appropriate certificate[240].

5.2.3.1. Certificates accompanying decisions – Articles 36 and 47

In addition to the authenticated copy of the decision, the party seeking enforcement has to provide the authority competent for enforcement with the appropriate certificate using:

- Annex II[241] for a decision in matrimonial matters[242];

[240] Only in the case of recognition the certificate is not mandatory (see Article 32).

[241] See Annex II of Council Regulation (EU) 2019/1111, *supra* note 1.

[242] For the production of this certificate see section 2.5.2.

- Annex III[243] for a decision in matters of parental responsibility[244];
- Annex IV[245] for a decision ordering the return of a child pursuant to the 1980 Hague Convention and, where applicable, any provisional, including protective, measures ordered in accordance with Article 27(5) accompanying the decision;[246]
- Annex V[247] for the privileged decision granting rights of access[248];
- Annex VI[249] for the privileged decision on the substance of rights of custody entailing the return of a child and given pursuant to Article 29(6)[250];

The party opposing enforcement may avail himself or herself of:

- Annex VII[251] concerning the lack or limitation of enforceability of certain decisions granting rights of access or entailing the return of the child which have been certified in accordance with Article 47 of the Regulation[252].

5.2.3.2. Certificates accompanying the authentic instruments and agreements – Article 66

In addition to the authenticated copy of the authentic instrument or agreement, the party seeking enforcement of an authentic instrument or agreement has to provide the authority competent for enforcement with the appropriate certificate using:

- Annex VIII[253] for matrimonial matters[254];
- Annex IX[255] for matters of parental responsibility, containing a summary of the enforceable obligation contained in the authentic instrument or agreement (see Article 66(1)(b))[256].

If the certificate is not provided, the authentic instrument or agreement cannot be recognised or enforced in another Member State under the Regulation (see Article 66(5)).

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[243] See Annex III of Council Regulation (EU) 2019/1111, *supra* note 1.

[244] For the production of this certificate see section 3.5.3.

[245] See Annex IV of Council Regulation (EU) 2019/1111, *supra* note 1.

[246] For the production of this certificate see section 4.1.1.

[247] See Annex V of Council Regulation (EU) 2019/1111, *supra* note 1.

[248] For the production of this certificate see 3.6.3.

[249] See Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

[250] For the production of this certificate see section 4.4.7.2.

[251] See Annex VII of Council Regulation (EU) 2019/1111, *supra* note 1.

[252] For the production of this certificate see section 4.4.7.2.4.

[253] See Annex VIII of Council Regulation (EU) 2019/1111, *supra* note 1.

[254] For the production of this certificate see section 2.5.6.

[255] See Annex Annex IX of Council Regulation (EU) 2019/1111, *supra* note 1.

[256] For the production of this certificate see section 3.5.8.

5.3. Initial phase of the enforcement

The initial phase of the enforcement includes the rules of the Regulation concerning certain aspects of the proceedings until the service of the certificate and/or of the decision to the party against whom enforcement is sought. What is not governed by the Regulation is governed by the law of the Member State of enforcement.

In this section, reference is made to the enforcement of decisions, but it is applicable to the enforcement of authentic instruments and agreements as well.

5.3.1. Authorities competent for enforcement, and courts – Article 52 and Recital 60

According to the Regulation, the application for enforcement is to be submitted to the authority competent for enforcement under the law of the Member State of enforcement. These authorities, designated by the Member States pursuant to Article 103, can be found on the e-Justice Portal[257]. As enforcement procedures could be judicial or extra-judicial depending on national law, "authorities competent for enforcement" could include courts, bailiffs and any other authorities as determined by national law (see Recital 60).

Where, in addition to authorities competent for enforcement, the Regulation also mentions courts, this should cover cases where, under national law, a body other than a court is the authority competent for enforcement, but the Regulation reserves certain decisions for courts, either from the outset or in the form of reviewing the acts of the authority competent for enforcement (for example Article 62). It should be for the authority competent for enforcement or the court of the Member State of enforcement to order, take or arrange for specific measures to be taken at the enforcement stage, such as any non-coercive measures which might be available under the national law of that Member State, or any coercive measures which might be available under that law, including fines, imprisonment or the fetching of the child by a bailiff (see Article 15(3) and Recital 60).

[257] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

5.3.2. No postal address required – Article 51(2)

The party seeking the enforcement of a decision given in another Member State is not required to have a postal address in the Member State of enforcement, as it was the case also pursuant to the Brussels IIa Regulation (see Article 51(2)).

5.3.3. Authorised representative– Article 51(2)

The party seeking the enforcement of a decision given in another Member State is required to have an authorised representative in the Member State of enforcement only if such a representative is mandatory under the law of the Member State of enforcement, irrespective of the nationality of the parties.

5.3.4. Partial enforcement possible – Article 53

The party seeking the enforcement of a decision may apply for enforcement of the entire decision or for a partial enforcement. Thus, where a decision has been given in respect of several matters, and enforcement has been refused for one or more of them, enforcement shall nonetheless be possible for the parts of the decision not affected by the refusal (Article 53(2)).

Nevertheless, partial enforcement is expressly excluded as regards enforcement of a decision ordering the return of a child containing provisional, including protective, measures, which have been ordered to protect the child from the risk referred to in Article 13(1)(b) of the 1980 Hague Convention (see Article 53(3)). This situation may occur where these measures need to be effective in the Member State where the child resided habitually prior to the wrongful removal or retention. They will cease to apply once the court of the Member State with jurisdiction as to the substance of the matter has taken measures or decisions after the return (see Recital 46).

5.3.5. Arrangements for the exercise of rights of access – Article 54 and Recital 61

It may occur that the decision given in one Member State concerning rights of access cannot be enforced in another Member State due to lack of specific arrangements in the decision needed under the law of the that Member State in order to enforce such a decision. This may concern all types of decisions on rights of access, even if certified under Article 47.

In order to facilitate enforcement, the authorities competent for enforcement or the courts in the Member State of enforcement are entitled, pursuant to Article 54(1), to make arrangements for organising the exercise of rights of access. This is possible only if the necessary arrangements have not or not sufficiently been made in the decision given by the courts of the Member State

having jurisdiction as to the substance of the matter and provided the essential elements of this decision are respected.

The authorities competent for enforcement, or the courts in the Member State of enforcement may specify details regarding practical circumstances or legal conditions required under the law of the Member State of enforcement (for example to determine where and at what time children should be picked up or dropped off). They may also make a vague decision more concrete and precise (for example where supervised contact was envisaged but without (sufficient) details). In addition, any other arrangements for complying with legal requirements under the national enforcement law of the Member State of enforcement, such as, for example, the participation of a child protection authority or a psychologist at the enforcement stage, may be made in the same way (for example, to allow the parent-child relationship to take place in the presence of a psychologist where the child has refused to see the non-custodial parent, see Recital 61). The national law of the Member State of enforcement determines the competent court or authority and the procedural terms and conditions (including the possible appeal), as regards the adoption of these arrangements.

However, any such arrangements should not interfere with, or go beyond, the essential elements of the decision on the rights of access. Thus, it is not possible to change the decision (for example to change the type of contact from face to face to online). Moreover, the power under the Regulation to adjust measures should not allow the court of enforcement to replace measures that are unknown in the law of the Member State of enforcement with different measures (see Recital 61).

The arrangements for the exercise of the rights of access cease to apply following a later decision by the courts of the Member State having jurisdiction as to the substance of the matter (see Article 54(2)). This later decision may resolve a situation where the decision of the court of the Member State of origin cannot be enforced without changing its essential elements. If the decision cannot be enforced but the child needs protection, the court of the Member State of enforcement may avail itself of provisional, including protective, measures pursuant to Article 15 (see section 3.1.1.5 of Chapter 3 “Parental Responsibility”). Direct judicial cooperation and communication may also be relied upon in this situation (see section 7.4 of Chapter 7 “Cooperation in matters of parental responsibility” and Chapter 8 “Collection and transmission of information, data protection and non-disclosure of information”).

5.3.6. Service of the certificate and the decision – Article 55 and Recitals 62 and 64

The enforcement in one Member State of a decision given in another Member State without a declaration of enforceability under the Regulation should not jeopardise the respect for the rights of the defence (see Recital 62).

Consequently, the party against whom enforcement is sought should first be aware of the decision and its enforcement and be able to defend himself or herself by invoking the grounds for suspension or refusal of enforcement (see Recital 64).

Thus, in order to inform the person against whom enforcement is sought of the enforcement of a decision given in another Member State, the appropriate certificate, if necessary, accompanied by the decision, should be served on that person in reasonable time before the first enforcement measure (see Article 55(1) and Recital 64). The specific time is determined by the national law. The first enforcement measure should mean the first enforcement measure after the service of the certificate and of the decision or the arrangement, if applicable (see Recital 64).

The certificate is to be accompanied by the decision, if not already served on that person in the Member State of origin, and, where applicable, accompanied by the details of the arrangement for the exercise of the rights of custody ordered in the Member State of the enforcement.

Often, service under Article 55 will take place in a Member State different to the Member State of origin. In this case, the person against whom enforcement is sought may request a translation or transliteration of the decision, in order to contest the enforcement and where applicable, the translatable content of the free text fields of the certificate accompanying privileged decisions. This is possible only if these documents are not written in or accompanied by a translation or transliteration into either a language which that person understands, or the official language of the Member State in which he or she is habitually resident or, where there are several official languages in that Member State, the official language or one of the official languages of the place where he or she is habitually resident (see Article 55(2)). If the decision and, where applicable, the certificate, have already been served on the person against whom enforcement is sought, in compliance with these translation or transliteration requirements, that person is not allowed to request a further translation or transliteration (see Article 55(3)). Thus, the non-compliance with these requirements may trigger a need for additional service. Where a translation or transliteration is duly requested, no measures of enforcement may be taken by the authority competent for the enforcement, other than protective measures, until that translation or transliteration has been provided to the person against whom enforcement is sought (see Article 55(2)).

Service within the Member State of enforcement shall take place in accordance with its national law. The service in another Member State shall be performed in compliance with the Service of Documents Regulation[258]. Service to third States may

[258] Regulation (EU) 2020/1784 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Service of documents) (recast). This Regulation repeals and replaces the Council Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters from 1 June 2022. It is applicable also in Denmark, see Council Decision of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters (OJ L 300 17.11.2005, p. 55) and Agreement between the European Community and the Kingdom of Denmark on the

be executed pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters[259], other (bilateral) treaties or the national law.

5.4. Suspension of enforcement – Article 56(1)-(4) and Article 57

Articles 56(1)-(4) of the Regulation introduce uniform grounds for suspension of the enforcement proceedings, where one of the grounds may even amount to refusal of enforcement (see Article 56(4) and (6) and section 5.5.1.1.3). The suspension of the enforcement proceedings as per Articles 56(1)-(4) is applicable to all types of decisions, including the privileged decisions under Article 42 and to authentic instruments or agreements.

Article 57 of the Regulation permits suspension of the enforcement on grounds envisaged under the law of the Member State of enforcement as far as they are not incompatible with the application of Articles 41, 50 and 56. These grounds may also be used for the suspension of enforcement of authentic instruments and agreements.

The national law of the Member State of enforcement determines who decides on the suspension of the enforcement – the authority competent for enforcement or the court[260].

The suspension of enforcement is mandatory if the decision is no longer enforceable in the Member State of origin (see Article 56(1)). With the exception of this case, where one or more of the grounds contained in or permitted by the Regulation are found to exist, the suspension of enforcement in the Member State of enforcement remains at the discretion of the authority competent for enforcement, or the court (see Recital 67).

Matters of suspension of the enforcement not governed by the Regulation fall to the national law of the Member State of the enforcement, where the national legislation should not undermine the objectives of the Regulation or render it ineffective.

service of judicial and extrajudicial documents in civil or commercial matters (OJ L 19, 21.1.2021, p. 1–1).

[259] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (HCCH 1965 Service Convention).

[260] For the list of competent authorities see This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

Grounds for suspension of the enforcement

5.4.1. Suspension of the enforceability of the decision in the Member State of origin – Article 56(1) and Recital 67

The first grounds for suspension of the enforcement is linked to the enforceability of the decision in the Member State of origin and the only one that is mandatory for the authority competent for enforcement or the court. Pursuant to Article 56(1), where the enforceability of the decision is suspended in the Member State of origin, the authority competent for enforcement or the court in the Member State of enforcement is obliged to suspend the enforcement of its own motion (for example where a bailiff receives information in this regard during the enforcement proceedings) or upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned (see Article 56(1)). The authority or court competent for enforcement should, however, not be obliged to investigate actively whether in the meantime enforceability has been suspended (following an appeal or otherwise) in the Member State of origin if there is no indication that this is the case (see Recital 67).

5.4.2. Appeal against the decision, application for refusal of enforcement and withdrawal of Article 47 certificate – Article 56(2) and Recital 68

The next grounds for suspension of the enforcement proceedings are listed in Article 56(2). If available, they provide the possibility for the authority competent for enforcement or the court in the Member State of enforcement to suspend the enforcement proceedings in whole or in part. This discretionary power can be exercised only upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned, but never *ex officio*.

Suspension of the enforcement proceedings under Article 56(2) is possible where:

- an ordinary appeal[261] against the decision has been lodged in the Member State of origin[262];
- the time for an ordinary appeal against the decision has not yet expired[263];
- an application for refusal of enforcement based on Articles 41, 50 or 57 has been submitted in the Member State of enforcement (see section 5.5.2);
- the person against whom enforcement is sought has applied in accordance with Article 48 for the withdrawal of a certificate issued, pursuant to Article 47 in the Member State of origin.

The period for suspension stems from the applied grounds. Where the decision is still subject to appeal in the Member State of origin and the time for lodging an ordinary appeal has not yet expired, the authority competent for enforcement or the court in the Member State of enforcement have the discretion, upon application, to suspend, the enforcement proceedings. In those cases, it may specify the time within which any appeal is to be lodged in the Member State of origin in order to obtain or maintain the suspension of enforcement proceedings (see Article 56(3) and Recital 68). The specification of a time-limit only has effect for the suspension of the enforcement proceedings and should not affect the deadline for lodging an appeal according to the procedural rules of the Member State of origin (see Recital 68).

5.4.3. Exposure of the child to a grave risk of physical or psychological harm – Article 56(4) and Recital 69

The next grounds for suspension of the enforcement proceedings is applicable only in exceptional cases in which it is established that the enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments or by virtue of any other significant change of circumstances which have arisen after the decision was given. This ground is applied upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned or of any interested party acting in the best interests of the child.

The temporary impediments exposing the child to a grave risk of physical or psychological harm may stem among others from a situation of serious illness of the person to whom the child is

[261] Where the decision was given in Ireland or Cyprus, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of Chapter IV of the Regulation (see Article 72). For the notion of "ordinary appeal" consider CJEU judgment of 22 November 1977 in Case C-43/77, *Industrial Diamond Supplies v Riva* ECLI:EU:C:1977:188.

[262] If the appeal has the effect of taking away the enforceability of the decision, Article 56(1) applies instead.

[263] If a decision does not become enforceable before the time for an ordinary appeal has expired, Article 56(1) applies instead.

to be handed over or imprisonment of that person or it may stem from a situation where the child is seriously ill and in hospital. The authority competent for enforcement or the court must assess if this impediment may cause grave risk to the child in this particular case. The separation of the child from the parent, who has to hand over the child, or the anxiety of the child, typical during such enforcement, should not be considered in itself as an impediment exposing the child to a grave risk of physical or psychological harm and cannot justify the suspension of the enforcement proceedings.

The significant change of circumstances is illustrated in Recital 69 with one example - manifest objection of the child voiced only after the decision was given which is so strong that, if disregarded, it would amount to a grave risk of physical or psychological harm to the child. This example clearly shows that the significant change of circumstances must have arisen after the decision subject to enforcement has been given. Another example could be a change of circumstances where the child threatens to commit suicide or self-harm if the decision would be enforced.

The competent enforcement authority shall in accordance with Recital 69 endeavour to overcome any such obstacles to enforcement. The enforcement must be resumed as soon as the grave risk of physical or psychological harm ceases to exist (see Article 56(4)).

5.4.4. Grounds for suspension under the national law – Article 57 and Recital 63

According to Article 57, the grounds for suspension of enforcement under the law of the Member State of enforcement shall apply alongside those provided for by the Regulation in so far as they are not incompatible with the application of Articles 41, 50 and 56. The idea is to streamline in one procedure both types of grounds for suspension in order to enable the enforcement of the decision in due course. Recital 63 lists examples of grounds under the national law: formal errors under national law in an act of enforcement, the assertion that the action required by the decision has already been performed or has become impossible, for instance, in case of force majeure, serious illness or imprisonment of the person to whom the child is to be handed over or where a war breaks out in the Member State to where the child is to be returned. Some of these grounds may amount to grounds for refusal of the enforcement (see section 5.5.1.1.3).

5.5. Refusal of enforcement

As already pointed out in the main principles of the rules on enforcement, the Regulation does not remove the grounds for refusal of the enforcement existing under the Brussels IIa

Regulation. The Regulation postpones the recourse to them after the commencement of the actual enforcement without prejudice to the right of the judgment debtor to make a "pre-emptive strike" by requesting the refusal of recognition/enforcement before enforcement proceedings have been commenced.

The enforcement may also be refused on grounds stemming from the actual enforcement and from national law of the Member State of enforcement if not incompatible with the Regulation.

The recognition and enforcement of decisions given in a Member State is based on the principle of mutual trust. Therefore, the grounds for refusal of enforcement are kept to a minimum in the light of the underlying aim of the Regulation, which is to facilitate recognition and enforcement and to effectively protect the best interests of the child (see Recital 55).

The refusal of enforcement is possible only if one or more of the grounds provided for in the Regulation are present. Thus, the grounds for refusal listed in the Regulation is exhaustive. It is not possible to invoke grounds which are not listed in the Regulation, such as, for example, a violation of the *lis pendens* rule (see Recital 56)[264]. The Regulation expressly prohibits the review of jurisdiction of the court of origin (see Article 69) as well as the review of the decision given in another Member State as to its substance (see Article 71).

National law determines whether the grounds for refusal of enforcement set out in the Regulation are to be examined *ex officio* or upon application (see Recital 62). This may be relevant if the party challenging enforcement raises one of the grounds, but the court may be empowered by national law to review all the grounds, in particular the *ordre public* ground of refusal.

5.5.1. Grounds for refusal of enforcement

The Regulation provides three types of grounds for refusal: grounds for refusal of recognition and enforcement of decisions that are similar to the grounds contained in the Brussels IIa Regulation (see section 5.5.1.1.1), grounds for refusal of recognition and enforcement of authentic instruments and agreements (see section 5.5.1.1.2) and grounds stemming from the actual enforcement (see section 5.5.1.1.3). In addition, the Regulation envisages a possibility for the party challenging the enforcement to rely on further grounds provided for by the national law if they are not incompatible with the Regulation (see section 5.5.1.2).

[264] CJEU judgment of 19 November 2015 in Case C-455/15, *PPU P* ECLI:EU:C:2015:763, para. 35-36 and Case C-386/17, *Liberato supra* note 151.

5.5.1.1. Grounds for refusal pursuant to the Regulation

The grounds for refusal of recognition and enforcement established by the Regulation are to be found in Article 38 (for decisions in matrimonial matters, albeit these rarely have any enforceable content), Article 41 in conjunction with Article 39 (for decisions in parental responsibility matters) and in Article 50 (for privileged decisions). The grounds for refusal of enforcement of authentic instruments and agreements are listed in Article 68.

