



EUROPEAN
COMMISSION

Brussels, 15.4.2014
COM(2014) 225 final

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and
the recognition and enforcement of judgements in matrimonial matters and the matters
of parental responsibility, repealing Regulation (EC) No 1347/2000**

INTRODUCTION

The growing mobility of citizens within the Union¹ has led to an increasing number of families with an international dimension, notably families whose members are of different nationalities, live in different Member States or live in a Member State of which one or more of them are not nationals. According to Article 81 of the Treaty on the Functioning of the European Union, the Union adopts measures in the field of judicial cooperation in civil matters having cross-border implications. Where families break up, such cooperation is particularly necessary to give children a secure legal environment to maintain relations with persons who have parental responsibility over them and may live in another Member State.

Regulation No 1347/2000 laying down rules on jurisdiction, recognition and enforcement of judgments on divorce, separation and marriage annulment as well as judgments on parental responsibility for the children of both spouses was the first Union instrument adopted in the area of judicial cooperation in family law matters². This Regulation was repealed by Regulation No 2201/2003³ (commonly known as the Brussels IIa Regulation, hereafter "the Regulation"). The Regulation is the cornerstone of Union judicial cooperation in matrimonial matters and matters of parental responsibility. It applies since 1 March 2005 to all Member States except Denmark⁴.

The Regulation provides for uniform rules to settle conflicts of jurisdiction between Member States and facilitates the free circulation of judgments, authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in another Member State. It complements the Hague Convention of 25 October 1980 on the civil aspects of international child abduction⁵ (hereafter "the 1980 Hague Convention") and lays down specific rules with regard to its relation with several provisions provided for in the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement

¹ In 2011 there were 33.3 million foreign citizens resident in the Union-27, 6.6% of the total population. The majority, 20.5 million, were citizens of non-Union countries, while the remaining 12.8 million were citizens of other Union Member States. Since citizenship can change over time, it is also useful to present information by country of birth. There were 48.9 million foreign-born residents in the Union in 2011, 9.7% of the total population. Of these, 32.4 million were born outside the Union and 16.5 million were born in another Union Member State (Statistics in Focus, 31/2012: "Nearly two-thirds of the foreigners living in EU Member States are citizens of countries outside the EU-27", Eurostat).

² Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30.6.2000, amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, OJ L 367, 14.12.2004.

³ Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

⁴ Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, does not participate in the Regulation and is therefore neither bound by it nor subject to its application. For the purpose of this report, the term "Member States" does not include Denmark.

⁵ The Convention applies in all Member States.

and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children⁶ (hereafter "the 1996 Hague Convention")⁷.

The Regulation does not contain rules to determine which law applies to cross-border disputes in the fields covered by it. In connection with applicable law, already in November 2004 the European Council called upon the Commission to present a Green Paper on conflict-of-law rules in matters relating to divorce⁸. In 2006, the Commission proposed amendments to the Regulation as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (hereafter "the 2006 Commission proposal to amend the Regulation")⁹. No unanimity could be reached within the Council with regard to the rules on applicable law and the Commission therefore withdrew the 2006 proposal to amend the Regulation¹⁰. On the basis of new Commission proposals¹¹, 14 Member States agreed to establish enhanced cooperation among themselves¹² and adopted Regulation (EU) No 1259/2010 laying down rules determining the law applicable to divorce and legal separation¹³ (hereafter "the Rome III Regulation"). This was the first time that enhanced cooperation was used in the Union. By its nature, an enhanced cooperation is open to the participation of all Member States with the ultimate goal that the Rome III Regulation is taken up by all Member States. Since the adoption of the Rome III Regulation two more Member States have decided to participate in the enhanced cooperation¹⁴.

⁶ Council Decision of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, OJ L 48, 21.2.2003, p. 1. The Convention applies in all Member States except Belgium and Italy, which have signed the Convention but not yet ratified it.

⁷ The Regulation applies: (i) where the child has his or her habitual residence in a Member State and (ii) with regard to the recognition and enforcement of a judgment given in a Member State, even if the child has his or her habitual residence in a third State which is Party to the Convention; Article 61.

⁸ The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council on 4-5 November 2004.

⁹ Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (COM (2006) 399 final).

¹⁰ OJ C 109, 16.4.2013, p. 7.

¹¹ Proposal for a Council decision No .../2010/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (COM(2010) 104 final - 2010/0066 (APP)); Proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (COM(2010) 105 final-2010/0067 (CNS)).

¹² Council decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU), OJ L 189, 22.7.2010, p. 12. The 14 Member States that established enhanced cooperation among themselves are Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

¹³ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p. 10. The Rome III Regulation applies in the 14 original Member States since 21 June 2012.

¹⁴ The Rome III Regulation will apply in Lithuania as from 22 May 2014 (OJ L 323, 22.11.2012, p. 18) and in Greece as from 29 July 2015 (OJ L 23, 28.1.2014, p. 41).

This report has been prepared pursuant to Article 65 of the Regulation¹⁵. It follows the structure of the Regulation by reviewing in separate sections the provisions on jurisdiction, recognition and enforceability of judgments and cooperation between Member States' Central Authorities. The report also focusses more specifically on a number of cross-cutting issues, namely the return of the child in cases of parental abduction, the enforcement of judgments and the placement of a child in another Member State.

