



Practice Guide for the application of the

# Brussels IIa Regulation

# Table of Contents

<b>1. General Introduction</b> .....	<b>4</b>
1.1. Geographical scope – Article 2.3. ....	5
1.2. Commencement provisions – Article 72 .....	5
1.3. Transitional rules – Article 64 .....	5
<b>2. Matrimonial Matters</b> .....	<b>8</b>
2.1. Introduction .....	9
2.2. Material scope in matrimonial matters .....	9
2.3. Which courts have jurisdiction in matrimonial matters? .....	9
2.4. Lis Pendens - or what happens if proceedings are brought in two Member States? – Article 19 (1) .....	15
2.5. Recognition and enforcement of judgments in matrimonial matters .....	15
<b>3. Parental Responsibility</b> .....	<b>18</b>
3.1. Material Scope .....	19
3.2. Which Member State's Courts have Jurisdiction in Parental Responsibility? .....	23
3.3. Transfer to a court better placed to hear the case – Article 15 .....	34
3.4. What happens if proceedings are brought in two Member States? .....	38
3.5. Recognition and Enforcement - General .....	40
3.6. The Rules on Rights of Access (Contact) - Recognition and Enforcement – Articles 40 and 41 .....	43
<b>4. The Rules on International Child Abduction within the EU</b> .....	<b>48</b>
4.1. General introduction – Articles 10, 11, 40, 42, 55 and 62 .....	49
4.2. Jurisdiction issues as regards child abduction cases .....	51
4.3. Rules to ensure the prompt return of the child – Article 11(1) to (5) .....	53
4.4. What happens if the court decides that the child shall not return? – Article 11(6) and (7) .....	58

<b>5. Enforcement</b>	<b>68</b>
5.1. Importance of enforcement – general	69
5.2. Judgment to be enforced in the same conditions as if granted in the Member State of enforcement – Art 47(2)	70
5.3. Jurisprudence of the European Court of Human Rights ('ECtHR')	71
<b>6. Hearing the child – Articles 23, 41 and 42</b>	<b>76</b>
6.1. Children are to be given the opportunity to express a view	77
6.2. Exception to the duty to take the views of a child	77
6.3. Procedure for taking the views of a child	77
6.4. How to obtain the views of the child	77
6.5. Training in taking the views of the child	78
6.6. Purpose of taking the views of a child	78
6.7. The UN Convention on the Rights of the Child	80
<b>7. Co-operation between central authorities and between courts – Articles 53-58</b>	<b>82</b>
7.1. The European Judicial Network in civil and commercial matters – Article 54	83
7.2. Duties of the central authorities – Article 55	83
7.3. Facilitating agreement – Article 55(e)	83
7.4. Placement of children in care in another Member State – Article 56	83
7.5. Resourcing of central authorities	85
7.6. Co-operation of Courts	85
7.7. Liaison Judges	86
<b>8. Relationship between the Regulation and the 1996 Hague Convention on child protection – Articles 61 and 62</b>	<b>88</b>
8.1. The scope of the two instruments	89
8.2. Ratification by the EU Member States	89
8.3. Which cases are covered by the Regulation and which by the 1996 Convention? – Articles 61 and 62	89
<b>List of Tables and Charts in this Guide</b>	<b>92</b>
<b>List of Cases referred to in this Guide</b>	<b>92</b>



# 1. General Introduction

## 1.1. Geographical scope – Article 2.3

The Regulation, known colloquially as Brussels IIa or sometimes Brussels II bis<sup>(1)</sup>, applies in all the Member States of the European Union with the sole exception of Denmark. The Regulation is directly applicable in the Member States which are bound by it and as such prevails over national law.

## 1.2. Commencement provisions – Article 72

The Regulation applied as from 1<sup>st</sup> March 2005 as regards twenty four of the then Member States and subsequently as from the date at which successive new States joined the Union.<sup>(2)</sup> The Regulation applies in its entirety to:

- relevant legal proceedings instituted,
- documents formally drawn up or registered as authentic instruments, and
- agreements concluded between parties – after the relevant date of its application under Article 72 (Article 64(1)).

(1) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

(2) As from 1<sup>st</sup> January 2007 as regards Bulgaria and Romania and as from 1<sup>st</sup> July 2013 as regards Croatia.

## 1.3. Transitional rules – Article 64

The rules on recognition and enforcement of the Regulation apply, in relation to legal proceedings instituted before 1 March 2005, to three categories of judgments:

- (a) judgments given on and after 1 March 2005 in proceedings instituted before that date but after the date of entry into force of the Brussels II Regulation (Article 64.2)<sup>(3)</sup>;
- (b) judgments given before 1 March 2005 in proceedings instituted after the date of entry into force of the Brussels II Regulation in cases falling under the scope of the Brussels II Regulation (Article 64.3); and
- (c) judgments given before 1 March 2005 but after the entry into force of the Brussels II Regulation in proceedings instituted before the date of entry into force of the Brussels II Regulation (Article 64(4)).

Such judgments falling under these categories are recognised and enforced pursuant to Chapter III of the Regulation under certain conditions, as follows:

- for a judgment referred to in (a) and (c): provided that the court which issued the judgment founded its jurisdiction on rules which accord with those in the Regulation, the Brussels II Regulation or in Convention which was in force between the Member State

(3) Council Regulation (EC) No 1347/2000; see OJ L 160, 30.6.2000, p. 19; The Brussels II Regulation came into force on 1<sup>st</sup> March 2001.

of origin and the Member State of enforcement at the time the proceedings were instituted; and

- for a judgment referred to in (b) and (c): provided that it relates to divorce, legal separation or marriage annulment or to parental responsibility for the children of both spouses on the occasion of any such matrimonial proceedings.

It should be noted that Chapter III of the Regulation on recognition and enforcement applies in its entirety to these judgments, including the rules in Section 4 thereof which dispenses with the exequatur procedure for certain types of judgments (see chapter 3, paragraph 3.6, and chapter 4).





## 2. Matrimonial Matters

## 2.1. Introduction

The provisions of the Regulation concerning matrimonial matters were taken over practically unchanged from the Brussels II Regulation<sup>(4)</sup>. That Regulation in turn had adopted the provisions of the Convention of 28 May 1998<sup>(5)</sup> on the same subject matter which never entered into force. Literature devoted to the Convention and to the Regulation can therefore also serve as guidance for the present Regulation as regards matrimonial matters. For example the explanatory report concerning the Convention, could be useful in this context<sup>(6)</sup>.

## 2.2. Material scope in matrimonial matters

The Regulation contains rules on jurisdiction, recognition and enforcement in civil matters relating to divorce, legal separation and marriage annulment ("matrimonial matters"). It does not deal with the grounds for divorce or applicable law in divorce<sup>(7)</sup> or with ancillary issues, such as maintenance

obligations<sup>(8)</sup>, the property consequences of marriage<sup>(9)</sup>, and matters of succession<sup>(10)</sup>.

## 2.3. Which courts have jurisdiction in matrimonial matters?

### 2.3.1. Jurisdiction rules introduction

The jurisdiction rules in Article 3 determine in which Member State the courts are competent but not the court which is competent within that Member State. This question is left to the domestic law of each Member State as to which court is competent in matrimonial matters.

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(4) See footnote 3 *supra*.

(5) See OJ C 221, 16.7.1998, p. 1.

(6) See OJ C 221, 16.7.1998, p. 27.

(7) See Council Regulation (EU) No 1259/2010 of 20 December 2010; OJ L 343, 29.12.2010, p. 10, which is not applied in all Member States.

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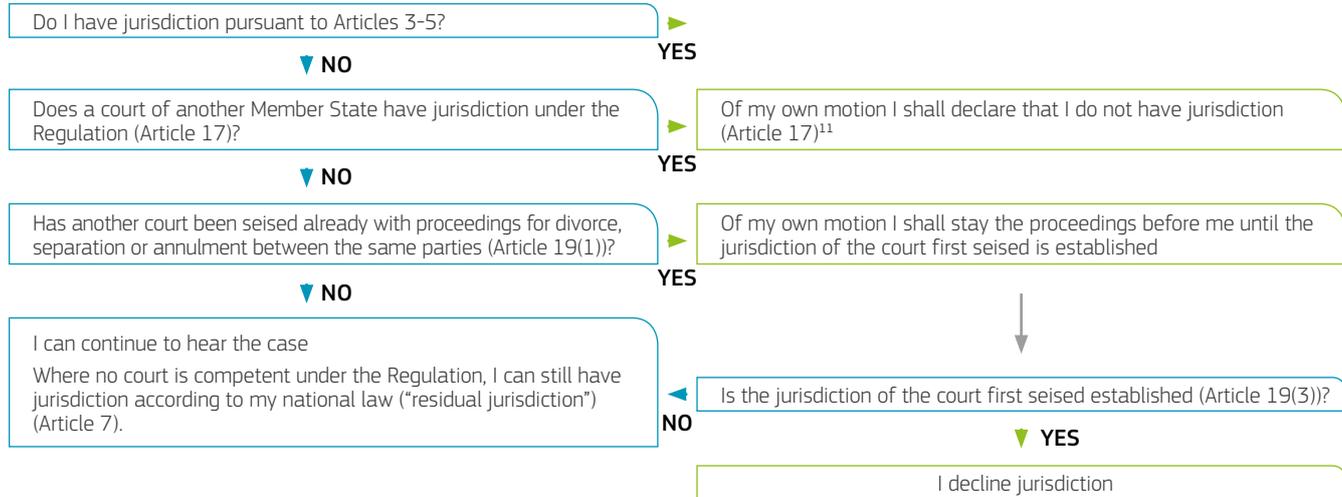
(8) See Council Regulation (EC) No 4/2009 of 18 December 2008; OJ L 7, 10.1.2009, p. 1.

(9) See Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; COM (2011) 126, 16.03.2011.

(10) 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.

### 2.3.2. Jurisdiction rules – judicial analysis

A judge whose court is seised with an application for divorce makes the following analysis:



(11) See paragraph 2.3.5.

### 2.3.3. The seven grounds of jurisdiction in matrimonial matters – Article 3

There is no general jurisdiction rule in matrimonial matters. Instead, Article 3 enumerates seven grounds of jurisdiction. Spouses may raise an application for divorce in the courts of the Member State of:

- a. their habitual residence, or
- b. their last habitual residence if one of them still resides there, or
- c. the habitual residence of either spouse in case of a joint application, or
- d. the habitual residence of the respondent, or
- e. the habitual residence of the applicant, provided that he or she has resided there for at least one year before making the application, or
- f. the habitual residence of the applicant, provided that he or she has resided there for at least six months before making the application and he or she is a national of that Member State, or
- g. their common nationality (common “domicile” in the case of the UK and Ireland).

### 2.3.4. The alternative nature of the grounds of Jurisdiction

The grounds of jurisdiction in matrimonial matters are alternative, implying that there is no hierarchy, and so no order of precedence, between them. In the CJEU case *Hadadi*<sup>(12)</sup> the court had to decide the questions as to whether there was such a hierarchy since in that case the spouses were

both nationals of the same two Member States; the essence of the court’s decision is given in the box hereafter.

The spouses lived together and had their habitual residence in Member State A. They were also both nationals of that Member State and of Member State B. After they split up both W and H raised actions for divorce, W in A and, four days later, H in B whilst they both continued to live in A. The court in B granted a divorce; that divorce was therefore, in principle, recognisable and enforceable.

Meanwhile the court of first instance in A refused to accept the application for divorce by W. On appeal by W the appeal court in A reversed this decision and also declared that the order of the court in B could not be recognised in A. H appealed this and the case was referred to the CJEU.

The Court of Justice was asked three questions:

- was Article 3(1)(b) of the Regulation to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail?
- if the answer to the first question is No, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more effective of the two nationalities? – and

(12) See, on this point, CJEU decision in Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871- judgment delivered on 16<sup>th</sup> July 2009.

- if the answer to the second question is No, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?

The Court answered as follows:

- where the court of the Member State addressed – in this case A – must verify whether the court of the Member State of origin – in this case B – of a judgment would have had jurisdiction under Article 3(1)(b) of the regulation, the latter provision precludes the court of A from regarding spouses who each hold the nationality both of A and of B as nationals only of A. The court in A, on the contrary, must take into account the fact that the spouses also hold the nationality of B and that, therefore, the courts of the latter could have had jurisdiction to hear the case.
- the system of jurisdiction established by the Regulation concerning the dissolution of matrimonial ties is not intended to preclude the courts of several States from having jurisdiction. Rather, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them.
- while the grounds of jurisdiction listed in Article 3(1)(a) are based in various respects on the habitual residence of the spouses, that in Article 3(1)(b) is ‘the nationality of both spouses or, in the case of the United Kingdom and Ireland, the “domicile” of both spouses’. Thus, except in relation to the latter two Member States, the courts of the other Member States of which the spouses hold

the nationality have jurisdiction in proceedings relating to the dissolution of matrimonial ties.

- Accordingly the answer to the second and third questions referred must be that, where spouses each hold the nationality of the same two Member States, Article 3(1)(b) of the Regulation precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. On the contrary, the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and the spouses may seise the court of the Member State of their choice.

### 2.3.5. Examination as to jurisdiction – Article 17

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. In the case of A<sup>(13)</sup> the European Court of Justice gave the following guidance as to what a court should do in such circumstances:

(13) Case C-523/07 A [2009] ECR I-2805; judgment delivered on 2<sup>nd</sup> April 2009.

‘Where the court of a Member State does not have jurisdiction at all, it must declare of its own motion that it has no jurisdiction, but is not required to transfer the case to another 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 designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.’

### 2.3.6. Examples of the application of the jurisdiction rules

*Example 1: Both spouses are habitually resident in the same Member State*

A man who is a national of Member State A is married to a woman who is a national of Member State B. The couple is habitually resident in Member State C. After a few years, their marriage deteriorates and the wife wants to divorce. Either spouse can apply for divorce only before the courts of Member State C pursuant to Article 3 on the basis that they have their habitual residence there. The wife cannot seise the courts of Member State B on the basis that she is a national of this State, since Article 3.1(b) requires the common nationality of both spouses.

*Example 2: Spouses habitually resident in different Member States*

Spouses, who previously habitually resided together in Member State A, split up. H, a national of that State, remains there whilst W goes to Member State B 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 A, on the ground that that was the last habitual residence of both spouses and H is still there; H can also apply in the courts of B once W is habitually resident there. W can also raise an application in the courts of A on the ground that H is habitually resident there and of B of which she is a national and she is habitually resident if she resided there for at least six months immediately before the application was made.

*Example 3: Spouses with joint nationality of one Member State*

Spouses H and W are both nationals of Member State P but have been living in state A; after they split up they both leave A. H goes to Member State B and W goes to C. Either spouse can immediately raise an application before the courts of P on the grounds of their joint nationality; 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.

*Example 4: Spouses are nationals of different Member States*

Spouses W and H, living in Member State S are nationals respectively of Member States G and H. After they separate W returns to G whilst H

goes to another Member State N. In this case the following options arise: W can apply for divorce to the courts in N once H has acquired Habitual Residence there; W can apply for divorce in G, the Member State of her nationality, once she has acquired a habitual residence there and resided there for six months. H can apply for a divorce in G also once W has acquired a habitual Residence there; H can only apply for a divorce in N once he has resided there for a year and has acquired habitual residence there.

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

Before they separated the spouses lived together and had their joint habitual residence in Member State A. Whilst W is a national of Member State B, H is a national of a non-EU State C. After the couple split up W remains in Member State A and H returns to live in C. Both H and W can make an application in the courts of A, on the ground that that was the last habitual residence of both spouses and W is still there. If W had left A and gone to live in B of which she is a national, she could have raised an application when she is habitually resident there if she resided there for at least six months before the application was made.

Aspects of this situation were dealt with in a case before the CJEU<sup>(14)</sup> 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 B the courts of that Member State of

(14) See Case C-68/07 *Sundelind Lopez v Lopez Lizazo* [2007] ECR I-10403, in which judgment was delivered on 29<sup>th</sup> November 2007.

which she is a national were competent by virtue of the operation of Articles 6 and 7.

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

### 2.3.7. Exclusive nature of the jurisdiction rules – Article 6

The grounds are exclusive in the sense that a spouse who is habitually resident in a Member State or who is a national of a Member State (or who has his or her “domicile” in the United Kingdom or Ireland) may only be sued in another Member State on the basis of the rules in Article 3 to 5 of the Regulation.