Comparative table of the grounds for refusal under the Regulation

Decisions in matrimonial matters **Article 38**	**Authentic instruments and agreements in matrimonial matters** **Article 68(1)**	**Decisions in parental responsibility matters** **Article 39**	**Privileged decisions** **Article 50**	**Authentic instruments and agreements in matters of parental responsibility** **Article 68(2) and (3)**
manifestly contrary to the **public policy** of the Member State of recognition	manifestly contrary to the **public policy** of the Member State of recognition	manifestly contrary to the **public policy** of the Member State of recognition, taking into account the best interests of the child	n/a	manifestly contrary to the **public policy** of the Member State of recognition, taking into account the best interests of the child
given in **default of appearance** if the person in default 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	n/a	given in **default of appearance** if the person in default 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	n/a	n/a

Decisions in matrimonial matters Article 38	Authentic instruments and agreements in matrimonial matters Article 68(1)	Decisions in parental responsibility matters Article 39	Privileged decisions Article 50	Authentic instruments and agreements in matters of parental responsibility Article 68(2) and (3)
enable that person to arrange for his or her defence unless it is determined that such person has accepted the decision unequivocally		enable that person to arrange for his or her defence unless it is determined that such person has accepted the decision unequivocally		
if the decision is **irreconcilable with a decision** given in proceedings between the same parties in the Member State of recognition;	if it is irreconcilable **with a decision, an authentic instrument or agreement** between the same parties in the Member State of recognition	if and to the extent that the decision is **irreconcilable with a later decision** relating to parental responsibility given in the Member State of enforcement;	if and to the extent that the decision is **irreconcilable with a later decision** relating to parental responsibility given in the Member State of enforcement;	if and to the extent that it is **irreconcilable with a later decision, authentic instrument, or agreement** in matters of parental responsibility given in the Member State of enforcement;
if the decision is **irreconcilable with an earlier decision** given in another Member State or in a non-Member State between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State of recognition;	if it is irreconcilable **with an earlier decision, authentic instrument or agreement** given in another Member State or in a non-Member State between the same parties, provided that the earlier decision, authentic instrument or agreement fulfils the conditions necessary for its	if and to the extent that the decision is **irreconcilable with a later decision** relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later decision fulfils the conditions necessary for its	if and to the extent that the decision is **irreconcilable with a later decision** relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later decision fulfils the conditions necessary for	if and to the extent that it is **irreconcilable with a later decision, authentic instrument or agreement** in matters of parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later decision, authentic instrument or agreement fulfils the conditions necessary for its

Enforcement

Decisions in matrimonial matters Article 38	Authentic instruments and agreements in matrimonial matters Article 68(1)	Decisions in parental responsibility matters Article 39	Privileged decisions Article 50	Authentic instruments and agreements in matters of parental responsibility Article 68(2) and (3)
	recognition in the Member State of recognition	recognition in the Member State of enforcement	its recognition in the Member State of enforcement	recognition in the Member State of enforcement;
n/a	n/a	**upon application by any person** claiming that the decision infringes his or her parental responsibility, if it was given without such person having been given an **opportunity to be heard**	n/a	**upon application by any person** claiming that the authentic instrument or agreement infringes his or her parental responsibility, if the authentic instrument was drawn up or registered, or the agreement was concluded and registered, **without that person having been involved**
n/a	n/a	if the **procedure laid down in Article 82** has not been complied with.	n/a	n/a
n/a	n/a	**may** be refused if the decision was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance	n/a	**may** be refused if the authentic instrument was formally drawn up or registered, or the agreement was registered, without the child who is capable of forming his or her own views having been given an

Enforcement

Decisions in matrimonial matters Article 38	Authentic instruments and agreements in matrimonial matters Article 68(1)	Decisions in parental responsibility matters Article 39	Privileged decisions Article 50	Authentic instruments and agreements in matters of parental responsibility Article 68(2) and (3)
		with Article 21, except where: a) the proceedings only concerned the property of the child and provided that giving such an opportunity was not required in light of the subject matter of the proceedings, or b) there were serious grounds taking into account, in particular, the urgency of the case		opportunity to express his or her views
		Long lasting grave risk (Article 56(6))	**Long lasting grave risk** (Article 56(6))	**Long lasting grave risk** (Article 56(6))

5.5.1.1.2. Grounds for refusal of enforcement of decisions - Article 38, Article 39 and Article 50

These grounds for refusal of enforcement are based on the already existing grounds for refusal of recognition with almost identical content in the Brussels II Regulation as well as in the Brussels IIa Regulation.

Public policy - Article 38(1)(a) and Article 39(1)(a)[265]

This ground for refusal applies only if the recognition of the decision given in the Member State of origin is manifestly contrary to the public policy of the Member State of enforcement. Thus, the public policy exception should be interpreted strictly and be relied on only in exceptional circumstances.

In accordance with the case-law of the CJEU[266], while the Member States in principle remain free to determine, according to their own national concepts, the content of the public policy, the limits of that concept are a matter of interpretation of the Regulation. As stated above, the Regulation prohibits the review of jurisdiction of the court of origin, expressly when relying on the public policy (see Article 69) as well as the review of the decision given in another Member State as to its substance (see Article 71). Therefore, the public policy exception may be relied on only in the case of infringement of a fundamental principle to an unacceptable degree. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State of enforcement or of a right recognised as being fundamental within that legal order. Last but not least, the CJEU limits the recourse to the public policy exception by requiring the party wishing to rely on it to have exhausted any legal remedies available in the Member State of origin, except where exceptional circumstances make this excessively difficult[267].

Resorting to the public policy in relation to decisions in matters of parental responsibility must take into account the best interests of the child (see Article 39(1)(a)). Nevertheless, by doing so, the court or the authority competent for enforcement is not allowed to review the foreign decision as to its substance (see Article 71).

[265] This ground for refusal is not applicable to the recognition and enforcement of privileged decisions.

[266] Case C-455/15, *PPU P supra* note 262, para. 35-36 and Case-386/17, *Liberato supra* note 151, as well as CJEU judgment of 16 July 2015 in Case C-681/13, *Diageo Brands* ECLI:EU:C:2015:471, para. 42.

[267] Case C-681/13, *Diageo Brands supra* note 264, para. 68.

Default of appearance – Article 38(1)(b) and Article 39(1)(b)[268]

This ground for refusal applies only if the decision was given in the Member State of origin in default of appearance by the defendant. If this is the case, the court or the authority competent for enforcement shall assess whether the defendant had been served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to be able to arrange for his or her defence.

If the court of origin appoints a representative *in absentia* where it has not been possible to contact the defendant, this is not tantamount to entering an appearance and the decision is treated as given in default of appearance[269]. The service of the document which instituted the proceedings or of an equivalent document in another Member State shall take place in accordance with the Service of Documents Regulation, and in a third State that is party to the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters in accordance with those rules (see Articles 19(2) and (3))[270]. If the address of the defendant is unknown or the service proves impossible, the court of origin should take all necessary steps to enable the defendant to receive the document instituting the proceedings or an equivalent document in sufficient time to arrange for his or her defence (see Article 19(1)). Nevertheless, a minor irregularity in the service will not suffice to prove that the defendant was not in a position to arrange his or her defence.

This ground for refusal will not be considered if it has been established that the defendant has accepted the decision unequivocally. However, the failure to appeal the decision does not in itself prove unequivocal acceptance. This type of acceptance may be linked to consequent acts of the defendant based on the decision, for example a second marriage or exercise of access rights stemming from the decision.

Irreconcilable decisions - Article 38(1)(c) and (d), Article 39(1)(d) and (e) and Article 50

This ground for refusal should not arise as between Member States if the *lis pendens* rules have been applied correctly (see section 3.4 of Chapter 3 “Parental Responsibility”). Nevertheless, if it happens that a decision of one Member State is irreconcilable with a decision given in proceedings between the same parties in another Member State concerning matrimonial matters, the decision of the Member State of recognition and enforcement will prevail, irrespective of whether

[268] This ground for refusal is not applicable to the recognition and enforcement of privileged decisions.

[269] Case C-215/15, *Gogova supra* note 60.

[270] Other (bilateral) conventions and national law may apply when the service has to take place in a third state.

it was given prior to or after the decision of the Member State of origin (see Article 38(1)(c)).

If the irreconcilability stems from an earlier decision in matrimonial matters emanating from a Member State different to the Member State of recognition and enforcement, or from a non-Member State which is entitled to recognition under the rules in force in the Member State of recognition and enforcement, it is the earlier decision that shall prevail (see Article 38(1)(d)).

If the decision of one Member State concerns parental responsibility, only a later decision relating to the same matter given in the Member State of recognition and enforcement may justify the refusal (see Article 39(1)(d) and Article 50(1)(a)[271]).

On the other hand, the later decision relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child will prevail over an earlier decision on the same matter given in the Member State of origin, when subject to recognition and enforcement in a Member State (see Article 39(1)(d) and Article 50(b)).

The later decision in matters of parental responsibility supersedes an earlier one because in this area of law the decisions do not have *res judicata* effect and are generally liable to alteration in case of changing circumstances insofar as the applicable substantive law governing matters of parental responsibility so provides.

Hearing of any person claiming that the decision infringes his or her parental responsibility - Article 39(1)(c)[272]

This ground for refusal may be raised only by a person who claims that the decision infringes upon his or her parental responsibility, if the decision was given without such person having been given an opportunity to be heard. This person did not have to be a party to the proceedings where the decision was given, but his or her parental responsibility rights must be infringed by the decision (for example a decision for placement of a child in institutional care where one of the parents was not given an opportunity to be heard).

Non-compliance with the procedure laid down in Articles 82 - Article 39(1)(f)

The recourse to this ground for refusal is possible only regarding decisions for placement of a child in a Member State different to the Member State where the decision is given. This placement requires, in the vast majority of cases, the consent of the competent authority of the Member State where the placement will be contemplated. If such a consent was not given prior to

[271] For further details see section 3.5.5 of Chapter 3 “Parental Responsibility” and section 4.4.8 of Chapter 4 “International Child Abduction”.

[272] This ground for refusal is not applicable to the recognition and enforcement of privileged decisions.

the placement, the recognition and enforcement of the decision must be refused.

Hearing of the child - Article 39(2) and Recitals 39 and 57[273]

The recognition and enforcement of decisions concerning parental responsibility may be refused where the child who is capable of forming his or her own views[274] was not given a genuine and effective opportunity to express them[275] in accordance with Article 21 (see Article 39(2)). This provision establishes a possibility but not an obligation to refuse. It is subject to three exceptions presented below at the end of this section.

Article 21(1) of the Regulation establishes a uniform rule requiring courts of the Member States to give, in accordance with national law and procedure, a child who is capable of forming his or her own views a genuine and effective opportunity to express them. The provision of this opportunity depends on the assessment of the court of origin in every single case as to whether the child is capable of forming his or her own views. Any age limits under national law do not preclude the need for this assessment. Once the child is given a genuine and effective opportunity to express his or her own views and the child makes use of this opportunity directly or otherwise, the court of origin has to give due weight to these views according to the child's age and maturity[276] (see Article 21(2)).

The ground for refusal pursuant to Article 39(2) is related only to the establishment of the capability of the child of forming own views and to the provision of genuine and effective opportunity to that chid to express his or her views, as stems from the unified minimum standards set out in Article 21. On the other hand, Article 39(2) does not permit a refusal of recognition and enforcement where the child was given genuine and effective opportunity to express his or her views, but the court of origin may not have attached due weight to those views. Moreover, the recognition and enforcement cannot be refused if the hearing of the child was conducted in violation of fundamental principles of procedure of the Member State in which recognition is sought, as used to be the case pursuant to Article 23(b) of the Brussels IIa Regulation. Thus, any more demanding conditions of the Member State of enforcement do not block the recognition and enforcement. The same is also true for the order public ground for refusal. Furthermore, it should not be possible to refuse recognition and enforcement of a decision on the sole grounds that the court of origin used a different method to hear

[273] This ground for refusal is not applicable to the recognition and enforcement of privileged decisions.

[274] For the assessment of the capability of the child to form his or her own views see section 6.3.1 of Chapter 6.

[275] For the provision of genuine and effective opportunity to the child to express his or her views see section 6.3.2 of Chapter 6.

[276] For the giving of due weight to the views of the child see section 6.3.3 of Chapter 6 "Right of the child to express his or her views" .

the child than the one which a court in the Member State of recognition would use (see Recital 57).

The information concerning the capability of the child to express his or her views is to be stated in the certificate issued in the form set out in Annex III,[277] point 14, in the affirmative or in the negative. If the answer is in the affirmative, then the court has to proceed with filling out point 15. There it must be stated whether the child was given a genuine and effective opportunity to express his or her own views in accordance with Article 21. Where the court of the Member State of origin decides not to give a child who is capable of forming his or her views the opportunity to express them, it should explain the reasons in point 15 of the certificate issued in the form set out in Annex III[278].

If the ground for refusal of Article 39(2) is raised, the courts in the Member State of enforcement may undertake a review based on objective and uniform criteria. The review may assess whether the child was capable of forming views (for example – if the court of origin decided not to hear the child, using the formalistic argument of his or her age). The review may equally assess whether there was a genuine and effective opportunity to express his or her views (for example whether the court of origin took all measures which are appropriate to the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case – see Recital 39).

When reviewing foreign decisions under the aspect of child hearing, the court should essentially refrain from applying national standards and should bear in mind that the Regulation reflects a pro-recognition bias.

Article 39(2) is subject to two exceptions when the court may not refuse recognition or enforcement even if the child was not given an opportunity to be heard. The first concerns a decision related to property of the child, provided that giving the child the opportunity to express his or her views was not required in light of the subject matter of the proceedings (see Article 39(2)(a)). The second exception can emanate from a situation where during the proceedings in the Member State of origin there were serious grounds (taking into account, in particular, the urgency of the case) hindering the court from providing a genuine and effective opportunity for the child to express his or her views (for example, when urgent protective measures are to be adopted).

Last but not least, the hearing of the child may be further excluded in cases involving court settlements (agreements approved by the court– see Recital 14)[279] taking into account

[277] See point 14 of Annex III of Council Regulation (EU) 2019/1111, *supra* note 1.

[278] See point 15 of Annex III of Council Regulation (EU) 2019/1111, *supra* note 1.

[279] Not the "agreements" under Article 2(2)(3) where the recognition or enforcement may be refused if the agreement was registered, without the child who is capable of forming his or her own views having been given an opportunity to express his or her view (see Article 68(3)).

the best interests of the child (see Recital 39). However, the recourse to this possibility should not be applied automatically but exercised on a case-by-case basis.

5.5.1.1.3. Grounds for refusal of enforcement of authentic instruments and agreements – Article 68 and Recital 71

The grounds for refusal of enforcement of authentic instruments and agreements are set out separately in Article 68. Most of them correspond to the grounds for refusal of decisions (see Article 68(1) in conjunction with Article 38, and Article 68(2) in conjunction with Article 39). The explanation above concerning the grounds for refusal may be used accordingly (see section 5.5.1.1.1).

There are several main differences.

- The ground for refusal ensuring the rights of defence in default of appearance of the defendant does not apply, as authentic instruments and agreements require the parties to have come to an agreement with all of them being involved.
- The ground for refusal related to the provision of the child who is capable of forming his or her views being given the genuine and effective opportunity to express them is to be applied in a more flexible way than in the case of decisions. The court deciding on the application for refusal has more room for manoeuvre regarding whether to take this grounds into account. The reason for this is that the authorities in the Member State of origin were not bound by the uniform minimum standards for hearing of the child pursuant to Article 21 when dealing with the authentic instrument or agreement (see Article 68(3)). Even though Article 21 does not apply to the drawing-up of authentic instrument or the registration of agreements, the right of the child to express his or her views continues to apply pursuant to Article 24 of the Charter and in light of Article 12 of the UN Convention on the Rights of the Child as implemented by national law and procedure (see Recital 71). In any case, the fact that the child was not given the opportunity to express his or her views should not automatically be a ground for refusal of recognition and enforcement of authentic instruments and agreements in matters of parental responsibility (see Article 68(3) and Recital 71). The certificate issued in the form set out in Annex IX contains specific fields concerning the capability of the child to form his or her own views (point 10) and states whether he or she was given a genuine and effective opportunity to express his or her views (point 11).
- The cross-border enforcement of an authentic instrument or agreement is not possible if the public authority or other authority which has formally drawn up or registered the document lacked jurisdiction pursuant to Chapter II of the Regulation (see Article 64). In such cases, the certificate in Annex VIII or IX

must not be issued. Nevertheless, the Regulation does not contain a ground for refusal in this regard[280]. The information concerning the jurisdiction should be included in point 2 of the certificate issued in the form set out in Annex VIII and of Annex IX.

- The same applies to the assessment of the "binding legal effect" certified in points 7.5 and 8.4 of Annex VIII and points 12.5 and 13.4 of Annex IX.
- If the public authority or other authority lacks jurisdiction or the authentic instrument or agreement does not have binding legal effect, the appropriate certificate must not be issued. If it is wrongly granted, then the interested party may apply for withdrawal in the Member State of origin (see Article 67(2)). The court or competent authority in this Member State must also act of its own motion if it establishes the lack of jurisdiction after the issuance of the certificate (see Article 67(2).
- The Regulation does not permit a Member State to refuse recognition and enforcement simply on the grounds that the divorce or the arrangement on parental responsibility matters by authentic instrument or agreement is not available under its own domestic law.

5.5.1.1.4. Grounds for refusal of enforcement due to long-lasting grave risk - Article 56(6) and Recital 69

Article 56(6) of the Regulation establishes one new ground for refusal of enforcement of all decisions, authentic instruments and agreements in matters of parental responsibility falling within its scope of application. It functions in conjunction with Article 56(4) permitting suspension of the enforcement (see section 5.4).

The refusal and the suspension of the enforcement may be relied on only in exceptional circumstances. The authority competent for enforcement or the court has to establish that the enforcement would expose the child to a grave risk of physical or psychological harm. The harm may stem from temporary impediments or by virtue of any other significant change of circumstances which have arisen after the decision was given (see Article 56(4)). Examples for temporary impediments or significant change of circumstances are presented above (see section 5.4.3). Where the grave risk is of temporary nature, the enforcement may be suspended. It shall be resumed as soon as the grave risk of physical or psychological harm ceases to exist.

[280] The lack of jurisdiction of the court of origin is not a ground for refusal of recognition and enforcement of decisions either.

Where the grave risk is of a lasting nature, the authority competent for enforcement or the court may refuse the enforcement of the decision. This may happen only upon application. However, before refusing the enforcement under Article 56(6), the authority competent for enforcement or the court shall take appropriate steps to facilitate enforcement in accordance with national law and procedure and the best interests of the child. The implementation of the decision may be ensured with the assistance of relevant professionals, such as social workers or child psychologists. In particular, the authority competent for enforcement or the court should, in accordance with national law and procedure, try to overcome any impediments created by the change of circumstances (see Recital 69).