The report is a first assessment of the application of the Regulation to date and does not purport to be exhaustive. It is based on input received from the members of the European Judicial Network in civil and commercial matters (hereafter "the EJM")¹⁶ as well as on available studies¹⁷, the Commission's Green Paper on applicable law and jurisdiction in divorce matters¹⁸, the 2006 Commission proposal to amend the Regulation and the work done within the framework of the Hague Conference on Private International Law on the follow-up of the 1980 and 1996 Hague Conventions. Finally, it takes into account citizen letters, complaints, petitions and case law of the Court of Justice of the European Union (hereafter "the CJEU") concerning the Regulation.

1. JURISDICTION

1.1. Matrimonial matters

In view of the increasing amount of international couples and the high divorce rate in the Union, jurisdiction in matrimonial matters concerns a significant number of citizens each year¹⁹. The jurisdiction rules of the Regulation have helped to simplify the legal framework in an already challenging situation for the individuals concerned. However, some difficulties have been raised with regard to these rules²⁰.

¹⁵ Article 65 provides that, by 1 January 2012, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Regulation on the basis of information supplied by Member States.

¹⁶ In particular, discussions in the framework of EJM meetings and replies of the EJM to a 2013 Commission questionnaire. See also the EJM Guide to best practices and common minimum standards, available at: https://e-justice.europa.eu/content_parental_responsibility-46-en.do.

¹⁷ See the Annex to this report.

¹⁸ COM(2005)82 final.

¹⁹ Of the approximately 122 million marriages in the Union, around 16 million (13%) have a cross-border dimension. Of 2.4 million marriages celebrated in the Union in 2007, about 300 000 fell into this category. So did 140 000 (13%) of the 1 040 000 divorces that took place in the Union in the same year (see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Bringing legal clarity to property rights for international couples, COM(2011) 125 final). According to 2010 Eurostat data, each year in the Union more than 2.2 million new marriages are contracted and approximately 1 million divorces take place.

²⁰ For instance, difficulties on the interpretation of the jurisdiction ground based on "the nationality of both spouses" (Article 3(1)(b)) where both spouses hold the nationality of the same two Member States have arisen. The CJEU, recalling the individuals' choice of the court having jurisdiction, particularly in cases where the right to freedom of movement for persons has been exercised, stated that this provision cannot be interpreted as meaning that only an 'effective' nationality can be taken into consideration. The courts of the Member States of which the spouses hold the nationality have jurisdiction and the spouses

First, the alternative (rather than hierarchical) grounds of jurisdiction set out in the Regulation in conjunction with the absence of harmonised conflict-of-law rules in the entire Union may induce a spouse to "rush to court", that is, to apply for divorce before the other spouse does to ensure that the law applied in the divorce proceedings will safeguard his or her own interests²¹. The Rome III Regulation has reduced the possibility of a spouse rushing to court as it lays down harmonised rules to determine the law applicable to matrimonial disputes in the participating Member States. However, as the Regulation does not yet apply in all Member States, the law applicable to a matrimonial dispute may differ depending on the conflict-of-law rules (the Rome III Regulation or national rules) applicable in the Member State of proceedings. The "rush to court" may result in the application of a law with which the defendant does not feel closely connected or which fails to take into account his or her interests. It may further complicate efforts of reconciliation and leave little time for mediation.

Secondly, the Regulation does not lay down the possibility for spouses to designate the competent court by common agreement. The trend in recent Union instruments in civil matters is to allow for some party autonomy (see, for instance, the 2008 Maintenance Regulation²² or the 2012 Successions Regulation²³). The introduction of a limited party autonomy in the Regulation allowing spouses to agree on the competent court could be particularly useful in cases of divorce by mutual consent, especially as spouses have the possibility under the Rome III Regulation to agree on the law applicable to their matrimonial dispute.

Responses received in connection with the 2006 Commission proposal to amend the Regulation already pointed to the need to enhance legal certainty and predictability by introducing a limited party autonomy and preventing a "rush to court"²⁴. They also revealed that Article 6 confirming the exclusive nature of the jurisdiction determined under Articles 3, 4 and 5 of the Regulation could create confusion and was superfluous as Articles 3, 4 and 5 describe in which circumstances a court has exclusive jurisdiction²⁵.

may seise the court of the Member State of their choice; Case C-168/08 *Hadadi* [2009] ECR I-06871, paragraphs 52, 53, 58.

²¹ One of the objectives of the 2006 Commission proposal to amend the Regulation was to prevent such "rush to court" through the establishment of harmonised conflict-of-law rules in all Member States. The introduction of harmonised conflict-of-law rules would have reduced the risk of "rush to court" as any court seised within the EU would have had to apply the law determined by common rules. As the Rome III Regulation on the law applicable to divorce and legal separation does not apply to all Member States, the "rush to court" concern remains.

²² Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p.1 (hereafter "the Maintenance Regulation").

²³ Council Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107 (hereafter "the Successions Regulation").

²⁴ 2006 Commission proposal to amend the Regulation, p. 5.

²⁵ 2006 Commission proposal to amend the Regulation, p. 8. See also Case C-68/7 *Sundelind Lopez*, [2007] ECR I-10403.

The jurisdiction rules proposed in the 2006 Commission proposal to amend the Regulation, the 2011 Commission proposal in matters of matrimonial property regime and the jurisdiction rules contained in recent Regulations in civil matters²⁶ could be considered as a possible model to improve current jurisdiction rules in matrimonial matters.