### 2.3.8. Residual grounds of jurisdiction – Article 7

Where the rules set out in Articles 3 to 5 do not serve to confer jurisdiction on a court of any Member State the national jurisdiction rules in each Member State may apply to determine whether a court of any Member State has jurisdiction. However, because of the exclusive nature of the rules set out in those Articles, as is provided in Article 6, this rule in Article 7(1) only applies in relation to a respondent who is not habitually resident in nor a national of or (in the case of the UK and Ireland) domiciled in a Member State. As against such a respondent the rules of jurisdiction in a Member State may be pled by any national of that Member State as well

as by any national of another Member State who is habitually resident in that State.<sup>(15)</sup>

### 2.3.9. Prorogation of the divorce court in matters of parental responsibility

There is a prorogation rule in Article 12 which stipulates that a court which is seised of divorce proceedings under the Regulation also has jurisdiction in matters of parental responsibility connected with the divorce if certain conditions are met<sup>(16)</sup>.

## 2.4. Lis Pendens - or what happens if proceedings are brought in two Member States? – Article 19 (1)

Once a court has been seised pursuant to Article 3 of the Regulation and declared itself competent, courts of other Member States are no longer competent and must dismiss any subsequent application. The aim of the “*lis pendens*” rule is to ensure legal certainty, and avoid parallel actions and the possibility of irreconcilable judgments.

Article 19(1) covers two situations:

- a. Proceedings relating to the same subject-matter and cause of action are brought before courts of different Member States and

- b. Proceedings which do not relate to the same cause of action, but which are “dependent actions” are brought before courts of different Member States.

The difference between (a) and (b) can be illustrated as follows: if spouses each raise proceedings for divorce in two different Member States then the rule in (a) will apply because the proceedings have the same cause of action. Where one spouse raises proceedings for divorce in one Member State and the other raises proceedings for annulment in another then the rule in (b) will apply because although the cause of action is not the same the actions are still related to or dependent on each other.

## 2.5. Recognition and enforcement of judgments in matrimonial matters

### 2.5.1. No special procedure required for recognition of a judgment – Article 21(2)

As a matter of principle it is not necessary for any special procedure to be used to achieve the recognition in one Member State of the EU of a judgment given in another. In particular if no appeal is lodged or no further appeal can be made against the judgment in the Member State of its origin, there is no special procedure required to update the civil status records of a Member State on the basis of a judgment. 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 judgment itself to the authorities in the Member State where the new marriage is to take place to vouch the civil status of that person as having been divorced and, thus, free to marry.

(15) See Example 5 in paragraph 2.3.6 and the previous footnote.

(16) See paragraph 3.2.6 *infra*.

## 2.5.2. Procedure for recognition and enforcement – Articles 21 and 23-39

Any interested party may request that a judgment on matrimonial matters, issued by a court of a Member State, shall be or not be recognised and be declared enforceable in another Member State. The process for declaring a foreign judgment to be enforceable is sometimes referred to as 'exequatur'. The request for a declaration of enforceability is to be made to the competent court in the Member State in which recognition and enforcement is sought. The courts designated by the Member States for this purpose are found in list 1<sup>(17)</sup>. This court shall declare, without delay, that the judgment is enforceable in that Member State. Neither the person against whom enforcement is sought, nor the child, is entitled to submit observations to the court at this stage.

The parties may appeal against the decision. The appeal shall be lodged with the courts designated by the Member States for this purpose which can be found in list 2. Both parties may submit comments to the court at this stage.

## 2.5.3. Grounds of refusal of recognition of a judgment – Article 22

There are limited grounds on the basis of which recognition may be refused. These are:

- that recognition would be manifestly contrary to the public policy of the Member State of enforcement<sup>(18)</sup>
- 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 judgment
- if the judgment is irreconcilable with a judgment between the same parties in the Member State where recognition is sought, or
- if it is irreconcilable with a judgment between the same parties in another State which is capable of being recognized in the Member State where recognition is sought.

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(17) OJ C 85, 23.3.2013, p. 6.

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(18) But see on this point Article 25 of the Regulation and para 2.5.4.

### 2.5.4. Restrictions concerning review by the court where recognition is sought

The court where recognition is sought may not:

- review the basis of jurisdiction of the court of the Member State of origin which issued the judgment – Art 24
- apply the test of public policy to the jurisdiction rules set out in Articles 3 to 7 of the Regulation – Art 24
- refuse to recognise the judgment because the law of the Member State of recognition would not have allowed a judgment in matrimonial matters on the same facts – Art 25 or
- in any event review the judgment as to its substance – Art 26

### 2.5.5. Authentic Instruments – Article 46

A document drawn up or registered in a Member State as an authentic instrument which is enforceable there, or an agreement which has been concluded and is enforceable in the Member State in which it was concluded, shall be recognised and declared enforceable in another Member State like a judgment<sup>(19)</sup>.

### 2.5.6. Legalisation – Article 52

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

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(19) For a general indication of the meaning of 'authentic instrument' which describes the nature and effect thereof see the CJEU case *Unibank A/S v Flemming G. Christensen*, Case C- 260/97 [1999] ECR I-3715 of 17<sup>th</sup> June 1999; there is also a definition now to be found in Article 2.3 of the Maintenance Regulation – reference at footnote 8 supra.



### 3. Parental Responsibility

## 3.1. Material Scope

*The Regulation deals with jurisdiction, recognition and enforcement*

### 3.1.1. Matters covered by the Regulation

The Regulation lays down rules on jurisdiction (Chapter II), recognition and enforcement (Chapter III) and co-operation between central authorities (Chapter IV) in matters of parental responsibility. It contains specific rules on child abduction and access rights.

*The Regulation applies to all civil matters concerning the “attribution, exercise, delegation, restriction or termination of parental responsibility”*

#### 3.1.1.1. Which children are covered by the Regulation?

In contrast to the 1996 Hague Convention on child protection (see chapter 8 below), which applies to children up to the age of 18, the Regulation does not define a maximum age for the children who are covered by the Regulation, but leaves this question to national law. It should be noted that the Hague Child Abduction Convention applies to children up to the age of 16. Although decisions on parental responsibility concern in most cases minors below the age of 18, persons below 18 years may be subject to emancipation under national law, in particular if they wish to marry. Decisions issued with regard to these persons do not in principle qualify as matters of “parental responsibility” and consequently fall outside the scope of the Regulation.

#### 3.1.1.2. Meaning of ‘parental responsibility’ – Articles 1 (1) (b), 1 (2) and 2 (7)

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 may arise by judgment, by operation of law or by agreement. The list of matters within the meaning of “parental responsibility” pursuant to the Regulation is not exhaustive, but merely illustrative.

It includes:

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

The holder of parental responsibility may be a natural or a legal person.

*The Regulation applies to “civil matters”*

#### 3.1.1.3. Meaning of civil matter – Article 1(1) and (2) and Recital 7

The Regulation applies to “civil matters”. The concept of “civil matters” is broadly defined for the purposes of the Regulation and covers all matters listed in Article 1(2). Where a specific matter of parental responsibility is a

“public law” measure according to national law, such as the placement of a child in a foster family or in institutional care, the Regulation shall apply. An example of this situation is given in the adjacent box.

The question as to 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 in the cases of *C*<sup>(20)</sup> and *A*<sup>(21)</sup>. In each of these cases the Court of Justice had to decide if such a placement in a foster family under public law could be within the scope of the Regulation. Both of these cases resulted from situations where children had been taken into care and placed with foster families.

In the case of *C* two children had been the subject of an order by the child care 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 by appealing to the Supreme Court in Finland on a number of grounds including that the order was outside the scope of the Regulation because it was not a civil matter but taken under public law. The CJEU held that the order was within the scope of the Regulation as a civil matter as regards both that part relating to the taking into care of the children as well as the placement of the children with a foster family.

In the case of *A* three children lived with their mother and stepfather in Sweden. They moved for the summer to Finland and later that year

(20) Case C-435/06 C [2007] ECR I-10141; judgment delivered on 27<sup>th</sup> November 2007

(21) Case C-523/07 A [2009] ECR I-2805; judgment delivered on 2<sup>nd</sup> April 2009

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 step father 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 for the purpose of the Regulation. That court referred the matter to the European Court of Justice for interpretation of the Regulation and the latter 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, where that decision was adopted in the context of public law rules relating to child protection.

### ***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 9

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. Thus the Regulation applies to any such measure which may be necessary for the administration or sale of the property if, for instance, the child’s parents are in dispute as regards such a question or the child becomes an orphan.

In contrast, measures that relate to the child’s property, but which do not concern parental responsibility, are not covered by the Regulation, but by Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and

the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation")<sup>(22)</sup>. It is for the judge to assess in the individual case whether a measure relating to the child's property concerns parental responsibility or not.

### 3.1.2. Matters excluded from the Regulation

#### 3.1.2.1. Matters to which the Regulation does not apply – Article 1(3) and Recital 10

Article 1(3) enumerates those matters which are excluded from the scope of parental responsibility within the meaning of the Regulation even though they may be closely linked thereto (for example parentage, adoption, emancipation 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 offences committed by children, see Art 1(3)(g) and Recital 10.

*The Regulation does not apply to maintenance obligations*

#### 3.1.2.2. Maintenance Obligations – Recital 11

Maintenance obligations and parental responsibility are often dealt with in the same negotiations or court proceedings between parents. Maintenance obligations are, however, not covered by the Regulation<sup>(23)</sup>,

(22) See footnote 8 supra.

(23) It should be noted that a recast version of the 'Brussels I' Regulation has been adopted and will apply as from 10<sup>th</sup> January 2015; see Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012; OJ L 351, 20.12.2012, p 1.

since they are already governed by the Maintenance Regulation. A court which is competent pursuant to the Regulation will nevertheless generally have jurisdiction to rule also on maintenance matters by application of Article 3(d) of the Maintenance Regulation. This provision allows a court which is competent to deal with a matter of parental responsibility also to decide upon maintenance if that question is ancillary to the question of parental responsibility.

Although the two issues would be dealt with in the same proceeding, the resultant 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 Brussels IIa 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 5

In contrast to the previous Brussels II Regulation, the present 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 judgments*

### 3.1.3.1. Meaning of judgment – Article 2(1) and (4)

The Regulation applies to court judgments, whatever the judgment may be called (including decree, order and decision). However, it is not limited to decisions issued by courts, but applies to any decision pronounced by an authority having jurisdiction in matters falling under the Regulation such as social and child protection authorities.

#### *The Regulation applies to “authentic instruments”*

### 3.1.3.2. Authentic Instruments – Article 46

Furthermore, the Regulation applies to documents which have been formally drawn up or registered as “authentic instruments” and which are enforceable in the Member State in which they were drawn up or registered. Such documents, which are to be recognised and declared enforceable in other Member States under the same conditions as a judgment, include, for example, documents drawn up by or before notaries as well as documents registered in public registers<sup>(24)</sup>.

#### *The Regulation applies to agreements between parties*

### 3.1.3.3. Agreements – Articles 46 and 55(e)

Another important feature of the Regulation is that it also covers agreements concluded between parties to the extent that they are enforceable in the Member State in which they were concluded. The aim of this provision is to support the policy that it is preferable in the interests of children to encourage parties to reach agreement on matters of parental responsibility by negotiation, preferably outside court.

Hence, an agreement is to be recognised and enforceable in other Member States under the same conditions as a judgment provided that it is enforceable in the Member State in which it is concluded, irrespective of whether it is a private agreement between the parties or an agreement concluded before an authority. This also accords with the provisions of Article 55(e) whereby the Central Authorities should facilitate agreement between holders of parental responsibility through mediation or other means and facilitate cross border communication to this end.

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

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(24) See also footnote 19 supra.

### 3.1.3.4. Provisional and Protective measures – Article 20

Article 20 makes it clear that the provisions of the Regulation do not prevent a court from taking provisional, including protective, measures in accordance with its national law in respect of a child situated on its territory even if a court of another Member State has jurisdiction under the Regulation as to the substance of the matter.

It is suggested, consequently, that as a matter of good practice and in order to make clearly evident the grounds of jurisdiction on the basis of which a court takes a measure under Article 20 that whenever a court does so it should state *in limine* of the judgment whereby the measures are taken whether it has jurisdictional competence under the Regulation on the substance of the process or whether it has not.<sup>(25)</sup>

Such a measure can be taken by a court or by an authority having subject matter jurisdiction in matters falling within the scope of the Regulation (Article 2(1)). A welfare authority, or child protection or youth authority may, for instance, be competent to take provisional measures under national law.

Article 20 is not a rule which confers jurisdiction. Consequently, the provisional measures cease to have effect when the competent court has ordered the measures it considers appropriate.

(25) 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, *Bianca Purucker v Guillermo Valles Perez* [2010] ECR I-7353, especially at paragraphs 70 to 76.

#### Example:

A family is travelling by car from Member State A to Member State B on their summer holiday. Once arrived in Member State B, 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 state of coma. The authorities of Member State B urgently need to take certain provisional measures to protect the child who has no relatives in Member State B. The fact that the courts of Member State A have jurisdiction under the Regulation as to the substance does not prevent the courts or competent authorities of Member State B from deciding, on a provisional basis, to take measures to protect the child. These measures cease to apply once the courts of Member State A have taken the measures which they consider to be appropriate.

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

### 3.2.1. System of Jurisdiction rules in Parental Responsibility

The provisions of Articles 8 to 10 and 12 and 13 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 do not designate the courts which are competent within the Member States as that is dealt with under the relevant national law. More information on this can be found on the websites of the European Judicial Network<sup>(26)</sup>.

(26) <https://e-justice.europa.eu/home.do>

### 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:

Does the court seised have jurisdiction under the general rule in Art. 8?

▼ YES

Do the courts of another MS have prevailing jurisdiction under Art. 9, 10 or 12?

▼ YES

The court seised must decline jurisdiction under Article 17.

▼ NO

Does that court have jurisdiction pursuant to Art. 9-10, 12 or 13?

▼ NO

Applying Art 17 does a court of another Member State have jurisdiction under the Regulation?

▼ YES

Applying Art 17 the court seised must declare of its own motion that it does not have jurisdiction.

▼ NO

Applying Art 14 where no court is competent under Articles 8 to 10 and 12 or 13, the court can exercise any jurisdiction conferred on it under its national law ("residual jurisdiction").

It is suggested that as a matter of good practice courts should always make clear in their judgements the basis on which they took jurisdiction in parental responsibility.<sup>(27)</sup>

### 3.2.3. General jurisdiction rule – Article 8 and Recital 12

#### 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 relevant court of the Member State of the habitual residence 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.

Habitual residence is not defined by the Regulation. The meaning of the term should be interpreted in accordance with the objectives and purposes of the Regulation.

It must be emphasised that the interpretation of habitual residence is not determined by reference to any concept of habitual residence under any particular national law, but should be accorded an “autonomous” meaning under and for the purposes of the law of the European Union. Whether or not in any particular case a child has her or his habitual residence in any particular Member State has to be determined by the court in each case on the basis of the facts applying to the situation of that particular child.

<sup>(27)</sup> See the case C-256/09, *Bianca Purrucker v Guillermo Valles Perez* cited above at footnote 25.

#### 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 her or his habitual residence especially where there is frequent movement from one Member State to another or the move across an international border is relatively recent. The Court of Justice of the European Union 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.

##### *A — Case C-523/07*

In its judgment issued on 2<sup>nd</sup> April 2009 in Case C-523/07, ‘A’<sup>(28)</sup>, the Court said that the ‘habitual residence’ of a child, within the meaning of Article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case. In that case the children concerned had been moved by their parents from one Member State to another 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.

<sup>(28)</sup> Case C-523/07 A [2009] ECR I-2805; judgment delivered on 2<sup>nd</sup> April 2009.

The Court analysed the circumstances and said that mere physical presence is not enough to establish habitual residence for the purposes of Article 8 of the Regulation. In addition to the physical presence of the child in a Member State, other factors must be chosen which are capable of showing that that presence is not in any way 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, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State.

The Court concluded by noting that 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 its judgment issued on 22<sup>nd</sup> December 2010 in the case of *Mercredi*<sup>(29)</sup> the court reaffirmed its statement in 'A' by saying that the concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment.

This case concerned a baby girl aged just two months at the time that she was removed by her mother from England to France. Separate proceedings had been raised by the mother in France some two or so weeks after the proceedings in London. The English Court referred the case to the CJEU which, in its judgment, began by stating, that the test for determining the jurisdiction of a court of a Member State in matters of parental responsibility over a child who lawfully moves to another State is where that child is habitually resident at the time when that court is seised.