This new ground for refusal is a departure from *Povse* where the CJEU held while a change of circumstances could have an effect on enforcement of a decision if it were detrimental to the best interests of a child, this was always a matter for the court of origin which, under the Brussels IIa Regulation, has jurisdiction on substance of the matters. Therefore, in *Povse*, the enforcement of a privileged decision could not 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 had to 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 decision. This aspect of Povse is overruled by Article 56(6) of the present Regulation, which permits the change of circumstances that had arisen after the decision was given leading to long-lasting grave risk for the child to be used as a ground for refusal of the enforcement in the Member State of enforcement. This is, however, without prejudice to the issue of jurisdiction to take a new decision on substance due to the change of circumstances.

5.5.1.2. Grounds for refusal under the national law - Article 57 and Recitals 62 and 63

A party challenging the enforcement of a decision given in another Member State may raise, in addition to the grounds for refusal provided for in the Regulation, grounds for refusal available under the law of the Member State of enforcement. This option may be relied on to the extent possible and in accordance with the legal system of the Member State of enforcement within the procedure for enforcement. Recital 63 provides examples for such permissible grounds: formal errors under national law in an act of enforcement or on the assertion that the action required by the decision has already been performed or has become impossible, for instance, in cases of force majeure, serious illness of the person to whom the child is to be handed over, the imprisonment or death of that person, the fact that the Member State to which the child is to be returned has turned into a war zone after the decision was given, or the refusal of enforcement of a decision which under the law of the Member State where enforcement is sought does not have any enforceable content and cannot be adjusted to this effect.

Some of these grounds may only lead to suspension of the enforcement (see section 5.4) while others are of the essence to totally exclude the enforcement (for example – the death of the person to whom the child was to be handed over).

The national grounds may be relied upon only if they are not incompatible with the grounds provided for in the Regulation (see Article 57). In addition, the application of any national grounds for refusal should not have the effect of extending the conditions and modalities of the grounds provided for under the Regulation (see Recital 62). For example, it is not possible to raise national grounds for refusal for example related to the hearing of the child that are different than the one of Article 41 of the Regulation as this matter is harmonised in the Regulation and the specific national ground would be incompatible with it.

5.5.2. Procedure for making an application for refusal

The procedure for making an application for refusal of enforcement is regulated in Articles 59-63. This procedure also applies to the application for a declaration that there are no grounds for refusal of recognition (see Article 30(3)) and to the application for refusal of recognition (see Article 40(1)). It is also relevant for applications for refusal of enforcement of authentic instruments and agreements.

5.5.2.1. Application for refusal of enforcement – Articles 58, 59 and 60

The application for refusal of enforcement based on Article 39 (the classical grounds for refusal)[281] shall be submitted only to the courts. The courts designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[282].. If the application is based on other grounds set out in or permitted by the Regulation (Article 56(6), Article 57 and Article 68) it shall be submitted to the authority or the court depending on the national law. The specific authorities or courts designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[283]. The party challenging the enforcement should, to the extent possible and in accordance with the legal

[281] Article 38 in the case of application for a declaration that there are no grounds for refusal of recognition and to the application for refusal of recognition in matrimonial matters.

[282] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[283] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

system of the Member State of enforcement, be able to raise all these grounds in the same proceeding (see Recital 63). This is relevant, in particular, in Member States where courts are also the authorities responsible for enforcement.

The local jurisdiction is determined by the law of the Member State in which the proceedings are brought (see Article 58(2)). This information is also communicated by each Member State to the European Commission, pursuant to Article 103 and can be found on the e-Justice portal[284].

The procedure is governed by the law of the Member State of enforcement, in so far as it is not covered by uniform rules of the Regulation. The Regulation does not set any restrictions for submissions on behalf of the persons against whom enforcement is sought or the child, at this stage, thus national rules apply. The national law determines, for example, how the application is to be submitted or whether there are procedural time limits. The Regulation determines which documents are to be provided (an authenticated copy of the decision and, where applicable and possible, the appropriate certificate), when a translation or transliteration may be necessary (see Articles 59(3) and (4)) and when the authority competent for enforcement or the court may dispense with the production of the documents (see Article 59(5)). This procedure does not require the applicant to have a postal address in the Member State of enforcement nor the party to have an authorised representative in that Member State except where such a representative is mandatory irrespective of the nationality of the parties (see Article 59(6)).

The authority competent for enforcement or the court should act without undue delay in procedures concerning the application for refusal of enforcement (see Article 60).

5.5.2.2. Challenge or appeal – Article 61 and Article 62

The Regulation provides that either party to the enforcement proceedings may challenge or appeal against a decision on the application for refusal of enforcement (see Article 61(1)). There are no time limits for lodging the challenge or the appeal in the Regulation, thus, this issue is left to the national law. The authority or court deciding on the challenge or appeal are communicated by the Member State of enforcement to the European Commission pursuant to Article 103.

The national law determines if the decision given on the challenge or appeal may be subject to further challenge or appeal. The courts with which the further challenge or appeal is

[284] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

to be lodged designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[285] (see Article 62).

The public authorities designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[286].

5.5.2.3. Stay of proceedings – Article 63

The procedure for refusal of enforcement may be stayed for of one of the following reasons:

- an ordinary appeal against the decision has been lodged in the Member State of origin;
- the time for an ordinary appeal has not yet expired; or
- the person against whom enforcement is sought has applied for the withdrawal, in accordance with Article 48, of a certificate issued pursuant to Article 47.

The procedure is suspended for a period determined by the grounds for suspension. If the time for the ordinary appeal has not yet expired, the authority competent for enforcement or the court may specify the time within which an appeal is to be lodged.

5.6. Jurisprudence of the ECtHR

5.6.1. Failure to take adequate steps to return a child can be a breach of Article 8 of the ECtHR

The Regulation partly harmonises enforcement law and procedures in cross-border scenarios within the EU. Concerning domestic enforcement law and procedures, the ECtHR has consistently ruled that once the authorities of a Member State which is party to the 1980 Hague Convention have found that a child has been wrongfully removed or retained pursuant to the 1980 Hague Convention, they have a duty to make adequate and effective efforts to secure the return of the child. A failure to make such efforts constitutes a violation of Article 8 of the ECHR (right to respect for family life)[287]. Each Member State party to

[285] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[286] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[287] See, for example, *Iglesias Gil and A.U.I. v Spain*, ECtHR Application no. 56673/00, Judgment 29 July 2003, para. 62.

the 1980 Hague Convention must equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the ECHR[288]. This extends to ensuring the exercise of rights of contact as in the cases *Shaw v Hungary*[289] and *Prizzia v Hungary* [290] in which a breach of Article 8 was held to have occurred when the authorities in Hungary had failed to ensure that the applicants could exercise rights of contact with their children.

5.6.2. Importance of speed in the taking and enforcement of decisions

The ECtHR has also emphasised that proceedings relating to the return of children and the decision of parental responsibility, including the enforcement of the final decision where it involves the return of a child, require urgent handling as the passage of time can have irremediable consequences for the relationship between the child and the parent with whom he or she does not live. The adequacy of a measure is therefore to be judged by the swiftness of its implementation[291]. The need for speed and expedition in cases involving children is also because it is in the interests of the child involved that matters relating to his or her future are settled quickly so as to minimise the uncertainty involved, particularly in cases involving the unlawful removal and retention of children[292].

5.6.3. Other than in exceptional circumstances, returning children is not a breach of Article 8 of the ECHR

In a series of cases the ECtHR has held, in general, that returning a child who has been wrongfully removed or retained, under the procedures set out in the Brussels IIa Regulation and the 1980 Hague Convention is not in breach of obligations under the ECHR, in particular Article 8 thereof. In this, the ECtHR has shown itself to be a supporter of the policy of the two instruments, compliance with which it has frequently declared is of importance in Member States party to the ECHR, otherwise those Member States risk breaches of that Convention. The

[288] See the series of cases *Ignaccolo-Zenide v Romania*, ECtHR Application no. 31679/96, Judgement 25 January 2000; *Maire v Portugal*, ECtHR Application no. 48206/99, Judgement 26 June 2003, *PP v Poland*, ECtHR Application no. 8677/03, Judgement 8 January 2008, *Raw v France*, ECtHR Application no. 10131/11, Judgement 7 March 2013 and more recently *Rinau v Lithuania*, ECtHR Application no.10926/09, Judgment 14 January 2020.

[289] *Shaw v Hungary*, ECtHR Application no. 6457/09, Judgment 26 October 2011.

[290] *Prizzia v Hungary*, ECtHR Application no. 20255/12, Judgment 11 June 2013.

[291] See, for example, the cases cited in footnote 286.

[292] See for example *Iosub Caras v Romania*, ECtHR Application no. 7198/04, Judgement 27 July 2006, *Deak v Romania and the UK*, ECtHR Application no. 19055/05, Judgement 3 June 2008 and *Raw v France*, ECtHR *supra* note 286.

ECtHR has in only a small number of cases, and mostly in exceptional circumstances, held that it may be a breach of the ECHR to return a child.

5.6.4. ECtHR cases where no breach of Article 8 was found

The ECtHR has dealt with a number of applications alleging breaches of Articles of the ECHR, through the return of children by holding that no breach had occurred and also by holding the application to be inadmissible. Amongst those cases were the following: *Maumosseau and Washington v France*[293], in which the enforcement of the return of a relatively young child from France to the USA was held not to be in breach of Article 8; *Lipkowski v Germany*[294], where an application to hold that there had been a breach of a number of Articles of the ECHR, including Article 8, where a child who had been removed unlawfully from Australia to Germany had been ordered by a court in Germany applying the 1980 Hague Convention to be returned to Australia, was declared to be inadmissible; and *Povse v Austria*[295] where, similarly to the previous case, an application to the ECtHR to find that there had been a breach of Article 8 of the ECHR, where an order from an Italian court for the return of a child to Italy from Austria (to where she had been wrongfully removed) was enforced by the Austrian authorities, was dismissed. In the case *Raban v Romania*[296], the ECtHR held that there had been no breach of Article 8, where the return of a child was refused on grounds similar to those set out in the *Neulinger* case[297]. More recently, the ECtHR decided along the same lines in the case *Lacombe v. France*[298].

5.6.5. Cases where a breach has been found

The ECtHR has held in a small number of cases that the return of a child after a wrongful removal or retention may constitute a breach of Article 8 of the ECHR but mostly these cases derive from exceptional circumstances[299].

[293] *Maumosseau and Washington v France*, ECtHR Application no. 29388/05, Judgment 6 December 2007.

[294] *Lipkowski* and Mc Cormack *v Germany*, ECtHR Application no. 26755/10, Judgment 18 January 2011.

[295] Povse v Austria, ECtHR Application no. 3890/11, Judgment 18 June 2013.

[296] *Raban v Romania*, ECtHR Application no. 25437/08, Judgment 26 October 2010.

[297] See *Neulinger and Shuruk v Switzerland*, ECtHR Application no. 41615/07, Judgment 6 July 2010.

[298] See *Lacombe v France*, ECtHR Application no. 23941/14, Judgment 10 October 2019.

[299] See *Neulinger and Shuruk v Switzerland*, ECtHR *supra* note 295; *Šneersone and Kampanella v Italy*, ECtHR *supra* note 209; *B v Belgium*, ECtHR Application no.

The basis of the decision by the ECtHR in above cases, notably where a change of circumstances is argued to have occurred between the making of the return order and its execution, is that the courts concerned are obliged to have regard to the best interests of the child in deciding whether to make or execute a return order. There is a risk that if this line of thinking goes too far, it might have the effect of undermining one of the basic principles of both the 1980 Hague Convention and the Regulation, namely that the long-term interests of children should be decided in the courts of the State of their habitual residence and that a wrongful removal and retention should in principle not have the effect of changing that, except in circumstances such as those set out in Article 10 of the Brussels IIa Regulation (Article 9 of the present Regulation)[300].

5.6.6.X v Latvia

In a judgment of the Grand Chamber in *X v Latvia*[301] the ECtHR made an attempt to clarify some of its earlier statements as regards the approach which should be taken in dealing with the relationship between the ECHR and the 1980 Hague Convention, notably as regards the balancing of the interest of the child and the parents where a case involves the exception of the return of a child set out in Article 13(1)(b) of the latter. In particular the ECtHR said that its remarks on this point set out in the Grande Chambre decision in *Neullinger and Shuruk v Switzerland*[302] are not to be interpreted as setting out any principle for the application by the domestic courts of the 1980 Hague Convention.

The ECtHR outlined what, in its view, are the factors which had to be in place to achieve a harmonious interpretation of the ECHR and the 1980 Hague Convention. The requested court must take into account, genuinely, factors which may constitute an exception to the return of the child under the 1980 Hague Convention and take a reasoned decision. The factors should then be evaluated in the light of Article 8 of the ECHR.

In consequence, the domestic courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return and insufficient reasoning in the ruling dismissing such objections would be contrary to the

4320/11, Judgment 10 July 2012, final on 19 November 2012; and *X v Latvia*, ECtHR Application no 27853/09, Judgment 13 December 2011; this latter case was sent to the Grande Chambre and the Judgment there was delivered on 26 November 2013, more recently *O.C.I. and Others v. Romania*, ECtHR Application no. 49450/17, Judgment 21 May 2019 and *Michnea v* Romania, ECtHR Application no. 10395/19, Judgment 7 July 2020.

[300] See section 3.2.5 *supra*.

[301] See *X v Latvia*, ECtHR *supra* note 297

[302] See *Neulinger and Shuruk v Switzerland*, ECtHR *supra* note 295.

requirements of Article 8 of the ECHR and also to the aim and purpose of the 1980 Hague Convention.

The ECtHR then went on to say that, as the Preamble to the 1980 Hague Convention provides for the return of children “to the State of their habitual residence”, the courts must be satisfied that adequate safeguards are convincingly provided in that country, and, in the event of a known risk, that tangible protection measures are put in place.

As regards cases falling under the Brussels IIa Regulation, this latter aspect of this decision will not have major effects, given the terms of Articles 11(4) and 11(6)-(8) of the Brussels IIa Regulation (Article 27(3) and Article 29 of the present Regulation). Courts in the EU are already obliged under Article 11(4) of the Brussels IIa Regulation (Article 27(3) of the present Regulation) to have regard to measures of protection available to a child in respect of whom the exception under Article 13(1)(b) of the 1980 Hague Convention is argued. Furthermore, even where a requested court refuses return on a ground set out in Article 13 of the 1980 Hague Convention, Articles 11(6)-(8) of the Brussels IIa Regulation (Article 29 of the present Regulation only for refusals based on Article 13(1)(b), Article 13(2), or both, of the 1980 Hague Convention) give the last word to the court in the Member State of the habitual residence of the child.

6. Right of the child to express his or her views

6.1. Scope of the Chapter

The Regulation pays special attention to the right of the child to express his or her views, which is a fundamental right[303].

First, courts exercising jurisdiction in parental responsibility matters (see Article 21 and section 3.2 of Chapter 3 "Parental responsibility")[304] and courts deciding on an application for the return of a child pursuant to the 1980 Hague Child Convention (see Article 26 and section 4.3.4 of Chapter 4 "International child abduction") have to provide a child, who is capable of forming his or her own views, with a genuine and effective opportunity to express those views, in accordance with national law and procedure. Where the court decides to hear the child, it is required to give due weight to his or her views in accordance with his or her age and maturity, in particular when assessing the best interests of the child (see Article 21(2) and Recital 39).

Second, the hearing of the child is one of the conditions for issuing the certificate for privileged decisions on access rights and decisions on the substance of custody rights entailing the return of the child (see Article 47(3)(b) and section 3.6.3.6 of Chapter 3 "Parental responsibility") and section 4.4.6.2 of Chapter 4 "International child abduction"). This certificate cannot be challenged in the Member State of enforcement and the court of origin thus has a special duty of care as regards the provision of the child with an opportunity to express his or her views in accordance with Article 21, should the child so wish.

Third, the right of the child to express his or her own views plays a role in the recognition and enforcement of decisions, authentic instruments and agreements. The recognition and enforcement of a decision relating to parental responsibility may be refused if it was given without the child who is capable of forming his or her own views having been given an opportunity to express those views in accordance with Article 21 (see Article 39(2) and section 5.5.1.1.1 of Chapter 5 "Enforcement"). The cross-border circulation of authentic instruments and agreements may also be excluded if the authentic instrument was formally drawn up or registered, or the agreement was registered, without the child who is capable of forming his or her own views having been

[303] Article 24 of the Charter, *supra* note 96 ("The rights of the child"), Article 12 UNCRC 1989, *supra* note 96

[304] Including the courts exercising jurisdiction on the substance of parental responsibility seised following a non-return decision given by the court of the Member State of refuge (see Article 29(6)).

given an opportunity to express those views (see Article 68(3) and section 5.5.1.1.2 of Chapter 5 "Enforcement").

This Chapter focuses on the right of the child to express his or her views when a court exercises jurisdiction in parental responsibility matters and/or when it decides on applications for return under the 1980 Hague Convention. Other aspects of hearing the child are presented in the respective chapters as an integral part of the main issue elaborated therein, i.e., parental responsibility (see sections 3.5.5 and 3.6.3.1 of Chapter 3), international child abduction (see section 4.4.6.2 of Chapter 4) and enforcement (see sections 5.5.1.1.1 and 5.5.1.1.2 of Chapter 5 "Enforcement").

6.2. Legal framework

In the Brussels IIa Regulation, there was no harmonised obligation for the courts of the Member State exercising jurisdiction in parental responsibility matters to provide the child with an opportunity to express his or her own views. The hearing of the child was regulated only in child abduction cases (see Article 11(2) of the Brussels IIa Regulation). Nevertheless, the provision of an opportunity for the child to express his or her views freely, followed by an obligation to take these views into consideration in accordance with the age and maturity of the child, is enshrined in Article 24(1) of the Charter[305]. The provisions of the Charter are addressed to national authorities when they are implementing EU law, such as this Regulation. The Brussels IIa Regulation recognised the fundamental rights and principles of the Charter, in particular, seeking to ensure respect for the rights of the child as set out in Article 24 of the Charter[306] , as established in Recital 33 of the Brussels IIa Regulation, and confirmed by the case-law of the CJEU in several judgments.

The right of the child to express his or her own views is also enshrined in Article 12 of the UN Convention on the Rights of the Child (UNCRC)[307], on which Article 24 of the Charter is based, stating that:

"1. 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.

[305] Article 24(1) of the Charter, *supra* note 96, states: "Children may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity".

[306] Case C-400/10, *McB supra* note 64, para. 60 and Case C-491/10, *PPU Aguirre Zarraga supra* note 210, para. 60-61.

[307] UNCRC 1989, *supra* note 96.

2. 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".

The UNCRC is a Convention to promote and protect the civic, political, economic, social, and cultural rights of children. It has more than one hundred and ninety State Parties and it is the cornerstone of the protection and promotion of human rights for children. A number of its provisions have had a direct influence on the development of legislation and policies involving children, such as the way in which children's rights and interests are to be taken into account. In particular, as set out in Article 3 of UNCRC, 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 a primary consideration.

The United Nations Committee on the Rights of the Child monitors the implementation of the UNCRC and its Optional Protocols by issuing recommendations to its State Parties. The Committee also issues General Comments, which constitute an authoritative interpretation of the content of the provisions of the UNCRC. General Comment Nr. 12 is devoted to the right of the child to be heard (General Comment Nr. 12)[308]. In General Comment Nr. 14 on the right of the child to have his or her best interests taken as a primary consideration (General Comment Nr. 14) [309], the Committee considers that children's rights should be fully integrated into all aspects of procedures affecting children, as a matter of right, principle, as well as procedure.