1.2. Matters of parental responsibility

The Regulation covers all decisions on parental responsibility independently of any link with matrimonial proceedings in order to ensure equality for all children. This reflects the significant increase of the share of extra-marital births over the last two decades in almost all Member States, which indicates a change in the pattern of traditional family formation²⁷. Matters of parental responsibility include rights of custody and rights of access to children.

The Regulation establishes a general jurisdiction rule based on the habitual residence of the child (Article 8) to ensure a real link between the child and the Member State exercising jurisdiction²⁸. This principle is reinforced by the jurisdiction provisions applicable in cases of cross-border child abduction (Article 10). In these cases, the courts of the Member State of the habitual residence of the child immediately before the child's abduction (hereafter the "court of origin") retain jurisdiction until the child has acquired a habitual residence in another Member State and certain additional conditions have been met, particularly until a judgment on custody that does not entail the return of the child has been issued by the court of origin²⁹.

While found useful by experts, the rules on prorogation of jurisdiction favouring a consensual solution and, in particular, avoiding that divorce and parental responsibility proceedings be dealt with by courts in different Member States (Article 12), have raised questions on the interpretation of the conditions that must be met³⁰. For their part, the provisions on the transfer of jurisdiction to a court better placed to hear the case if it is in the best interests of the child (Article 15) have raised difficulties in some instances with regard to their

²⁶ Commission proposal on jurisdiction, applicable law and the recognition and enforcement in matrimonial property regimes, COM(2011) 126 final (hereafter "the Commission proposal in matters of matrimonial property regimes"); Maintenance Regulation; Successions Regulation.

²⁷ Each year, more than 5 million children are born in the Union-28 (2004-2011 Eurostat Statistics). In 2010, some 38.3 % of children were born outside marriage, while the corresponding figure in 1990 was 17.4 % (Eurostat).

²⁸ The CJEU gave guidance for the interpretation of the concept of habitual residence in Case C-523/07 *A.*, [2009] ECR I-02805 and Case C-497/10 PPU *Mercredi*, [2010] ECR I-14309. In relation to Articles 8 and 10, the CJEU held in particular that the habitual residence of the child corresponds to the place which reflects some degree of integration by the child in a social and family environment and that it is 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.

²⁹ The interpretation of the latter condition was clarified by the CJEU in Case C-211/10 PPU *Povse* [2010] ECR I-06673. The CJEU ruled that a provisional measure issued by the court of origin does not constitute a "judgment on custody that does not entail the return of the child" and, therefore, cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child was unlawfully removed. Indeed, if the effect of a provisional measure were a loss of jurisdiction over the issue of custody of the child, the competent court in the Member State where the child was habitually resident might be deterred from adopting a provisional measure even if it were in the interests of the child (paragraphs 47 and 50).

³⁰ In particular under Article 12(3).

functioning, in particular as a result of the fact that the requested court often fails to inform the requesting court in a timely manner that it accepts jurisdiction.

In urgent cases, provisional measures may need to be adopted by the courts of a Member State over a child present in their territory even if those courts do not have jurisdiction as to the substance of the matter (Article 20). The CJEU has given guidance on how to apply provisional measures in cases of child abduction. It has clarified that the court of the Member State to which the child was abducted is not allowed to take a provisional measure granting custody to one parent over a child who is in its territory if a court having jurisdiction had provisionally granted custody to one parent before the abduction and that judgment had been declared enforceable in that Member State³¹.

The *lis pendens* rule, whereby the court second seised must stay proceedings until the jurisdiction of the court first seised is established so as to avoid parallel proceedings in different Member States and contradictory rulings, has given rise to questions of interpretation³². The CJEU has clarified that this rule is not applicable where the court first seised in matters of parental responsibility is seised only for the adoption of provisional measures and the court second seised of an action aiming at the same measures is the court of another Member State having jurisdiction on the substance of the matter³³.

The extent to which the interpretation given by the CJEU could be incorporated in the Regulation should be explored, as well as how the practical applicability of certain provisions could be improved.

1.3. Jurisdiction issues common to matrimonial matters and matters of parental responsibility

In matrimonial matters, a Member State court will have jurisdiction if (i) at least one of the spouses has been habitually resident in that Member State for a minimum time, or (ii) both spouses share the nationality of that Member State regardless of whether they live in the Union or in a third State (Article 3). Pursuant to the residual jurisdiction provisions of the Regulation (Article 7), the access of spouses to a Member State court when they are of different Union nationalities and live in a third State depends on the law of each Member State³⁴.

³¹ Case C-403/09 PPU *Detiček*, [2009] ECR I-12193.

³² With regard to this rule, the CJEU stated in Case C-497/10 PPU *Mercredi* [2010] ECR I-14309 that judgments of a court of a Member State which refuse to order the prompt return of a child under the 1980 Hague Convention to the jurisdiction of a court of another Member State and which concern parental responsibility for that child have no effect on judgments to be delivered in that other Member State in proceedings relating to parental responsibility which were brought earlier and are still pending in that other Member State.

³³ Case C-296/10 PPU *Purrucker II*, [2010] ECR I-11163.

³⁴ See the 2006 Commission proposal to amend the Regulation, the Commission Staff Working Document SEC(2006) 949 - Impact assessment and the Study on Residual Jurisdiction referred to in the Annex to this report.