The court continued by saying that because the Articles of the Regulation which refer to 'habitual residence' make no express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept, its meaning and scope must be determined in the light of the context of the Regulation's provisions and the objective pursued by it, in particular the objective stated in recital 12, that the grounds of jurisdiction established in the Regulation are

(29) Case C-479/10 PPU, [2010] ECR I-0000; judgment delivered on 22<sup>nd</sup> December 2010

shaped in the light of the best interests of the child, in particular on the criterion of proximity.

The child's age, it added, is liable to be of particular importance. As a general rule, it went on, 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.

The Court added that 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 Court 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.

### 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<sup>(30)</sup>, the acquisition of habitual residence in the 'new' Member State, should, in principle, coincide with the 'loss' of habitual residence in the former Member State. 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' 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 a certain duration of residence has to be established before this can be characterised as 'habitual', it should not be excluded that a child might acquire habitual residence in a Member State on, or not long after, the very day of arrival there.

The question of jurisdiction is determined at the time the court is seised of proceedings. Once a competent court is seised, in principle 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.

However, if it is in the best interests of the child, Article 15 provides for the possible transfer of the case, or of a part thereof, subject to certain

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(30) See chapter 4.

conditions, from the court with jurisdiction on the substance, to a court of a Member State to which the child has moved<sup>(31)</sup>.

### 3.2.4. Exceptions to the general rule

Articles 9, 10, 12 and 13 set out the exceptions to the general rule, indicating where jurisdiction may lie with the courts of a Member State other than that in which the child is habitually resident.

#### 3.2.4.1. Continuing jurisdiction of the child's former habitual residence – Article 9

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. Article 9 contains a rule the policy background to which is that holders of parental responsibility are encouraged to agree 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, but can apply for an appropriate adjustment of access rights before the court that granted them during a period of three months

following the move. The courts of the new Member State do not have jurisdiction in matters of access rights during this period.

#### 3.2.4.2. Article 9 is subject to the following conditions:

##### 3.2.4.2.1. *The access rights to be modified must have been conferred in a judgment.*

Article 9 applies only to the situation where it is wished to modify a previous judgment on access rights issued by the courts in a Member State before the child moved. If the access rights were not conferred in a judgment, Article 9 does not come into play, but the other jurisdiction rules apply. Thus the courts of the 'new' Member State would have jurisdiction pursuant to Article 8 to decide on matters of access rights once the child had acquired habitual residence in that 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). 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 9 does not apply, but Article 10 comes

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(31) See paragraph 3.3.

into play<sup>(32)</sup>. 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, Article 9 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 9.

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

Article 9 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 8. It should be noted that 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 9 not apply but neither can Article 8 jurisdiction be founded on. In such a scenario the provisions of Article 13 may have to be relied upon to give jurisdiction to the courts of the Member State where the child is present.

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(32) See paragraph 4.2.

*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 9 does not apply, but the courts of the new Member State 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 9 does not apply if she or he is prepared to accept 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 9 does not apply and the court of the new Member State exercises jurisdiction under Article 8. It follows that Article 9 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 9 deals only with jurisdiction to rule on access rights, but does not apply to other matters of parental responsibility such as custody rights.

Therefore Article 9 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 (ART. 9)*

Has a decision on access rights been issued by the courts in the Member State from which the child moved ("the MS of origin")?

▶ NO

Article 9 does not apply, but the courts of the other MS become competent once the child acquires habitual residence there according to Article 8

▼ YES

Has the child moved lawfully from the MS of origin to another Member State ("the new MS")?

▶ NO

If the removal is unlawful, Article 9 does not apply. Instead, the rules on child abduction apply.

▼ YES

Has the child acquired habitual residence in the new MS within the 3-month period?

▶ NO

Article 9 does not apply. If the child still has habitual residence in the MS of origin after 3 months, the courts of that MS remain competent according to Article 8.

▼ YES

Does the holder of access rights still have habitual residence in the MS of origin?

▶ NO

Article 9 does not apply.

▼ YES

Has the holder of access rights participated in proceedings before the courts of the new MS without contesting their competence?

▶ NO

Article 9 applies.

▼ YES

Article 9 does not apply.

### 3.2.5. Jurisdiction in cases of child abduction – Article 10

Jurisdiction in child abduction cases is governed by a special rule<sup>(33)</sup>.

### 3.2.6. Prorogation of jurisdiction – Article 12

#### 3.2.6.1. Limited possibility to choose a court

The Regulation introduces 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 seised in any matter of parental responsibility where either the matter is connected with a pending divorce proceeding in, or the child has a substantial connection with, that other Member State. It should be noted that Article 12 does not create a ground of jurisdiction in the absence of an application such as is referred to in paragraph (1) or (3).'

3.2.6.2. Article 12 covers two different situations:

#### *Situation 1:*

*3.2.6.2.1. Jurisdiction of a divorce court in matters of parental responsibility*

#### *Article 12 (1) AND (2)*

When divorce proceedings are pending in a court in a Member State, that court also has jurisdiction in any matter of parental responsibility connected with the divorce even if the child concerned is not habitually resident in that Member State. This applies whether or not the child is the child of both spouses. The same applies where such a court has been seised of an application for separation or annulment of marriage.

The divorce court has jurisdiction provided the following conditions are met:

- At least one of the spouses has parental responsibility in relation to the child, and
- The spouses and all holders of parental responsibility accept the jurisdiction of the divorce court, whether by express acceptance or unequivocal conduct; this should be determined by the court at the time the court is seised, and
- The jurisdiction of that court is in the superior interests of the child.

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(33) See paragraph 4.2.

The jurisdiction of the divorce court ends as soon as:

- the judgment allowing or refusing divorce has become final, or
- a final judgment is issued in proceedings on parental responsibility which were still pending when the divorce judgment became final, or
- the proceedings on divorce and parental responsibility have come to an end for another reason (such as where the applications for divorce and parental responsibility are withdrawn).

NB: No distinction was intended by the drafters of the legislation between the terms “superior interests of the child” (Article 12(1)(b)) and “best interests of the child” (Article 12(3)(b)) in the English language version. Versions of the Regulation in other languages employ an identical wording in both paragraphs.

### *Situation 2:*

*3.2.6.2.2. Jurisdiction of a court of a Member State with which the child has a substantial connection<sup>(34)</sup>*

#### *Article 12 (3)*

The courts of a Member State, before which proceedings other than for divorce, legal separation or marriage annulment have been initiated on a ground of jurisdiction set out in Article 3, shall also have jurisdiction in matters of parental responsibility even if the child is not habitually resident in that Member State provided that the following conditions are met:

- The child has a substantial connection with the Member State in question, in particular by virtue of the fact that one of the holders

(34) It should be noted that, at the time of writing, a preliminary reference to the European Court of Justice has been made which is relevant to the interpretation of Article 12(3); see Case C – 656/13 (2014/C 85/19); this is a request from the Nejvyšší soud České republiky (Czech Republic) lodged on 12 December 2013 — in the case *L v M, R and K*; the reference raises the question as to whether Article 12(3) must be interpreted as establishing jurisdiction over proceedings concerning parental responsibility even where no other related proceedings (that is, ‘proceedings other than those referred to in paragraph 1’) are pending. Another preliminary reference on Article 12.3 has been made, this time by the Court of Appeal (England and Wales) (Civil Division) (United Kingdom) lodged on 2nd August 2013 in the case C- 436/13, E v B; in this case the first question asked is as to whether, where there has been a prorogation of the jurisdiction of a court of a Member State in relation to matters of parental responsibility pursuant to Article 12(3), that prorogation of jurisdiction only continues until there has been a final judgment in those proceedings or does it continue even after the making of a final judgment?

of parental responsibility is habitually resident there or that the child is a national of that State. These circumstances are not exclusive, and it is possible to base the connection on others, and

- All parties to the proceedings accept the jurisdiction of those courts expressly or otherwise unequivocally at the time the court is seised (in other words equivalent to the requirement in situation 1).
- The jurisdiction is in the best interests of the child (again equivalent to the condition set out in Article 12.1(b) – see also NB: above at the end of paragraph 3.2.6.2.1).

*3.2.6.2.3. Jurisdiction under Article 12 where a child is habitually resident in a third State which is not a party to the 1996 Hague Convention – Article 12(4)*

Article 12(4) specifies that jurisdiction under Article 12 shall be deemed to be in the “child’s best interest” when the child in question is habitually resident in a third State which is not a contracting State to the 1996 Hague Convention on Child Protection<sup>(35)</sup>, in particular if it is found impossible to hold proceedings in the third State in question.

So, for example, the limited prorogation option for a party to choose to seise a court in a Member State in which the child is not habitually resident, but with which the child has nevertheless a substantial connection, is extended to situations where the child is habitually resident within the territory of such a third State. Provided the jurisdiction of the court has been unequivocally accepted by all parties at the time the court is seised

and is in the child’s best interests, the courts of that Member State shall have jurisdiction.

### 3.2.7. Presence of the child – Article 13

If it proves impossible to determine the habitual residence of the child and Article 12 does not apply, Article 13 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.

### 3.2.8. Residual jurisdiction – Article 14

If no court has jurisdiction pursuant to Articles 8 to 13, the court may found its jurisdiction on the basis of its own national rules on private international law. Such decisions are to be recognised and declared enforceable in other Member States pursuant to the rules of the Regulation.

(35) See chapter 8.

### 3.3. Transfer to a court better placed to hear the case – Article 15<sup>(36)</sup>

#### 3.3.1. In what circumstances is it possible to transfer a case under Article 15?

The Regulation contains an innovative rule which allows, by way of exception, that a court which is seised of a case, and has jurisdiction on the substance, can transfer it to a court of another Member State if the latter is better placed to hear the case. The court may transfer the entire case or a specific part thereof.

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 8). Therefore, jurisdiction does not shift automatically in a case where the child acquires habitual residence in another Member State during the court proceedings.

However there may be circumstances where, exceptionally, the court which has been seised ("the court of origin") is not the best placed to hear the case. Article 15 allows in such circumstances that the court of origin may transfer the case to a court of another Member State provided that this is in the best interests of the child.

Once a case has been transferred to the court of another Member State, it cannot be further transferred to a third court (Recital 13).

The transfer is subject to the following conditions:

The child must have a "particular connection" with the other Member State. Article 15.3 enumerates the five situations where such connection exists according to the Regulation:

- the child 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.

In addition, both courts must be convinced that a transfer is in the best interests of the child. The judges should co-operate to assess this on the basis of the "specific circumstances of the case". They should do this either directly or through the respective central authorities.

(36) See footnote 34 supra; in the case cited there of *E v B* the CJEU has been asked a second question, this time concerning the effect of Article 15; the question is - 'Does Article 15..... allow the courts of a Member State to transfer a jurisdiction in circumstances where there are no current proceedings concerning the child?'. At the time of writing the CJEU has yet to give its decision.

### 3.3.2. Who initiates the transfer?

The transfer may take place:

- on application from a party, or
- of the court's own motion, if at least one of the parties agrees, or
- on application of a court of another Member State, if at least one of the parties agrees.

### 3.3.3. What procedure applies?

A court which is faced with a request for a transfer or which wants to transfer the case of its own motion has two options:

- **It may stay the case and invite the parties to introduce a request before the court of the other Member State, or**
- **It may directly request the court of the other Member State to take over the case.**

In the former case, the court of origin shall set a time limit by which the parties shall seise the courts of the other Member State. If the parties do not seise such other court within the time limit, the case is not transferred and the court of origin shall 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. The court which has received the request for a transfer must decide, within six weeks of being seised, whether or not to accept the transfer. If it does not accept jurisdiction, the court of origin retains jurisdiction for the whole case and must exercise it.

The relevant question should be whether, in the specific case, a transfer would be in the best interests of the child. 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 competent to deal with a case. The central authorities can play an important role by providing information to the judges on the situation in the other Member State.

### 3.3.4. Certain practical aspects

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

The European Judicial Atlas in Civil Matters can be used to find the competent court of the other Member State. 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) (see Judicial Atlas<sup>(37)</sup>). 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 55(c)<sup>(38)</sup>.

(37) [http://ec.europa.eu/justice\\_home/judicialatlascivil/](http://ec.europa.eu/justice_home/judicialatlascivil/)

(38) See chapter 7.

### 3.3.4.2. How should the judges communicate?

Article 15 states that the courts shall co-operate, either directly or through the central authorities, for the purpose of the transfer. 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. 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.<sup>(39)</sup> Other forms of modern technology may be useful, such as 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.

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 Article 15. 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 case 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. The central authorities may also be able to assist in providing informal translations<sup>(40)</sup>.

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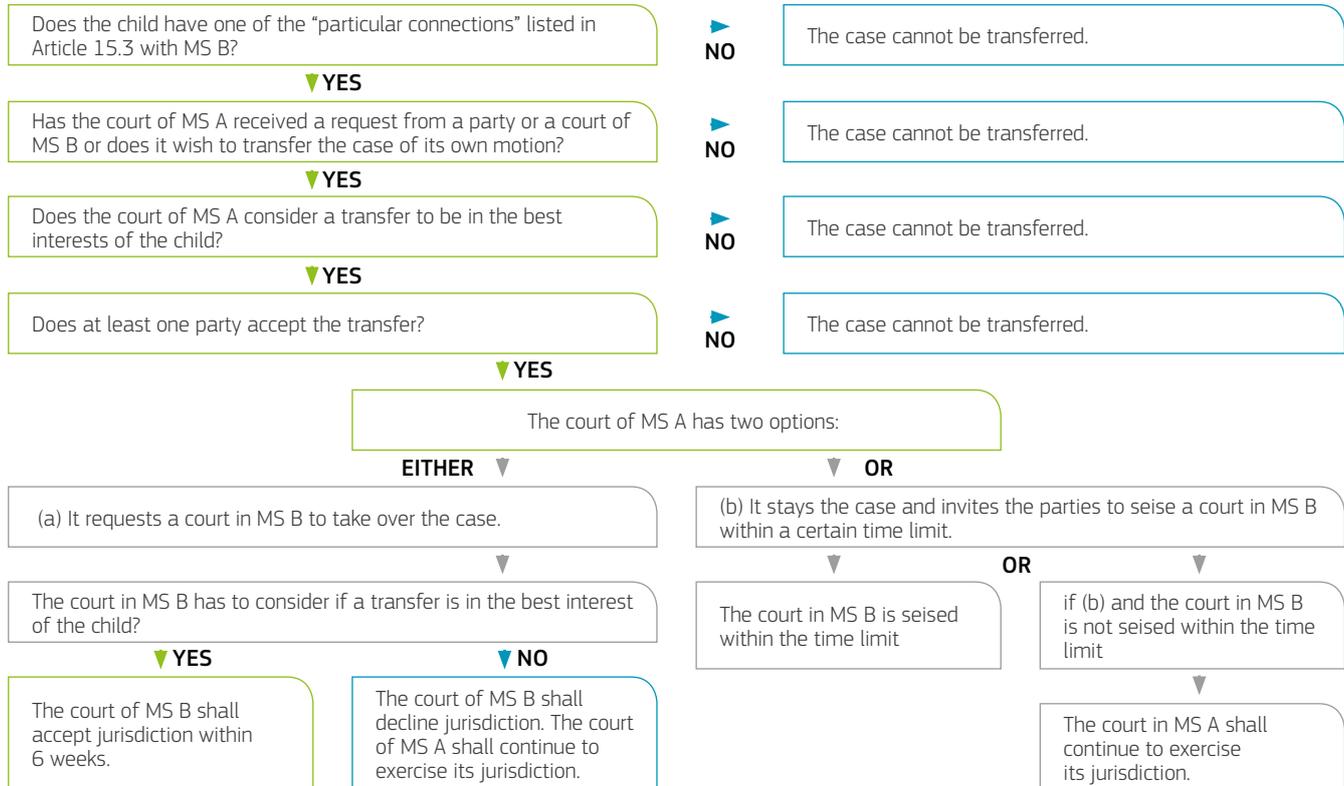
(39) The Hague Conference on Private International Law has led to the creation of the International Hague Network of Judges one of whose aims is to facilitate direct communication between judges in the context of International Family Law. The Hague Conference has developed some general guidance for judicial communications. On both of these reference may be made to the web site of the Hague Conference – see <http://www.hcch.net/upload/haguenetwork.pdf> and [http://www.hcch.net/upload/brochure\\_djc\\_en.pdf](http://www.hcch.net/upload/brochure_djc_en.pdf). There is also a network of Family Judges within the EU which is active within the structure of the European Judicial Network in Civil Matters.

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(40) Ibid

### 3.3.4.4. Transfer to a better placed court – Article 15

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 8 to 14 of the Regulation, it may, as an exception, transfer the case, or a specific part of it, to a court of another Member State (“MS B”), if the following conditions are met:



### 3.4. What happens if proceedings are brought in two Member States?

#### 3.4.1. Similar proceedings brought in two different States concerning the same child – Article 19(2)

It may happen that parties 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 judgments on the same issue.