The Charter and the UNCRC continue to play an important role in the application of the present Regulation (see Recital 39).

The right of the child to express his or her views is also recognised by the Council of Europe. The ECtHR considers the

[308] UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

[309] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html. For the best interests of the child and the right to be heard see para. 43-45.

right of the child to be heard as incorporated in Article 6 and Article 8 of the ECHR[310].

In addition, the guidelines of the Council of Europe on child-friendly justice acknowledge that the right to access to justice and to a fair trial, including the right to be heard, equally apply to children while taking into account their capacity to form their own views[311].

6.3. Uniform standards for the hearing of the child - Articles 21 and 26 and Recital 39

The Regulation introduces uniform rules obliging the courts of the Member States[312], when exercising jurisdiction in parental responsibility matters or when deciding on applications for return under the 1980 Hague Convention, to provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express those views, in accordance with national law and procedure (see Article 21(1), Article 26 and Recital 39). Where the court decides to hear the child, it is required to give due weight to the views of the child in accordance with his or her age and maturity, in particular when assessing the best interests of the child (see Article 21(2) and Recital 39).

Thus, the Regulation harmonises three aspects of the hearing of the child: 1) the obligation of the court to assess the capability of the child to form his or her own views (see section 6.3.1); 2) the provision of a genuine and effective opportunity for the child to express those views (see section 6.3.2) and 3) the obligation to give due weight to them in accordance with the child's age and maturity (see section 6.3.3).

The provision of an opportunity for the child to express his or her views may have different purposes depending on the type and objective of the procedure. In a proceeding concerning custody rights, the objective is usually to assist in finding the most suitable environment in which the child should reside. In a case of child abduction, the purpose is often to ascertain if the child objects to the return, the nature of and reason(s) for the child's objections, and to determine whether, and if so in what

[310] See, for example *NTS and Others v Georgia*, ECtHR Application no 71776/12, Judgment 2 February 2016, *Iglesias Casarubios and Cantalapiedra Iglesias v Spain*, ECtHR Application no. 23298/12, Judgment 11 October 2016.

[311] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, https://rm.coe.int/16804b2cf3

[312] For the meaning of "court" see section 3.1.3.1 of Chapter 3 "Parental responsibility". For public authorities or other authorities see Recital 71.

way, the child may be protected from a grave risk (see Article 13(1)(b) and 13(2) of the 1980 Hague Convention).

6.3.1. Assessment of the capability of the child to form his or her own views - – Article 21(1) and Recital 39

The Regulation imposes on the courts of the Member States the obligation to establish whether the child is capable of forming his or her own views without conditioning this formalistically on the age or maturity of the child (see Article 21(1)). The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views[313]. The views of young children may be expressed by non-verbal forms of communication including play, body language, facial expressions, drawing and painting[314]. The age and maturity are relevant when the court has to consider the weight of the views of the child in the decision-making process (see Article 21(2)). The assessment of the capability of the child does not depend either on his or her request to be heard or on the request of the parents.

However, the Regulation does not modify the applicable national law and procedures on the question of how to establish the capability of the child to form his or her own views (see Recital 39 and section 6.4). Courts in the Member States develop their own techniques and strategies. Some courts do so directly; others commission special experts, such as psychologists, who then report back to the court. Whichever technique is deployed, it is a matter for the court itself to decide whether or not the child is capable of forming his or her own views. In doing so, the court is not allowed to presume that the child is incapable of expressing his or her own views[315].

[313] See para 54 of UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html

[314] See para 21 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

[315] The Member States should presume that a child has the capacity to form his or her own views and recognize that he or she has the right to express them; it is not up to the child to first prove her or his capacity, see para 20 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

Similarly, the guidelines of the Council of Europe on child-friendly justice (p. 28) specify that the right of children to be heard should be respected in all matters affecting them. Children should at least be heard when they are assessed to have a sufficient understanding of the matters in question. The decision to hear a child should not only be based on the age of the child. On the contrary, a child should be provided with all necessary information on how to exercise their right to be heard. When a child takes the initiative to be heard, their views should be heard and listened to, unless this is not in the child's best interests. Decisions not to follow the child's views should be duly reasoned.

Whether the child was capable of expressing his or her views is to be stated in the certificate issued using the form set out in Annex III[316], point 14, Annex IV[317], point 15, Annex V[318], point 12 and Annex VI[319], point 12, in the affirmative or in the negative. In a case of an authentic instrument or agreement the information is to be included in point 10 of Annex IX[320]. This information has relevance for the authorities of the Member State of recognition and enforcement when assessing whether to recognise or enforce a decision given without the child having been given an opportunity to be heard (see Article 39(2) or 68(3)).

6.3.2. Provision of genuine and effective opportunity to express views – Article 21(1) and Recitals 39 and 53

Once the court establishes that a child is capable of forming his or her own views, it must provide this child with a genuine and effective opportunity to express his or her views, either directly, through a representative or an appropriate body[321]. The representative can be the parent (but not when there is a risk of conflict of interests), a lawyer, or another person (e.g., a social worker) with sufficient knowledge on the proceedings and experience in working with children. In such cases, caution must be exercised to ensure that the child's views are correctly transmitted to the court.

All appropriate legal tools must be made available for the child to express his or her views freely. Thus, the court of the Member State concerned is required to take all measures which are appropriate for the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case. The court should, in so far as possible and always taking into consideration the best interests of the child, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by the Taking of Evidence Regulation (see Recital 39 and CJEU in *Aguirre Zarraga*[322]). The reference to the Taking of Evidence Regulation[323] in Recital 39 is intended to clarify that the hearing

[316] See Annex III of Council Regulation (EU) 2019/1111, *supra* note 1.

[317] See point 14 of Annex IV of Council Regulation (EU) 2019/1111, *supra* note 1.

[318] See point 15 Annex V of Council Regulation (EU) 2019/1111, *supra* note 1.

[319] See point 12 of Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

[320] See point 10 of Annex IX of Council Regulation (EU) 2019/1111, *supra* note 1.

[321] Wherever possible, the child must be given the opportunity to be directly heard in the proceedings, see paras. 35, 36, 42, 43 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

[322] Case C-491/10, *PPU Aguirre Zarraga supra* note 210, para. 67.

[323] The reference in the recital is to Council Regulation (EC) No 1206/2001 *supra* note 211, but it was repealed and replaced by the Taking of Evidence Regulation (Regulation 2020/1783).

of the child falls within its scope for the purposes of this Regulation, irrespective of the national classification of the hearing as evidence, or another procedural institute. In addition, where it is not possible to hear a child in person, and where the technical means are available, the court might consider holding a hearing through videoconference or by means of any other communication technology[324] unless, on account of the particular circumstances of the case, the use of such technology would not be appropriate for the fair conduct of the proceedings (see Recital 53).

The recognition and enforcement of a decision in matters of parental responsibility may be refused if it was given without providing a child capable of forming own views with genuine and effective opportunity to express his or her views whether directly or through a representative or an appropriate body (see Article 39(2) and section 5.5.1.1.1 of Section 5 "Enforcement"). The court of origin provides the information whether the child was provided with this genuine and effective opportunity in point 15 of Annex III[325], point 16 of Annex IV[326], point 13 of Annex V[327] and point 13[328] of Annex VI. Where the court of the Member State of origin decides not to give a child who is capable of forming his or her views the opportunity to express them, it should explain the reasons in the same point of Annex III and Annex IV[329]. In the case of privileged decisions, the court cannot, in such circumstances, issue the certificate set out in Annex V and VI and should use Annex III (see point 13 of Annex V and VI). In the case of authentic instruments or agreements the information is to be included in point 11 of Annex IX[330].

6.3.3. Giving due weight to the views of the child – Article 21(2)

If the child makes use of the opportunity to express freely his or her views directly or through a representative or an appropriate body, the court of the Member State shall give due weight to these views in accordance with his or her age and maturity. The consideration of the views of the child is of particular importance when assessing his or her best interests (see Recital 39)[331]. Any decision that does not take into account the child's views or does not give their views due weight according to their age and

[324] See, on this point also COM(2021) 759 final *supra* note 212.

[325] See point 15 of Annex III of Council Regulation (EU) 2019/1111, *supra* note 1.

[326] See point 16 of Annex IV of Council Regulation (EU) 2019/1111, *supra* note 1.

[327] See point 13 Annex V of Council Regulation (EU) 2019/1111, *supra* note 1.

[328] See point 13 of Annex VI of Council Regulation (EU) 2019/1111, *supra* note 1.

[329] See point 15 of Annex III and point 16 of Annex IV of Council Regulation (EU) 2019/1111, *supra* note 1.

[330] See point 11 of Annex IX of Council Regulation (EU) 2019/1111, *supra* note 1.

[331] On the best interests of the child, see UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html.

maturity, does not respect the possibility for the child to influence the determination of their best interests[332].

The obligation to give due weight means that it is not sufficient merely to listen to the child; in addition, the views of the child must be taken into consideration. The reasoning of the court in this regard should be part of the decision, in particular when the decision does not follow the child's views.

The court must evaluate the views of the child having regard to the particular circumstances of each case and of each individual child, as the level of children's development of the same age may differ[333].

In any case, the obligation of the court to give due weight to the child's views does not mean that the court is bound by the wishes of the child when deciding on the subject matter, as decisions need to be taken according to the best interests of the child.

6.4. National rules for the hearing of the child

The Regulation does not create an entirely harmonised procedure for the hearing of the child in Member States. It leaves the question of who will hear the child and how the child is to be heard to the national law and procedure of the Member State[334]. Consequently, the Regulation does not set out whether the child should be heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom or in another place or through other means (see Recital 39). National law is also applicable to the provision of information to the child, pursuant to Article 13(1) of the UNCRC[335].

In general, listening to the child needs to be carried out in a manner which takes account of the child's age and maturity. Assessing the views of all children should be done with expertise and care and in a manner compatible with the age and

[332] The fact that the child is very young or in a vulnerable situation should not reduce the weight given to the child's views in determining his or her best interests, see para 53 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

[333] See para 54 of UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html

[334] See Fundamental Rights Report 2020 of the European Union Fundamental Rights Agency (FRA) at https://fra.europa.eu/en/publication/2020/fundamental-rights-report-2020.

[335] Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms, see para 34 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

maturity of the child. Assessing the views of younger children needs to take into account their capability to form views from the youngest age, including through non-verbal methods[336].

It is not necessary for the child's views to be heard at a court hearing, but they may be otherwise obtained by a competent authority according to national laws. For instance, in certain Member States, the hearing of the child is done by a social worker who presents a report to the court indicating the wishes and feelings of the child. If the hearing takes place in court, the judge should seek to organise the questioning to take account of the nature of the case, the maturity of the child and other circumstances of the case. In many courts, this is done by setting up an informal arrangement whereby the child is heard in a room other than the court room or even outside the court building (for example in a park or on the beach). Whatever the situation, it is important to enable the child to express his or her views in confidence[337].

Thus, the methods of the hearing of the child are not unified but are subject to the common standards introduced by Article 21 of the Regulation. The same is true for the minimum age excluding the possibility of the child to express his or her views in some legal systems. The Regulation does not set out an age limit but requires the courts to assess, irrespectively of the age of the child, whether he or she is capable of forming his or her own views.

Example:

Under Bulgarian law, the child is to be heard in all judicial proceedings affecting his or her rights, provided he or she has reached the age of 10[338], unless this proves harmful to his or her interests. The hearing of a child who at the time of the proceedings is under 10, is optional and is to be assessed by the court in accordance with his or her maturity. However, when applying the Regulation, Article 21 provides that the age and maturity of the child are no longer relevant to the question of whether the child should be given the opportunity to

[336] See para 21 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

[337] A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate, see para 34 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

[338] Para 21 of the UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html discourages States parties to the UNCRC from introducing age limits either in law or in practice which would restrict the child's right to be heard. Some Member States used the Regulation to reform their national law by repealing existing age limits (for example Estonia).

express his or her views. The Bulgarian court must thus make a factual assessment in every single case as to whether the child is capable of forming his or her own views. Where this is the case, the court must provide this child with a genuine and effective opportunity to express those views. It must use all means available under Bulgarian law and any specific instruments of international judicial cooperation, including, when appropriate, the Taking of Evidence Regulation, or to consider holding a hearing through videoconference or by means of any other communication technology. The questions of "who" will hear the child (a judge or an expert), "how" (directly or through a representative) and "where" (in the court room or in another place) are regulated by the national law. Once the child exercises his or her right to express his or her views, the court shall give due weight to these views in accordance with his or her age and maturity, in particular when assessing the best interests of the child.

6.5. Exception to the duty to hear the child – Article 39(2) and Recitals 39 and 71

While remaining a right of the child, his or her hearing does not constitute an absolute obligation but must be assessed taking into account the best interests of the child (see Recital 39)[339]. The preamble to the Regulation provides for an example of a situation where the hearing of the child may be omitted: in the case of an agreement between the parties concerning parental responsibility matters and/or child abduction (see Recital 39). However, the court still retains the discretion to provide the child with an opportunity to express his or her views, if this is required for the consideration of the best interests of the child. Furthermore, as always, the child is free to decide whether or not to exercise his or her right to express their views. It must also be pointed out that this has no direct bearing on the possibility of refusing recognition or enforcement of such a decision in another Member State if the authorities of that Member State do not accept the reasoning behind the absence of hearing of the child.

[339] For example, the UN Committee on the Rights of the Child emphasizes that due to the risk of trauma, a child should not be interviewed more often than necessary, in particular when harmful events are explored, see para 24 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

Right of the child to express his or her views

Two exceptions to the duty to hear the child where the absence of hearing may not be a reason for the refusal of recognition and enforcement stem from Article 39(2). This provision contains the grounds for refusal of recognition and enforcement of decisions in matters of parental responsibility linked to the right of the child to express his or her views (see section 5.5.1.1.1 of Section 5 "Enforcement"). The first exception concerns proceedings related only to the property of the child, provided that giving an opportunity to the child to express his or her own views is not required in light of the subject matter of the proceedings. The second exception refers to the existence of serious grounds, to be established taking into account, in particular, the urgency of the situation, (for example when ordering provisional, including protective, measures (see section 3.1.1.5 of Chapter 3 "Parental responsibility")[340].

If the court of the Member State decides not to hear a child who is capable of forming his or her own views, it should state the underlying reasons as specified in:

- point 15 of Annex III[341] concerning decisions in matters of parental responsibility;
- point 16 of Annex IV concerning decisions ordering the return of a child to another Member State pursuant to the 1980 Hague Convention and any provisional, including protective, measures taken in accordance with Article 27(5) of the regulation accompanying them;
- point 10 of Annex IX[342] in the case of authentic instruments or agreements.

In the case of the privileged decisions the court cannot issue the certificate set out in Annex V and VI in these circumstances and should use Annex III instead (see point 13 of Annex V and VI).

All exceptions to the duty to hear the child should be interpreted very restrictively. In particular, it should be borne in mind that the rights of the child are very significant in relation to proceedings affecting the child, and that generally decisions about the future of a child and his or her relationships with parents and others are crucial for ensuring the best interests of the child.

[340] However, these exceptions are not absolute. The court may provide the child with an opportunity to express his or her views, if this is required for the consideration of the best interests of the child, for example when the outcome of the proceedings will have great impact on the life of the child, see para 30 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html.

[341] See point 15 of Annex III of Annex IX of Council Regulation (EU) 2019/1111, *supra* note 1.

[342] See point 10 of Annex IX of Council Regulation (EU) 2019/1111, *supra* note 1.

6.6. Training in taking the views of the child

Whether the hearing of the child is carried out by a judge, an expert, psychologist, social worker or other official, it is of the essence that that person receives adequate training, for instance on how best to communicate with children[343]. Whoever hears the views needs to be aware of the risk that parents seek to influence and put pressure on the child. When carried out properly, and with appropriate discretion, the hearing may enable the child to express his or her own wishes.

[343] See para 36 of UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html

7. Cooperation in matters of parental responsibility

Chapters V and VI of the Regulation lay down rules relating to the administrative and/or judicial cooperation between the Member States in matters of parental responsibility[344]. This cooperation implements the objectives of the Regulation to ensure the free movement of persons and access to justice. The Regulation focuses mainly on cooperation with the involvement of the Central Authorities (requesting and requested Central Authority). However, it pays special attention to direct judicial cooperation and communication. In general, the Regulation extends and clarifies the duties of the Central Authorities[345] and the ways in which the courts can cooperate in comparison to the Brussels IIa Regulation.

The provisions of the Regulation on cooperation in matters of parental responsibility do not apply to the processing of return applications under the 1980 Hague Convention which, in accordance with Article 19 of that Convention and the established case-law of the CJEU, are not proceedings on the substance of parental responsibility (see Recital 73 and *CvM*[346]). The Child Abduction Central Authorities and the courts, however, may utilise the provisions on cooperation when the Regulation complements the 1980 Hague Convention (for example when the court of the Member State of refuge has to assess if adequate arrangements have been made to secure the protection of the child after his or her return (see Article 27(3)), or where this court takes provisional, including protective, measures in order to protect the child from the grave risk referred to in Article 13(1)(b) of the 1980 Hague Convention (see Article 27(5)).

[344] Council Regulation (EU) 2019/1111, *supra* note 1does not contain provisions on administrative or judicial cooperation in matrimonial matters. Cooperation in abduction cases is governed primarily by the HCCH 1980 Child Abduction Convention, *supra* note 100.

[345] With the intention to harmonize its provisions in view of the structure of HCCH 1996 Child Protection Convention, *supra* note 55.

[346] Case C-376/14, *PPU CvM supra* note 106, para. 40.

7.1. Central Authorities and the European Judicial Network in civil and commercial matters (EJN-civil)

7.1.1. Central Authorities – General introduction – Articles 76 and 83 and Recitals 72, 74

The Central Authorities play a vital role in the application of the Regulation with respect to parental responsibility matters. Central Authorities assist courts and competent authorities, and also in certain cases, the holders of parental responsibility in cross-border procedures on matters of parental responsibility, and they cooperate both in general matters and in specific cases, including for the purposes of promoting the amicable resolution of family disputes (see Recital 74 and section 7.2 and 7.3).

The Member States must designate at least one Central Authority (see Article 76)[347]. The ideal situation is that the designated authorities coincide with the Central Authorities designated under the 1980[348] and the 1996[349] Hague Conventions (see Recital 72). This could create synergies and allow the authorities to benefit from the experience they have acquired in managing other cases under the 1980 and 1996 Hague Conventions.

The assistance provided by the Central Authorities pursuant to the Regulation is free of charge (see Article 83(1)). Each Central Authority shall bear its own costs in applying the Regulation (see Article 83(2)). Nevertheless, other authorities may still claim costs even where Central Authorities are facilitating the communication and cooperation, for example costs for court fees, supervised contact with the child or for an expert opinion of a professional psychologist. The translation costs are usually not covered by the Central Authorities but by the requesting party. However, the Central Authorities may informally describe the nature and the content of the request as well as in general the content of the forwarded documents in order to enhance and speed up cooperation.