In matters of parental responsibility over a child, a Member State court will as a rule have jurisdiction if the child is habitually resident in that Member State at the time the court is seised (Article 8). If the child has his/her habitual residence in a third State, jurisdiction can still be established in a Member State provided the parents have accepted expressly the jurisdiction and this is in the best interests of the child (Article 12). If parents do not agree, the possibility of starting proceedings before a Member State court over a child habitually resident outside the Union depends, pursuant to the residual jurisdiction provisions, on the law of each Member State (Article 14)³⁵.

The absence, in respect of both matrimonial and parental responsibility matters, of a uniform and exhaustive rule on residual jurisdiction results in Union citizens having unequal access to justice. Indeed, Member State rules on jurisdiction are based on different criteria and do not always ensure effective access to court despite a close connection of the applicant or the respondent with a Member State. This may lead to situations where neither a Member State nor a third State have jurisdiction over a matter³⁶ and to practical difficulties stemming from the absence of common rules on the effects of third State judgments in the Union³⁷.

Also, unlike recent legislative instruments such as the Maintenance Regulation or the Successions Regulation, the Regulation does not contain a *forum necessitatis*³⁸. Such jurisdiction ground was demanded by the European Parliament in its legislative resolution of 15 December 2010 on the proposal for the Rome III Regulation³⁹.

³⁵ The Study on Residual Jurisdiction referred to in the Annex to this report shows that there is a great divergence between the jurisdiction rules of Member States. The most important difference is that, in about half the Member States, the citizenship of the child (or of either parent, which will often coincide with the citizenship of the child) is sufficient to establish jurisdiction in the Member State of such citizenship, while this is not the case in the other half. Although in some of these latter States other grounds of residual jurisdiction may in some circumstances allow an action to be brought in the Union, there is no guarantee to that effect.

³⁶ This could be the case, for instance, in matrimonial matters if the spouses live in a third State where the rules on jurisdiction are based exclusively on the citizenship of the spouses, or if the spouses live in different third States and the residence of only one spouse is not enough to establish jurisdiction and jurisdiction is not available at the last habitual residence of the spouse. See, for a practical example, the actual case reported in the Study on the European framework for private international law referred to in the Annex to this report, of an Italian citizen and his Dutch wife who married in an African state and lived there for a number of years. The wife, a diplomat, moved for professional reasons to an Asian state with her husband. At one point the couple wished to divorce but this turned out not to be possible in the Asian state of their residence. Jurisdiction was also not available under the Dutch or Italian residual rules on jurisdiction in divorce cases. In these circumstances, a Member State court would have had jurisdiction under the Regulation only if both spouses had shared the nationality of the same Member State.

³⁷ See the Study on Residual Jurisdiction referred to in the Annex to this report.

³⁸ Ground of jurisdiction that allows, on an exceptional basis, a court of a Member State to have jurisdiction over a case which is connected with a third State, in order to remedy, in particular, situations of denial of justice, for instance where the proceedings prove impossible in the third State in question (for example, because of civil war); see Recital 16 of the Maintenance Regulation. It is traditionally considered, and has even been pointed out during parliamentary discussions in some Member States, that this jurisdiction “of necessity” is based on, or is even imposed by, the right to a fair trial under Article 6(1) of the European Convention on Human Rights –Study on Residual Jurisdiction, p. 64.

³⁹ Resolution P7_TA(2010)0477, point 3.

Finally, the absence of provisions determining in which cases Member State courts can decline their jurisdiction in favour of a court in a third State generates a great deal of uncertainty⁴⁰. The Brussels I Regulation⁴¹ has been recently amended by the Brussels I recast Regulation⁴² so as to introduce, amongst other amendments, a provision addressing this issue.

Commission proposals and recent legislative developments in civil law matters⁴³ could assist in reviewing the Regulation on the above issues taking into account that, in parental responsibility matters, the best interests of the child should be the overriding principle.

2. RECOGNITION AND ENFORCEABILITY

The protection of the child's best interests is one of the main objectives of Union action in the context of recognition and enforceability provisions, in particular by giving concrete expression to the child's fundamental right to maintain contact with both parents, as laid down in Article 24 of the Charter of Fundamental Rights of the European Union (hereafter "the Charter"). In addition, the Regulation aims to achieve the free circulation of judgments in all matrimonial and parental responsibility matters⁴⁴. The abolition of *exequatur* in the area of civil law and the possible introduction of common minimum standards with regard to the recognition and enforceability of parental responsibility decisions were identified in the Stockholm Programme⁴⁵ and the Stockholm Action Plan⁴⁶ as key for the Commission's future work in civil matters.

The Regulation is the first Union instrument to have abolished *exequatur* in civil matters in respect of certain decisions, namely certified judgments on access rights to children and certified return orders in child abduction cases. It also extended the principle of mutual recognition of judgments to all decisions on parental responsibility (protecting the child regardless of the existence of matrimonial links between the parents) thereby completing, in accordance with the Stockholm Programme, the first stage of the programme of mutual recognition, the ultimate objective remaining the abolition of *exequatur* for all decisions.

⁴⁰ In particular, for parental responsibility matters in third States which are not Contracting Parties to the 1996 Hague Convention. See the Study on Residual Jurisdiction referred to in the Annex to this report.

⁴¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L12, 16.1.2001, p.1.

⁴² Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1 (hereafter "the Brussels I recast Regulation").