Article 19(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 19(2) stipulates that the court first seised, in principle, takes the case. The court second seised has to stay its proceedings and wait for the other court to decide whether it has jurisdiction. If the first court considers itself competent, the other court must decline jurisdiction. The second court may only continue its proceedings if the first court comes to the conclusion that it does not have jurisdiction or if the first court decides to transfer the case pursuant to Article 15 and the second court accepts the transfer.

#### 3.4.2. Different types of proceedings in two different States concerning the same child – Articles 19(2) and 20

For the mechanism in Article 19(2) to have effect the proceedings in the two Member States must both be proceedings on the substance in relation to the matters of parental responsibility raised. If however the proceedings in the first Member State are for provisional and protective measures under Article 20, 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 19(2). The reasoning behind this is that as the provisional measures are not enforceable in the other Member State there is no possibility of the judgments conflicting.

Example: the following situation gave rise to two cases before the European Court of Justice:

Two children were born in Member State A; the father was from that MS and the mother from Member State B. Shortly after the birth the relationship between the parents deteriorated and the mother indicated that she wanted to return to MS B with the children. They entered into an agreement whereby the mother was to be able to take both children to MS B; 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 MS B 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 MS A 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 MS B, substantive proceedings for custody of the boy.

In due course the father sought under the Regulation to enforce in MS B the order for interim custody in his favour which had been granted by the court in MS A. The court in MS B referred the matter to the CJEU with the question as to whether the provisions of Article 21 et seq., which deal with recognition and enforcement of judgments, also apply to enforce provisional measures, within the meaning of Article 20, concerning the right to child custody? The CJEU held in this case that the judgment in favour of the father, in so far as it granted provisional measures relating to rights of custody falling within the scope of Article 20 of the Regulation could not be enforced under Article 21 of the Regulation<sup>(41)</sup>.

In the separate action by the mother in MS B for an order for custody of the boy, the court there sought contact with the court in MS A in order to establish the precise nature of the proceedings before it and in particular of the order which had been granted by that court. For various reasons it was not possible for the courts to communicate with each other despite the intervention of the liaison magistrate in MS A and, in the absence of agreement by the parents, the court in MS B considered, therefore, that it was unable to take matters further without first referring the case to the CJEU<sup>(42)</sup>. The questions raised in this second case were dealt with by the

CJEU against the background, and in the light, of its decision in the first case noted above.

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

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 MS B 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 MS A, in particular, to demonstrate the jurisdiction of that court in accordance with the Regulation, and where, because of specific circumstances, the interest of the child required that the court in MS B issue a judgment 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

(41) See CJEU Case C-256/09, *Bianca Purrucker v Guillermo Valles Perez* [2010] ECR I-7353, judgment delivered on 15<sup>th</sup> July 2010 ('Purrucker I').

(42) See CJEU Case C-296/10, *Bianca Purrucker v Guillermo Valles Perez* [2010] ECR I-11163, judgment delivered on 9<sup>th</sup> November 2010 ('Purrucker II').

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.

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

### 3.5. Recognition and Enforcement – General

#### 3.5.1. Procedure for recognition and enforcement – Articles 21 and 23-39

Any interested party may request that a judgment on parental responsibility, issued by a court of a Member State, shall or shall not be recognised and be declared enforceable in another Member State (“*exequatur* procedure”). A judgment granting provisional measures falling within the scope of Article 20 is held not to be enforceable under the Regulation outside the Member State in which it was granted<sup>(43)</sup>.

The request shall be made to the competent court in the Member State in which recognition and enforcement is sought. The courts designated by the Member States for this purpose are to be found in list 1<sup>(44)</sup>. The competent court shall declare, without delay, that the judgment is enforceable in that Member State.

Neither the person against whom enforcement is sought, nor the child, is entitled to submit observations to the court at this stage. It has been

(43) See paragraph 3.4.2 *supra* and the case *Purrucker I* cited in footnote 41

(44) OJ C 85, 23.3.2013, p. 6.

confirmed in the case law of the European Court of Justice that the person against whom the judgment was granted cannot apply under Article 31 for a declaration that the judgment should not be recognised or enforced.<sup>(45)</sup>

Both parties may appeal against the decision and submit comments at this stage. If the appeal is brought by the applicant, the party against whom the enforcement is sought shall be summoned to appear before the appellate court.

#### 3.5.2. Grounds for refusal to recognise or enforce a judgment relating to parental responsibility – Article 23

The court shall only refuse to declare the judgment enforceable if:

- this would be manifestly contrary to the public policy in the Member State addressed;
- except in case of urgency, the child has not been given the opportunity to be heard in the proceedings leading to the judgment;
- the judgment was given in the absence of a person who was not served with the documents instituting the proceedings 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 judgment infringes his or her parental responsibility has not been given an opportunity to be heard;
- the judgment is irreconcilable with another judgment, in the conditions set out in Article 23(e)(f);

(45) See the Case C-195/08 PPU *Inga Rinau*.

- the case concerns the placement of a child in another Member State and the procedure prescribed in Article 56 has not been complied with.

### 3.5.3. Appeal against decision on a declaration of enforceability of a judgment – Article 33

The parties may appeal against the decision. The appeal shall be lodged with the courts designated by the Member States for this purpose which can be found in list 2<sup>(46)</sup>. Both parties may submit comments to the court at this stage.

### 3.5.4. Legal aid and other assistance – Articles 50 and 55(b)

When applying for exequatur, a person is entitled to legal aid if he or she was so entitled in his or her Member State of origin. Such a person may also be assisted by the central authorities, which shall have the role of informing and assisting holders of parental responsibility who seek the recognition and enforcement of a decision on parental responsibility in another Member State.

### 3.5.5. Recognition and declarations of enforceability of authentic instruments and agreements – Article 46

As explained in paragraphs 3.1.3.2 and 3.1.3.3 the procedure for recognition and enforcement applies also to authentic instruments and agreements which are enforceable in the Member State of their origin. These are thus

recognised and declared enforceable in other Member States under the same conditions as judgments.

### 3.5.6. No requirement for legalisation of documents – Article 52

Where recognition, a declaration of enforceability or enforcement of an order in respect of parental responsibility is sought under the Regulation there is no requirement to legalise any of the documents required for these purposes. So for example a judgment on custody, or a certificate regarding the enforceability of such a judgment, do not require to undergo any formality of legalisation in connection with recognition or enforcement in another Member State.

### 3.5.7. Exceptions to the general procedure for recognition and enforcement – Article 40

#### 3.5.7.1. Orders for access (contact) and return of children under Article 11(6-8) – Articles 41 and 42

The procedure described above applies generally to decisions on parental responsibility, such as in matters of custody. There are, however, two exceptions where the Regulation dispenses with this procedure and where a decision is to be recognised and enforceable in other Member States without any procedure. The exceptions concern access rights (see paragraph 3.6.3) and the return of the child following her or his unlawful removal or retention (see paragraph 4.4.7). In each of these situations the Regulation provides that there is no need for a declaration of enforceability and the provisions for opposing recognition and the grounds set out in Article 23 do not apply.

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(46) OJ C 85, 23.3.2013, p. 6.

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

### 3.5.7.2. Certificate for enforcement of an order for return of a child – Article 42 and Annex IV

The certificate to be issued for enforcement of an order to return a child after unlawful removal as required by a judgment issued pursuant to Article 11(8) must contain the following information:

- a. the child was given the opportunity to be heard unless, having regard to his or her age or maturity, that is considered to be inappropriate;

NB: This provision means that it is the court which issues the certificate and delivered the judgment which is obliged to hear the child except where it considers this to be inappropriate in which case it must take that decision having taken into account information about the age and maturity of the child; it should not issue a certificate unless this condition is fulfilled;

- b. all parties had been given an opportunity to be heard; and
- c. the court took into account in reaching its judgment the reasons for and the evidence underlying the order whereby the court in the other Member State declined under Article 13 of the Hague Convention of 1980 to return the child.

In addition if the court orders measures of protection of the child after return to the State of habitual residence these measures are to be included in the certificate; space is available for this at paragraph 14 of the certificate.

The judge is to issue the certificate of his or her own motion.

### 3.5.7.3. Documents for enforcement – Article 45

The party who seeks enforcement must produce a copy of the judgment and the certificate issued under Article 41 or 42 completed in the language of the judgment. When enforcement is sought in the other Member State a translation of the relevant part of the certificate into an official language of that Member State is to be provided. As regards access the translation is to cover the specific access arrangements to be detailed in paragraph 12 of the certificate. As regards return of the child the arrangements for implementing the measures ordered for ensuring the return of the child are to be detailed in paragraph 14 of the certificate.

### 3.6. The Rules on Rights of Access (Contact) – Recognition and Enforcement – Articles 40 and 41

#### 3.6.1. Direct recognition and enforcement of rights of access (contact) under the Regulation – Articles 40 and 41

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<sup>(47)</sup>. The Regulation facilitates the exercise of cross-border access rights by ensuring that a judgment on access rights issued in one Member State is directly recognised and enforceable in another Member State provided that it is accompanied by a certificate issued by the court which granted the judgment<sup>(48)</sup>. This does not prevent holders of parental responsibility from seeking recognition and enforcement of a judgment on access by applying for exequatur under the relevant parts of the Regulation if they wish to do so (see Article 40(2) and section 3.5).

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(47) In this way the Regulation expresses the principle in Articles 9 and 10 of the UN Convention on the Rights of the Child. The Convention applies to children under the age of 18 years; see also Article 24(3) of the Charter of Fundamental Rights of the European Union (2010/C 83/02) EN 30.3.2010 OJ C 83/389.

(48) See paragraph 3.6.7.

#### 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 her or his habitual residence for a limited period of time.

The rules on access rights apply to any access rights, irrespective of who the beneficiary thereof is. According to 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 third persons.

“Access rights” can include any form of contact between the child and the other person, including for instance, contact by telephone, skype, internet or e-mail.

These rules on recognition and enforcement apply only to judgments which grant access rights. Conversely, recognition of a judgment whereby a request for access rights is refused is governed by the general rules on recognition.

### 3.6.3. What are the conditions for issuing a certificate? – Articles 40 and 41 and Annex III

A judgment on access rights is directly recognised and enforceable in another Member State provided it is accompanied by a certificate, which shall be issued by the judge of origin who granted the judgment. The certificate purports to guarantee that certain procedural safeguards have been respected during the procedure in the Member State of origin.

The judge of origin shall issue the certificate once he/she 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 be heard, unless a hearing was considered inappropriate due to the age and maturity of the child;
- where the judgment was given in default, the defaulting party has been served with the document instituting the proceedings 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 judgment unequivocally.

Although this is not regulated in the Regulation, judges may consider it to be good practice that where a decision is taken not to hear a child on the grounds that he or she is not of sufficient age or maturity then they should include in their judgment a description of the steps taken

to establish the age and maturity of the child and of the reasons why the child was not given the opportunity to be heard.

If the procedural safeguards have not been respected, the decision will not be directly recognised and declared enforceable in other Member States, but the parties will have to apply for an exequatur to this end (see Section 3.5).

### 3.6.4. The Certificate – Article 41(2)

The judge of origin shall issue the certificate in the language of the judgment by using the standard form in Annex III. The certificate not only indicates whether the above-mentioned procedural safeguards have been respected, but it also contains information of a practical nature, intended to facilitate the enforcement of the judgment. This can include for example, the names and addresses of the holders of parental responsibility and the children concerned, any practical arrangements for the exercise of access rights, any specific obligations on the holder of access rights or the other parent and any restrictions that may be attached to the exercise of access rights. All obligations mentioned in the certificate concerning access rights are, in principle, directly enforceable pursuant to the rules.

### 3.6.5. When should the judge of origin issue the certificate? – Article 41(1) and (3)

This depends on whether, at the time that the judgment is delivered, the access rights which are to be exercised are likely to involve a cross-border situation.

#### 3.6.5.1. The access rights involve a cross-border situation

If, at the time the judgment is issued, the access rights involve a cross-border situation, for example if a parent of the child concerned is a resident of or plans to move to another Member State, the judge shall issue the certificate of his/her own initiative (*“ex officio”*) when the judgment becomes enforceable, even if only provisionally.

The national laws of many Member States provide that judgments on parental responsibility are “enforceable” notwithstanding appeal. If national law does not enable a judgment to be enforceable whilst an appeal against it is pending the Regulation confers this right on the judge of origin. The aim is to prevent dilatory appeals from unduly delaying the enforcement of a decision.

#### 3.6.5.2. The access rights do not involve a cross-border situation

If, at the time the judgment is delivered, there is no indication that the access rights will be exercised across national borders, the judge is not obliged to issue a certificate. However, if the circumstances of the case

indicate there is an actual or potential chance that the access rights will have involved a cross-border situation, judges may consider it to be good practice to issue the certificate at the same time as the judgment. This could, for instance, be the case where the court in question is situated close to the border of another Member State or where the holders of parental responsibility are of different nationalities.

If the situation subsequently acquires a cross-border character, say because one of the holders of parental responsibility moves to another Member State, either party may at that time request the court of origin which delivered the judgment to issue a certificate.

### 3.6.6. Is it possible to appeal against the certificate? – Article 43 and Recital 24

No, it is not possible to appeal against the issuing of a certificate. If the judge of origin has committed an error in filling in the certificate and it does not correctly reflect the judgment, it is possible to make a request for rectification to the court of origin. The national law of the Member State of origin shall apply in that case.

### 3.6.7. What are the effects of the certificate? – Articles 41(1) and 45

*A judgment on access rights, which is accompanied by a certificate, is directly recognised and enforceable in other Member States without the need for the procedure to obtain a declaration of enforceability.*

The fact that the judgment 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 of the judgment. Consequently it is not necessary to apply for a declaration of enforceability in respect of a judgment on access rights nor is it possible to oppose recognition of the judgment, on the basis of the grounds of non-recognition listed in Article 23. A certificate for the judgment is to be issued by the court in the Member State of origin provided certain procedural safeguards have been respected. A party who wishes to request the enforcement of access rights in another Member State shall produce a copy of the judgment and the certificate. It is not necessary to translate the certificate, with the exception of item 12 concerning the practical arrangements for the exercise of access rights.

### 3.6.8. Judgment to be treated as equivalent to a judgment of the Member State of enforcement – Articles 44 and 47

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

The fact that a judgment is directly recognised and enforceable in another Member State means that it is to be treated as if it were a “national” judgment and be recognised and enforced under the same conditions as a judgment issued in that Member State. If a party does not comply voluntarily with a judgment on access rights, the other party may directly request the authorities in the Member State of enforcement to enforce

it. The enforcement procedure is not governed by the Regulation, but by national law (see chapter 5).

### 3.6.9. The power of the courts in the Member State of enforcement to make practical arrangements for the exercise of access rights – Article 48

Enforcement can be rendered difficult or even impossible if the judgment 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 of the Member State of enforcement the power to make the necessary practical arrangements for organising the exercise of access rights, whilst respecting the essential elements of the judgment.

Article 48 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 judgment subsequently.





# 4. The Rules on International Child Abduction within the EU

## 4.1. General introduction – Articles 10, 11, 40, 42, 55 and 62

### 4.1.1. Relations with the 1980 Hague Convention – Articles 60 and 62 and Recital 17

The Hague Convention of 25 October 1980 on the civil aspects of International Child abduction (“the 1980 Hague Convention”) 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 supplemented 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 Convention in so far as it concerns matters governed by the Regulation.

### 4.1.2. Deterrence of parental child abduction

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 Convention and the Regulation seek to ensure the prompt return of the child to her or his Member State of origin<sup>(49)</sup>. For the purpose of the Convention and the Regulation, child abduction covers both wrongful removal and wrongful retention<sup>(50)</sup>. What follows applies to cases involving both situations.

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(49) See Recital 17 of the Regulation and Articles 1(a) and 12, *inter alia*, of the 1980 Hague Convention.

(50) See Article 2(9) and (11) of the Regulation and Articles 3, 4 and 5 of the Convention.

### 4.1.3. General description of the functioning of the Regulation as regards child abduction

Where a child is abducted from one Member State (“the Member State of origin”) to another Member State (“the requested Member State”), the Regulation ensures that the courts of the Member State of origin retain jurisdiction to decide on the question of custody notwithstanding the abduction. Once an application for the return of the child is lodged before a court in the requested Member State, this court applies the 1980 Hague Convention as complemented by the Regulation. If the court of the requested Member State decides not to order the return of the child on the grounds set out in Article 13 of the Convention, it shall immediately transmit a copy of its decision to the competent court of the Member State of origin (“the court of origin”) which may then examine a question of custody at the request of a party, if it has not already been seised of the question. If the court of origin takes a decision entailing the return of the child, this decision is directly recognised and enforceable in the requested Member State without the need for exequatur (see paragraph 4.4.7 and the chart in paragraph 4.4.9).