[347] The list of Central Authorities under the Regulation is available at https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast

[348] The list of Central Authorities under the HCCH 1980 Child Abduction Convention, *supra* note 100, is available at https://www.hcch.net/en/instruments/conventions/authorities1/?cid=24

[349] The list of authorities under the HCCH 1996 Child Protection Convention, *supra* note 55, is available at https://www.hcch.net/en/instruments/conventions/authorities1/?cid=70

Member States should ensure that Central Authorities have adequate financial and human resources to enable them to carry out the tasks assigned to them under this Regulation (see Recital 72). The extended duties of the Central Authorities pursuant to the Regulation may require additional funding and staff. Thus, the Member States are encouraged to secure these in order to ensure the smooth and effective application of the Regulation.

Alongside their everyday work, the personnel of the Central Authorities should receive adequate training as regards the functioning of the Regulation and also preferably the background and functioning of the 1980 and 1996 Hague Conventions, as well as other relevant family law instruments. Language training is also very valuable, as is joint training with the judiciary, lawyers and others involved in the functioning of the Regulation and the 1980 and 1996 Hague Conventions.

The use of modern technologies is highly beneficial in speeding up the management of cases and should be encouraged and funded wherever possible. This is of special importance bearing in mind the Proposal for a Regulation on Digitalisation of Judicial Cooperation and Access to Justice in Cross-Border Civil, Commercial and Criminal Matters, and Amending Certain Acts in the Field of Judicial Cooperation[350].

7.1.2.EJN-civil – Article 77 and Article 84 and Recital 86

Central Authorities are members of EJN-civil[351].

The EJN-civil consists of contact points designated by the Member States, central bodies, Central Authorities as well as liaison magistrates, any other appropriate judicial or administrative authority with responsibilities for judicial cooperation in civil and commercial matters, and professional associations representing, at national level in the Member States, legal practitioners directly involved in the application of the Regulation.

The contact points may receive requests from contact points of other Member States, or from the local competent authorities in their own Member State (for example courts and Central Authorities). Among others, they seek solutions to difficulties that arise from a request for judicial cooperation (for example as regards service of documents or taking of evidence). They also

[350] See, on this point Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM/2021/759 final.

[351] See, on this point Article 2(1)(a) of the Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC) at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02001D0470-20110101. The information as regards the EJN-civil is available at: European e-Justice Portal.

handle requests on foreign law or on identifying the competent authority in a cross-border procedure. They assist in overcoming practical difficulties in cross-border situations. Finally, they publish information on their national law through the factsheets of the e-Justice Portal.

There are some Member States that have liaison magistrates[352] and, furthermore, some Member States have appointed family judges as "other judicial authority who assist in the functioning of the Regulation. This good practice could lead to better and more effective liaison between judges and the Central Authorities as well as between judges themselves (see Article 86 and section 7.4), and thus contribute to a speedier resolution of cases of parental responsibility under the Regulation. In parallel, the HCCH has established the international Hague Network of Judges (IHNJ) composed of judges responsible for liaising with each other in cross-border abduction cases[353].

The EJN-civil provides support to the Central Authorities and makes them a key player in cooperation in matters of parental responsibility.

The EJN-civil establishes and updates free of charge information sheets on EU and national law and procedures, in all EU languages. They are regularly updated by the national authorities[354]. The Regulation stipulates that in order to facilitate the application of the Regulation, Central Authorities shall meet regularly. The meetings of Central Authorities are organized by the EJN Secretariat (the European Commission) within the framework of the EJN-civil (see Article 84(2)). This does not preclude other meetings of the Central Authorities from being organised (see Recital 86).

7.2. Tasks of the Central Authorities – Articles 77 and 78

The Central Authorities perform general tasks (see section 7.2.1) and specific tasks (see section 7.2.2).

7.2.1.General tasks -Article 77

The Central Authorities communicate information on national law, procedures, and services in matters of parental responsibility (see section 7.2.1.1), undertake measures for improvement of the application of the Regulation (see section 7.2.1.2) and cooperate and promote cooperation among the

[352] See, on this point Article 2(1)(c) of the Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC), *supra* note 350.

[353] The International Hague Network of Judges (IHNJ)

[354] These information sheets are available at: European e-Justice Portal, Information on national law (information sheets)

competent authorities in their Member States, in order to achieve the purposes of the Regulation (see section 7.2.1.3).

7.2.1.1. Provision of information on national law, procedures, and services

The Central Authorities collect and pass on information regarding the content of their laws and procedures together with the relevant information concerning the proper interpretation of the national provisions in matters of parental responsibility, if needed. The Regulation, unlike the Brussels IIa Regulation, expressly includes the duty of the Central Authorities to also provide information about different services available in matters of parental responsibility.

The information usually relates to the legal provisions on parental responsibility, including the rights and responsibilities of the holders of the parental responsibility, the existing provisional, including protective measures, the possible adequate arrangements, institutional or foster care, procedural issues such as seising of court, timeframes, possible appeals, the occurrence of the binding legal effect or of the enforceability of decision, and details of the enforcement. The Central Authority also directs the competent authorities within its Member State by provision of information.

Lot of information on national law and procedure is already available at the e-Justice portal (so called “information sheets”) [355]. This portal should be consulted before requesting the Central Authority of the other Member State.

7.2.1.2. Measures improving the application of the Regulation

The Central Authorities are empowered to take measures that they consider appropriate for improving the application of the Regulation in their Member States. They can do this internally via initiatives for legislative changes, sharing of information materials, training of judges, child protection authorities and other practitioners. They can also work within the EJN-civil by drafting guides, discussing the newest case-law of the CJEU, and raising challenging issues that need to be discussed in order to establish best practices for application of the Regulation within the Member State, as well as to get involved in the resolving of ongoing cases.

[355] European e-Justice Portal, Information on national law (information sheets)

7.2.1.3. Cooperation

The last general task of the Central Authorities is to cooperate and to promote cooperation among the competent authorities in their Member States, including by setting up national networks. The Central Authority may rely on the EJN-civil in order to enhance cooperation with the Central Authorities of the other Member States. Central Authorities may request the assistance of the EJN contact point in case of disagreement or particular difficult with another Central Authority. At the EJN-civil meetings the Central Authority may raise general observations or share specific questions or experience.

The Central Authority may work to improve the internal cooperation between all competent authorities (for example judges, child protection authorities, bailiffs, attorneys) involved in matters of parental responsibility.

7.2.2. Specific tasks - Articles 79, 80, 81 and 82 and Recitals 78 and 79

The specific tasks of the Central Authorities are listed in Article 79 while some of the specific tasks are elaborated further in Articles 80, 81 and 82. The Central Authorities do not have to carry out these duties themselves, but may act through courts, competent authorities or other bodies depending on the distribution of responsibilities under the national law.

7.2.2.1. List of specific tasks

The requested Central Authorities shall, acting directly or through courts, competent authorities or other bodies, take all appropriate steps to:

- **provide assistance**, in accordance with national law and procedure, in **discovering the whereabouts of a child.** In order to request such assistance the Regulation sets out two conditions: it must appear that the child may be present within the territory of the requested Member State and the information must be necessary for carrying out an application or request under the Regulation (see Recital 78);
- **collect and exchange information** relevant in procedures in matters of parental responsibility under **Article 80** (see section 7.2.3);
- **provide information and assistance to holders of parental responsibility** seeking the recognition and enforcement of decisions in the territory of the requested Central Authority. This is permitted in particular regarding decisions concerning rights of access and the return of the child, including, where necessary, information about how to obtain legal aid;
- **facilitate communication between courts,** competent authorities and other bodies involved, in particular for the application of **Article 81 on the implementation of decisions** in matters of parental responsibility in another Member State (see section 7.2.4);

- **facilitate communication between courts**, where necessary, in particular for the application of **Articles 12** (Transfer of jurisdiction to a court of another Member State), **13** (Request for transfer of jurisdiction by a court of a Member State not having jurisdiction), **15** (Provisional, including protective, measures in urgent cases**,** in particular where they are related to international child abduction and aimed at protecting the child from the grave risk referred to in Article 13(1)(b) of the 1980 Hague Convention (see Recital 79)) and **20** (*Lis pendens* and dependent actions). To this effect, provision of information enabling further direct communication may be sufficient in some cases, for example providing contact details of child welfare authorities, network judges or the competent court (see Recital 79);
- provide such **information and assistance** as is needed by courts and competent authorities to apply **Article 82 on placement** of a child in another Member State (see section 7.3);
- **facilitate agreement** between holders of parental responsibility through mediation or other means of alternative dispute resolution and facilitate cross-border cooperation to this end (see section 7.2.5).

7.2.2.2. Who can request services of the Central Authority for what action and how?

Who can request the services of the Central Authority?	For what action?
The Central Authority of another Member State	Cooperation in individual cases

Cooperation in matters of parental responsibility

A court or a competent authority[356]	Requests under Chapter V on cooperation
Holders of parental responsibility	Information and assistance with recognition and enforcement of decisions; Facilitation of agreement between holders of parental responsibility through mediation or other means of alternative dispute resolution, and facilitation of cross-border cooperation to this end; Requesting courts or competent authorities in the Member State of the Central Authority to consider the need to take measures for the protection of the person or property of the child.

In principle, the requests are to be made through the Central Authority of the Member State of the requesting court or competent authority or of the applicant's habitual residence (see Article 78(2) and Recital 75). Only in urgent cases may the request be lodged directly with the requested Member State (see Article 78(3))[357]. An example of an urgent case permitting direct initial contact with the court or competent authority of the requested Member State is a request to the competent authority of another Member State to consider the need to take measures for the protection of the child where the child is presumed to be at imminent risk.

The obligation to proceed through Central Authority channels should only be mandatory for initial requests; any subsequent communication with the court, competent authority or applicant might also take place directly (see Recital 76).

Another option for the Member State is to enter or maintain existing agreements or arrangements with Central Authorities or

[356] Authorities with competence under the national law to request information in matters of parental responsibility.

[357] In any case the applications for return under the 1980 Hague Convention can be lodged directly with the Hague Central Authority of the Member State of refuge by the applicant (see Article 8 of the HCCH 1980 Child Abduction Convention, *supra* note 100).

competent authorities of one or more other Member States, allowing direct communications in their mutual relations (see Article 78(4)). Competent authorities should inform their Central Authorities about such agreements or arrangements (see Recital 77). The Member States are free to determine the authorities parties to these agreements, whether they are general or specific, long term or ad hoc.

The channeling of the requests though the requesting Member State pursuant to Article 78 of the Regulation does not preclude:

- the direct cooperation and communication between courts;
- the direct application to the courts of another Member State by any holder of parental responsibility under the applicable procedural rules of that Member State.

In any case, the provisions of the Regulation on the specific tasks of the Central Authorities and on cooperation on collecting and exchanging information do not impose an obligation on a Central Authority to exercise powers that can be exercised only by judicial authorities under the law of the requested Member State.

7.2.3. Cooperation on collecting and exchanging information relevant in procedures in matters of parental responsibility – Article 80

Article 80 in conjunction with Article 79(b) provides the legal grounds for the Central Authorities to exercise competence with regard to the collection and exchange of information relevant in procedures in matters of parental responsibility.

The relevant Central Authorities are those of the Member State where the child is or was habitually resident or present. They act upon a request made by the Central Authority of another Member State with supporting reasons (see Article 78(3)). The request should contain, in particular, a description of the procedures for which the information is needed and the factual situation that gave rise to those procedures (see Recital 81). It should also clearly state who is requesting the information and to whom the information relates.

The request and any additional documents shall be accompanied by a translation into the official language of the requested Member State or, where there are several official languages in that Member State, into the official language or one of the official languages of the place where the request is to be carried out, or any other language that the requested Member State expressly accepts (see Articles 80(3) and 103).

The other languages accepted by the Member States can be found on the e-Justice Portal[358].

The powers of the Central Authorities may be exercised directly or indirectly through courts, competent authorities, or other bodies. It is up to each Member State to decide how to distribute these powers internally. Nevertheless, it is the Central Authority of the requested Member State that shall be the receiving authority for the requests.

The information collected in the framework of these tasks must be transmitted to the requesting Central Authority no later than three months following the receipt of the request, except where exceptional circumstances make this impossible (see Article 80(4)). This should include the obligation of the competent national authority to provide the information to the requested Central Authority in such time as to enable it to comply with that timeframe or explain why it cannot be provided. Nonetheless, all competent authorities involved should strive to provide the reply as quickly as possible, and well within the timeframe of three months (see Recital 85).

The channeling of the information though the Central Authority does not exclude the possibility of the courts communicating directly based on Article 86. On the contrary, the access to direct communication is not a ground for the Central Authority not to execute a request originating from a court of another Member State.

Thus, a requesting court or competent authority should have the discretion to choose freely between the different channels available to it for obtaining the necessary information (see Recital 80).

The Central Authorities are given under Article 80(1) and (2) four different tasks.

7.2.3.1. Provision of report

According to Article 80(1)(a), the Central Authority shall provide or draw up a report on:

- the situation of the child (for example on the social situation of the child, mental and physical wellbeing, or presenting the views of the child);
- ongoing procedures in matters of parental responsibility (for example court proceedings on the substance of the rights of custody or on access; provisional, including protective measures; other child protection proceedings that could be of relevance; the state of the procedure, *lis pendens*)[359];

[358] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[359] Case C-296/10, *PPU Purrucker supra* note 151, para. 81.

- decisions taken in matters of parental responsibility for the child (of any instances and as to the substance or on provisional, including protective measures, including where the court decides that it does not have jurisdiction[360]).

The Central Authority may provide a report that is already drawn up for a specific procedure or prepare a new one. Usually, the Central Authorities do not draft a report themselves, but request it from other competent authorities – for example the child protection authorities or courts. Those authorities shall act without undue delay.

7.2.3.2. Provision of any other relevant information

According to Article 80(1)(b) the Central Authorities shall provide also any other information relevant in procedures in matters of parental responsibility in the requesting Member State, in particular regarding the situation of a parent, a relative or other person who may be suitable to care for the child, if the situation of the child so requires. Another example could be the discovering of the address of the parent in order to ensure the access to justice.

This is especially important if the court is deciding on custody, guardianship or access rights with applicants from other Member States. The court may need to collect information as regards the applicants and may request the Central Authority of the other Member State to collect the information needed under Article 80(1)(1)(b). Another important scenario would be a procedure for placement of children in institutional care in another Member State (see section 7.3).

7.2.3.3. Requesting measures for protection of the person or property of the child

Article 80(1)(c) of the Regulation enables the Central Authority to request the court or competent authority of its Member State to consider the need to take measures for the protection of the person or property of the child. This possibility for the Central Authority may be particularly relevant where the court of another Member State has taken provisional, including protective, measures pursuant to Article 15 and has informed the Central Authority of the Member State of the court that has jurisdiction as to the substance of the matters relating to the imposed measures (see Article 15(2)). This initiative of the Central Authority may enable the court of its Member State to take the

[360] Case C-523/07, *A supra* note 66, para. 70.

subsequent measures it considers appropriate (see Article 15(3)).

Example:

A child with habitual residence Portugal travels with a parent to Italy where the parent has a (mental) disease episode. The parent is hospitalised on a short-term basis and the child is taken under urgent care based on a decision imposing provisional, including protective, measures. The parent leaves the hospital, takes the child, and returns home. The Italian court may inform its Central Authority of the decision taken, and this Central Authority may submit the request to the Central Authority of Portugal with the aim for the Portuguese courts to take any subsequent measures it considers appropriate in order to monitor the parent's wellbeing and assess the best interests of the child.

7.2.3.4. Facilitating the communication between courts where the child is exposed to a serious risk

Article 80(2) of the Regulation envisages one further role for the Central Authority - to mediate communication between courts and competent authorities in cases where the child is exposed to serious danger. In such a situation, the court or competent authority contemplating or having taken measures for the protection of the child, if it is aware that the child's residence has changed to, or that the child is present in, another Member State, shall inform the courts or competent authorities of that other Member State about the danger involved and the measures taken or that are under consideration. The Central Authority may facilitate this communication by transmitting the information directly, or through the Central Authorities of the other Member State.

Example:

Child protection proceedings have started in Sweden. While these proceedings are pending, the parents move with the child to Hungary. The court or the competent authority in Sweden shall inform the courts or competent authorities in Hungary about the danger, and the measures that were under consideration. This information may be transmitted directly between the courts or competent authorities, or the Central Authorities in Sweden and Hungary may mediate and facilitate this communication.

7.2.4. Implementation of decisions in matters of parental responsibility in

another Member State – Article 81 and Recital 82

The Central Authority shall on the one hand provide information and assistance to the holders of parental responsibility seeking the recognition and enforcement of decisions in its territory, in particular concerning rights of access and the return of the child, including, where necessary, information on how to obtain legal aid[361] (see Article 79(c)). Usually, the Central Authority does not provide legal services and does not represent the holders of parental responsibility in proceedings of that type. The Central Authorities have to provide concrete practical information to the holders of parental responsibility (for example which authority to seise, is an attorney needed, how to find a suitable attorney, what may be the expected costs and so on). They may also flag when the decision contains measures that are not known or are not the same in the Member State of recognition and enforcement (for example, different types of supervised contact).

On the other hand, the Regulation extends the role of the Central Authorities by giving them the obligation to facilitate communication between courts, competent authorities and other bodies involved, in particular regarding the application of Article 81. Article 81 permits a court of a Member State to request the courts or competent authorities of another Member State to assist in the implementation of decisions in matters of parental responsibility given under the Regulation, in particular in securing the effective exercise of rights of access. This assistance is provided mainly through explanations. The requests are subject to the translation rules of Article 80(2). The involvement of the court of one Member State that has given a decision in matters of parental responsibility in its implementation in another Member State is not envisaged for all decisions. Recital 82 gives an example where this could be possible - in decisions granting supervised access which is to be exercised in a Member State other than the Member State where the court ordering access is located or involving any other accompanying measures of the courts or competent authorities in the Member State where the decision is to be implemented. Thus, the involvement of the court depends on the arrangements for the exercise of the rights. The court that has given the decision or is contemplating such a decision decides independently on whether it wishes to remain committed to the implementation of the decision in the other Member State (for example – to request information) and to involve the Central Authority of this other Member State (see Recital 82).

[361] For the legal aid systems of the Member States see European e-Justice Portal, Legal aid.

7.2.5. Facilitating agreement – Article 79(g)

Another task of the Central Authorities, in accordance with Article 79(g), is to facilitate agreement between holders of parental responsibility through mediation or other means of alternative dispute resolution and also to facilitate cross-border communication to this end.

It has been shown that mediation can play an important role in, for example, in matters of parental responsibility to ensure that the child can continue to see the parent that has the rights of access.

The Regulation does not require the Central Authorities to engage directly in the mediation. Thus, they are not obliged to provide mediators. However, doing so is not precluded. The Central Authorities usually explain the benefits of the amicable resolution of the issues, give information about providers of mediation services and collaborate with the Central Authorities of another Member State when the mediation takes place there[362]. The e-Justice portal provides additional information on cross-border mediation[363].

7.3. Placement of a child in another Member State – Article 82 and Recitals 83 and 84

The Regulation pays special attention to the placement of children by the court of one Member State (requesting Member State) across the border in another Member State (requested Member State) with someone else than a parent[364]. A decision to do so, which is within the scope of the Regulation as a civil law matter concerning parental responsibility (see section 3.1.1.3 of Chapter 3 "Parental Responsibility")[365], is subject to specific provisions as regards cooperation between the courts and Central and other authorities of the Member States (see Article 82). The placement of a child in another Member State is decided by the court that has jurisdiction as to the substance

[362] For further details concerning cross-border family mediation see European e-Justice Portal, Family mediation.