⁴³ Maintenance Regulation; 2006 Commission proposal to amend the Regulation; Commission proposal in matters of matrimonial property regimes; Commission proposal on jurisdiction, applicable law and the recognition and enforcement regarding the property consequences of registered partnerships (COM(2010)127 final); Successions Regulation; Brussels I recast Regulation.

⁴⁴ The Regulation provides that authentic instruments and agreements must be declared enforceable under the same conditions as judgments if they are enforceable in their Member State of origin. The fact that certificates used in the *exequatur* procedure refer only to "judgments" has caused difficulties.

⁴⁵ Stockholm Programme (Council document No 17024/09 JAI 896), paragraphs 3.1.2 and 3.3.2.

⁴⁶ Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee, Delivering an Area of Freedom, Security and Justice for Europe's Citizens – Action Plan Implementing the Stockholm Programme of 20 April 2010, COM(2010) 171 final, pp. 10, 12, 23.

The fact that certain categories of judgments do not benefit from the abolition of *exequatur* leads to complex, lengthy and costly procedures, in particular with regard to judgments on parental responsibility matters. It may also lead to contradictory situations where a Member State must recognise access rights under the Regulation (and maintenance claims for the child under the Maintenance Regulation) while, at the same time, could refuse the recognition of custody rights granted in the same judgment. This is because, in areas other than access rights and the return of the child in certain abduction cases, recognition may still be opposed on the grounds laid down in the Regulation and a declaration of enforceability must be obtained before the judgment can be enforced in another Member State⁴⁷.

Regarding the recognition of judgments in both matrimonial and parental responsibility matters, the use of the "public policy" ground of non-recognition has been rare. However, in matters of parental responsibility, significant divergences have arisen in practice with regard to a broader or narrower application of this ground⁴⁸. In addition, in matters of parental responsibility, a frequently raised ground of opposition has been the fact that the judgment was given without the child having been given an opportunity to be heard⁴⁹. In this connection, particular difficulties arise due to the fact that Member States have diverging rules governing the hearing of the child.

Complications also stem from the fact that Member States do not interpret the term "enforcement" in a uniform manner, which has resulted in the adoption of inconsistent Member State policies as to which judgments on parental responsibility require a declaration of enforceability. This has important consequences where, for example, a person is appointed as the guardian of a child by a Member State court and this guardian requests the delivery of a passport in another Member State. In these cases, some Member States only require the recognition of the judgment attributing the guardianship whilst, others, considering that the issuing of a passport is an enforcement act, require a declaration of enforceability of the judgment attributing the guardianship before the passport can be issued.

Consideration should be given to the pertinence of extending the abolition of *exequatur* to other categories of decisions in line with recent Union legislation⁵⁰. In this connection, the

⁴⁷ In Case C-195/08 PPU *Rinau*, [2008] ECR I-05271, the CJEU clarified that, except for certified judgments benefiting from the abolition of *exequatur*, any interested party can apply for the non-recognition of a judgment even if no application for the recognition of the judgment has been submitted beforehand. In Case C-256/09 *Purrucker I*, [2010] ECR I-07353, the CJEU confirmed that the provisions on recognition and enforcement do not apply to provisional measures relating to rights of custody falling within the scope of Article 20.

⁴⁸ Study on the Interpretation of the Public Policy Exception referred to in the Annex to this report.

⁴⁹ Other frequently raised grounds for the non-recognition of judgments have been the service of documents where the judgment was given in default of appearance, the failure to comply with the procedure laid down in the Regulation for the placement of a child in another Member State and the fact that the judgement was given without the parent concerned having been given an opportunity to be heard. These are important considerations referring to the right to an effective remedy and to a fair trial guaranteed by Article 47 of the Charter.

⁵⁰ Regulation No 805/2004 establishing a European enforcement order for uncontested claims; Regulation No 1896/2006 creating a European Order for Payment Procedure; Regulation No 861/2007 creating a European Small Claims Procedure; Maintenance Regulation; Brussels I recast Regulation.

functioning of the current grounds of refusal for the recognition and enforceability of a judgment should be taken into account so as to establish the necessary safeguards. In addition, the introduction of common minimum procedural standards, in particular regarding the hearing of the child⁵¹, could enhance mutual trust between Member States and, thus, the application of the provisions concerning recognition and enforceability.

3. COOPERATION BETWEEN CENTRAL AUTHORITIES

The Regulation lays down provisions on cooperation between Central Authorities in matters of parental responsibility. This cooperation is essential for the effective application of the Regulation. Central Authorities must, for example, collect and exchange information on the situation of the child (for instance in connection with custody or child return proceedings), assist holders of parental responsibility to have their judgments recognised and enforced (in particular concerning access rights and the return of the child) and facilitate mediation. Central Authorities also meet regularly within the framework of the EJM to exchange views on their practices as well as bilaterally to discuss on-going cases⁵².

Cooperation between Central Authorities, in particular in bilateral discussions, has proved very useful in connection with cross-border child abduction cases. As regards these cases, the Stockholm Programme mentions expressly that, apart from effectively implementing existing legal instruments in this area, the possibility to use family mediation at international level should be explored taking account of good practices in Member States. Accordingly, a working group created in the framework of the EJM has been mandated with proposing efficient means to improve the use of family mediation in cases of international parental child abduction⁵³.