#### 4.1.4. The main principles of the rules on child abduction

1. After the wrongful removal or retention of a child, in principle jurisdiction remains with the courts of the Member State of origin (see chart in paragraph 4.2.2).
2. The courts of the requested Member State shall ensure the prompt return of the child (see chart in paragraph 4.3.6).
3. If the court of the requested Member State decides not to return the child on any basis set out in Article 13 of the Convention, it must transmit a copy of its decision to the competent court in the Member State of origin, which shall notify the parties. The two courts shall co-operate (see chart in paragraph 4.4.9).
4. If the court of the Member State of origin decides that the child shall return, exequatur is abolished for this decision and it is directly enforceable in the requested Member State (see chart in paragraph 4.4.9).<sup>(51)</sup>
5. The central authorities of the Member State of origin and the requested Member State shall co-operate with each other and assist the courts in their tasks<sup>(52)</sup>.

(51) In the case C – 211/10 PPU *Povse v Alpago* [2010] ECR I – 06673, judgment delivered on 1st July 2010, the European Court of Justice made clear, amongst other things that for an order under Article 11.8 to be enforceable as regards the return of a child this does not necessarily require that the proceedings in the court of origin should have led to the adoption of a decision on the custody of the child; see paragraph 5 et seq.

(52) See Article 55 of the Regulation and Article 7 of the Convention.

#### 4.1.5. Importance of the role of the judiciary

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 calls 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 in quality and efficiency.

International co-operation 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 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 other States as regards issues arising in such cases<sup>(53)</sup>.

(53) See [http://www.hcch.net/index\\_en.php?act=text.display&tid=21](http://www.hcch.net/index_en.php?act=text.display&tid=21) for details of the International Hague Network of Judges; see also footnote 39 supra; the European Network of Family Judges functions as a part of the European Civil Judicial Network.

## 4.2. Jurisdiction issues as regards child abduction cases

### 4.2.1. Prevention of change of jurisdiction after abduction – Article 10

#### 4.2.1.1. Courts of the Member State of origin to retain jurisdiction

To deter parental child abduction between Member States, Article 10 ensures that the courts of the Member State where the child was habitually resident before the unlawful removal or retention (“Member State of origin”) remain competent to decide on the substance of the case also thereafter. Jurisdiction may be attributed to the courts of the new Member State (“the requested Member State”) only under very strict conditions (see chart in paragraph 4.2.2).

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

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

##### *Situation 1:*

- The child has acquired habitual residence in the requested Member State, and
- All those with rights of custody have acquiesced in the abduction.

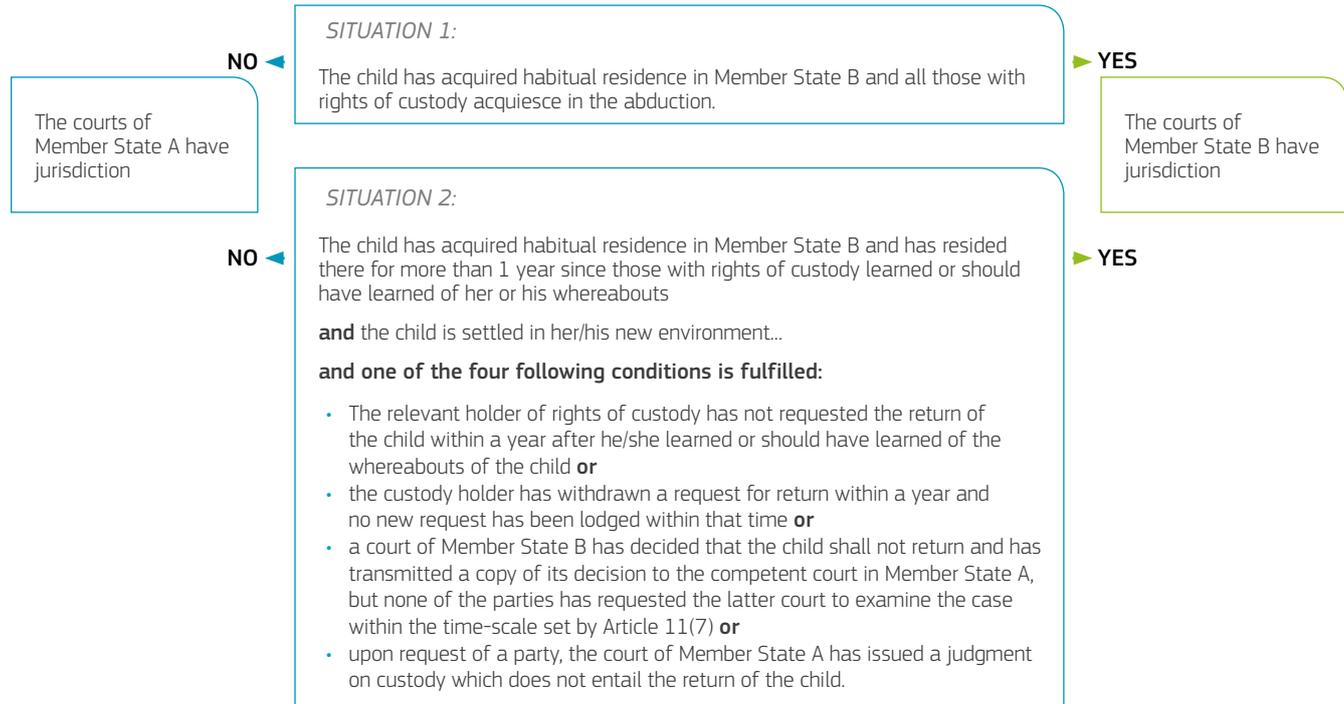
##### *Situation 2:*

- The child has acquired habitual residence in the requested Member State and has resided in that Member State 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:**
  - no request for the return of the child has been lodged within the year after the left-behind parent 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;
  - a decision on non-return has been issued in the requested State and the courts of both Member States have taken the requisite steps under Article 11(6), but the case has been closed pursuant to Article 11(7) because the parties have not made submissions within 3 months of notification;
  - the competent court of origin has issued a judgment on custody which does not entail the return of the child. It should be noted in this connection that the European Court of Justice has made clear that the condition set out in Article 10(b)(iv) is to be construed strictly and the judgment referred to must be a final judgment. Thus a judgment granting a provisional and protective measure does not fulfil this condition nor can such a judgment effect a transfer of jurisdiction to the courts of the Member State to which the child was removed.<sup>(54)</sup>

(54) See Case C-211/10, *Povse v Alpagó* at paragraphs 39 to 49.

## 4.2.2. Jurisdiction in child abduction cases – effect of Article 10

**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?



### 4.3. Rules to ensure the prompt return of the child – Article 11(1) to (5)

#### 4.3.1. The court applies the 1980 Hague Convention as complemented by Article 11(1) to (5)

When a court of a Member State receives a request for the return of a child pursuant to the 1980 Hague Convention, it shall apply the rules of the Convention as complemented by Article 11(1) to (5) of the Regulation (see chart in paragraph 4.3.6). To this end, the judge may find it useful to consult the relevant case-law under this Convention which is available in the INCADAT database set up by the Hague Conference on Private International Law<sup>(55)</sup>. The Explanatory Report and the Practice Guides concerning this Convention can also be of use (see website of the Hague Conference on Private International Law)<sup>(56)</sup>. Also the European Judicial Network in Civil Matters has prepared a practice guide giving information about the methods for processing and hearing of the return cases.<sup>(57)</sup>

#### 4.3.2. The court assesses whether an abduction has taken place – Article 2(11)(a) and (b)

The judge shall first determine whether a “wrongful removal or retention” has taken place. The definition in Article 2(11) of the Regulation is very

(55) <http://www.incadat.com/>; the INCADAT database now also includes cases under the Regulation and also in the CJEU and ECtHR.

(56) [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php); [http://www.hcch.net/index\\_en.php?act=text.display&tid=21](http://www.hcch.net/index_en.php?act=text.display&tid=21); [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2779](http://www.hcch.net/index_en.php?act=publications.details&pid=2779)

(57) See [https://e-justice.europa.eu/content\\_parental\\_child\\_abduction-309-en.do?clang=en](https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en)

similar to that in Article 3 of the 1980 Hague Convention and covers a removal or retention of a child in breach of custody rights under the law of the Member State where the child was habitually resident immediately before the abduction.

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

It goes without saying that the meaning of custody is central to the question as to whether there has been a wrongful removal or retention. This expression has to be given a meaning which is not determined solely by the law of the Member State of the habitual residence of the child concerned. It has to be given a meaning which is autonomous and must reflect the terms of the Regulation and of the 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 given that Article 7 of the Charter makes provision, which corresponds to that in Article 8 of the ECHR, that everyone has the right to respect for his or her family life. By 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<sup>(58)</sup>.

Example: This has arisen in a case before the CJEU where the father and the mother of three children were not married to each other and under the law of the habitual residence of the children the father did not have rights of custody without a court order or an agreement. The children were removed to another Member State by their mother and the father sought return under the Hague Convention as complemented by the Regulation.

(58) See Case C-400/10 PPU, *McB v L.E.* . [2010] ECR I-8965; judgment delivered on 5<sup>th</sup> October 2010.

The father argued for application of Article 7 of the Charter of Fundamental Rights 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 unlawful within the meaning of the Regulation and the 1980 Convention.

In the particular case 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.<sup>(59)</sup> On this basis, and taking into account jurisprudence of the European Court of Human Rights (“ECtHR”) it could not be said that the father had 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. 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, in order to acquire rights of custody which would mean that removal of a child from the State of its habitual residence is unlawful for the purposes of Article 2(11) of the Regulation, must have obtained previously an order of a court granting custody to him of the child in question.

#### 4.3.2.2. Actual exercise of custody and joint custody – Article 2(11)(b)

The removal or retention is considered 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(11)(b) of the Regulation.

That provision of the Regulation adds that custody is to be 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. As a result, a removal of a child from one Member State to another without the consent of the relevant person constitutes child abduction under the Regulation. If the removal is lawful under national law, Article 9 of the Regulation may apply<sup>(60)</sup>.

#### 4.3.3. The court shall always order the return of the child if she or he can be protected in the Member State of origin – Article 11(4)

The Regulation reinforces the principle that the court shall order the immediate return of the child by restricting the exceptions of Article 13(1) (b) of the 1980 Hague Convention to a strict minimum. The principle is that the child shall always be returned if she/he can be protected in the Member State of origin.

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(59) Ibid

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(60) See paragraph 3.2.4

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 her/him in an intolerable situation. The Regulation goes a step further by extending the obligation to order the return of the child to 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.

The court must examine this on the basis of the facts of the case. It is not sufficient that procedures exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question.

It will generally be difficult for the judge to assess the factual circumstances in the Member State of origin. The assistance of the central authorities of the Member State of origin will be vital to assess whether or not protective measures have been taken in that country and whether they will adequately secure the protection of the child upon his or her return.

#### 4.3.4. Hearing the child – Article 11(2) and (5)<sup>(61)</sup>

##### 4.3.4.1. The child and the requesting party shall have the opportunity to be heard

The Regulation reinforces the right of the child to be heard during the procedure. Hence, the court shall give the child the opportunity to be heard

(61) See also chapter 6 below.

unless the judge considers it inappropriate due to the child's age and degree of maturity<sup>(62)</sup> (see paragraph 6.2 in chapter 6). The Regulation does not lay down criteria for determining the age or degree of maturity required or the procedure for hearing the child. In addition, the court cannot refuse to return the child without first giving the person who requested the return the opportunity to be heard. Having regard to the strict time limit, the hearing should be carried out in the quickest and most efficient manner available.

##### 4.3.4.2. Use of the Regulation on the Taking of Evidence

One possibility is to use the arrangements laid down in Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in taking of evidence in civil or commercial matters (“the Evidence Regulation”). The Evidence Regulation facilitates co-operation between courts of different Member States in the taking of evidence in civil and commercial matters including family law cases. 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-day time limit, prescribed by Article 10(1) of the Evidence Regulation. The use of video-conference and tele-conference, which is proposed in Article 10(4) of the Evidence Regulation, can be particularly useful for taking evidence in cases involving children.

(62) Article 12(2) of the UN Convention on the Rights of the Child contains a similar provision; see also Article 24(1) of the EU Charter on Fundamental Rights.

#### 4.3.5. The court shall issue a decision within a six-week deadline – Article 11(3)

The court must apply the most expeditious procedures available under national law and issue a decision within six weeks of being seised with the application for return of the child. This time limit may only be exceeded if exceptional circumstances make it impossible to achieve.

With regard to decisions ordering the return of the child, Article 11(3) does not specify that such decisions, which are to be given within six weeks, shall be enforceable within the same period.

However, this is the only interpretation which would effectively guarantee the objective of ensuring the prompt return of the child within the strict time limit. This objective could be undermined if national law allows for the possibility for appeal of a return order and meanwhile suspends the enforceability of that decision, without imposing any time-limit on the appeal procedure.

For these reasons, Member States should seek to ensure that a return order issued within the prescribed six-week time limit is “enforceable”. The way to achieve this goal is a matter of national law.

Different procedures may be envisaged to this end, for example:

- a. National law may preclude the possibility of an appeal against a decision entailing the return of the child, or
- b. National law may allow for the possibility of appeal, but provide that a decision entailing the return of the child is enforceable pending any appeal.
- c. In the event that national law allows for the possibility of appeal, and suspends the enforceability of the decision, the Member States should put in place procedures:
  - to declare the decision enforceable if the circumstances of the individual cases so require and
  - to ensure an accelerated hearing of the appeal so as to ensure the respect of the six-week deadline.

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

#### 4.3.6. The return of the child – The rules of the 1980 Hague Convention and Regulation compared

NB: The rules of the Regulation (Article 11(2) to (5)) prevail over the relevant rules of the Convention.

	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 MS to which the child has been abducted (“the court”) shall in principle order the immediate return of the child if less than a year has elapsed since the abduction.	Article 11(2) to (5): 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 11(4): 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 MS of origin have made adequate arrangements to secure the protection of the child upon her/his return.
Hearing the child	Article 13(2): The court may refuse to order the return of the child if she or he objects to being returned and has attained an age and maturity at which it is appropriate to take account of her/his views.	Article 11(2): The court shall ensure that the child is given an opportunity to be heard during the proceedings, unless it is inappropriate having regard to the child’s age and maturity.
The hearing of the non-abducting custody holder	(No provision)	Article 11(5): The court cannot refuse to return the child unless the person who requested the return has been given an opportunity to be heard.
The time limit for handling requests for return	Articles 2/11: Art 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. Art 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 11(3): The court shall use the most expeditious procedures available in national law. The court shall issue its decision no later than 6 weeks from the lodging of the application, unless this proves impossible due to exceptional circumstances.

## 4.4. What happens if the court decides that the child shall not return? – Article 11(6) and (7)

### 4.4.1. The competent court shall transmit a copy of the decision on non-return to the competent court in the Member State of origin.

Having regard to the strict conditions set out in Article 13 of the 1980 Hague Convention and Article 11(2) to (5) of the Regulation, the courts are likely to decide to order the return of the child in the vast majority of cases.

However, in those exceptional cases where a court nevertheless decides not to order return of a child pursuant to Article 13 of the 1980 Hague Convention, Article 11(6) and (7) of the Regulation provides a special procedure. This requires a court which has issued a decision on non-return, be it final or still subject to appeal, to transmit a copy of its decision, together with the relevant documents, to the competent court in the Member State of origin<sup>(63)</sup>. This transmission can take place either directly from one court to another, or via the central authorities in the two Member States. The court in the Member State of origin is to receive the documents within a month of the decision on non-return.

Unless it has already been seised by one of the parties the court of origin shall notify the information to the parties and invite them to make submissions, in accordance with national law, within three months of the

date of notification, to indicate whether they want the court of origin to examine the question of custody of the child.

If the parties do not submit comments within the three-month time limit, the court of origin shall close the case.

The court of origin shall examine the case if at least one of the parties submits comments to that effect. Although the Regulation does not impose any time limit on this, the objective should be to ensure that a decision is taken as quickly as possible.

### 4.4.2. To which court shall the decision on non-return be transmitted? – Article 11(6)

The decision on non-return and the relevant documents shall be transferred to the court which is competent to decide on the substance of the case.

If a court in the Member State of origin has previously issued a judgment concerning the child in question, the documents shall in principle be transmitted to that court. In the absence of a judgment, the information shall be sent to the court which is competent according to the law of that Member State, in most cases the court for the place where the child was habitually resident before the abduction. The European Judicial Atlas in Civil Matters can be a useful tool for finding the competent court in the other Member State<sup>(64)</sup>. The central authorities appointed under the Regulation can also assist the judges in finding the competent court in the other Member State (see chapter 7).

(63) See Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271.

(64) [https://e-justice.europa.eu/content\\_european\\_judicial\\_atlas\\_in\\_civil\\_matters-88-en.do](https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-88-en.do)

#### 4.4.3. Which documents shall be transmitted and in which language? – Article 11(6)

Article 11(6) provides that the court which has issued the decision on non-return shall transmit a copy of the decision and of the “relevant documents, in particular a transcript of the hearings before the court”. It is for the judge who has taken the decision 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 her or his decision, including e.g. any reports drawn up by social welfare authorities concerning the situation of the child. The other court must receive the documents within one month of the decision.

The mechanisms of translation are not governed by Article 11(6). 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 case 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. The central authorities may also be able to assist in providing informal translations. If it is not possible to carry out the translation within the one-month time limit, it should be carried out in the Member State of origin.

#### 4.4.4. The court of origin is competent to deal with the substance of the case in its entirety – Articles 10(b) (iii) and (iv), 11(7) and 42

The court of origin which takes a decision in the context of Article 11(7) is competent to deal with the substance of the case in its entirety as it was the court of the habitual residence of the child immediately before the unlawful removal or retention. Its jurisdiction is therefore not limited to deciding upon the custody of the child, but it may also decide on other aspects of parental responsibility including, for example, access rights. The judge 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 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 requesting return of the child did not have the residence of 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.

#### 4.4.5. The procedure before the court of origin – Articles 11(7) and 42

The court of origin should apply certain procedural rules when examining the case. Compliance with these rules will later allow the court of origin to deliver the certificate mentioned in Article 42(2).

The judge of origin should ensure that:

- all parties are given the opportunity to be heard;
- the child is given an opportunity to be heard, unless the court considers it to be inappropriate to hear the child having regard to her or his age and maturity;

**NB: This provision means that it is for the court of origin to take the decision whether or not to hear the child having assessed her or his age and maturity; it should not issue a certificate unless this condition is fulfilled;**

- her/his judgment takes into account the reasons for and evidence underlying the decision on non-return.

#### 4.4.6. Return of the child after abduction - certain practical aspects

4.4.6.1. How can the judge of origin take account of the reasons underlying the decision on non-return?<sup>(65)</sup>

It is necessary to establish co-operation between the two judges in order for the judge of origin to be able properly to take account of the reasons for and the evidence underlying the decision on non-return. 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<sup>(66)</sup>. If there are language problems, the central authorities will be able to assist (see chapter 7).

4.4.6.2. How will it be possible for the court in the Member State of origin to hear the parent and the child who are not in that State?

The fact that the person who has removed or retained the child unlawfully and the abducted child are not likely to travel to the Member State of origin to attend the proceeding means that their evidence can be given from the Member State where they find themselves. One possibility is to use the arrangements laid down in the Evidence Regulation (see paragraph 4.3.4).

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(65) See also para 3.3.5 *supra*

(66) See [https://e-justice.europa.eu/content\\_european\\_judicial\\_atlas\\_in\\_civil\\_matters-88-en.do](https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-88-en.do)

#### 4.4.6.3. 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. 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 State of origin to facilitate their participation in the procedure before the court of that State.

#### 4.4.6.4. Outcome of the proceedings under Article 11(6) and (7)

If the court of origin takes a decision that does not entail the return of the child, the case is to be closed. Jurisdiction to decide on the question of substance is then attributed to the courts of the Member State to which the child has been abducted if the child is habitually resident in that state (see charts in paragraphs 4.3.6 and 4.4.9).

If, on the other hand, the court of origin takes a decision which entails the return of the child, that decision is directly recognised and enforceable in the other Member State provided it is accompanied by a certificate (see paragraph 4.4.7 and the chart in paragraph 4.4.9). Such a decision also takes precedence over any decision in the courts of the requested

Member State whereby the return of a child is refused on a ground set out in Article 13 of the 1980 Hague Convention.<sup>(67)</sup>

#### *Example:*

#### *Facts:*

A girl, daughter of married parents who were separated and living in Member State A and had commenced divorce proceedings in a court in A, was taken by her mother to Member State B with the consent of her father on the basis that she and her mother would return to A after a holiday of two weeks duration. Neither she nor the mother did return.

#### *Various legal proceedings ensued in each State:*

Shortly following the departure of the girl and her mother to B the father was granted custody of the girl on a provisional basis by the court in A. That decision was later affirmed on appeal by the mother. The father also made an application under the 1980 Hague Convention in the courts of B for return of the girl to A. This application was refused at first instance but the appeal court ordered her return. This decision was not enforced because the first instance court in B, on the application of the mother, several times ordered suspension of the enforcement.

The mother then sought to reopen the return proceedings. Although this was refused at first instance and on appeal the third instance court eventually suspended enforcement of the return order pending its own decision on the merits. By this stage around eighteen months had passed since the girl had been taken to B.

(67) See Article 11(8) of the Regulation; see also the Case C-195/08 PPU *Inga Rinou* 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 father's lawyer transmitted a copy of the non-return order from B in the original language to the Central Authority of A which forwarded it to the custody court in A. A translation of the order and the case documents were subsequently transmitted to the court in A through the central authorities. Subsequently the court in A issued a certificate under Article 42 having granted a divorce and custody of the girl permanently to the father and ordered return of the child to A. A subsequent appeal by the mother was not upheld.

The mother sought to resist enforcement of the return order from A with its certificate in the courts in B. The appeal court refused the mother's application to that effect on the ground that she had no right to seek non-recognition of the certificated judgment which had to be enforced directly and with no intermediate procedure. Eventually the third instance court in B referred the matter to the CJEU.

*The decision of the CJEU:*

The CJEU was asked to consider, amongst other issues, whether the adoption by a court of the Member State of origin, in this case the court in A, of a decision that the child be returned and the issue of the certificate under Article 42 of the Regulation, complied with the objectives of and procedures under the Regulation where a court of the Member State where the child is wrongfully retained, in this case the appeal court in B, had taken a decision that the child be returned to the Member State of origin.

The CJEU answered to the following effect: given that a non-return decision had been taken by the court in B and brought to the attention of the court in A, it was irrelevant, for the purposes of issuing the certificate provided for in Article 42 of the Regulation, that that decision had been suspended, overturned, set aside or, in any event, had not become *res judicata* or had been replaced by a decision ordering return, in so far as the return of the child had not actually taken place.

The procedure established in Articles 40 to 42 provides that judgments to which those Articles apply may be declared enforceable by the court of origin irrespective of any possibility of appeal whether in the Member State of origin or that of enforcement. Further since no doubt had been expressed as regards the authenticity of that certificate and since it was drawn up in accordance with the standard form set out in Annex IV to the Regulation, opposition to the recognition of the decision ordering return was not permitted and it was for the requested court only to ensure that the certified decision was enforced directly and immediately so as to secure the immediate return of the child.

*Comment:*

This judgment shows clearly that the procedure under Article 11(6) to (8) has to be seen to be independent of any other procedure for recognition and enforcement under the Regulation. Once an order not to return a child is made on the basis of Article 13 of the 1980 Hague Convention, irrespective of whether the order is subject to appeal, a subsequent return order under Article 11(6) to (8) of the Regulation has to be enforced under Article 42. On this basis the objective of the Regulation to ensure that the return of a child to the Member State of her or his habitual residence can take place with the minimum deadline is fulfilled.

#### 4.4.6.5. The effect of a judgment for return – Article 11(8)

It should be borne in mind that the European Court of Justice has clarified that a judgment of the court of the Habitual Residence of the child which orders or requires the return of the child falls within the ambit of the provisions of Article 11(8) even though the judgment is not preceded by a final decision on the merits of the custody of the child. This follows from the need to ensure that a child who has been wrongfully removed or retained is returned as quickly as possible to the State of her or his Habitual Residence.<sup>(68)</sup> This is not the case, however, when the certificate under Article 42 is issued “prematurely” and relates to a decision granted in the State of origin before a non-return order is issued in the requested State. In such a case, despite the certificate, the procedure for declaration of enforceability is to be followed in case there is a need for enforcement.<sup>(69)</sup>

#### 4.4.6.6. Parallel proceedings in the State requested and the State of the Habitual Residence of the child – Article 11 (6) to (8)

It follows from the provisions of Article 11 (6) to (8) that where there are parallel proceedings, for return, in the State requested as well as, on the substance, in the State of the Habitual Residence of the child and the courts in the former refuse return on a ground set out in Article 13 of the 1980 Hague Convention the case will still have to be transmitted under Article 11(6) despite the possibility of an appeal against the non return order in the former. This is not in principle a problem because of the terms

of Article 11(8) since if the courts in the Habitual Residence State make an order requiring the child to return that will still have to be enforced.

The possibility of a conflict in the enforcement of two judgments is avoided because either both courts order return, in which case the applicant has a choice as to which to enforce, or a judgment of the court of Habitual Residence is enforceable under Article 11(8). If a court in the Habitual Residence State grants custody to the abducting parent before the return proceedings in the State requested have concluded this is likely to be treated as equivalent to acquiescence for the purposes of the return proceedings. In that case the return order will be refused and the court in the Habitual Residence State will make no order requiring return of the child to that State.

Finally where, as in the *Inga Rinau* case,<sup>(70)</sup> the return proceedings ultimately lead to a return order after the court in the Habitual Residence State has made an order requiring return of the child there should be no conflict either as both judgments will be enforceable, the latter under the Regulation and the former under the national law of the requested State; this aspect is not dealt with in the Regulation.

(68) See Case C-210/10 PPU *Povse v Alpage* at paragraphs 51 et seq.

(69) See Case C-195/08 PPU *Inga Rinau* at paragraphs 68 and 69.

(70) See previous footnote for the citation.

#### 4.4.7. The abolition of *exequatur* for a decision of the court of origin entailing the return of the child – Articles 40 and 42

##### 4.4.7.1. The court of origin orders return of the child after an order for non-return

As described above (paragraph 4.3), a court which is seised of a request for the return of a child pursuant to the 1980 Hague Convention shall apply the rules of the Convention as complemented by Article 11 of the Regulation. If the requested court decides pursuant to Article 13 of the Convention not to order return of the child, the court of origin will have the final say in determining whether or not the child shall return.

If the court of origin takes a decision which entails the return of the child, it is important to ensure that this decision can be enforced quickly in the other Member State. For this reason, the Regulation provides that such judgments are directly recognised and enforceable in the other Member State provided they are accompanied by a certificate. The consequence of this rule is two-fold: (a) it is no longer necessary to apply for an “*exequatur*” and (b) it is not possible to oppose the recognition of the judgment. The judgment shall be certified if it meets the procedural requirements mentioned above in paragraph 4.4.5.

##### 4.4.7.2. The court of origin issues a certificate

The judge of origin shall issue the certificate by using the standard form in Annex IV in the language of the judgment. The judge shall also fill in the other information requested in the Annex, including whether the

judgment is enforceable in the Member State of origin at the time the certificate is issued.

The court of origin shall in principle deliver the certificate once the judgment becomes “enforceable”, implying that the time for appeal shall, in principle, have elapsed. However, this rule is not absolute and the court of origin may, if it considers it necessary, declare that the judgment shall be enforceable, notwithstanding any appeal<sup>(71)</sup>. The Regulation confers this right on the judge, even if this possibility is not foreseen under national law. The aim is to prevent dilatory appeals from unduly delaying the enforcement of a decision.

##### 4.4.7.3. Rectification of the certificate – Article 43 and Recital 24

It is not possible to appeal against the issuing of a certificate. If the judge of origin has committed an error in filling in the certificate and it does not correctly reflect the judgment, it is possible to make a request for rectification to the court of origin. The national law of the Member State of origin shall apply in that case. A party who wishes to request the enforcement of the judgment entailing the return of the child shall produce a copy of the judgment and the certificate. It is not necessary to translate the certificate, with the exception of item 14 concerning the measures taken by the authorities in the Member State of origin to ensure the protection of the child upon his or her return.

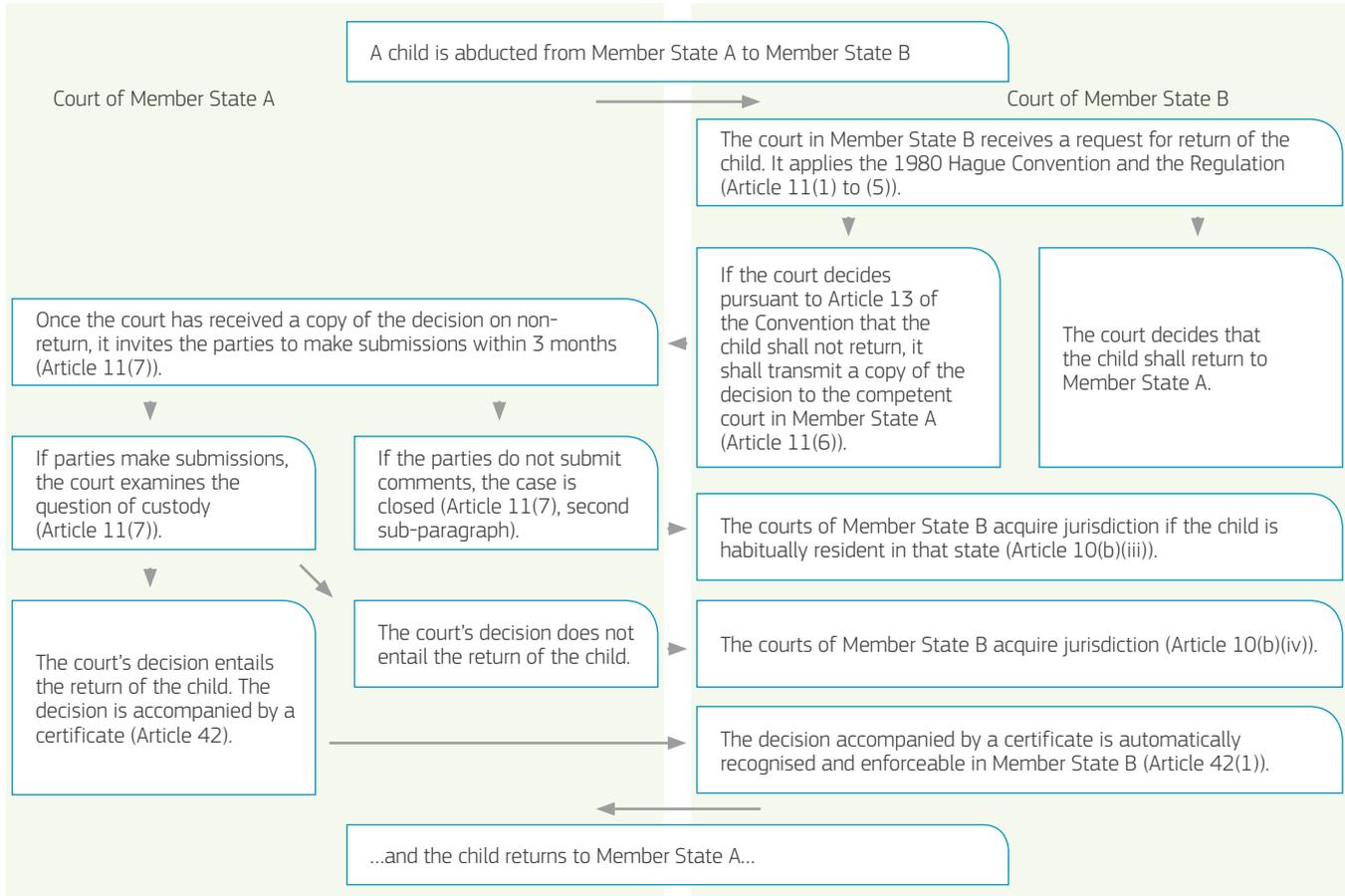
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(71) See paragraph 4.4.6.4

#### 4.4.8. New removal of the child to another Member State – Article 42

It must be emphasised that the decision of the court of origin is automatically enforceable in all the Member States and not only in the Member State in which the decision of non-return was pronounced. This results clearly from the wording of Article 42(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. It is not necessary to start a new procedure for the return of the child pursuant to the 1980 Hague Convention, but merely to enforce the decision of the court of origin.