[363] For further information see European e-Justice Portal, Family mediation.

[364] For further details concerning the cross-border placement of children see European e-Justice Portal, Cross-border placement of a child including foster family.

[365] See Article 1(2)(d); see also Case C-, *C supra* note 57, in which the CJEU held that a decision placing a child into a foster home is a 'civil' matter for the purposes of Article 1 of the Regulation, even though the procedure for so doing is a matter of public law. Case C-523/07, *A supra* note 66, para.22-29, Case C-92/12 *Health Service Executive supra* note 67, para. 56-62.

in matters of parental responsibility, usually by the court of the habitual residence of the child. That court may decide either to place the child in care in its Member State or to do this in another Member State[366]. The Regulation focuses on the placement of a child in another Member State. However, it provides some guidance for domestic placement (see Recital 84). Another option for the court seised would be to decide to transfer jurisdiction pursuant to Article 12 to the courts of another Member State (see section 3.3 of Chapter 3 "Parental Responsibility").

The decision on placement in another Member State is subject to the general provisions on recognition and enforcement (see section 3.5 of Chapter 3 "Parental Responsibility" and Chapter 5 "Enforcement"). Thus, the decision on placement is generally recognised in other Member States without any special procedure being required. If enforceable in the Member State of origin, this decision is enforceable *per se* in the Member State of the placement and in all other Member States without declaration of enforceability.

However, the decision on placement is subject to the grounds for refusal of recognition and enforcement applicable to

decisions in matters of parental responsibility that are not privileged. The Regulation contains one additional specific ground for refusal of enforcement of that type of decision - if the procedure laid down in Article 82 has not been complied with (see Article 39(1)(f) and section 5.5.1.1.1 of Chapter 5 "Enforcement").

7.3.1. Placement in another Member State

There are different types of placements of a child in another Member State that fall into the scope of the Regulation (see section 3.1.1.3 of Chapter 3 "Parental Responsibility"). Some of the placements need the prior consent of the requested Member State. The principle is that consent is needed, unless the Regulation or the Member States to the extent allowed by the Regulation provide otherwise.

[366] If for some reason the child is already present in the Member State of the planned placement, the courts of this Member State may recourse to provisional, including protective, measures pursuant to Article 15 (see section 3.1.1.5 of "Parental Responsibility").

Cooperation in matters of parental responsibility

Type of placement	Notion of placement covered by Article 82	Consent of the requested Member State needed
In foster care **(With individual/s or institutional care)**	YES	YES
With a parent	NO	n/a
With certain categories of close relatives	YES	YES, unless the requested Member State waives the requirement to obtain consent[367]
Educational placements for protection of the child	YES	YES
With a view to adoption	NO	n/a
Educational placements following a punishable act under national criminal law	NO	n/a

[367] See the notifications of the Member States in this regard at the e-Justice Portal: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

7.3.1.1. Placement without the consent of the competent authority of the requested Member State

The Regulation permits placement of children in another Member State without obtaining the consent of the requested Member State prior to the placement where the child is to be placed with the parent (see Article 82(2)).

The Member States may extend the possibility to place a child without the consent to certain categories of close relatives other than parents (for example the grandparents or an aunt and an uncle). The categories of close relatives designated by the Member States pursuant to Article 103 can be found on the e-Justice Portal[368].These designations have only unilateral effect, i.e. the designation by the Member State of possible placement have to be observed by the court of another Member State contemplating such placement.

Example:

Member State A[369] designates placement of the child with grandparents as one of the situations where the consent of its authorities for placement in its territory is not required under Article 82(2). If a court in Member State B[370] contemplates placement of the child with grandparents in Member State A, it does not have to follow the procedure under Article 82 and the resulting decision cannot be refused recognition and enforcement in Member State A. However, if the court in Member State A contemplates placement of the child with the grandparents in Member State B and Member State B has not made a designation including placement with grandparents, the court in Member State A must follow the procedure under Article 82, irrespective of whether Member State A itself requires any procedure under Article 82 or not for such situation. Otherwise, the recognition and enforcement of the resulting decision will be refused in the Member State B.

The absence of requirement for the consent for cross-border placement does not exclude the right of the courts or competent authorities of a Member State contemplating the placement of a child in another Member State to consult the details of the placement or to receive, for example, a social report under Article 80(1) prior the decision on placement.

[368] This is available at: https://e-justice.europa.eu/37842/EN/brussels_iib_regulation__matrimonial_matters_and_matters_of_parental_responsibility_recast_

[369] Member State A is Ireland.

[370] Member State B is the Czech Republic.

7.3.1.2. Placements requiring the consent of the competent authority of the requested Member State

Without prejudice to the exceptions described in section 7.2.1.1, the placement of children in another Member State requires the consent of the competent authority in the requested Member State before ordering or arranging the placement (see Article 82(1) and Recital 83). This consent ensures that the host Member State will be aware of the child residing in its territory and will stay vigilant as regards the protection of the child and his or her best interests.

The consent is to be given only by the competent authority, governed by the public law, in the requested Member State. The fact that the institution where the child is to be placed gives its consent is not sufficient[371]. The agreement of the parents or of the child also does not exclude the need for consent. The obtaining of the consent is part of a consultation procedure allowing the Member States involved to resolve the related questions, for example regarding the care measure for the child, his or her transfer or the supervision of the imposed measure.

The request for consent is produced by the court or the competent authority contemplating the placement of a child in another Member State. This request should at least include a report on the child together with the reasons for the proposed placement or provision of care, information on any contemplated funding and any other information the court or the competent authority considers relevant, such as the expected duration of the placement (see Article 82(1)). The additional information may further relate to any envisaged supervision of the measure, arrangements for contact with the parents, other relatives, or other persons with whom the child has a close relationship, or the reasons why such contact is not contemplated in light of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see Recital 83).

The request and any additional documents shall be accompanied by a translation in the language (or in one of the official languages) of the requested Member State or any other language that the requested Member State expressly accepts (see Articles 82(4) and 103).

The request for consent with any additional documents must only be transmitted through the Central Authority of the requesting Member State to the Central Authority of the Member State where the child is to be placed (see Article 82(1)). However, the Central Authorities or competent authorities are not precluded from entering into or maintaining existing agreements or arrangements with Central Authorities or competent authorities of one or more other Member State,

[371] Case C-92/12 *Health Service Executive supra* note 67, para. 95.

simplifying the consultation procedure for obtaining consent in their mutual relations (see Article 82(8)).

The procedure for obtaining consent is governed by the national law of the requested Member State (see Article 82(7)). The Member States should establish clear rules and procedures for the purposes of consent to be obtained pursuant to the Regulation, in order to ensure legal certainty and expedition (see Recital 83 and *Health Service*, paragraph 56). The procedure may be one and the same for cross-border or domestic placement cases or it may differ. It may be administrative or judicial[372].

The procedures should, *inter alia*, enable the competent authority to grant or refuse its consent promptly. According to Article 82(5) the placement of the child in another Member State shall only be ordered or arranged by the requesting Member State after the competent authority of the requested Member State has consented to the placement. The Regulation envisages that except where exceptional circumstances make this impossible, the decision granting or refusing consent shall be transmitted to the requesting Central Authority no later than three months following the receipt of the request (see Article 82(6) and Recital 85). Nonetheless, all competent authorities involved should strive to provide the reply even more quickly than within this maximum timeframe of three months (see Recital 85). The absence of a reply within three months should not be understood as consent, and without consent the placement should not take place (see Recital 83).

Where consent has been given to a placement for a specified period of time, that consent should not apply to decisions or arrangements extending the duration of the placement. In such circumstances, a new request for consent should be made (see Recital 83 and *Health Service Executive* [373]).

7.3.2. Placement in the Member State of the habitual residence of the child – Recital 84

The Regulation pays special attention to placements contemplated in the Member State of the habitual residence of a child who holds a close connection to another Member State and/or is assumed to have parents or other relatives in this other Member State. According to Recital 84, where a decision on the

[372] For further information on the national procedure see European e-Justice Portal, Cross-border placement of a child including foster family.

[373] Case C-92/12, *Health Service Executive supra* note 67, paras. 138-139.

placement of a child in institutional or foster care is being contemplated in the Member State of the habitual residence of the child, the court should consider, at the earliest stage of the proceedings, appropriate measures to ensure respect of the rights of the child, in particular the right to preserve his or her identity and the right to maintain contact with the parents, or, where appropriate, with other relatives, in light of Articles 8, 9 and 20 of the UN Convention on the Rights of the Child.

Where the court is aware of a close connection of the child with another Member State (for example the child is of the nationality of another Member State), appropriate measures could, in particular include, where Article 37(b) of the Vienna Convention on Consular Relations is applicable, a notification to the Consular body of that Member State. Such awareness might also be raised by information provided by the Central Authority of that other Member State pursuant to Article 79(f) - for example where the grandparents of the child are habitually resident there. Appropriate measures could also include, pursuant to the Regulation, a request to that Member State for information about a parent, a relative or other persons who could be suitable to care for the child. Moreover, depending on the circumstances, the court might also request information on procedures and decisions concerning a parent or siblings of the child.

In any case, the best interests of the child should remain the paramount consideration. The recourse to these appropriate measures should not affect the national law or procedure applicable to any placement decision made by the court or competent authority in the Member State contemplating the placement. Recital 84 should not be interpreted as placing any obligation on the authorities of the Member State having jurisdiction to place the child in the other Member State, or further involve that Member State in the placement decision or proceedings.

7.4. Direct cooperation and communication of courts – Article 86

In parallel with the requirements for Central Authorities to cooperate, the Regulation permits the courts of different Member States to cooperate and communicate directly with each other, provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information (see Article 86(1)).

The courts may cooperate and communicate directly for various purposes. The cooperation may be implemented by any means that the court considers appropriate. It may, in particular, concern:

- communication for the purposes of the transfer of jurisdiction pursuant to Article 12 and Article 13;
- information concerning provisional, including protective, measures in urgent cases pursuant to

Article 15 and incidental questions pursuant to Article 16;
- information on pending proceedings for the purposes of *lis pendens* and dependent actions pursuant to Article 20;
- communication for the purposes of Chapters III to V.

The courts have the discretion to choose freely whether to communicate and cooperate directly or to obtain the necessary information though the Central Authorities (see Recital 80). The judges may further avail themselves of the contact points of the EJN-civil in relation to all matters that fall within the scope of application of the Regulation and of the liaison judges of the IHNJ, if the matter is related to child abduction.

To encourage and facilitate such cooperation, discussions between judges are and should be encouraged, both within the context of the EJN-civil and through initiatives organised by the Member States. The experience of the informal network of the IHNJ, organised by the Hague Conference on Private International Law in the context of the 1980 Hague Convention, has proved instructive in this context[374].

[374] See on this point paragraphs 3.3.4.2 and Chapter 4.


GDPR

8. Collection and transmission of information, data protection and non-disclosure of information

The Regulation provides legal grounds for the collection and transmission of information within the Member State (see section 8.1), introduces special rules relating to the notification of the data subject (in light of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data) and repealing Directive 95/46/EC (General Data Protection Regulation, ("GDPR"), see section 8.2) and prohibits the disclosure of information in some cases (see section 8.3).

8.1. Collection and transmission of information by the requested Central Authority – Article 87

The requested Central Authority has the right to transmit incoming applications, requests or information to the domestic courts, competent authorities, or any intermediary (see Article 87(1)). In doing so, the Central Authority follows the national law and procedure. The received information may be used by the intermediary, court or competent authority only for the purposes of the Regulation (see Article 87(2)).

Article 87(3) of the Regulation obliges in the case of a request any intermediary, court or competent authority which holds or is competent to collect, within the requested Member State, information required to carry out a request or an application pursuant to the Regulation, to provide that information to the requested Central Authority at its request in cases where the requested Central Authority does not have direct access to the information. This is the legal grounds obliging these domestic authorities to collect and provide requested information, including cases where this obligation is not expressly envisaged in the national law and procedure.

The requested Central Authority must transmit the obtained information to the requesting Central Authority in accordance with national law and procedure (see Article 87(4)).

8.2. Notification of the data subject – Article 88 and Recital 87

Unless the Regulation provides otherwise, the GDPR applies to the processing of personal data by the Member States carried out during the application of the Regulation. This includes obligations of notification as provided by the GDPR.

The Regulation allows for exceptions where there is a risk that may prejudice the effective carrying out of the request or application under the Regulation for which the information was transmitted (see Article 88). This could be the case, for example, for the return of the child in accordance with the 1980 Hague Convention or for a court to consider the need to take measures for the protection of the person or property of the child (see Recital 87). In such cases, the notification of the data subject as required by Article 14(1)-(4) of the GDPR (for example regarding data requested for locating the child) may be deferred until the request for which this information is required has been carried out (see Article 87 and Recital 87). This exception is made in accordance with Article 14(5) as well as points (f), (g), (i) and (j) of Article 23(1) of the GDPR.

However, the limitation of the obligation to notify the data subject should not preclude an intermediary, court or competent authority to which the information has been transmitted, from taking measures for the protection of the child, or causing such measures to be taken, where the child is at risk of harm or there are indications for such a risk.

8.3. Non-disclosure of information – Article 89 and Recital 88

The Regulation strives to strike a delicate balance as regards the provision of information (see Recital 88). It considers on the one hand, the rights of the interested person to know about proceedings in progress in matters of parental responsibility. On the other hand, the Regulation allows the Central Authority, court or competent authority to not disclose or confirm information gathered or transmitted to the applicant or to a third party for the purposes of Chapters III to VI, if it determines that to do so could jeopardise the health, safety or liberty of the child or another person. Such a risk may exist, for example, where domestic violence has occurred and a court has ordered the new address of the child not to be disclosed to the applicant (see Recital 88). A determination to that effect made in one Member State shall be taken into account by the Central Authorities, courts and competent authorities of the other Member States, in particular in cases of domestic violence (see Article 88(2)).

The non-disclosure of information to the applicant or to a third party shall not impede the gathering and transmitting of information by and between Central Authorities, courts and competent authorities where necessary for carrying out the obligations under Chapters III to VI (see Recital 88). This means that where possible and appropriate, an application should be processed under the Regulation without the applicant being provided with all the information necessary to process it. For example, where national law so provides, a Central Authority might institute proceedings on behalf of an applicant without passing on the information about the child's whereabouts to the applicant. However, in cases where merely making the request could already jeopardise the health, safety or liberty of the child

or another person, there should not be an obligation under the Regulation to make such a request (see Recital 88).

9. Relation with other instruments

9.1. Relation with other instruments concluded between Member States – Article 94

The Regulation supersedes all bilateral or multilateral conventions which have been concluded between two or more Member States, to the extent they regulate matters governed by the Regulation, applicable at the time of entry into force of its predecessor Regulation Brussels IIa (see Article 94 (1)). Finland and Sweden availed themselves of the option[375] to preserve the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway, and Sweden comprising international private law provisions on marriage, adoption, and guardianship, together with its Final Protocol in relations between these two Member States (see Article 94(2)). Nevertheless, decisions rendered in Finland and Sweden under a ground of jurisdiction corresponding to one of those laid down in Chapter II of the Regulation, must be recognised and enforced in the other Member States under the rules of the Regulation.

9.2. Relation with other instruments concluded between Member States and third countries – Recital 91

The Regulation does not affect any bilateral convention concluded between a Member State and a third country governing matters falling within the material scope of application of the Regulation. The same applies to multilateral conventions, insofar as the special rules of the Regulation set out in Articles 95-99 do not provide otherwise. This outcome stems from the international obligations previously taken by the Member State in question (see Recital 91 and Article 351 TFEU).

[375] See Annex VI to Brussels IIa Regulation.

9.3. Relation with certain multilateral conventions – Article 95

Article 95 enumerates four conventions[376] that are superseded by the Regulation in relations between Member States only for overlapping matters. No further conditions are set, i.e., it is not necessary that the child concerned should have his or her habitual residence in the territory of a Member State. In any case the decision issued will circulate between the Member States in accordance with the Regulation.

9.4. Relation with the 1980 Hague Convention – Article 96

As stated in Chapter IV on child abduction, the Regulation upholds the application of the 1980 Hague Convention to cases of wrongful removal or retention of a child between EU Member States[377]. In doing so, the Regulation complements and clarifies[378] in Chapters III and VI some of the rules of the 1980 Hague Convention and allows a decision ordering return given in a Member State to be recognised and enforced in another Member State as per Chapter IV. Both instruments – the 1980 Hague Convention and the Regulation – create an interlinked set of rules that aim to strengthen the child's prompt return to the Member State of his or her habitual residence.

9.5. Relation with the 1996 Hague Convention– Article 97 and Recital 92

9.5.1. The scope of the two instruments

The scope of application of the Regulation is very similar to that of the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in

[376] Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors (HCCH 1961 Protection of Minors Convention), the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages (Luxembourg Convention 1967), the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations (HCCH 1970 Divorce Convention) 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 (ETS No. 105).

[377] The Regulation does not apply in Denmark. However, Denmark is a State Party to the HCCH 1980 Child Abduction Convention, *supra* note 100.

[378] See CJEU Opinion of 14 October 2014 in Case C-1/13, ECLI:EU:C:2014:2303.

respect of parental responsibility and measures for the protection of children ("the 1996 Hague Convention")[379]. Both instruments contain rules on jurisdiction, recognition, and enforcement of decisions on parental responsibility and on co-operation. The major difference is that the 1996 Hague Convention also includes rules on applicable law. In turn, the Regulation clarifies that the Member State's courts, when exercising jurisdiction, should determine the applicable law in matters of parental responsibility in accordance with the provisions of Chapter III of the 1996 Hague Convention. The relevant rules are to be found in Article 15(1) of the 1996 Hague Convention, where "the provisions of Chapter II" should be read as "the provisions of this Regulation" (see Recital 92). The 1996 Hague Convention does not contain rules on matrimonial matters.

9.5.2. Ratification by all EU Member States

The 1996 Hague Convention is ratified and applied in all EU Member States[380].

9.5.3. Which cases are covered by the Regulation and which by the 1996 Hague Convention?

In order to determine whether the Regulation or the 1996 Hague Convention applies in a specific case, the following questions should be examined.

9.5.3.1. Does the case concern a matter covered by the Regulation?

The Regulation prevails over the 1996 Hague Convention in relations between Member States in matters covered by the Regulation. Consequently, the Regulation prevails in matters relating to parental responsibility, in particular jurisdiction, including in child abduction cases, recognition and enforcement, and co-operation. On the other hand, the 1996 Hague Convention applies in determining applicable law in matters of parental responsibility since this subject matter is not covered by the Regulation, and the Regulation explicitly refers to the 1996 Hague Convention in this regard in Recital 92. Nevertheless, the bilateral treaties of the Member States which

[379] For the HCCH 1996 Child Protection Convention, *supra* note 55, further explanations can be found in Lagarde, P., Proceedings of the Special Commission of a diplomatic character (1999), available at https://www.hcch.net/en/publications-and-studies/details4/?pid=2951

[380] HCCH 1996 Child Protection Convention, *supra* note 55.

contain rules for establishing the applicable law will supersede those of the 1996 Hague Convention (see Article 52(1) of the 1996 Hague Convention).

9.5.3.2. Does jurisdiction have to be determined?

In general terms the jurisdictional set of rules of the Regulation prevails over those of the 1996 Hague Convention where the child is habitually resident in the territory of a Member State at the moment the court is seised (see Article 97 (1) (a) of the Regulation). Hence, the 1996 Hague Convention applies where the child has his or her habitual residence in a State Party which is not an EU Member State.