Despite their overall positive functioning, the provisions on cooperation have been considered as not sufficiently specific. In particular, experts have reported difficulties in connection with the obligation to collect and exchange information on the situation of the child⁵⁴. The main concerns relate to the interpretation of this provision, the fact that applications for information have not always been handled in a timely manner as well as to the translation of the information exchanged. Also, significant differences exist between Member States with regard to the assistance provided by Central Authorities to holders of parental responsibility that seek enforcement of access rights judgments.

The efficiency of the provisions on cooperation could be improved by drawing inspiration from other family law instruments (in particular, the Maintenance Regulation) or by

⁵¹ See also, for example, the consideration of future minimum standards on service of documents - Report from the Commission to the European Parliament, the Council and the Economic and Social Committee on the application of Regulation (EC) No 1393/2007 of the European Parliament and the Council on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters.

⁵² Since 2010, 155 cases have been discussed in bilateral meetings.

⁵³ See Council document 16121/10, JUSTCIV 194, of 12 November 2010, Conclusions of the ministerial seminar organised by the Belgian Presidency concerning international family mediation in cases of international child abduction, available at <http://register.consilium.europa.eu>.

⁵⁴ Article 55(a).

developing guides to good practices in line with the EJM guide for cases of child abduction⁵⁵. Moreover, the Commission will further contribute to building trust between Member States including with Member State child protection bodies to enhance understanding of the cross-border context and the acceptance of decisions taken in another Member State.

4. CROSS-BORDER PARENTAL CHILD ABDUCTION: ISSUANCE OF THE RETURN ORDER

When parents live together they usually exercise parental responsibility over their children jointly. In case of separation or divorce, parents must decide, by mutual agreement or by going to court, how they will exercise their responsibility in the future. However, one of the major risks to which a child is exposed in cases of separation or divorce is being taken out of his/her country of habitual residence by one of the parents. The harmful impact of parental child abduction on the child and the left-behind parent are significant enough that measures at both international and Union level have been taken.

One of the main objectives of the Regulation is to deter child abductions between Member States and to protect the child from their harmful effects by establishing procedures to ensure the child's prompt return to the Member State of habitual residence immediately before his/her abduction⁵⁶. In this respect, the Regulation complements the 1980 Hague Convention by clarifying some of its aspects, in particular the hearing of the child, the time period to render a decision after an application for return has been lodged and the grounds for not returning the child. It also introduces provisions governing conflicting return and non-return orders issued in different Member States.

The CJEU and the European Court of Human Rights (hereafter "the ECtHR") have laid down a number of principles in their case law on international child abduction with the child's best interests as the primary consideration. The CJEU has upheld the principle that the Regulation seeks to deter child abduction between Member States and to obtain the child's return without delay once an abduction has taken place⁵⁷. For its part, the ECtHR has ruled⁵⁸ that, once it has been found that a child has been wrongfully removed, Member States have a duty to make adequate and effective efforts to secure the return of the child and that failure to make such efforts constitutes a violation of the right to a family life as set out in Article 8 of the

⁵⁵ EJM Guide to best practices and common minimum standards:

https://e-justice.europa.eu/content_parental_responsibility-46-en.do.

⁵⁶ In 2008, 706 return applications were made between Member States. Statistics show that the overall return rate between Member States was 52% in 2008 while it was 39% when the requesting State was a third State: Statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Part II — Regional Report, Prel. Doc. No 8 B — update of November 2011 for the attention of the Special Commission of June 2011, available at <http://www.hcch.net>.

⁵⁷ Case C-195/08 PPU *Rinau*, [2008] ECR I-05271, paragraph 52,

⁵⁸ See, for example, Cases *Šneerson and Campanella v Italy* (application no. 14737/09), paragraph 85(iv); *Iglesias Gil and A.U.I. v Spain* (application no. 56673/00); *Ignaccolo-Zenide v Romania* (application no. 31679/96), *Maire v Portugal* (application no. 48206/99); *PP v Poland* (application no. 8677/03) and *Raw v France* (application no. 10131/11).

Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the ECHR")⁵⁹.

The Regulation provides that the court to which an application for the return of a child has been made must issue its judgment no later than six weeks after the application is lodged. Member State courts have not always been able to meet this deadline⁶⁰. However, it is clear, as experts have confirmed, that a six-week deadline within which a decision must be rendered is crucial to signal the importance of securing the rapid return of the child.

In cases of conflict between a non-return order issued by the court of the Member State to which the child was abducted and a subsequent return order adopted by the court of origin, the Regulation resolves in favour of the latter in order to secure the return of the child⁶¹: where it is certified by the court of origin, the return order benefits from the abolition of *exequatur*, that is, it is immediately recognised and enforceable in the Member State to which the child was abducted without the need for a declaration of enforceability and without the possibility of its recognition being opposed⁶². Such a return order does not need to be preceded by a final judgment on the custody of the child, as the purpose of the return order is also to contribute to resolving the issue of custody of the child⁶³.

The court of origin will only issue the certificate accompanying the return order if certain procedural safeguards have been applied during the procedure before it, in particular if the parties and the child were given an opportunity to be heard⁶⁴. As a result of divergences between Member States on the application of these safeguards, in particular with regard to the hearing of the child, difficulties could arise at the enforcement stage.