#### 4.4.9. Schema of procedure in child abduction cases after non-return order – Article 11(6) and (7)







# 5. Enforcement

## 5.1. Importance of enforcement – general

Although, as is stated in Article 47, 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. Speedy enforcement is of particular importance with regard to access rights and the return of the child following an abduction for which, under the Regulation, the exequatur procedure has been abolished in order to speed up the procedure. The importance of this issue has been emphasised also in a number of judgments delivered by the CJEU as well as by the European Court of Human Rights (see paragraph 5.3)<sup>(72)</sup>.

### 5.1.1. Provisional measures not to be used to defeat enforcement

The CJEU has been asked in a number of cases to clarify certain aspects of the application of the Regulation as regards enforcement. Reference has already been made to the fact that provisional measures ordered in one Member State under Article 20 are not enforceable in other Member States under the provisions of Article 21 *et seq.*<sup>(73)</sup>. This also extends to the situation where an enforceable order granting provisional measures of parental responsibility in favour of a parent has been made and declared enforceable in one Member State and an attempt is made by the other

parent to defeat enforcement of that order in another Member State by seeking there provisional measures in favour of that parent. In such a case also the CJEU has made it clear that the court in that other Member State is simply not entitled to order such measures, it being required under the Regulation to enforce the original order.

### 5.1.2. Avoidance of delay which might block enforcement

In addition, if in a case of wrongful removal within the meaning of Article 2(11) a change of circumstances resulting from a gradual process such as the child's integration into a new environment were enough to entitle a court not having jurisdiction as to the substance to adopt a provisional measure amending the measure in matters of parental responsibility taken by the court with jurisdiction as to the substance, any delay in the enforcement procedure in the requested Member State would contribute to creating the conditions that would allow the former court to block the enforcement of the judgment that had been declared enforceable. Such an interpretation would undermine the very principles on which the Regulation is based<sup>(74)</sup>.

### 5.1.3. The CJEU and enforcement of return orders

The CJEU has held that where a court in the Member State of origin of a child has, subsequent to a non-return order issued in another Member State to or in which the child was removed or retained, made an order requiring return of the child, the courts in that other State cannot review that order

(72) For more on enforcement issues, particularly in relation to child abduction cases, see the Guide to Good Practice on Enforcement published by the Hague Conference on Private International Law available at <http://www.hcch.net/upload/guide28enf-e.pdf>

(73) See paragraph 3.4.2 and the case of Purucker I cited in footnote 41 *supra*.

(74) See Case C-403/09 PPU *Detiček v Sgueglia* [2009] ECR I-12193, at paragraph 47.

with a view to preventing its enforcement<sup>(75)</sup>. The CJEU has gone so far as to hold that this cannot be done even if there is evidence that the certificate issued by the court under Article 42 contains a false statement<sup>(76)</sup>.

## 5.2. Judgment to be enforced in the same conditions as if granted in the Member State of enforcement – Art 47(2)

In applying the terms of Article 47(2), to the effect that a judgment delivered in one Member State should be enforced in another ‘in the same conditions as if it had been delivered 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 judgment delivered in another Member State in the ‘same conditions’ as if it had been delivered 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 a substantive ground of opposition to the judgment of the court which has jurisdiction.

(75) See Case C-195/08 PPU *Inga Rinau* [2008] ECR I-5271 and paragraph 4.4.6.4 *supra*.

(76) See Case C-491/10 PPU *Aguirre Zarraga v Pelz*, [2010] ECR I-14247 and paragraph 6.6 *infra*.

*Example:*

*The facts:*

A child is taken by her mother from Member State A to Member State B despite an order prohibiting her removal from A. The removal is unlawful for the purposes of the Regulation and the 1980 Hague Convention. Both parents go to court in the respective Member States to seek to secure parental rights; the left behind father also seeks return of the girl from B to A under the Convention and the mother seeks a custody order in the courts of B. The court in B refuses return of the girl to A on a ground specified in Article 13 of the Convention. The court in A subsequently issues a certificate following the procedure in Article 11(6) to (8) of the Regulation requiring the return of the girl to A.

Meanwhile the court in B grants a provisional custody order to the mother who tries to oppose the return of the girl to A by asking the court in B to refuse enforcement firstly on the ground that the return order is irreconcilable with the subsequent custody order in her favour and secondly on the ground that there is a change of circumstances which should preclude return of the child namely that the child would be at risk if returned, the same argument on which the court in B refused to return the child under the Convention.

*The decision of the CJEU<sup>(77)</sup>:*

The matter was referred to the CJEU and on this point the CJEU very clearly states that it is not for the court in B under Article 47(2) to go beyond procedural matters in the enforcement of the certified judgment and certainly not to entertain any plea in law as to the substance of the matters at stake which, on a proper application of the Regulation, can only be heard in the courts of the Member State of origin, in this case A.

The CJEU went on to state that to hold that a judgment delivered subsequently by a court in the Member State of enforcement can preclude enforcement of an earlier judgment which has been certified in the Member State of origin and which orders the return of the child would amount to circumventing the system set up by Section 4 of Chapter III of the Regulation. Such an exception to the jurisdiction of the courts in the Member State of origin would deprive of practical effect Article 11(8) of the Regulation, which ultimately grants the right to decide to the court with jurisdiction and would recognise the jurisdiction, on matters of substance, of the courts in the Member State of enforcement.

As regards change of circumstances the CJEU affirmed that this could have an effect on enforcement of an order if it was detrimental to the best interests of a child but that this was always a matter to be considered by the court of origin which, under the Regulation, has jurisdiction on matters of substance. Therefore enforcement

(77) The CJEU case in question is C-211/10 PPU, *Povse v Alpagó*, [2010] ECR I-06673

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

### 5.3. Jurisprudence of the European Court of Human Rights ('ECtHR')

#### 5.3.1. Failure to take adequate steps to return a child can be a breach of Article 8 of the European Convention on Human Rights ('ECHR')

The ECtHR has consistently ruled that once the authorities of a Contracting State to the 1980 Hague Convention have found that a child has been wrongfully removed pursuant to the 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)<sup>(78)</sup>. Each contracting State must equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the ECHR<sup>(79)</sup>. This extends to ensuring the

(78) See, for example, *Iglesias Gil v Spain*, Application No 56673/00, judgment delivered on 29<sup>th</sup> July 2003, paragraph 62.

(79) See the series of cases *Ignaccolo-Zenide v Romania*, Application No 31679/96, *Maire v Portugal*, Application No 48206/99, *PP v Poland*, Application No 8677/03 and, more recently, *Raw v France*, Application No 10131/11, judgment delivered on 7<sup>th</sup> March 2013, final on 7<sup>th</sup> June 2013.

exercise of rights of contact as in the cases *Shaw v Hungary*<sup>(80)</sup> and *Prizzia v Hungary*<sup>(81)</sup> in which a breach of Article 8 was held to have occurred where the authorities in Hungary had failed to ensure that the applicants could exercise rights of contact with their children.

### 5.3.2. 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 award 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 relations 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<sup>(82)</sup>. 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 her or his future are settled quickly so as to minimise the uncertainty involved particularly in cases involving the unlawful removal and retention of children<sup>(83)</sup>.

(80) Application No 6457/09, judgment delivered on 26<sup>th</sup> October 2011.

(81) Application No 20255/12, judgment delivered on 11<sup>th</sup> June 2013.

(82) See, for example, the cases cited at footnote 79.

(83) See for example *Iosub Caras v Romania*, Application No 7198/04, *Deak v Romania and the UK*, application No 19055/05 and *Raw v France* which is cited at footnote 79.

### 5.3.3. Other than in exceptional circumstances returning children is not a breach of Article 8 ECHR

In a series of cases the ECtHR has held, in general, that returning a child under the procedures set out in the Regulation and the 1980 Hague Convention who has been wrongfully removed or retained 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 States party to the ECHR otherwise those States risk breaches of that Convention. The 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.

### 5.3.4. 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 in recent cases by holding the application to be inadmissible. Amongst those cases were the following: *Maumosseau and Washington v France*<sup>(84)</sup> 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*<sup>(85)</sup> 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

(84) Application No 29388/05, judgment delivered on 6<sup>th</sup> December 2007.

(85) Application No 26755/10, judgment delivered on 18<sup>th</sup> January 2011.

court in Germany applying the 1980 Hague Convention to be returned to Australia was declared to be inadmissible; and *Povse v Austria*<sup>(86)</sup> where, similarly to the previous case, an application to the ECtHR to find that there had been a breach of Article 8 ECHR where an order from an Italian court for the return of a child to Italy from Austria to where she had been removed wrongfully was enforced by the Austrian authorities, was dismissed<sup>(87)</sup>. In the case *Raban v Romania*<sup>(88)</sup> 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<sup>(89)</sup>.

### 5.3.5. 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 but mostly these cases derive from exceptional circumstances<sup>(90)</sup>.

(86) Application No 3890/11; see also paragraph 5.2 *supra*.

(87) The judgment of the ECtHR was delivered on 18<sup>th</sup> June 2013.

(88) *Raban v Romania*, Application No 25437/08, judgment delivered on 26<sup>th</sup> October 2010.

(89) See *Neulinger and Shuruk v Switzerland*, application No 41615/07, judgment delivered by the Grande Chambre on 6<sup>th</sup> July 2010.

(90) See *Neulinger and Shuruk v Switzerland* cited at footnote 89; *Šneerson and Campanella v Italy*, application No 14737/09, judgment delivered on 12<sup>th</sup> July 2011, final on 12<sup>th</sup> October 2011; *B v Belgium*, application No 4320/11, judgment delivered on 10<sup>th</sup> July 2012, final on 19<sup>th</sup> November 2012; and *X v Latvia*, application No 27853/09, judgment delivered on 13 December 2011; this latter case was sent to the Grande Chambre and the judgment was delivered on 26<sup>th</sup> November 2013.

The basis of the decision by the ECtHR in these 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 Regulation<sup>(91)</sup>.

### 5.3.6. X v Latvia – the decision of the Grande Chambre

In a recent decision of the Grande Chambre in the case *X v Latvia*<sup>(92)</sup> the court, by a majority of nine to eight, has made an attempt to clarify some of its earlier statements as regards the approach which should be taken to dealing with the relationship between the European Convention on Human Rights and the Hague Child Abduction Convention notably as regards the balancing of the interest of the child and the parents where a case involves the exception to the return of a child set out in Article 13(1)(b) of the latter. In particular the Court has said that its remarks on this point set out in the Grande Chambre decision in *Neullinger and Shuruk v Switzerland*<sup>(93)</sup> are not to be interpreted as

(91) See paragraph 4.2 *supra*.

(92) See footnote 90.

(93) Also cited at footnote 90.

setting out any principle for the application by the domestic courts of the Hague Convention.

The court outlined what in its view are the factors which had to be in place to achieve a harmonious interpretation of the European Convention on Human Rights and the Hague Convention. The requested court must take into account, genuinely, factors which may constitute an exception to the return of the child under the 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 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 requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention.

The Court then went on to say that, as the Preamble to the Hague Convention provides for children’s return “to the State of their habitual residence”, the courts must satisfy themselves 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.

**It has to be pointed out that, as regards cases falling under the Regulation, this latter aspect of the decision in this ECtHR case will not have major effects given the terms of Article 11 (4)**

**and (6) to (8). Courts in the EU are already obliged under Article 11(4) to have regard to measures of protection available to a child in respect of whom the exception under Article 13(1) (b) of the Hague Convention is argued. Furthermore even where a requested court refuses return on a ground set out in Article 13 of the Convention, Article 11 (6) to (8) gives the last word to the court in the Member State of the Habitual Residence of the child. It remains to be seen what future developments will appear following the case of X v Latvia both in this respect as well as in other issues covered by that case.**



A photograph showing a man in a white shirt and dark tie sitting at a table, looking towards a woman with long brown hair who is seen from the back. The man has a serious expression. The woman is wearing a light blue top. The background is a plain, light-colored wall.

6. Hearing the child – Articles 23,  
41 and 42

## 6.1. Children are to be given the opportunity to express a view

The Regulation emphasises the importance of giving children the opportunity to express their views in proceedings concerning them<sup>(94)</sup>. Hearing the child is one of the requirements for the abolition of the exequatur procedure for access rights and decisions entailing the return of the child (see paragraph 3.6 and chapter 4). It is also possible to oppose the recognition and enforcement of a judgment relating to parental responsibility on the basis that the child concerned was not given the opportunity to be heard (see paragraph 3.5.2).

## 6.2. Exception to the duty to take the views of a child

The Regulation sets out the main principle that a child shall be heard in proceedings that concern them. As an exception, a child may not be heard if this would be inappropriate having regard to the child's age and maturity. This exception 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 her or his relationships with parents and

(94) Reference should be made to Article 12(2) of the UN Convention on the Rights of the Child which contains a statement in similar terms: '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.' See, also, Article 24 of the Charter of Fundamental Rights of the European Union: '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.'

others are crucial as concerns the best interests of the child. It should also be remembered that these factors apply to children of all ages.

## 6.3. Procedure for taking the views of a child

The Regulation does not modify the applicable national procedures on this question<sup>(95)</sup>. Courts in the Member States develop their own techniques and strategies for taking the views of children of all ages. Some courts do so directly; others commission special experts to take children's views who then report back to the court. Whatever technique is deployed for taking the views of the child, it is a matter for the court itself to decide whether or not to do so but it is not possible to take any informed decision on this point without having been able to assess the child as to her or his age and maturity which is the only criterion. Once it decides that a child is of sufficient age and maturity to give a view, the court is under an obligation to take the child's views whether directly or otherwise so long as those views require to be heard in proceedings affecting the child.

## 6.4. How to obtain the views of the child

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 younger children needs to be done with special expertise and care and differently from adolescents.

It is not necessary for the child's views to be heard at a court hearing, but they may be obtained by a competent authority according to national laws.

(95) See Recital 19 of the Regulation.

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 age of the child and the 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. Whatever the situation it is important to enable the child to express his or her views in confidence.

## 6.5. Training in taking the views of the child

Whether the hearing of the child is carried out by a judge, an expert, social worker or other official, it is of the essence that that person receives adequate training, for instance how best to communicate with children. Whoever takes 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 and to release him or her from a feeling of responsibility or guilt.

## 6.6. Purpose of taking the views of a child

Hearing the child 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 the nature of the child's objections to return and why they have developed, and also to ascertain whether, and if so in what way, the child may be at risk.

*Example:*

*The Facts:*

A girl aged 8 years and six months is retained by her mother in Member State B having been on holiday there from her home with her father in Member State A; the father had provisionally been granted rights of custody and the mother rights of contact under orders of a court in A. The father makes an application for return of the child under the 1980 Hague Convention and this is refused by courts in B on the ground of the child's opposition to return. The courts in B had heard the views of the child having assessed her as being of sufficient age and maturity to express a view.

The courts in A subsequently confirm the granting of custody to the father and order that the child be returned to A. Meanwhile the court in B, as required by Article 11(6) to (8) of the Regulation, transmits notice of the refusal of return to the court in A; a certificate is issued under Article 42 of the Regulation by that court which, however, had not heard the child before issuing the certificate and had refused to allow her views to be taken by video link.

*The decision of the CJEU:*

The case went to the CJEU<sup>(96)</sup> on the basis that the child's fundamental rights had been infringed, in particular rights conferred by Article 24 of

(96) See Case C-491/10 PPU *Aguirre Zarraga v Pelz*, [2010] ECR I-14247; see also Case C-400/10 *McB v L.E.*, [2010] ECR I-8965.

the Charter of Fundamental Rights of the EU which confirms the rights of children to express their views freely on matters which concern them and for those views to be taken into account in accordance with their age and maturity.

The CJEU said that whilst it is not a requirement of Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of the Regulation that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express her or his views.

The court of the Member State of origin, it added, being the court with fundamental jurisdictional competence under the Regulation, must assess the child and decide whether or not to hear the child's views and in so far as possible, and always taking into consideration the child's best interests, 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 Evidence Regulation. This can only be done by the court of origin not by the court in the Member State of enforcement.

Before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of the Regulation, that court must ensure that, having regard to the child's best interests and all the circumstances of the individual case, the judgment to be certified was made with due regard to the child's right to freely express her or his views and that a genuine and effective opportunity to express those views was offered to the child. However, the CJEU concluded, it is solely for the national courts of the Member State of origin to examine the lawfulness of that judgment with reference to the requirements imposed, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of the Regulation and so, in the case concerned, the courts in B, the Member State of enforcement, have no right to review or oppose enforcement of a judgment, even in the circumstances disclosed in this case, nor can they reopen the certificate and they have no right to review or oppose enforcement of a judgment even in the circumstances disclosed in this case.

## 6.7. The UN Convention on the Rights of the Child<sup>(97)</sup>

The UN Convention on the Rights of the Child is a worldwide Convention whose general purpose is to give greater focus to and seek to strengthen the rights of children under the age of eighteen years in all areas where their interests are involved. The Convention has around one hundred and ninety States parties and is a cornerstone of the activities of the United Nations in its activities through UNICEF in support of children worldwide. A number of the provisions of the Convention have had a direct influence on the development of policies in proceedings involving children notably as to the way in which children's rights and interests are to be taken into account.<sup>(98)</sup> In particular, as set out in Article 3 of the 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.**

(97) Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990, in accordance with Article 49; see <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

(98) See in particular Article 12 on the taking of the views of the child referred to above at footnote 94.

The Convention is supported by a Committee on the Rights of the Child which conducts regular surveys and issues reports about the state of children's rights in the world. In particular it issues General Comments in which it offers views about the situation of children and makes recommendations. In the most recent General Observation<sup>(99)</sup> the Committee has argued that children's rights should be fully integrated into all aspects of procedures affecting children as a matter of principle as well as procedure. In the same document the following passage appears:<sup>(100)</sup>

'The Committee encourages the ratification and implementation of the conventions of the Hague Conference on Private International Law,<sup>(101)</sup> which facilitate the application of the child's best interests and provide guarantees for its implementation in the event that the parents live in different countries.'

(99) GC 14 issued on 29<sup>th</sup> May 2013; see [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

(100) At paragraph 68.

(101) These include No. 28 on the Civil Aspects of International Child Abduction, 1980; No. 33 on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993; No. 23 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, 1973; No. 24 on the Law Applicable to Maintenance Obligations, 1973.





7. Co-operation between  
central authorities and between  
courts – Articles 53-58

The central authorities play a vital role in the application of the Regulation with respect to parental responsibility matters. The Member States must designate at least one central authority. The ideal situation is that the authorities designated coincide with the authorities designated under the 1980 Hague Convention. This could create synergies and allow the authorities to benefit from experience acquired by the authorities in managing other cases under the Convention.

### 7.1. The European Judicial Network in civil and commercial matters – Article 54

The Regulation foresees that the central authorities will be effectively integrated in the European Judicial Network in civil and commercial matters<sup>(102)</sup> (“European Judicial Network”) and that they will meet regularly within this Network to discuss the application of the Regulation.

### 7.2. Duties of the central authorities – Article 55

The specific duties of the central authorities are listed in Article 55. The central authorities do not have to carry out these duties themselves, but may act through other agencies.

Upon request from a holder of parental responsibility the Central Authorities are to take all appropriate steps to collect and exchange information on the situation of the child; any procedures under way; or on decisions taken concerning the child. They also take the necessary

(102) [https://e-justice.europa.eu/content\\_ejn\\_in\\_civil\\_and\\_commercial\\_matters-21-en.do](https://e-justice.europa.eu/content_ejn_in_civil_and_commercial_matters-21-en.do)

steps to provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child.

Their duties also include facilitating court-to-court communications, which will be necessary in particular where a case is transferred from one court to another (see paragraph 3.3 and chapter 4). In these cases, the central authorities will serve as a link between the national courts and the central authorities of other Member States.

### 7.3. Facilitating agreement – Article 55(e)

Another task of the central authorities, in accordance with Article 55(e), is to facilitate agreement between holders of parental responsibility through mediation or other means and also to facilitate cross border communication to this end. It has been shown that mediation can play an important role in, for example, child abduction cases to ensure that the child can continue to see the non-abducting parent after the abduction and to see the abducting parent after the child has returned to the Member State of origin. However, it is important that the mediation process is not used to delay unduly the return of the child.

### 7.4. Placement of children in care in another Member State – Article 56

An important provision of the Regulation relates to the placing of children in care, either in a foster or care home, across the border in another Member State. A decision to do so, which is within the scope

of the Regulation<sup>(103)</sup>, is subject to specific provisions as regards co-operation between the courts and central and other authorities of the Member States which are set out in Article 56. Put shortly, before a court in one Member State can order the placement of a child in care or in a foster home in another Member State it must consult the central authority or another authority which has jurisdiction as regards intervention by a public authority in that second Member State for cases there regarding the placement of children. In cross-border cases where a public authority would have a role in domestic cases of that kind within a Member State, it is only if the competent authority of the requested State agrees that the court of the requesting State can proceed to order the placement. In the case of the placement of a child in foster care if no public authority intervention is required in the requested State for such a placement the court contemplating the placement need only inform the central or other authority in the requested State.

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(103) See Article 1(2)(d); see also Case C-435/06 *C* [2007] ECR I-10141 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.

*Example:*

*The Facts:*

The situation was that the authorities in Member State A wished to place a teenage girl in a special secure care institution situated outside her country of origin because she was in need of particular measures of protection due to her behaviour and continued absconding from the care institutions in that State. No such special care institution existed in that State so the authorities considered that the best option was to place her in an institution in Member State B where her mother lived. An exchange between the central authorities led to the court in A being told that the institution in B had a place for the girl and accepted the placement; the court then made an order for the placement. The courts in B also made an order of a provisional nature under Article 20. The girl was transferred to B and placed in the care institution.

*The decision of the CJEU:*

The CJEU was then asked a number of questions about the procedures under Article 56 in the case<sup>(104)</sup> and the CJEU took the opportunity to clarify a number of points the first of which was as to whether such an order fell within the material scope of the Regulation – this was answered in the affirmative in the light of the jurisprudence of the CJEU in the case of *C*<sup>(105)</sup>.

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(104) See Case C-92/12 *PPU Health Service Executive v S.C. and A.C.* [2012] ECR I-0000, judgment delivered on 26<sup>th</sup> April 2012.

(105) Cited at footnotes 20 and 103 *supra*.

Next was the question as to which authority in B was competent to issue the consent to the placement the answer to which was that the consent referred to in Article 56(2) of the Regulation must be given, prior to the making of the judgment on placement of a child, by a competent authority, governed by public law. The fact that the institution where the child is to be placed gives its consent is not sufficient. In circumstances where a court of a Member State, which made the judgment on placement, is uncertain whether a consent was validly given in the requested Member State because it was not possible to identify with certainty the competent authority in the latter State, an irregularity may be corrected in order to ensure that the requirement of consent imposed by Article 56 of the Regulation has been fully complied with.

The third and fourth questions concerned the effect and enforcement of the order for placement and turned towards the issue as to whether before the placement could be effected there had to be a declaration of enforceability issued by the courts in the Member State where the placement is to have effect. The answer to these questions was that the order had to be subject to the procedure for a declaration of enforceability and would have no effect, in other words it could not be executed formally, before the declaration was granted. This procedure needed to be carried out with particular expedition, it added, and if there was an appeal that should not have the effect of suspending execution of the order.

The fifth and sixth questions addressed concerned the situation where, once consent had been given to an order for placement for a specific time, as had been the situation in the case in point, a further order

extending the duration of the placement could be made without the need for a further consent. To this the CJEU answered in pretty clear terms that a consent to placement given for a specified period of time does not apply to any orders which are intended to extend the duration of the placement. In such circumstances, an application for a new consent must be made. A judgment on placement made in a Member State, declared to be enforceable in another Member State, can be enforced in that other Member State only for the period stated in the judgment on placement.

## 7.5. Resourcing of central authorities

The central authorities must be given sufficient financial and human resources to be able to fulfil their duties and their personnel must receive adequate training as regards the functioning of the Regulation and also preferably in the background and functioning of the 1980 Hague Convention and other relevant family law instruments. Language training is also very valuable as is joint training with the judiciary, lawyers and others involved with the functioning of the Regulation and Convention. The use of modern technologies is highly beneficial in speeding up the management of cases and should be encouraged wherever possible.

## 7.6. Co-operation of Courts

In parallel with the requirements for central authorities to co-operate, the Regulation requires that the courts of different Member States co-operate for various purposes. Certain provisions impose specific obligations upon judges of different Member States to communicate and to exchange

information in the context of a transfer of a case (see paragraph 3.3) and in the context of child abduction (see chapter 4).

## 7.7. Liaison Judges

To encourage and facilitate such co-operation, discussions between judges are and should be encouraged, both within the context of the European Judicial Network and through initiatives organised by the Member States. The experience of the informal network of International Hague Network Judges organised by the Hague Conference on Private International Law in the context of the 1980 Hague Convention has proved instructive in this context. <sup>(106)</sup>

Many Member States consider it worthwhile to participate in establishing judicial networks by appointing liaison judges or judges specialised in family law to assist the functioning of the Regulation. Such arrangements, under the Hague Network also exist within the context of the European Judicial Network, and could lead to better and more effective liaison between judges and the central authorities as well as between judges, and thus contribute to a speedier resolution of cases of parental responsibility under the Regulation.

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(106) See on this point paragraphs 3.3.4.2 and 4.1.5 *supra*.





8. Relationship between the Regulation and the 1996 Hague Convention on child protection – Articles 61 and 62

## 8.1. 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 respect of parental responsibility and measures for the protection of children (“the 1996 Hague Convention”)<sup>(107)</sup>. Both instruments contain rules on jurisdiction, recognition and enforcement of decisions on parental responsibility. The major difference is that the 1996 Hague Convention also includes rules on applicable law.

## 8.2. Ratification by the EU Member States

As at the time of writing [June 2014] all but two of the Member States have ratified or acceded to the Convention to date; the two exceptions are Belgium and Italy which, though, have both signed but not yet ratified the Convention. The Convention entered into force as regards each of the Member States in terms of the ratification by each. The relationship between the two instruments is clarified in Articles 61 and 62 of the Regulation.

## 8.3. Which cases are covered by the Regulation and which by the 1996 Convention? – Articles 61 and 62

In order to determine whether the Regulation or the Convention applies in a specific case, the following questions should be examined:

### 8.3.1. Does the case concern a matter covered by the Regulation?

The Regulation prevails over the Convention in relations between Member States in matters covered by the Regulation. Consequently, the Regulation prevails in matters of jurisdiction, recognition and enforcement. On the other hand, the Convention applies in relations between Member States in matters of applicable law, since this subject is not covered by the Regulation.

### 8.3.2. Does the child concerned have her/his habitual residence on the territory of a Member State?

If both questions in paragraphs 8.3.1 and 8.3.2 can be answered in the affirmative, the Regulation prevails over the Convention.

(107) For the 1996 Hague Convention please refer to the explanatory report to the Convention by Professor Paul Lagarde at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2943](http://www.hcch.net/index_en.php?act=publications.details&pid=2943)

### 8.3.3. Does the case concern the recognition and/or enforcement of a decision issued by a court 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 the competent court of a Member State. It is irrelevant whether the child concerned lives within the territory of a particular Member State or not so long as the courts of that State have competence to take the decision in question. 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 lives in a third State which is a contracting Party to the Convention. The aim is to ensure the creation of a common judicial area which requires that all decisions issued by competent courts within the European Union are recognised and enforced under a common set of rules.

### 8.3.4. Limited prorogation option – Article 12

As described in paragraph 3.2.6, Article 12 of the Regulation introduces a limited prorogation option for a party to choose to seise a court of a Member State in which the child is not habitually resident, but with which the child has nevertheless a substantial connection.

This option is not limited to situations where the child is habitually resident within the territory of a Member State, but it applies also where the habitual residence of the child is in a third State that is not a contracting party to the 1996 Hague Convention. In that case, jurisdiction under Article 12 shall be deemed to be in the child's best interests, in particular, but not only, if it is found impossible to hold proceedings in the third State in question<sup>(108)</sup>. By contrast, if the child is habitually resident in the territory of a third State which is a contracting party to the Convention, the rules of the Convention apply.

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(108) See Article 12(4) of the Regulation.



## List of Tables and Charts in this Guide

<i>Table/Flow Chart</i> . . . . .	<i>Paragraph</i>
Jurisdiction in Matrimonial Matters . . . . .	2.3.2
Analysis by Court of Jurisdiction in Parental Responsibility . . . . .	3.2.2
Continuing jurisdiction of the courts of the child's former habitual residence . . . . .	3.2.4.2.8
Transfer to a better placed court . . . . .	3.3.4.4
The main principles of the new rules on child abduction . . . . .	4.1.4
Restricted situations where courts in the requested Member State acquire jurisdiction . . . . .	4.2.1.2
Jurisdiction in child abduction cases – effect of Article 10 . . . . .	4.2.2
The return of the child – The rules of the 1980 Hague Convention and Regulation compared . . . . .	4.3.6
Return of the child after abduction – certain practical aspects . . . . .	4.4.6
Schema of procedure in child abduction cases after non-return order . . . . .	4.4.9

## List of Cases referred to in this Guide

<i>CJEU Cases</i> . . . . .	<i>Paragraph</i>
Case C-168/08, Hadadi v Hadidi, [2009] ECR I-6871 . . . . .	2.3.3
Case C-68/07, Sundelind Lopez v Lopez Lizazo, [2007] ECR I-10403 . . . . .	2.3.6 and 2.3.8
Case C-260/97, Unibank A/S v Flemming G. Christensen, [1999] ECR I-3715 . . . . .	2.5.5
Case C-435/06, C [2007] ECR I-10141 . . . . .	3.1.1.3 and 7.6
Case C-523/07, A [2009] ECR I-2805 . . . . .	2.3.5 and 3.1.1.3
Case C-497/10 PPU, Mercredi v Chaffe [2010] ECR I-0000 . . . . .	3.2.3.2
Case C-256/09, Bianca Purrucker v Guillermo Valles Perez [2010] ECR I-7353, ('Purrucker I') . . . . .	3.1.3.4, 3.4.2, 3.5.1 and 5.1.1
Case C-296/10, Bianca Purrucker v Guillermo Valles Perez [2010] ECR I-11163, ('Purrucker II') . . . . .	3.4.2
C-211/10 PPU, Povse v Alpago, [2010] ECR I-06673 – 4.1.4, 4.2.1.2, 4.4.6.5 and 5.2 Case C-400/10 PPU, McB v L.E., [2010] ECR I-8965 . . . . .	4.3.2.2 and 6.6
Case C-195/08 PPU, Inga Rinau [2008] ECR I-5271 . . . . .	4.4.6.4, 4.4.6.6 and 5.1.3

Case C-403/09 PPU, <i>Detiček v Sgueglia</i> [2009] ECR I-12193 - 5.1.2 Case C-491/10 PPU <i>Aguirre Zarraga v Pelz</i> , [2010] ECR I-14247 .....	5.1.3 and 6.6	<i>Povse v Austria</i> , Application No 3890/11 .....	5.3.4
Case C-92/12 PPU <i>Health Service Executive v S.C. and A.C.</i> , [2012] ECR I-0000 .....	7.6	<i>Raban v Romania</i> , Application No 25437/08 .....	5.3.4
<i>ECtHR Cases</i> .....	<i>Paragraph</i>	<i>Neulinger and Shuruk v Switzerland</i> , Application No 41615/07 .....	5.3.4 and 5.3.5
<i>Iglesias Gil v Spain</i> , Application No 56673/00 .....	5.3.1	<i>Šneerson and Kampanella v Italy</i> , Application No 14737/09 .....	5.3.5
<i>Ignaccolo-Zenide v Romania</i> , Application No 31679/96 .....	5.3.1	<i>B v Belgium</i> , Application No 4320/11 .....	5.3.5
<i>Maire v Portugal</i> , Application No 48206/99 .....	5.3.1	<i>X v Latvia</i> , Application No 27853/09 .....	5.3.5
<i>PP v Poland</i> , Application No 8677/03 .....	5.3.1		
<i>Raw v France</i> , Application No 10131/11 .....	5.3.1 and 5.3.2		
<i>Shaw v Hungary</i> , Application No 6457/09 .....	5.3.1		
<i>Prizzia v Hungary</i> , Application No 20255/12 .....	5.3.1		
<i>Iosub Caras v Romania</i> , Application No 7198/04 .....	5.3.2		
<i>Deak v Romania and the UK</i> , Application No 19055/05 .....	5.3.2		
<i>Maumosseau and Washington v France</i> , Application No 29388/05 .....	5.3.4		
<i>Lipkowski v Germany</i> , Application No 26755/10 .....	5.3.4		

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ISBN 978-92-79-39738-7  
doi:10.2838/28781

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*Printed in Belgium*

PRINTED ON ELEMENTAL CHLORINE-FREE BLEACHED PAPER (ECF)

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Publications Office

European Judicial Network  
in civil and commercial matters