However, according to the case-law of CJEU[381], a court of a Member State that is hearing a dispute relating to parental responsibility does not retain jurisdiction to rule on that dispute under the general jurisdiction based on the habitual residence of the child at the time the court is seised, where the habitual residence of the child has been lawfully transferred, during the proceedings, to the territory of a third State that is a party to the 1996 Hague Convention (see section 3.2.3.3 of Chapter 3 “Parental responsibility”).

Where the habitual residence of the child cannot be established (a situation typical for refugee or internationally displaced children), the connecting factor is linked to his or her habitual residence prior to the displacement. If that habitual residence was in a Member State, the Regulation applies, if it was in a third State the jurisdiction rules of the 1996 Hague Convention on refugee children and internationally displaced children take precedence (see Recital 25 and Article 52(2) of the 1996 Hague Convention).

However, Article 97(2) of the Regulation provides priority to the 1996 Hague Convention in the following three matters related to the jurisdiction even when the child is habitually resident in the territory of a Member State.

- Where the parties have agreed upon jurisdiction of a court of a non-EU State Party, Article 10 of the 1996 Hague Convention applies. This provision allows for the court to join parental responsibility matters with proceedings on an application for divorce, legal separation or annulment of a marriage and requires, in addition to the agreement of parties to jurisdiction also, among others, one of the parents to have their habitual residence in the State of the chosen court at the time of commencement of the proceedings. If a court of a Member State is seised in a matter in respect of which the parties have agreed to the

[381] Case C-572/21, *CC supra* note 9.

jurisdiction of such a court, it has to dismiss the proceedings once the jurisdiction is established. Where the parties chose a court of a Member State, Article 10 of the Regulation prevails.

- Where transfer of jurisdiction between a court of a Member State and of a non-EU State Party is envisaged, Articles 8 and 9 of the 1996 Hague Convention apply.
- Where proceedings relating to parental responsibility are pending before the court of a non-EU State Party at the time when the court of a Member State is seised of proceedings relating to the same child and involving the same cause of action, Article 13 of the 1996 Hague Convention shall apply. If the proceedings of the same type are pending before the court of a third State, which is not a State Party to the 1996 Hague Convention, and before the court of a Member State, the national law of that Member State shall apply on the question of how to treat parallel proceeding.

In terms of child abduction and co-operation issues, the Regulation applies between Member States and the 1996 Hague Convention applies between a Member State and a non-EU State Party.

9.5.3.3. Does the case concern the recognition and/or enforcement of a decision issued by a court of a Member State in another Member State?

This question must be addressed on the basis that the rules on recognition and enforcement of the Regulation apply with regard to all decisions issued by a court of a Member State regardless of the habitual residence of the child. Hence, the rules on recognition and enforcement of the Regulation apply to decisions issued by the courts of a Member State, even if the child concerned has his or her habitual residence in a third State which is a State Party to the Convention. The aim is to ensure the creation of a common judicial area which requires that all decisions issued by courts of Member States within the European Union are recognised and enforced between them under a common set of rules.

9.6. Relation with other instruments closely linked to the Regulation

The Regulation applies in parallel with numerous different instruments being EU law or international Conventions. The Regulation does not deal with the matters covered by those instruments, but they are closely linked to its scope of application.

Relation with other instruments

The EU law instruments include in particular[382]:

- 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;
- 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;
- 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;
- Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters;
- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation);
- Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes;
- Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast);
- Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast);

The international Conventions include in particular:

- United Nations Convention on the Rights of the Child;
- European Convention for the Protection of Human Rights and Fundamental Freedoms;
- Vienna Convention on Consular Relations;

[382] See on this point also the initiative of the European Commission "Modernising judicial cooperation between EU countries – use of digital technology", available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12685-Modernising-judicial-cooperation-between-EU-countries-use-of-digital-technology_en

Relation with other instruments

- Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;
- Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

As the case may be, judges will need to apply these instruments alongside the Regulation.

Annex I – Correlation table 1 (Articles – Recitals in the Brussels IIb Regulation)

Article	Recital(s)	Topic
-	Recital 1 Recital 3 Recital 90	The need to recast Brussels IIa Regulation
ARTICLE 1(1)	Recital 2 Recital 4 Recital 5 Recital 8	Scope of the Regulation, the notion of 'civil matters' - general
ARTICLE 1(1)(A)	Recital 9 Recital 12	Scope of matrimonial matters
ARTICLE 1(1)(B), 1(2)	Recital 4 Recital 5	Scope of matters of parental responsibility

Annexes

Article	Recital(s)	Topic
	Recital 7 Recital 10 Recital 11 Recital 17 Recital 18 Recital 92	
ARTICLE 1(3)	Recital 2 Recital 5 Recital 16 Recital 17 Recital 40 Recital 73	The circulation of return decisions
ARTICLE 1(4)	Recital 11 Recital 12 Recital 13 Recital 92	Matters falling outside the scope

Annexes

Article	Recital(s)	Topic
ARTICLE 2(1)	Recital 14 Recital 16 Recital 59	Definition of ‘decision’
ARTICLE 2(2)(1)	Recital 7 Recital 14	Definition of ‘court’
ARTICLE 2(2)(2)	Recital 5 Recital 14 Recital 15	Definition of ‘authentic instrument’
ARTICLE 2(2)(3)	Recital 5 Recital 14	Definition of ‘agreement’
ARTICLE 2(2)(4), (5)	-	Definitions of ‘Member State of origin’ and ‘Member State of enforcement’
ARTICLE 2(2)(6)	Recital 7 Recital 17	Definition of ‘child’

Annexes

Article	Recital(s)	Topic
ARTICLE 2(2)(7)	Recital 7 Recital 10 Recital 11 Recital 16 Recital 18	Definition of 'parental responsibility'
ARTICLE 2(2)(8)	Recital 18	Definition of 'holder of parental responsibility'
ARTICLE 2(2)(9)	Recital 18	Definition of 'rights of custody'
ARTICLE 2(2)(10)	Recital 18	Definition of 'rights of access'
ARTICLE 2(2)(11)	Recital 16 Recital 17	Definition of 'wrongful removal or retention'
-	Recital 19	Notion of 'best interests of the child'
ARTICLE 3	Brussels II Regulation Recital 8 and Recital 12	General jurisdiction in matrimonial matters

Annexes

Article	Recital(s)	Topic
ARTICLE 4	Brussels II Regulation Recital 8 and Recital 12	Counterclaim
ARTICLE 5	Brussels II Regulation Recital 8 and Recital 12	Conversion of legal separation to divorce
ARTICLE 6	Brussels II Regulation Recital 8 and Recital 12	Residual jurisdiction
ARTICLE 7	Recital 19 Recital 20 Recital 21	General jurisdiction in matters of parental responsibility
ARTICLE 8	Recital 20	Continuing jurisdiction in relation to access rights
ARTICLE 9	Recital 22	Jurisdiction in cases of the wrongful removal or retention of a child
ARTICLE 10	Recital 20 Recital 22 Recital 23	Choice of court

Annexes

Article	Recital(s)	Topic
	Recital 24 Recital 38 Recital 43	
ARTICLE 11	Recital 25	Jurisdiction based on presence of the child
ARTICLES 12 AND 13	Recital 21 Recital 26 Recital 27 Recital 28 Recital 37 Recital 79	Transfer of jurisdiction
ARTICLE 14	Recital 29 Recital 34	Residual jurisdiction
ARTICLE 15	Recital 30 Recital 31 Recital 44	Provisional, including protective, measures in urgent cases

Annexes

Article	Recital(s)	Topic
	Recital 46 Recital 59 Recital 79	
ARTICLE 16	Recital 32 Recital 33	Incidental questions
ARTICLE 17	Recital 35 Recital 36 Recital 38	Seising of a court
ARTICLE 18	Recital 31 Recital 37	Examination as to jurisdiction
ARTICLE 19	Recital 36	Examination as to admissibility
ARTICLE 20	Recital 35 Recital 38 Recital 79	*Lis pendens* and dependent actions

Annexes

Article	Recital(s)	Topic
ARTICLE 21	Recital 39 Recital 53 Recital 57 Recital 71	Right of the child to express his or her views
ARTICLE 22	Recital 16 Recital 40 Recital 73	Return of the child under the 1980 Hague Convention
-	Recital 41 Recital 43	Concentration of jurisdiction for return proceedings
ARTICLE 23	Recital 73	Receipt and processing of applications by Central Authorities
ARTICLE 24	Recital 41 Recital 42	Expeditious court proceedings
ARTICLE 25	Recital 42 Recital 43	Alternative dispute resolution

Annexes

Article	Recital(s)	Topic
ARTICLE 26	Recital 39 Recital 53	Right of the child to express his or her views in return proceedings
ARTICLE 27(1)	Recital 53	The right of the person seeking the return of the child to be heard
ARTICLE 27(2)	-	Access arrangement during return proceedings
ARTICLE 27(3), (4)	Recital 44 Recital 45 Recital 46 Recital 79	Adequate arrangements
ARTICLE 27(5)	Recital 30 Recital 44 Recital 45 Recital 46 Recital 59	Provisional measures to protect the child from grave risk

Annexes

Article	Recital(s)	Topic
	Recital 79	
ARTICLE 27(6)	Recital 47 Recital 66	Provisional enforceability of a return decision
ARTICLE 28	Recital 60 Recital 65 Recital 66 Recital 67	Enforcement of decisions ordering the return of a child
ARTICLE 29(1)	Recital 48 Recital 49	Scope of the 'overriding mechanism'
ARTICLE 29(2), (3), (4)	Recital 49 Recital 50	'Overriding mechanism' where parental responsibility proceedings are pending
ARTICLE 29(2), (5)	Recital 49 Recital 51	'Overriding mechanism' where no parental responsibility proceedings are pending
ARTICLE 29(6)	Recital 52	Overriding effect

Annexes

Article	Recital(s)	Topic
ARTICLE 30(1), (2), (3)	Recital 54	Recognition of a decision
ARTICLE 31	-	Documents to be produced for recognition
ARTICLE 32	-	Absence of documents
ARTICLE 33	-	Stay of proceedings
ARTICLE 34(1)	Recital 58 Recital 66	Enforceable decisions
ARTICLE 34(2)	Recital 66	Provisional enforceability of decisions granting rights of access
ARTICLE 35(2)	-	Documents to be produced for enforcement
ARTICLE 36	Recital 64	Issuance of the certificate
ARTICLE 37	-	Rectification of the certificate

Annexes

Article	Recital(s)	Topic
ARTICLE 38	Recital 54 Recital 55 Recital 56	Grounds for refusal of recognition of decisions in matrimonial matters
ARTICLE 39	Recital 54 Recital 55 Recital 56 Recital 62	Grounds for refusal of recognition of decisions in matters of parental responsibility
ARTICLE 39(2)	Recital 39 Recital 57	Ground for refusal of recognition of decisions in matters of parental responsibility where the child did not have an opportunity to express his or her views
ARTICLES 40	Recital 54 Recital 6	Procedure for refusal of recognition
ARTICLE 41	Recital 54 Recital 55 Recital 62	Grounds for refusal of enforcement of decisions in matters of parental responsibility

Annexes

Article	Recital(s)	Topic
ARTICLE 42	Recital 52 Recital 58	Scope of privileged decisions
ARTICLE 43	Recital 52	Recognition of privileged decisions
ARTICLE 44	-	Stay of proceedings
ARTICLE 45	Recital 66	Enforceable privileged decisions
ARTICLE 46	-	Documents to be produced for enforcement
ARTICLE 47	Recital 52	Issuance of the privileged certificate
ARTICLE 48	-	Rectification and withdrawal of the privileged certificate
ARTICLE 49	-	Certificate on lack or limitation of enforceability
ARTICLE 50	Recital 38 Recital 52 Recital 56	Irreconcilable decisions

Annexes

Article	Recital(s)	Topic
ARTICLE 51	Recital 60 Recital 65 Recital 6	Enforcement procedure
ARTICLE 52	Recital 60	Authorities competent for enforcement
ARTICLE 53	-	Partial enforcement
ARTICLE 54	Recital 61	Arrangements for the exercise of rights of access
ARTICLE 55	Recital 64	Service of certificate and decision
ARTICLE 56(1)	Recital 64 Recital 67	Suspension of enforcement proceedings where enforceability is suspended in the Member State of origin
ARTICLE 56(2)(B) AND ARTICLE 56(3)	Recital 67 Recital 68	Suspension of enforcement proceedings due to appeal
ARTICLE 56(4)-(6)	Recital 67 Recital 69	Suspension and refusal of enforcement due to exposure of the child to grave risk

Annexes

Article	Recital(s)	Topic
ARTICLE 57	Recital 62 Recital 63	Grounds for suspension or refusal of enforcement under national law
ARTICLES 58-60	Recital 62 Recital 63	Procedure for refusal of enforcement
ARTICLE 61	-	Challenge or appeal
ARTICLE 62	-	Further challenger or appeal
ARTICLE 63	-	Stay of proceedings
ARTICLE 64	Recital 5 Recital 6 Recital 14 Rectal 15	Scope of authentic instruments and agreements
ARTICLE 65	Recital 55 Recital 70	Recognition and enforcement of authentic instruments and agreements

Annexes

Article	Recital(s)	Topic
ARTICLES 66-67	-	Issuance, rectification and withdrawal of the certificate
ARTICLE 68(3)	Recital 55 Recital 71	Grounds for refusal of recognition or enforcement of authentic instruments and agreements
ARTICLE 69	-	Prohibition of review of jurisdiction of the court of origin
ARTICLE 70	-	Differences in applicable law
ARTICLE 71	-	Non-review as to substance
ARTICLE 72	-	Appeal in certain Member States
ARTICLE 73	-	Costs
ARTICLE 74	-	Legal aid
ARTICLE 75	-	Security, bond or deposit
ARTICLE 76	Recital 72 Recital 73	Designation of Central Authorities

Annexes

Article	Recital(s)	Topic
	Recital 74	
ARTICLE 77(3)	Recital 74 Recital 86	General tasks of Central Authorities and EJN-civil
ARTICLE 78(1)-(2)	Recital 74 Recital 75 Recital 80	Requests through Central Authorities
ARTICLE 78(2) - (3)	Recital 74 Recital 75 Recital 76 Recital 78	Applicants
ARTICLE 78(4)	Recital 77	Agreements between Central Authorities
ARTICLE 79	Recital 78 Recital 79 Recital 80	Specific tasks of Central Authorities, discovering the whereabouts of a child

Annexes

Article	Recital(s)	Topic
ARTICLE 80	Recital 75 Recital 76 Recital 81 Recital 84 Recital 85	Cooperation on collecting and exchanging information relevant in procedures in matters of parental responsibility
ARTICLE 81	Recital 82	Implementation of decisions in matters of parental responsibility in another Member State
ARTICLE 82	Recital 11 Recital 77 Recital 83 Recital 84 Recital 85	Placement of a child in another Member State
ARTICLE 83	Recital 72	Costs of Central Authorities
ARTICLE 84	Recital 86	Meetings of Central Authorities

Annexes

Article	Recital(s)	Topic
ARTICLE 85		Scope of general provisions
ARTICLE 86	Recital 75 Recital 79 Recital 80	Cooperation and communication between courts
ARTICLE 87	Recital 85	Collection and transmission of information
ARTICLE 88	Recital 87	Notification of data subject
ARTICLE 89	Recital 88	Non-disclosure of information
ARTICLE 90	-	Legalisation or other similar formality
ARTICLE 91	-	Languages
ARTICLE 92	Recital 89	Amendments to Annexes
ARTICLE 93	Recital 89	Exercise of the delegation
ARTICLE 94	Recital 90	Relations with other instruments

Annexes

Article	Recital(s)	Topic
-	Recital 90	The continuity with the Brussels II Convention, the Brussels II and Brussels IIa Regulations
ARTICLE 95	Recital 91	Relations with certain multilateral conventions
ARTICLE 96	Recital 2 Recital 5 Recital 16 Recital 17 Recital 30 Recital 40 Recital 72 Recital 73	Relation with the 1980 Hague Convention
ARTICLE 97	Recital 17 Recital 25 Recital 72 Recital 92	Relation with the 1996 Hague Convention

Annexes

Article	Recital(s)	Topic
ARTICLE 98	Recital 91	Scope of effect
ARTICLE 99	-	Treaties with the Holy See
ARTICLE 100	Recital 90	Transitional provisions
ARTICLE 101	Recital 93	Monitoring and Evaluation
ARTICLE 102	-	Member States with two or more legal systems
ARTICLE 103	Recital 94	Information to be communicated to the Commission
ARTICLE 104	-	Repeal
ARTICLE 105	-	Entry into force
-	Recital 95 Recital 96	Protocols on the positions of the UK, Ireland and Denmark
-	Recital 97	Consultation of the EDPS
-	Recital 98	Subsidiarity

Annexes

Annex II – Correlation table 2 (Articles of Regulation (EC) No 2201/2003 – Articles of Regulation (EU) 2019/1111, as set out in Annex X of the latter)

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 1	Article 1
-	Article 1(3)
ARTICLE 2	Article 2
ARTICLE 3	Article 3
ARTICLE 4	Article 4
ARTICLE 5	Article 5
ARTICLE 6	Article 6(2)

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 7	Article 6(1) and (3)
ARTICLE 8(1)	Article 7(1)
ARTICLE 8(2)	Article 7(2)
ARTICLE 9(1)	Article 8(1)
ARTICLE 9(2)	Article 8(2)
ARTICLE 10	Article 9
-	Article 10
ARTICLE 11(1)	Article 22
-	Article 23
ARTICLE 11(2)	Article 26
ARTICLE 11(3)	Article 24(1)

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
-	Article 24(2)
-	Article 24(3)
-	Article 25
ARTICLE 11(4)	Article 27(3)
ARTICLE 11(5)	Article 27(1)
-	Article 27(2)
-	Article 27 (4)
-	Article 27(5)
-	Article 27(6)
-	Article 28
-	Article 29(1) and (2)

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 11(6)	Article 29(3)
-	Article 29(4)
ARTICLE 11(7)	Article 29(5)
ARTICLE 11(8)	Article 29(6)
ARTICLE 12	-
ARTICLE 13	Article 11
ARTICLE 14	Article 14
ARTICLE 15(1), (2)(a) and (b) and 4	Article 12(1)
ARTICLE 15(3)	Article 12(4)
-	Article 12(2) and (3)
-	Article 12(5)

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 15(2)(c)	Article 13(1)
-	Article 13(2)
ARTICLE 16	Article 17(a) and (b)
-	Article 17 (c)
-	Article 16
ARTICLE 17	Article 18
ARTICLE 18	Article 19
ARTICLE 19	Article 20
-	Article 20(4) and (5)
-	Article 21
ARTICLE 20(1)	Article 15(1)

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 20(2)	Article 15(3)
-	Article 15(2)
ARTICLE 21(1) and (2)	Article 30(1) and (2)
ARTICLE 21(3)	Article 30(3) and (4)
ARTICLE 21(4)	Article 30(5)
ARTICLE 22	Article 38
ARTICLE 23(a), (c), (d), (e) and (f)	Article 39 (a), (b), (c), (d) and (e)
ARTICLE 23(b)	Article 39(2)
ARTICLE 24	Article 69
ARTICLE 25	Article 70
ARTICLE 26	Article 71