⁵⁹ The ECtHR has also held in some cases that it may be a breach of Article 8 of the ECHR to return a child, in particular where it found that the requested court had not sufficiently appreciated the seriousness of the difficulties which the child was likely to encounter on return to his/her State of origin, that the requested court could not have determined in an informed manner whether a risk within the meaning of Article 13(b) of the 1980 Hague Convention existed or the requested court failed to carry out an effective examination of the applicant's allegations under Article 13(b) of the 1980 Hague Convention. See, for example, Cases *Šneersone and Kampanella v Italy* (application no. 14737/09), paragraph 95; *B v Belgium* (application no. 4320/11), paragraph 76; *X v Latvia* (application no. 27853/09), paragraph 119.

⁶⁰ In 2008, 15% of applications between Member States were resolved within 6 weeks: see statistical analysis referred to in footnote 56.

⁶¹ Articles 11(8) and 42.

⁶² As the Regulation intends to secure the rapid return of the child, the issuing of a certificate by the court of origin in relation to its return order cannot be subject to appeal, and the only pleas in law which can be relied on in relation to the certificate are those seeking its rectification or raising doubts on its authenticity under the law of the Member State of origin; Article 43(2) and Case C- 211/10 PPU *Povse*, [2010] ECR I-06673, paragraph 73.

⁶³ Case C-211/10 PPU *Povse*, [2010] ECR I-06673, paragraph 53. Pursuant to Case C-195/08 PPU *Rinau*, [2008] ECR I-05271, once a non-return order has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of the court of origin issuing a certified return order, that the non-return order has not become final or has been overturned in so far as the return of the child has not actually taken place.

⁶⁴ Similar safeguards apply to certified decisions concerning rights of access to children.

In light of the foregoing, it could be examined whether the incorporation in the Regulation of relevant case law of the CJEU would facilitate the application of the provisions concerning the issuance of return orders. The adoption of minimum common standards concerning the hearing of the child should also be considered to enhance the effectiveness of return orders.

5. GENERAL ENFORCEMENT ISSUES

A number of enforcement issues apply in a cross-cutting manner to parental responsibility matters and return orders in cases of parental child abduction.

The Regulation provides that a judgment delivered by a court of another Member State and declared enforceable in the Member State of enforcement must be enforced under the same conditions as if it had been delivered there⁶⁵.

As the enforcement procedure is governed by the law of the Member State of enforcement and differences exist between national laws, difficulties arise with regard to the enforcement of parental responsibility decisions. Some national systems do not contain special rules for the enforcement of family law decisions and parties must resort to procedures available for ordinary civil or commercial decisions, which do not take into account the fact that, in the area of parental responsibility, the passing of time is irreversible⁶⁶. The application of different Member State procedures (for example, concerning the right of appeal, which suspends the effects of the judgment) may not therefore guarantee an effective and expeditious enforcement of judgments.

With regard, in particular, to the enforcement of return orders in cases of parental child abduction, the Regulation provides that a certified return order issued by the court of origin must be enforced in the Member State of enforcement in the same conditions as if it had been delivered there and that the order cannot be enforced if it is irreconcilable with a subsequent enforceable judgment⁶⁷.

The CJEU has strengthened the position of the courts of origin in its case law. Pursuant thereto, no plea in law can be raised before the courts of the Member State of enforcement challenging the enforcement of the certified return order and the subsequent enforceable judgment can only refer to a judgment handed down by the court of origin. In addition, the courts of origin are the only ones entitled to examine challenges to their jurisdiction, an application to suspend the enforcement of a certified return order and a change of circumstances subsequent to the certified return order that might be seriously detrimental to the best interests of the child⁶⁸. Likewise, the court in the Member State of enforcement cannot oppose the enforcement of a certified return order on the ground that the court of

⁶⁵ Article 47.

⁶⁶ See the Comparative study on enforcement procedures of family rights referred to in the Annex to this report.

⁶⁷ The same enforcement provisions apply in respect of certified judgments concerning rights of access to children; Article 47.

⁶⁸ Case C- 211/10 PPU *Povse*, [2010] ECR I-06673, paragraphs 74-83.

origin may have infringed the provisions governing the certificate interpreted in accordance with Article 24 on the rights of the child of the Charter, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the court of origin⁶⁹. The ECtHR has used a similar reasoning in its case law⁷⁰.

In practice hurdles remain in connection with the actual enforcement of return orders⁷¹, whether it is the enforcement in the territory of the Member State to which the child was abducted of a return order issued by a court of that Member State⁷², or the enforcement in that Member State of a certified return order issued by the court of origin. As enforcement procedures are subject to the law of the Member State of enforcement, means of enforcement differ from one Member State to another. In some Member States, enforcement procedures can in fact last for over a year as enforcement courts re-examine the substance of the case⁷³, while return orders should be enforced immediately. In this respect, the CJEU has stated that, even if the object of the Regulation is not to unify the substantive and procedural rules of Member States, it is nevertheless important that the application of national rules does not prejudice the useful effect of the Regulation⁷⁴. The ECtHR has in the same vein emphasised that proceedings relating to the return of the child and the enforcement of a final decision involving the return of the child require urgent handling as the passage of time can have irreparable consequences for the relations between the child and the parent with whom he/she does not live. The adequacy of a measure must therefore be judged by the swiftness of its implementation⁷⁵.