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
-	Article 72
ARTICLES 27(1)	Article 33(a) and 44 (a)
-	Article 33 (b)
-	Article 44 (b)
ARTICLE 27(2)	-
ARTICLE 28	-
ARTICLE 29	-
-	Article 34
-	Article 35
-	Article 40
-	Article 41

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 30	-
ARTICLE 31	-
ARTICLE 32	-
ARTICLE 33	-
ARTICLE 34	-
ARTICLE 35	-
ARTICLE 36	Article 53
-	Article 53 (3)
ARTICLE 37(1)	Article 31 (1)
-	Article 31 (2) and (3)
ARTICLES 37(2)	-

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 38	Article 32
ARTICLE 39	Article 36
ARTICLE 40	Article 42 and 47(1)
-	Article 45
-	Article 46
-	Article 47(3)
ARTICLE 41(1)	Article 43(3)
ARTICLE 41(2)	Article 47(3)
-	Article 47(4), (5) and (6)
ARTICLE 42(1)	Article 43(1)
ARTICLE 42(2)	Article 47(3)

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 43	Articles 37 and 48
-	Article 49
-	Article 50
ARTICLE 44	-
ARTICLE 45(1)	Article 31(1)
ARTICLE 45(2)	Article 31(2)
-	Article 31(3)
ARTICLE 46	Article 65
ARTICLE 47(1)	Article 51(1)
-	Article 51(2)
-	Article 52

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 48	Article 54
-	Article 55
-	Article 56
-	Article 57
-	Article 58
-	Article 59
-	Article 60
-	Article 61
-	Article 62
-	Article 63
-	Article 64

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
-	Article 66
-	Article 67
-	Article 68
ARTICLE 49	Article 73
ARTICLE 50	Article 74(1)
-	Article 74(2)
ARTICLE 51	Article 75
ARTICLE 52	Article 90
ARTICLE 53	Article 76
ARTICLE 54	Article 77(1)
-	Article 77(2) and (3)

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
-	Article 78
-	Article 79 (a)
ARTICLE 55(1) (a)	Article 79 (b)
ARTICLE 55(1) (b)	Article 79 (c)
-	Article 79 (d)
ARTICLE 55(1) (c)	Article 79 (e)
ARTICLE 55(1) (d)	Article 79 (f)
ARTICLE 55(1) (e)	Article 79 (g)
-	Article 80
-	Article 81
ARTICLE 56(1)	Article 82(1)

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
-	Article 82(2), (3) and (4)
ARTICLE 56(2)	Article 82(5)
-	Article 82(6)
ARTICLE 56(3)	Article 82(7)
-	Article 82(8)
ARTICLE 57(1) and (2)	-
ARTICLE 57(3)	Article 83(1)
ARTICLE 57(4)	Article 83(2)
ARTICLE 58	Article 84
-	Article 85
-	Article 86

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
-	Article 87
-	Article 88
-	Article 89
-	Article 91
ARTICLE 59	Article 94
ARTICLE 60 (a), (b), (c) and (d)	Article 95
ARTICLE 60(e)	Article 96
ARTICLE 61	Article 97(1)
-	Article 97(2)
ARTICLE 62	Article 98
ARTICLE 63	Article 99

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 64(1)	Article 100(1)
ARTICLE 64(2), (3) and (4)	-
-	Article 100(2)
ARTICLE 65 (1)	Article 101(1)
-	Article 101(2)
ARTICLE 66	Article 102
ARTICLE 67	Article 103
ARTICLE 68	Article 103
ARTICLE 69	Article 92
ARTICLE 70	-
-	Article 93

Annexes

Article of Regulation (EC) No 2201/2003	Article(s) of Regulation (EU) 2019/1111
ARTICLE 71	Article 104
ARTICLE 72	Article 105
ANNEX I	Annex II
-	Annex I
ANNEX II	Annex III
-	Annex IV
ANNEXIII	Annex V
ANNEX IV	Annex VI
-	Annex VII
-	Annex VIII
-	Annex IX

Annexes

Annex III – List of decisions and opinions of the CJEU referring to Regulation (EU) No 2201/2003 (Brussels IIa Regulation) and the 1980 Hague Child Abduction Convention

Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
1	C-435/06	C	Korkein hallinto-oikeus (Supreme Administrative Court) FI	26.01.2008	P	Art. 1(1)	3.1.1.2 3.1.1.3 7.3
2	C-68/07	Sundelind Lopez	Högsta domstol (Supreme Court) SE	29.11.2007	M	Art. 6, Art. 7	2.3.4 2.3.7
3	C-523/07	A	Korkein hallinto-oikeus (Supreme Administrative Court) FI	02.04.2009	P	Art. 1(1), Art. 8(1), Art. 15, Art. 17, Art. 20	3.1.1.2 3.1.1.3 3.1.1.5.2 3.1.1.5.3

Annexes

Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
							3.2.3.2 3.2.9 7.2.3.1 7.3
4	C-168/08	Hadadi	Cour de Cassation (Supreme Court) FR	16.07.2009	M	Art. 3(1)(b), Art. 64(4)	2.3.3.3 2.3.3.4
5	C-195/08 PPU	Rinau	Lietuvos Aukščiausiasis Teismas (Supreme Court) LT	11.07.2008	P	Art. 11(8), Art. 31(1), Art. 40, Art. 40 - 42	3.1.1.5.2 4.4.1 4.4.6.6 4.4.7.1 4.4.7.2.3 5.6.1
6	C-256/09	Purrucker I	Supreme Court DE	15.07.2010	P	Art. 20, Art. 21 et seq.	3.1.1.5.1

Annexes

Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
							3.1.1.5.2 3.1.1.5.3 3.2.2 3.3.1 3.4.2
7	C-403/09 PPU	Detiček	Višje Sodišče v Mariboru (Court of Appeal Maribor) SI	23.12.2009	P	Art. 20	3.1.1.5.1 3.1.1.5.2 3.3.1
8	C-211/10 PPU	Povse	Supreme Court AT	01.07.2010	P	Art. 10(b)(iv), Art. 11(8), Art. 47(2)	3.2.5.1 3.2.5.2 4.4.4 4.4.7.2.3 4.4.7.3 5.5.1.1.3

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
							5.6.4
9	C-296/10	Purrucker II	Amtsgericht (Local Court) Stuttgart DE	09.11.2010	P	Art. 19(2), Art. 20	3.4.1 3.4.2 7.2.3.1
10	C-400/10 PPU	McB.	Supreme Court IE	05.10.2010	P	Art. 2 Nr. 11 Reg., Art. 7 EU-Charter	3.1.1.2 4.3.3.2.1 6.2
11	C-491/10 PPU	Aguirre Zarraga	Oberlandesgericht (Higher Regional Court) Celle DE	22.12.2010	P	Art. 42 Reg., Art. 24 EU-Charter	4.4.6.3 4.4.7.2.3 6.2 6.3.2
12	C-497/10 PPU	Mercredi	Court of Appeal of England & Wales (Civil Division) UK	22.12.2010	P	Art. 8, Art. 10, Art. 13, Art. 19	3.2.3.2 3.2.3.3

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
13	C-92/12 PPU	Health Service Executive ./. C	High Court IE	26.04.2012	P	Art. 1, Art. 21 et seqq., Art. 56	3.1.1.3 7.3. 7.3.1.2
14	C-185/12	Ciampaglia	Tribunale (Local Court) di Torre Annunziata IT	03.05.2012	P	Manifestly inadmissible	n/a
15	C-1/13	Opinion	European Commission	14.10.2014	Hague Child Abduction Convention	EU external competence for the acceptance of accessions	9.4
16	C-436/13	E ./. B	Court of Appeal of England & Wales (Civil Division) UK	01.10.2014	P	Art. 12(3)	3.2.2 3.2.6.3

Annexes

Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
17	C-656/13	L ./. M	Nejvyšší soud (Supreme Court) CZ	12.11.2014	P	Art. 12(3)	3.2.6.2.2 3.2.6.2.3
18	C-4/14	Bohez ./. Wiertz	Korkein oikeus (Supreme Court) FI	09.09.2015	P	Art. 1, Art. 28 ff., Art. 47(1) Brussels IIa Regulation, Art. 1(2), Art. 49 Brussels I Regulation	2.5.2 3.1.1.2
19	C-184/14	A	Corte suprema di cassazione (Supreme Court) IT	16.07.2015	P	Art. 3(c) and (d) Maintenance Regulation	3.1.2.2
20	C-376/14 PPU	C ./. M	Supreme Court IE	09.10.2014	P	Art. 2 No. 11, Art. 11	3.2.3.2 4.1.3 4.3.3.1

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
							7
21	C-404/14	Matoušková	Nejvyšší soud (Supreme Court) CZ	06.10.2015	P	Art. 1(1)(b), Art. 1(3)	3.1.1.2 3.1.1.4 3.1.1.6
22	C-489/14	A ./.B	High Court of Justice of England & Wales, Family Division UK	06.10.2015	P	Art. 16, Art. 19(1), (3)	2.4
23	C-498/14 PPU	RG	Cour d'appel (Court of Appeal) de Bruxelles BE	09.01.2015	P	Art. 11(7), (8)	4.4.2 4.4.4
24	C-507/14	P ./. M	Supremo Tribunal de Justiça (Supreme Court) PT	16.07.2015	P	Art. 16(1)(a)	3.4.4
25	C-215/15	Gogova ./. Iliev	Varhoven kasatsionen sad (Supreme Court) BG	21.10.2015	P	1. Art. 1(1)(b), Art. 2 No 7	3.1.1.2 3.2.6.2.2

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
							5.5.1.1.1
26	C-294/15	Mikolajczyk	Warsaw Court of Appeal PL	13.10.2016	M	Art. 1(1)(a)	2.2 2.3.3.1
27	C-428/15	CAFA ./. J. D.	Supreme Court IE	27.10.2016	P	Art. 15	3.3.1
28	C-455/15	P ./. Q	Varbergs Tingsrätt SE	19.11.2015	P	Art. 23(a), Art. 24	5.5 5.5.1.1.1
29	C-499/15	W. & V. ./. X.	Vilniaus miesto apylinkės teismas (District Court of the city of Vilnius) LT	15.02.2017	P	Art. 8	3.2.3.1
30	C-173/16	M. H. ./. M. H.	Court of Appeal IE	22.06.2016	M/P	Art. 16	n/a

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
31	C-565/16	Saponaro & Xylina	Irinodikio Lerou (Small Claims Court), Leros, GR	19.04.2018	P	Art. 12(3)	3.1.1.2 3.1.1.4 3.1.1.6 3.2.6.2.2
32	C-111/17 PPU	O. L.	Monomeles Protodikeio (court of first instance – single judge), Athens, GR	08.06.2017	P	Art. 11(1) (Art. 8)	3.2.3.2 3.2.6.2.1 3.2.7
33	C-335/17	Valcheva	Varhoven kasatsionen sad (Supreme Court) BG	31.05.2018	P	Art. 1(2)(a), Art. 2 No 7 and No 10	3.1.1.2 3.2.6.2.2
34	C-386/17	Liberato	Corte suprema di cassazione IT	16.01.2019	P	Art. 19(2), Art. 23(a), Art. 24	3.4.1 5.5 5.5.1.1.1

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
35	C-478/17	IQ	Tribunalul Cluj (court of appeal) RO	04.10.2018	P	Art. 15	3.3.1
36	C-512/17	H.R. ./. K.O.	District Court Poznan-Old Town (court of 1st instance) PL	28.06.2018	P	Art. 8	2.3.3.2 3.2.3.2
37	C-604/17	AN	Varhoven kasatsionen sad (Supreme Court) BG	18.01.2018 (Order)	P	Ancillary jurisdiction for PR not possible outside Arts 8 and 12	n/a
38	C-85/18 PPU	CV	Judecătoria Oradea (court of 1st instance) RO	10.04.2018 (Order)	P	Art. 10	n/a
39	C-325/18 PPU	Hampshire County Council	Court of Appeal IE	19.09.2018	P	Art. 11, Art. 33(5)	4.1.3 n/a

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
	C-375/18 PPU						
40	C-393/18 PPU	U.D. ./. X.B.	High Court UK – E&W	17.10.2018	P	Art. 8	1.3.2 3.2.3.2 3.2.7
41	C-499/15	W and V	Vilniaus miesto apylinkės teismas (District Court) LT	6.05.2021	P	Art. 7	3.2.3.2
42	C-530/18	EP ./. FO	Tribunalul Ilfov (court of appeal) RO	10.07.2019 (Order)	P	Art. 15	3.3.1
43	C-759/18	OF ./. PG	Judecătoria Rădăuţi (court of 1st instance) RO	03.10.2019 (Order)	M P	Art. 3, Art. 17 Art. 2 No 7, Art. 12(1)(b)	n/a

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
44	C-289/20	IB./FA	COUR D'APPEL DE PARIS (court of appeal) FR	25.11.2021	M	Art. 3	2.3.3.2
45	C-501/20	MPA ./. LCDMNT	Audiencia Provincial de Barcelona (court of appeal) ES	01.08.2022	P/M	Art. 3, Art. 8, Art. 7, Art. 14 Brussels IIa; Art. 3, Art. 7 Maintenance Regulation; Art. 47 Charter	2.3.3.2 2.3.4 2.3.7 3.2.3.2 3.2.8
46	C-522/20	OE ./. VY	Oberster Gerichtshof (Supreme Court) AT	10.02.2022	M	Art. 3(1)(a)	n/a
47	C-603/20 PPU	SS ./. MCP	High Court of Justice (England & Wales) UK	24.03.2021	P	Art. 10	3.2.5.1.

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
48	C-646/20	Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht ./. TB	Bundesgerichtshof (Federal Court of Justice) DE	Pending	M	Art. 2(4), Art. 21(1)	3.1.3.1 5.2.1
49	C-262/21 PPU	A ./. B	Korkein oikeus (Supreme Court) FI	02.08.2021	P	Art. 2(11)	3.2.4.2.2 4.3.3.2.2
50	C-572/21	CC ./. VO	Högsta Domstolen (Supreme Court) SE	14.07.2021	P	Art. 8(1), Art. 61(a) Brussels IIa; Art. 52(2) Hague 1996	1.3.2 3.2.3.3 9.5.3.2
51	C-87/22	TT ./. AK	Landgericht Korneuburg AT	Pending	P	Art. 10, Art. 15	n/a
52	C-372/22	CM ./. DN	Tribunal d'arrondissement LU	Pending	P	Art. 9, Art. 15	n/a

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Number	Case number	Names of parties	Referring national court	Date of CJEU decision	Matrimonial matter / Parental responsibility	Article of the Regulation	References in Practice Guide
53	C-462/22	BM ./. LO	Bundesgerichtshof (Federal Court of Justice) DE	Pending	M	Art. 3(1)(a)	n/a

Annex III – List of other decisions and opinions of the CJEU (referring to legislation other than the Brussels IIa Regulation or the 1980 Hague Child Abduction Convention)

Number	Case number	Names of parties	Referring national court	Date of CJEU decision	References in Practice Guide
1	C-43/77	Industrial Diamond Supplies v Riva	Rechtbank van eerste aanleg (Court of 1st instance) BE	22.11.1977	5.4.2
2	C-369/90	Micheletti and Others v Delegación del Gobierno en Cantabria	Tribunal Superior de Justicia (High Court of Justice) ES	7.07.1992	2.3.3.3
3	Case C-260/97	Unibank v Christensen	Bundesgerichtshof (Federal Court of Justice) DE	17.06.1999	3.1.3.2 5.2.2
4	Case C-456/11	Gothaer Allgemeine Versicherung and Others	Landgericht Bremen DE	15.11.2012	3.4.1

Annexes

Number	Case number	Names of parties	Referring national court	Date of CJEU decision	References in Practice Guide
5	C-324/12	Novontech-Zala	Handelsgericht Wien AT	21.03.2013	4.3.6.1
6	C-681/13	Diageo Brands	the Hoge Raad (Supreme Court) NL	16.07.2015	5.5.1.1.1
7	C-281/15	Sahyouni	Oberlandesgericht (Higher Regional Court) München DE	12.05.2016	1.3.2
8	C-467/16	Schlömp	Amtsgericht (Local Court) Stuttgart DE	20.12.2017	3.4.4
9	C- 555/18	K.H.K., (Account Preservation)	Sofiyski rayonen sad (Sofia District Court) BG	7.11.2019	4.3.6.1
10	C-454/19	ZW	Amtsgericht Heilbronn (court of 1st instance) DE	19.11.2020	4.4.6.5
11	C-422/21	RK	Oberlandesgericht (Higher Regional Court) Köln DE	9.09.2021	3.4.1

Annex IV – List of decisions of the ECtHR

Number	ECtHR application number	Names of parties	Date of ECtHR judgment	References in Practice Guide
1	Application no. 14737/09	Šneersone e Kampanella v Italy	12.10.2011	4.4.6.1 5.6.5
2	Application no. 56673/00	Iglesias Gil and A.U.I. v Spain	29.07.2003	5.6.1
3	Application no. 31679/96	Ignaccolo-Zenide v Romania	25.01.2000	5.6.1
4	Application no. 48206/99	Maire v Portugal	26.06.2003	5.6.1
5	Application no. 8677/03	PP v Poland	8.01.2008	5.6.1
6	Application no. 10131/11	Raw v France	7.03.2013	5.6.1 5.6.2

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Number	ECtHR application number	Names of parties	Date of ECtHR judgment	References in Practice Guide
7	Application no. 10926/09	Rinau v Lithuania	14.01.2020	3.1.1.5.2 4.4.1 4.4.6.6 4.4.7.1 4.4.7.2.3 5.6.1
8	Application no. 6457/09	Shaw v Hungary	26.10.2011	5.6.1
9	Application no. 20255/12	Prizzia v Hungary	11.06.2013	5.6.1
10	Application no. 7198/04	Iosub Caras v Romania	27.07.2006	5.6.2
11	Application no. 19055/05	Deak v Romania and the UK	3.06.2008	5.6.2
12	Application no. 29388/05	Maumosseau and Washington v France	6.12.2007	5.6.4

Annexes

Number	ECtHR application number	Names of parties	Date of ECtHR judgment	References in Practice Guide
13	Application no. 26755/10	Lipkowski and Mc Cormack v Germany	18.01.2011	5.6.4
14	Application no. 3890/11	Povse v Austria	18.06.2013	5.6.4
15	Application no. 25437/08	Raban v Romania	26.10.2010	5.6.4
16	Application no. 41615/07	Neulinger and Shuruk v Switzerland	6.07.2010	5.6.4 5.6.5 5.6.6
17	Application no. 23941/14	Lacombe v France	10.10.2019	5.6.4
18	Application no. 4320/11	B v Belgium	19.11.2012	5.6.5
19	Application no 27853/09	X v Latvia	13.12.2011	5.6.5 5.6.6

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Number	ECtHR application number	Names of parties	Date of ECtHR judgment	References in Practice Guide
20	Application no. 49450/17	O.C.I. and Others v. Romania	21.05.2019	5.6.5
21	Application no. 10395/19	Michnea v Romania	7.07.2020	5.6.5
22	Application no 71776/12	NTS and Others v Georgia	2.02.2016	6.2
23	Application no. 23298/12	Iglesias Casarubios and Cantalapiedra Iglesias v Spain	11.10.2016	6.2

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