The Union's main policy objective in the area of civil procedural law is that borders between Member States should not constitute an obstacle to the enforcement of decisions in civil matters. To render the application of the Regulation more effective, especially in the critical area of the return of the child, the Commission will review the enforcement of decisions in this area, including the appropriateness of introducing common minimum enforcement standards.

6. PLACEMENT OF A CHILD IN ANOTHER MEMBER STATE

The Regulation contains in Article 56 specific provisions on the placement of a child in institutional care or with a foster family in another Member State. Where the court of a Member State contemplates the placement of a child in another Member State and public authority intervention is required in the host State for domestic cases of child placement, the

⁶⁹ Case C-491/10 *Zarraga*, [2010] ECR I-14247.

⁷⁰ Case *Povse v Austria* (application no. 3890/11), paragraphs 81-82.

⁷¹ Citizens' complaints refer mostly to burdensome enforcement procedures, lengthy proceedings and diverging practices of national authorities.

⁷² See, for example, ECtHR Cases *PP v Poland* (application no. 8677/03); *Shaw v. Hungary* (application no. 6457/09); *Raw and Others v. France* (application no. [10131/11](#)).

⁷³ For example, enforcement provisions in some Member States allow for appeals to be filed against enforcement orders.

⁷⁴ Case C-195/08 PPU *Rinau*, [2008] ECR I-05271, paragraph 82.

⁷⁵ See, for example, *Shaw v Hungary* (application no. 6457/09) and *Raw v France* (application no. 10131/11).

court must consult the Central Authority or other competent authority in the host State and obtain the consent of the competent authority in that State prior to the adoption of the placement decision. Currently, the procedures for consultation and consent are governed by the national law of the host Member State, which means that diverging internal Member State procedures apply. Central Authorities must cooperate, where requested, in providing information and assistance⁷⁶.

The CJEU has confirmed that a placement judgment must be, before it can be enforced in the host Member State, declared enforceable in that Member State. One of the grounds that can be opposed against a declaration of enforceability of a decision placing a child in another Member State is the failure to respect the procedure laid down in Article 56 of the Regulation⁷⁷ so as to avoid the imposition of the placement measure on the host State. In order not to deprive the Regulation of its effectiveness, the CJEU added that the decision on the application for a declaration of enforceability must be made with particular expedition and that appeals brought against that decision will not have a suspensive effect⁷⁸. Notwithstanding these observations, the application of the *exequatur* procedure to placement decisions has been reported by experts to be very cumbersome in view of the child's needs.

The application of a common, uniform procedure that enables a swifter and more efficient application of the provisions on the placement of a child in another Member State could thus be explored as a means to overcome the reported problems.

CONCLUSION

The Regulation is a well-functioning instrument that has brought important benefits to citizens. It has facilitated the settlement of increasing cross-border litigation in matrimonial and parental responsibility matters through a comprehensive system of jurisdiction rules, an efficient system of cooperation between Member State Central Authorities, the prevention of parallel proceedings and the free circulation of judgments, authentic instruments and agreements. The provisions on the return of the child complementing the 1980 Hague Convention aimed at deterring parental child abduction between Member States are regarded as particularly useful.

However, there are indications on the basis of data and preliminary feedback from experts that existing rules could be improved. In order to explore comprehensively the concerns identified in this report, the Commission intends to launch a further policy evaluation of the existing rules and their impact on citizens. To this end, the Commission will also launch a public consultation. On the basis of the evaluation and the replies to the public consultation, the Commission will take action as appropriate.

⁷⁶ Article 55(d).

⁷⁷ Articles 31(2) and 23(g).

⁷⁸ Case C-92/12 PPU *Health Service Executive*.

Annex

2012 Study on the European framework for private international law: Current gaps and future perspectives, prepared by Prof. Dr. Xandra Kramer (scientific director), Mr Michiel de Rooij, LL.M. (project leader), Dr. Vesna Lazić, Dr. Richard Blauwhoff and Ms Lisette Frohn, LL.M., available at:

<http://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58300/20121219ATT58300EN.pdf>

2010 Study on the parental responsibility, child custody and visitation rights in cross-border separations, prepared by Institut Suisse de droit comparé (ISDC), available at:

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425615/IPOL-PETI_ET\(2010\)425615_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425615/IPOL-PETI_ET(2010)425615_EN.pdf)

2010 Study on the cross-border exercise of visiting rights, prepared by Dr Gabriela Thoma-Twaroch, President of Josefstadt District Court, Vienna, available at:

[http://www.europarl.europa.eu/RegData/etudes/note/join/2010/432735/IPOL-JURI_NT\(2010\)432735_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2010/432735/IPOL-JURI_NT(2010)432735_EN.pdf)

2010 Study on the Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, prepared by Prof. Burkhard Hess and Prof. Thomas Pfeiffer, Heidelberg University, available at:

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453189/IPOL-JURI_ET\(2011\)453189_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf)

2007 Report Study on Residual Jurisdiction prepared by Prof. A. Nuyts, available at:

http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm

2007 Comparative study on enforcement procedures of family rights, prepared by T.M.C. ASSER Institut, available at:

http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm

2006 Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters, drawn up by the European Policy Evaluation Consortium (EPEC) - Commission Staff Working Document - Impact assessment SEC(2006) 949.

2002 Evaluation on practical problems resulting from the non-harmonisation of choice of Law rules in Divorce Matters, prepared by T.M.C. ASSER Institut, available at:

http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm