Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment

FINAL REPORT

Analytical annexes

Deloitte.

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and Consumers

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Directorate-General for Justice and Consumers
Directorate Civil Justice
Unit A.1

E-mail: JUST-CIVIL-COOP@ec.europa.eu

European Commission
B-1049 Brussels

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Annex 1. Analysis of the effectiveness of the Brussels IIa Regulation at the level of the operational objectives

1.1 Introduction

This Annex presents the findings on the **effectiveness** of the Brussels IIa Regulation at the level of the operational objectives. The table below displays the six operational objectives that were identified as well as their shortened denominations, which are used as headings in the following sub-sections, as well as in the section on Effectiveness in the main body of the report.

Table 1: Operational objectives and their shortened denominations

Operational objective	Shortened denominations
Operational objective 1: *To ensure that there are clear and comprehensive jurisdiction rules that are based on a close connection of the spouses or the child to the court in question*	Jurisdiction rules
Operational objective 2: *To ensure that the right of the child to be heard and its representation in court is guaranteed*	Hearing of the child and the child's representation in court
Operational objective 3: *To ensure speedy and unproblematic recognition and enforcement of judgments and avoid undue non-recognition*	Recognition and enforcement
Operational objective 4: *To put time limits in place that ensure the prompt handling of child abduction cases and to limit the possibilities to refuse the return of children*	Provisions specific to child abduction cases
Operational objective 5: *To ensure support to citizens in cross-border proceedings, in particular through the active and efficient participation of the Central Authorities, as well as mediation*	Support to citizens in cross-border proceedings by Central Authorities
Operational objective 6: *To ensure awareness of the content of the Regulation among citizens and practitioners*[1]	Information and awareness

[1] This operational objective is not discussed within this Annex, but Section *3.3.3. "Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States*" in the main body of the Evaluation.

For each of the operational objectives, a number of legal issues[2] were identified which hamper the achievement of the operational objectives and, in turn, the specific objectives.

Based on our analysis, we prepared a list of the legal issues that are causing difficulties in the table below. Since the table is the *result* of the analysis carried out in this annex, there are small discrepancies between this table and the structure of this annex.

The **table below shows the links between the legal issues identified for each operational objective and the specific objectives** of the Regulation. In addition, the table identifies whether the legal issues refer to matrimonial matters only, parental responsibility matters only, if they are horizontal in character and thus refer to both, or if they refer to other specific issues (see the 'type of issue' column). Legal issues shaded in blue were identified to be particularly significant[3] and are given high priority status throughout the analysis.

For each legal issue, the green shaded cells indicate that there is an impact on a specific objective. We can see that each operational objective (mentioned in the left column) has connections to more than one of the five specific objectives.

For each of the high-priority legal issues, the specific objective which is most impacted was identified and marked in dark green. Other specific objectives that are clearly impacted by a legal issue, but to a lesser degree, are marked in light green.[4] For each high priority issue, there is only one specific objective that is most impacted and thus marked in dark green.

At the beginning of each sub-section below, we provide an overview of the main findings identified on the basis of the evidence collected through desk research, telephone interviews, the expert panel, the 27 national reports produced by the study's network of national legal experts, a survey of Central Authorities and the analysis of the responses to the European Commission's public consultation. The main findings identified on the basis of the evidence collected are presented in ***bold and italics***.

[2] Only the most relevant legal issues are contained in this annex. A number of additional issues were mentioned by some stakeholders, however these were not considered sufficiently serious. These are discussed separately in Annex 3.

[3] The criteria for defining the high priority issues are: (1) The legal issue requires a substantial modification to the Regulation; (2) The legal issue refers to fundamental rights; and (3) A significant number of people are affected.

[4] In the main body of the evaluation, the analysis has been restricted to the high priority issues marked in blue in the table. In order to avoid repetition, a detailed analysis of each legal issue has only been included under the specific objective where the legal issue has been marked with dark green. Cross-references are provided in the other sections.

Table 2: Links between specific objectives, operational objectives and identified issues

Operational objectives (OO)	**Barriers to achieving the objectives**		**Specific Objective (SO)**				
	Type of issue	**Description of issue**	**Access to court for citizens in international families with a close connection to the EU (SO1)**	**Predictability, clarity, and reliability for citizens involved in cross-border cases (SO2)**	**Smooth recognition and enforcement of judgments, authentic instruments and agreements (SO3)**	**Protection of the economically weaker spouse (SO4)**	**Well-being of the child and parent-child relationship (SO5)**
Jurisdiction Rules (OO1)	Matrimonial matters	Potential for 'rush to court'/'forum shopping' on the basis of the alternative grounds of jurisdiction.					
		The current jurisdiction rules do not sufficiently promote a common agreement between spouses					
		Jurisdiction under Article 3(1)(a)(last indent) – potential favourable treatment of spouses resident in their Member State of nationality					
		Differing interpretations of Article 6 on exclusive jurisdiction and questions related to its effect and utility					
	Parental responsibility	Different interpretations of the term 'habitual residence'					
		The principle of *perpetuatio fori* is not consistent with the 1996 Hague Convention and may be detrimental to ensuring the well-being of the child					
		Unspecific rules on prorogation of jurisdiction and potential negative effects on the well-being of the child if proceedings are held in a Member State where no family member lives (Article 12)					
		Limited actual use of the possibility to transfer a case and lack of detail as concerns the procedural rules					
	Horizontal issues	Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court					
		Unspecific rules on the application of the provisions on the seising of a court and on *lis pendens* causing practical					

Operational objectives (OO)	Barriers to achieving the objectives		Specific Objective (SO)				
	Type of issue	**Description of issue**	**Access to court for citizens in international families with a close connection to the EU (SO1)**	**Predictability, clarity, and reliability for citizens involved in cross-border cases (SO2)**	**Smooth recognition and enforcement of judgments, authentic instruments and agreements (SO3)**	**Protection of the economically weaker spouse (SO4)**	**Well-being of the child and parent-child relationship (SO5)**
		difficulties					
		Non-application of the provisions on *lis pendens* if third countries are involved					
		Ambiguity with regard to the scope of the rules on provisional measures					
Hearing of the child and its representation in court (OO2)	Hearing of the child	Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments)					
	Representation of the child in court	Different practices related to the representation of the child in court					
Recognition and enforcement (OO3)	Horizontal issues	Uncertainties relating to applications for non-recognition					
		Incorrect application of the system of certificates laid down in Articles 39, 41(2) and 42(2)					
		Legal aid systems do not sufficiently take into account the specific needs and costs related to proceedings under the Brussels IIa Regulation					
	Matrimonial Matters	Difficulties relating to the automatic updating of civil status documents					

Operational objectives (OO)	**Barriers to achieving the objectives**		**Specific Objective (SO)**				
	Type of issue	**Description of issue**	**Access to court for citizens in international families with a close connection to the EU (SO1)**	**Predictability, clarity, and reliability for citizens involved in cross-border cases (SO2)**	**Smooth recognition and enforcement of judgments, authentic instruments and agreements (SO3)**	**Protection of the economically weaker spouse (SO4)**	**Well-being of the child and parent-child relationship (SO5)**
	Parental responsibility (recognition)	Uncertainty as to which types of authentic instruments and agreements are recognised under the Regulation					
		Different interpretations of the term 'recognition' leading to differing practices as to which judgments require a declaration of enforceability					
	Parental responsibility (enforcement)	Difficulties relating to the enforcement of provisional measures					
		Difficulties related to the possibility of specifying decisions on access rights under Article 48, arising from the different levels of specification in the Member States and the risk that the court of enforcement can substantially modify the original judgment					
		Exequatur proceedings are still in place for some types of judgments					
		Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement					
Provisions specific to child abduction cases (OO4)	Return procedure under Article 11(1) to (5)	Difficulties relating to the time limit for return (i.e. not clear and not effective)					
		Questions on the practical application of Article 11(4) and ambiguity as regards the concept of 'adequate arrangements' under that provision					
	Hearings under Article 11(6)- (8)	The system stipulated in Article 11(6) to (8) may endanger the well-being of the child if a child is returned in spite of a risk that was established in the return proceedings and possibly after a long time has passed					

Operational objectives (OO)	**Barriers to achieving the objectives**		**Specific Objective (SO)**				
	Type of issue	**Description of issue**	**Access to court for citizens in international families with a close connection to the EU (SO1)**	**Predictability, clarity, and reliability for citizens involved in cross-border cases (SO2)**	**Smooth recognition and enforcement of judgments, authentic instruments and agreements (SO3)**	**Protection of the economically weaker spouse (SO4)**	**Well-being of the child and parent-child relationship (SO5)**
		Disadvantages for the abducting parent in subsequent custody hearings					
	Enforcement of return orders	Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplication of the Regulation and reservations against the content of decisions					
Support to citizens in cross-border proceedings by Central Authorities (OO5)	General tasks of the Central Authorities and the procedure on the placement of a child	No clear definition of the scope of responsibilities, leading to different interpretations and misuse					
		Rules relating to the obligation for Central Authorities to collect and exchange information on the situation of the child that are not specific enough, and thus cause practical problems					
		Insufficiently specific provisions on the procedure for the placement of a child in another Member State					
		Confusion concerning the delineation of the scope of the Regulation (i.e. which legal basis should be used for a request between Central Authorities)					
	Involvement of social authorities	Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children					
	Mediation	The use of mediation is currently not promoted to a sufficient extent					

Operational objectives (OO)	Barriers to achieving the objectives		Specific Objective (SO)				
	Type of issue	**Description of issue**	**Access to court for citizens in international families with a close connection to the EU (SO1)**	**Predictability, clarity, and reliability for citizens involved in cross-border cases (SO2)**	**Smooth recognition and enforcement of judgments, authentic instruments and agreements (SO3)**	**Protection of the economically weaker spouse (SO4)**	**Well-being of the child and parent-child relationship (SO5)**
Information and awareness (OO6)	Horizontal issues	**Practitioners** are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions of the Brussels IIa Regulation					
		Citizens are not sufficiently aware of the content of the Regulation and its implication for international proceedings on matrimonial matters, matters of parental responsibility or child abduction					

The analysis of the operational objectives presented below is based on the triangulation of data collected through various channels, including desk research, telephone interviews, the expert panel, the 27 national reports produced by the study's network of national legal experts, a survey of Central Authorities and the analysis of the responses to the European Commission's public consultation. A detailed description of the study's methodology (including the data collection activities) is provided in Annex 8 "*Main Elements of the Methodology for the Evaluation and Impact Assessment of the Brussels IIa Regulation*". Quantitative estimates are provided in Annex 6 "*Quantitative Analysis*".

1.2 Jurisdiction rules

The Brussels IIa Regulation aims to provide clear and comprehensive jurisdiction rules that are based on a close connection of the spouses or the child to the court in question, and that prevent 'rush to court' issues (*operational objective 1*).

This section assesses the extent to which the Regulation has achieved this operational objective and examines legal issues that have emerged in this regard. It is structured in three sub-sections relating to:

- Matrimonial matters;
- Parental responsibility; and
- Horizontal issues (i.e. issues that are applicable to both matrimonial matters and matters of parental responsibility).

1.2.1 Matrimonial matters

This section discusses legal issues in matrimonial matters related to the jurisdiction rules of the Brussels IIa Regulation. The legal issues covered include:

- Potential for 'rush to court'/'forum shopping' on the basis of the alternative grounds of jurisdiction;
- The current jurisdiction rules do not sufficiently promote a common agreement between spouses;
- Article 3(1)(a), 5th and 6th indent unilaterally favour nationals of the forum state and disadvantage the moving spouse; and
- Differing interpretations of Article 6 on exclusive jurisdiction and questions related to its effect and utility.

Potential for 'rush to court'/'forum shopping' on the basis of the alternative grounds of jurisdiction

Article 3 of the Brussels IIa Regulation provides for several alternative grounds for jurisdiction, on the basis of which the courts of more than one Member State may have jurisdiction to hear the same case. The outcome of the case may depend on the forum, i.e. the competent court (which in turn determines the law applicable to the divorce). This, combined with the *lis pendens* rule provided by Article 19, has led to instances in which the spouses tried to beat each other to filing a claim in the Member State with the most favourable outcome for them ('rush to court' or 'forum shopping'). In this context, in 2010 the Council of the European Union adopted the Rome III Regulation, which introduces harmonised conflict-of-law rules on the law applicable to divorce and hence aims to reduce the risk of rush to court. Any court seised in one of the participating Member States should

apply the law designated on the basis of common rules.[5] However, only 15 Member States apply the Rome III Regulation[6]. ***Based on the study team's assessment, the following main findings result from the evidence collected: it would appears that rush to court/forum shopping in international cases of matrimonial matters can still take place under the Brussels IIa Regulation[7], due to the combination of alternative grounds of jurisdiction, the* lis pendens *rule and the variations between the applicable law. Typically, specialised legal advice is needed to take full advantage of the alternative grounds of jurisdiction (and 'rush to court') – a situation that may disadvantage the economically weaker spouse, who may not be able to afford such advice***[8].

Some interviewees believed that rush to court/forum shopping is due to the **absence of fully harmonised rules on applicable law** in matrimonial matters throughout the EU. This observation is supported by previous studies such as the 2006 Impact Assessment study which proposed a policy to mitigate the problem[9]. It was confirmed by a large majority of the stakeholders consulted that the entry into force of the **Rome III Regulation** has significantly **reduced the risk of rush to court/forum shopping situations** by laying down harmonised rules on applicable law for the participating countries. Stakeholders generally perceive Rome III as a useful tool which will greatly increase legal certainty and predictability both for the spouses concerned and for practitioners. The rule on the law applicable in the absence of choice is intended to protect the weaker spouse by giving priority to the application of the law of the family's habitual residence prior to separation, irrespective of the court seised by one or other spouse lodges the case.[10] However, as the Rome III Regulation **does not apply in all EU Member States**, most of the national experts, as well as our expert panel participants, noted that in practice, **rush to court/forum shopping under Brussels IIa is a fact** for cases that involve Member States which do not participate in the Rome III Regulation.

Many interviewees and 69%[11] of respondents to the public consultation believed that Brussels IIa does not sufficiently prevent **rush to court/forum shopping** behaviour for **matrimonial matters**. The fact that Article 3 contains alternative grounds for jurisdiction as well as the combination of the *lis pendens*[12] rule (Article 19) and the differences in substantial law across the EU may foster 'rush to court'/'forum shopping' according to many respondents[13].

---

[5] In the absence of choice, the applicable law should be determined on the basis of a scale of connecting factors giving priority to the law of the spouses' habitual residence, which ensures that the divorce or legal separation proceeding is governed by a legal system with which the couple has a close connection.

[6] The following 15 Member States participate in the Rome III Regulation: Belgium, Bulgaria, Germany, Lithuania, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. The Rome III Regulation will apply in Greece as from 29 July 2015 (OJ L 23, 28.1.2014, p. 41).

[7] Notably where the Rome III Regulation laying down harmonised rules on applicable law is not applicable.

[8] N. A. Baarsma, *The Europeanisation of International Family Law* (Asser Press: 2011), p. 154.

[9] Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters, prepared for the European Commission DG Justice, Freedom and Security; see also N. A. Baarsma (2011) p 154 which states that the best way to strengthen legal certainty and predictability and preventing a 'rush to court' is through action at EU level.

However, this view was mitigated by a lawyer interviewee who argued that even if the same rules on divorce, maintenance, parental responsibility, etc. were to be in force throughout the EU, the application of those rules by judges in the different Member States would probably still differ significantly due to the socio-economic background/socialisation of judges. Thus, this interviewee believed that rush to court/forum shopping will always exist to a certain degree.

[10] Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation Brussels, 24.3.2010 COM(2010) 105 final 2010/0067 (CNS)

[11] I.e. 111 of 160 valid responses.

[12] The rule of *lis pendens* is of central relevance to affected citizens, as it provides that the court where the case is first lodged has jurisdiction subject to Article 19 of the Brussels IIa Regulation.

[13] According to some commentators, the Regulation encourages forum shopping because of this combination. See N. A. Baarsma *The Europeanisation of International Family Law (*2011); see also McEleavy *The Communitarization of Divorce Rules: what impact for English and Scottish law? (2004)* ICLQ 53: 605-642 and Boele-Woelki and Gonzalew Beilfuss, *Brussels II bis: its impact and application in the Member States* (Intersentia:2007) 33

These alternative (rather than hierarchical) grounds of jurisdiction were perceived as a potential inducement to rush to court in the European Commission's *Application Report*[14]*.* Indeed, a large proportion of our interviewees regarded the possible application **of different *alternative* fora as a major weakness of the Brussels IIa Regulation.** This is further substantiated by 69%[15] of the respondents to the public consultation who believed that the lack of an order of priority for the alternative grounds of jurisdiction is the most important factor contributing to the risk of 'rush to court'[16].

Regarding the reason behind forum shopping, interviewees clearly pointed to the difference in maintenance rules among the Member States. In particular, it appears to some interviewees that rush to court/forum shopping is **mostly not related to the divorce itself**, but to the related **maintenance** proceedings, which are typically dealt with in the same procedure.[17] Differences in national legislation make forum shopping attractive, e.g. in the UK, the courts are significantly more generous in granting maintenance.[18] Furthermore, the national expert for Belgium reported that in some cases, proceedings are brought before a court in another Member State in order to exploit longer proceedings which allow the parties to claim certain benefits for the duration of proceedings. The following case example illustrates a regularly reported occurrence for Italian nationals residing in Belgium.

Case example: Specific forum shopping problem caused by the presence of joint nationality as a criterion (Belgium)

Two spouses of Italian nationality reside in Belgium for the duration of their marriage. The party applying for a divorce issues the proceedings in Italy (rather than Belgium) to benefit from the fact that divorce proceedings in Italy typically extend over a long period of time, with a first stage of two years where the spouses continue to be married but may live separately. During these two years, one of the spouses may be awarded maintenance (and of a higher amount than he or she would be awarded as an ex-spouse), thus extending the period of time during which he/she will enjoy maintenance. If proceedings had been brought in Belgium, a divorce would have been granted much more quickly, thereby reducing the extent of time during which the spouse may enjoy maintenance.

Rush to court / forum shopping can in principle be exploited by either party and, in practice, will be used by the party who intends to get divorced, perhaps without informing the other spouse of his/her intentions. Nevertheless, forum shopping can particularly be used by wealthier spouses, who can take advantage of specialised legal advice to determine which court would offer him/her the most advantageous outcome.[19] At the same time, the economically weaker spouse may, however, not be in a position to afford the specialised legal advice required to take full advantage of the

[14] *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 judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*

[15] i.e. 78 of 113 responses.

[16] N. A. Baarsma (2011) p153 which states that '*From the beginning the Brussels II(bis)-Regulation has been criticised for including far too many jurisdiction grounds, but also for not ranking the*m in any hierarchy'.

[17] A similar point was made by the study *Practical Problems Resulting from The Non-Harmonization of Choice of Law Rules in Divorce Matters*, T.M.C. Asser Instituut The Hague, the Netherlands, December 2002, http://ec.europa.eu/civiljustice/publications/docs/divorce_matters_en.pdf. We note here that since the publication of this report, the Maintenance Regulation has been adopted. It has applied since June 2011 and provides for harmonised applicable law rules on maintenance by *renvoi* to the 2007 Hague Protocol. This is expected to limit rush to court related to maintenance rules. However, the UK does not apply the Protocol.

[18] In particular, an interviewee reported that there have been cases where high sums were granted in the United Kingdom to one of the spouses on the basis of a German marital agreement. Under German law, the spouse would not have received anything based on the marital regime they had chosen (*Gütertrennung*).

[19] Cf. SEC (2011) 327 final, p. 31 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0327:FIN:EN:PDF).

possibility to file the case in different jurisdictions and thus rush to court, and hence **may be placed at a disadvantage**.

Rush to court is **perceived to have discouraged out-of-court solutions such as mediation**. Some lawyers interviewed felt they were somewhat forced to argue against working on saving the marriage of their clients due to the strict *lis pendens* rule of the Regulation. This line of thought is also supported by Buckley (2012)[20] who has observed that Brussels IIa "*has led to a serious change of practice in cases with any kind of international element. Effectively, the Irish practitioner is now faced with two conflicting requirements: under the marital breakdown legislation, it is mandatory to inform clients of conciliation mechanisms, such as mediation. However, from a professional negligence point of view, it is now vital to establish immediately whether jurisdictional requirements could potentially be satisfied in a different Member State. If so, it is imperative to advise a client seeking a divorce that any delay in initiating a claim may lead to the other spouse securing exclusive jurisdiction in the other Member State where the marital regime may be less favourable to the client—or indeed, to advise the client on the possibility of seeking more favourable jurisdiction elsewhere.*"

Many of the interviewees argued that spouses who want to break their marriage link should be as free as possible in 'choosing' where to have the divorce proceedings. On the other hand, one could argue that a distinction needs to be made between one spouse **rushing to court** in order to obtain advantages, and a ***common choice* of jurisdiction based on a mutual agreement** between the spouses[21].

The current jurisdiction rules do not sufficiently promote a common agreement between spouses

The choice of a court which would not otherwise have jurisdiction, based on a mutual agreement between the spouses (hereinafter: choice of court) is currently not allowed under the Regulation despite the fact that, as pointed out by some stakeholders, agreement among parties is a general trend in family law.

In line with this development, in its withdrawn 2006 proposal, the **European Commission** suggested introducing a provision on choice of court in matrimonial matters[22]. The proposal argued that the introduction of choice of court would "in particular improve access to court for spouses of different nationalities by enabling them to designate by common agreement a court or the courts of a Member State of which one of them is a national."

"Article 3a

*Choice of court by the parties in proceedings relating to divorce and legal separation 1. The spouses may agree that a court or the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided they have a **substantial connection**[23] with that Member State by virtue of the fact that*

(a) any of the grounds of jurisdiction listed in Article 3 applies, or (b) it is the place of the spouses' last common habitual residence for a minimum period of three years, or

(c) one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States.

[20] Referred to by our national expert for Ireland, c.f. Buckley, LA, "European Family Law: The Beginning of the End for "Proper" Provision?" (2012) 15(2) *Irish Journal of Family Law* 31.

[21] i.e. "choice of court", discussed in the next section.

[22] Article 3a of the proposal, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006PC0399&from=EN.

[23] Emphasis added.

2. An agreement conferring jurisdiction shall be expressed in writing and signed by both spouses at the latest at the time the court is seised."

In the Impact Assessment for the 2006 Proposal, the Commission highlighted that the introduction of a provision giving the spouses a limited possibility to choose the competent court[24] would have a positive impact on fundamental rights, since it would enhance access to court and legal certainty while encouraging mutual agreement between the parties. Furthermore, this option would not result in any major change of the national legal systems and would therefore not entail any major costs for Member States' legal and administrative systems.[25] It also pointed out that the lack of a choice of court rule also leads to an increase in 'rush to court'.

Based on the study team's assessment, the following main finding results from the evidence collected: the idea of introducing a choice of court in the Regulation seems to be widely welcomed by practitioners.

Most of our interviewees and 85%[26] of respondents to the public consultation believed that there was an important need for affected citizens to be given the possibility to choose the competent court by common agreement.

At present, as mentioned by a Dutch interviewee, although a couple might have declared in their prenuptial agreement that they want any divorce matters to be dealt with by the courts of a certain Member State, it might not be possible for them to proceed in a court of that Member State.

This is illustrated in a case reported by our Austrian national expert.

Case example: Absence of choice of court (Austria)

In 2011, the Austrian Supreme Court had to decide a case in which two spouses – the wife was an Austrian citizen, the husband a German citizen – agreed in writing to have their divorce proceedings in Austria. However, due to the fact that both of them had their habitual residence in Germany, the Supreme Court decided that the Austrian courts were not competent to decide this case, despite the fact that the wife had a connection to Austria through her nationality.[27]

The 2006 Impact Assessment Study[28] noted that the **circumstances in which a choice of court** may be made need to be sufficiently defined in order to avoid creating a 'divorce paradise' where spouses can apply for a divorce in a Member State with which they have no connection. In this regard it was emphasised that formal requirements[29] should be adhered to and that choices must be limited to countries with which spouses have a connection. This connection should be based on alternative connecting factors such as habitual residence of one of the spouses, common habitual residence or nationality. It is further underlined that legislation on connecting factors must be carefully drafted. Particular attention should be given to 'habitual residence' which it is recommended should only apply after a given number of years.[30]

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[24] Policy option 4 of the study allows for a limited choice of court. *Choice of court*, as outlined by the study, is not the same as *choice of law* but allows the parties some flexibility by indirectly choosing the law which will apply to the divorce.

[25] Annex to the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, Impact Assessment, Brussels, 17.7.2006 SEC(2006) 949.

[26] I.e. 145 of 170 responses.

[27] Judgment of 28.04.2011, *Oberster Gerichtshof*, 1 Ob 76/11z.

[28] Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters, prepared for the European Commission DG Justice, Freedom and Security.

[29] Regarding formal requirements, the study maintains that agreements should be subject to completion within an appropriate time (whether during the marriage or divorce proceedings) set by legislation, both parties must be informed of the consequences by their divorce lawyer (or equivalent) and that the agreement should be concluded in writing before a notary or similar legal representative. This list is not exhaustive.

[30] In the study, practitioners point out that 1 or 2 years may be too little for citizens to fully settle in a country and have suggested from five to 10 or 15 years.

Similarly, our interviewees agreed that it would be justified to have to base the choice on a substantial connection to the Member State chosen. This trend has been confirmed by the results of the public consultation whereby 97%[31] indicated that the choice should be limited to 'substantial connection' criteria[32].

Several of our interviewees and 7%[33] of the respondents to the public consultation, when asked to indicate an EU instrument which the Brussels IIa Regulation should take **inspiration** from to define the requirements of the common agreement to allow spouses to choose the responsible court, pinpointed the **Rome III** Regulation.

Our interviewees and most of the respondents to the public consultation also referred to the formal requirements for the agreement to choose applicable law which are laid down by the Rome III Regulation, as well as the example of Article 4[34] of the Maintenance Regulation. We note that an introduction of a rule allowing for the choice of court would require the introduction of an exception to the *lis pendens* rule to ensure that the court that was agreed upon by the parties has jurisdiction, even if another court has been seised previously.[35] In this context, our German national expert pointed out that Article 5 of the Rome III Regulation allows for a limited choice of the law applicable to a separation or divorce by the spouses. In particular, the spouses may opt by agreement for an application of the *lex fori*, Article 5(1) d of the Rome III Regulation in order to avoid the application of a foreign divorce law which regularly leads to higher costs and delays the proceedings.

Several interviewees and respondents to the public consultation underlined the added value of the parties receiving independent legal advice: this ensures that the possibility to make a choice of court agreement is not misused in a way puts the financially weaker spouse at a disadvantage as they might not be able to assess the consequences of agreeing to choose a certain jurisdiction.[36]

Some interviewees indicated that **it is inconsistent that there is the option of choosing a court in other situations, but not for divorce**. As divorce has the least consequences compared to other possible proceedings, respondents believed that it was even more important to grant the parties autonomy in choosing a court.

While the majority of national experts reported no case law that would substantiate the need for a choice of court, a very large minority felt that this was an appropriate provision to introduce in the Regulation.

Finally, it is worth mentioning that our German and Spanish national experts pointed out that a **choice of law is not very useful if the spouses are not allowed to agree at the same time on the court having jurisdiction**. This is because the effectiveness of the choice of law made would depend on the courts seised to rule on the divorce or the legal separation and therefore often on the 'habitual residence' of the parties at the time when the divorce or separation proceedings will start. If the proceedings start in the Member State where the respondent spouse establishes his or her 'habitual residence' and that State does not allow for a choice of law in divorce matters, the choice

[31] i.e. 140 of 145 responses to this question.

[32] In particular, of 140 respondents, 65% (i.e. 85 of 140 responses) think that criteria should apply in relation to spouses the spouses' 'habitual residence', 33% (i.e. 47 of 140 responses) think that the chosen court should be the nationality of at least one of the spouses and 36% (i.e. 48 of 140 responses) think that the court hashaswith which the case was lodged has the responsibility to hear the case under the main jurisdiction provisions of the regulation.

[33] NB This percentage is an approximate number. It represents a trend which arises from the answers that about seven stakeholders gave to an open question. The total number of respondents to this question was 104.

[34] This was also supported by 63% of the respondents to the public consultation, i.e. 69 of 110 responses.

[35] For this purpose, the recast Brussels I provides an example.

[36] In this respect, the example of Article 8 (5) of the Hague Protocol on Maintenance (applicable in all Member States with the exception of Denmark and the United Kingdom) with regard to a choice of law is of interest.

made under Article 5 Rome III Regulation would not be respected and no legal certainty would be achieved by the spouses.

In other words, the validity of the choice of law made under Article 5 of the Rome III Regulation depends on the circumstances (nationality, habitual residence) at the time when the choice is made. However, the problem is not that the choice might be invalid under the Rome III Regulation but that it will not be respected by a court of a Member State which does not participate in the enhanced cooperation and will thus not apply the Rome III Regulation but rather its own private international law on divorce.

Hypothetical case example: choice of competent forum

A German husband and his English wife live in Belgium. The parties agree that in the event of divorce, Belgian law should be applied. This choice is valid according to Article 5(1) (a) of the Rome III Regulation and it will be respected if one of the spouses brings divorce proceedings before the Belgian or the German courts. But if the English wife brings divorce proceedings under Article 3(1) (a), last indent, before the English courts the choice of law will not be respected. Instead the English court having jurisdiction will apply, according to English private international law, English divorce law.

As it was pointed out by the 2006 Impact Assessment study, the lack of a choice of court rule also leads to an increase in 'rush to court'.

Article 3(1)(a), 5th and 6th indent unilaterally favour nationals of the forum state and put the moving spouse at a disadvantage

An assessment of Article 3 of the Regulation suggests that a spouse having his or her habitual residence in the Member State of his/her nationality is treated favourably compared to a spouse who has his/her habitual residence in the same State, but is a national of another Member State. For example, if an Austrian husband who lives with his Slovenian wife in Slovenia wants to get divorced, he can seek divorce in Austria six months after he has moved back to Austria. However, if he moves from Slovenia to Germany, he has to wait a year until he can seek divorce before the German courts (Article 3 (1) indent 5 of the Brussels IIa Regulation). It also seems to be an important view in legal literature[37] that the last indent of Article 3(1)(a) is in conflict with Article 18 of the Treaty on the Functioning of the European Union (TFEU) on the prohibition of discrimination on the grounds of nationality.

Differing interpretations of Article 6 on exclusive jurisdiction and questions related to its effect and utility

Based on the study team's assessment, the following main finding results from the evidence collected: despite the existence of relevant European Court of Justice (ECJ) jurisprudence, Article 6, as well as the interplay between Article 6 and Article 7, do not seem clear for practitioners and seem to create confusion.

According to the European Commission's 2006 proposal, **Article 6** (*Exclusive nature of jurisdiction under Articles 3, 4 and 5*)[38] may create confusion and was also considered superfluous, as Articles 3, 4

[37] See Magnus/Mankowski, Brussels IIbis Regulation (2012), p.43; Daphne-Ariane Simotta, in: Fasching/Koneceny, Kommentar zu den Zivilprozessgesetzen, 2nd edition, 2010, Article 3 Brussels IIa Regulation marg. No 153, 154.
Furthermore: Hausmann, The European Legal Forum 200/01, 345 (352), Gruber, IPRax 2005, 293 (295), Hau , FamRZ 2000, 1333 (1336), Dilger, IPRax 2006, 617 (619), Spellenberg, Festschrift Geimer (2002) 1257 (1270), Geimer, in: Zöller, Kommentar zur ZPO, 30. ed. 2014, Article 3 par. 18., Hausmann, *Internationales und Europäisches Ehescheidungsrecht*, 2013, par. A 64 with further references.
[38] *"A spouse who:*
(a) is habitually resident in the territory of a Member State; or

and 5 describe in which circumstances a court has exclusive jurisdiction[39]. Therefore, the Commission's proposal aimed to abolish the rule on exclusive jurisdiction as set forth in Article 6 of the Regulation because the rule has raised difficulties of interpretation in practice and its benefits seemed to be limited.

Confirming the above, most of our interviewees, as well as our expert panel participants argued that Article 6 is not sufficiently clear and is confusing for practitioners. Furthermore, our national experts also reported that Article 6 was a difficult rule and that courts in different Member States (and sometimes even in the same Member State) actually apply it differently. The effect and utility of the article was also questioned.

The ECJ has provided some clarification on the **relationship between Article 6 (*Exclusive jurisdiction*) and Article 7 (*Residual jurisdiction*)** for cases where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State. In such cases, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law if the courts of another Member State have jurisdiction under Article 3 of that Regulation.[40].

Furthermore, our German national expert pointed out that the interpretation of Article 6 and the question of how this rule has to be combined with Article 7 has indeed raised considerable difficulties for the Member States' courts. The same expert also noted that the ECJ has clarified that it cannot be inferred from Article 6 (by an *argumentum a contrario*) that the Member States' courts are allowed to apply their national jurisdiction rules in each case in which the respondent spouse is not protected by this article. Even if there is no exclusive jurisdiction under Article 6, recourse to national law additionally requires that no Member State court has jurisdiction under Articles 3, 4 and 5 (*ECJ C-68/07 – Sundelind/Lopez*).

As a result, an application of national jurisdiction rules is only permitted, according to the combined application of Articles 6 and 7, in the Member State of the respondent's nationality if the applicant has a different nationality, the respondent has their habitual residence in a third State and the applicant is not in one of the situations set out in Article 3 (1) (a) 4th, 5th or 6th indent.

Our German national expert further noted that as the practical effect of Article 6 is very small, the complicated application of this rule does not seem to be justified.

1.2.2 Parental responsibility

This section discusses legal issues in matters of parental responsibility related to the jurisdiction rules of the Brussels IIa Regulation. The legal issues covered include:

- Different interpretations of the term 'habitual residence';
- The principle of *perpetuatio fori* is not consistent with the 1996 Hague Convention and may be detrimental to ensuring the well-being of the child*;*
- Unspecific rules on prorogation of jurisdiction and potential negative effects on the well-being of the child if proceedings are held in a Member State where no family member lives (Article 12); and
- Limited actual use of the possibility to transfer a case and lack of detail regarding the procedural rules.

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States, may be sued in another Member State only in accordance with Articles 3, 4 and 5."

[39] C.f. 2006 Commission proposal to amend the Regulation, p. 8.

[40] ECJ 29.11.2007 – C 68/07 – K.L. Lopez./M.E. Lopez Lizazo

Different interpretations of the term 'habitual residence'

The jurisdiction rules for matters of parental responsibility are based on the aim of ensuring the best interests of the child, considering in particular the criterion of proximity. This means that jurisdiction should by default (subject to some flexibility[41]) lie with the Member State of the child's habitual residence, as reflected in Article 8.[42] While the term 'habitual residence' is not defined in the Regulation, the ECJ has provided guidance on its interpretation, underlining that 'habitual residence' is a European concept to be interpreted independently of national law.[43] Guidelines to assess 'habitual residence' can be found in the ECJ judgments *Mercredi v Chaffe* and *Re A*. On this basis, the place of 'habitual residence' corresponds to the place which reflects some degree of the child's 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, language knowledge and the family and social relationships of the child in that State must be taken into consideration. The ECJ highlighted that duration of stay can only serve as an indicator; a person can also have their habitual residence in a country when he/she (or in the case of young children their primary carer) intends to establish a permanent or lasting habitual centre of his/her interests in that place.[44] 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.[45] The Court acknowledged that there may be situations in which the factual circumstances make it impossible to establish the habitual residence of the child or to establish the jurisdiction on the basis of Article 12. In such cases, Article 13 provides a solution, allowing a court to acquire jurisdiction on the basis of the child's presence.[46]

Based on the study team's assessment, the following main findings result from the evidence collected: the criterion of habitual residence is widely acknowledged as an adequate criterion for establishing jurisdiction in cases on matters of parental responsibility. However, the interpretation of the term 'habitual residence' has caused significant practical difficulties in its application by courts and legal practitioners, in spite of the existing guidelines. Such difficulties were mentioned by several interviewees, respondents to the public consultation as well as national experts (BE, CZ, DE, FI, FR, HR, IE, LU, NL, PL, RO, SE). While the concept of habitual residence is relevant to both matrimonial matters and parental responsibility, problems have mainly been associated with cases on parental responsibility. Indeed, several national experts and interviewees regarded the difficulties related to the concept of habitual residence in the context of cases on parental responsibility as one of the most severe issues related to the application of the Regulation. More

[41] Exceptions to this rule are discussed in the following sections.
[42] Cf. Brussels IIa Regulation, Recital (12).
[43] See 22.12.2010 – C-497/10 PPU - *Mercredi/Chaffe*, para. 46: 'Since 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 […]"
[44] See the opinion of Advocate General Kokott in A, C-523/07. Taking into consideration the wording and objectives of the Brussels IIa Regulation, as well as the relevant multilateral conventions, Advocate General Kokott states that '*the concept of habitual residence in Article 8(1) of the Regulation should be understood as corresponding to the actual centre of interests of the child*.' (para 38). As relevant criteria for the distinction between habitual residence and the mere (temporary) presence, the Advocate General designates in particular a certain duration and regularity of residence, which might be interrupted as long as it is only a temporary absence (para 41 et seq.). Further, the familial and social situation of the child constitutes an important indicator for habitual residence (para 47 et seq.).
[45] 02.04.2009 – C-523/07 – A.; ECJ (22.12.2010 – C-497/10 PPU - *Mercredi/Chaffe*. See also Koen Lenaerts, Vice-President of the ECJ, *The Best Interests of the Child Always Come First: The Brussels II bis Regulation and the European Court of Justice* (Jurisprudence (Jurisprudencija), issue: 20(4)/2013, pages: 1302–1328, on www.ceeol.com.)
[46] Case A, C-523/07, para 43.

specifically, there is no guidance on the interpretation of the concept in the Regulation and other available guidance is not sufficient, which has different consequences. Practical challenges exist in cases that are more complex, for example if the child has moved several times. It has also been difficult for courts to establish the habitual residence of the child in cases where the parents have an informal agreement stating that the child can live with one of the parents for a limited period of time.

In EU legislation that includes conflict of law rules, 'habitual residence' is widely used as a connecting factor[47]. This is welcomed by many stakeholders. Indeed, the fact that 'habitual residence' has such a prominent place in the Brussels IIa Regulation for cases concerning children was considered one of the strengths of the Regulation by several interviewees and by several respondents to the public consultation. The Regulation is considered helpful by these groups because it acts in **compliance with the principle of the best interests of the child**, defining the jurisdiction according to the principle of the habitual residence of the child, which guarantees that the responsible court is the best connected to the child. It was pointed out in a European Parliament note that 'habitual residence' is considered appropriate as a connecting factor in family law, because it is more flexible compared to nationality or domicile.[48] This was supported by Koen Lenaerts, who argues that the wish for legal certainty needs to be balanced to ensure the best interests of the child and that "*Mercredi […] shows the importance of allowing room for flexibility when interpreting the concept of 'habitual residence'*."[49]

The use of 'habitual residence' as a connecting factor is thus supported by the majority of stakeholders. Nevertheless, **the application of the principle has been challenging and has led to difficulties, mainly due to a lack of guidance**. The Regulation does not contain any guidance on the interpretation of the concept. As pointed out by commentators, the notion of 'habitual residence' can be interpreted in a number of ways and from a number of different sources.[50] During several interviews, practitioners have pointed out that different interpretations are possible despite the guidelines developed by the ECJ in *Mercredi v Chaffe* and *Re A*. According to the case law of the ECJ, it is up to the national courts to identify the concept, taking account of all the circumstances specific to each individual case. In the case *A (C-523/07)*[51] the ECJ named eight factors to consider when determining habitual residence,[52] but it did not exactly pinpoint the concept of determining habitual residence by systematically listing its constitutive elements. This lack of definition strongly dilutes the possibility of uniform interpretation among Member States' courts.

This has led to practical difficulties in deciding on the habitual residence of the child and thus determining the jurisdiction. More specifically, some of the national experts (BE, DE, FI, FR, HR, IE,

[47] See, for example, the following instruments and proposals: Rome III Regulation, Maintenance Regulation, Successions Regulation, Proposal on matrimonial property regimes (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:en:PDF) and Proposal regarding the property consequences of registered partnerships (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:en:PDF).

[48] European Parliament Library Briefing *"Habitual residence" as connecting factor in EU civil justice measures* (http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130427/LDM_BRI(2013)130427_REV1_EN.pdf)

[49] Koen Lenaerts, Vice-President of the ECJ, *The Best Interests of the Child Always Come First: The Brussels Ii Bis Regulation and the European Court of Justice* (Jurisprudence (Jurisprudencija), issue: 20(4)/2013, pages: 1302–1328, on www.ceeol.com.)

[50] Eva Lein in Andrea Bonomi and Paul Volken (eds.) *Yearbook of Private International Law Vol. XI* (2009) Swiss Institute of Comparative Law. See also Pranevičienė, K. (2014), *Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges applying Regulation Brussels II bis,* indicating that the criteria developed in *Mercredi* leave discretion to the national courts (http://www.degruyter.com/view/j/bjlp.2014.7.issue-1/bjlp-2014-0007/bjlp-2014-0007.xml)

[51] *ECJ case C-523/07 (02 April 2009)*

[52] (1) duration, (2) regularity, (3) conditions, (4) reasons for the child's presence, (5) school attendance, (6) linguistic knowledge, (7) family relationships, and (8) social relationships.

NL, RO) who discussed the concept of habitual residence indicated that **courts sometimes struggle to determine the 'habitual residence' of the child concerned when the circumstances are complex, for example because a child moved several times**. It was also mentioned by the public consultation that 'habitual residence' is difficult to establish in some cases, because the definition is not sufficiently clear. For example, a lawyers' association responding to the public consultation regarded this as a problematic area for the Regulation's helpfulness in matters of parental responsibility. It is to be highlighted in this context that individual solutions were usually found in the cases reported. In cases where it is not possible to determine 'habitual residence', jurisdiction can still be established on the basis of the presence of the child (Article 13). Based on the input of legal experts, the courts in the Member States faced challenges in different situations.

First, courts have faced difficulties in cases where the child moved back and forth between two or more Member States. In this context some of the experts pointed out that the concept of 'habitual residence' is difficult to combine with alternating places of residence. This can be demonstrated by a Belgian case. A Belgian court was faced with a situation where a one-year-old child born in Belgium had been moving back and forth between the United Kingdom and Belgium with his mother as the two parents divided their time between various residences. Although the court came to a firm conclusion on the child's habitual residence, the decision reveals the delicate nature of the assessment to be carried out.[53] Finally, the Croatian expert indicated that it might be particularly difficult to determine the habitual residence in cases where a child lives for equal periods of time in two countries.

Another challenge in determining habitual residence was reported by the Irish expert. According to him, a number of recent Irish cases have addressed the question of the point at which a child's habitual residence can be deemed to change in cases where proceedings are ongoing. Some tension is evident between these cases, with one judgment ruling that habitual residence had not changed even though the case had been struck down[54], while the other ruled that the 'habitual residence' had changed even though an appeal was pending[55]. The latter case was referred to the ECJ for a preliminary ruling. In this case, the French courts had issued a decision on custody, which stated that the child should live in Ireland with her mother. However, when the mother took the child to Ireland, an appeal was pending against this judgment. It was questioned whether taking the child to Ireland constituted a wrongful removal of the child in the sense of Articles 2(11) and 11 of the Brussels IIa Regulation. This was dependent on whether the habitual residence was still in France immediately before the removal. The ECJ ruled that the habitual residence could in principle have changed although proceedings were ongoing in France and that this question needs to be assessed in light of the criteria established in *Mercredi v Chaffe* and *Re A*.[56] It indicated that *'when examining in particular the reasons for the child's stay in the Member State to which the child was removed and the intention of the parent who took the child there, it is important, in circumstances such as those of the main proceedings, to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary. Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal, […] and, in particular, the time which elapsed between that removal and the judgment*

[53] CA Brussels, 21 June 2012, *Rev. trim. dr. fam.*, 2013, 263, at pp. 275-278, with comments C. Henricot.
[54] Case *M v R* [2012] IEHC 450.
[55] Case *CG v MG* [2013] IEHC 460.
[56] Case C -376/14 PPU, *C v M*.

which set aside the judgment of first instance and fixed the residence of the child at the home of the parent living in the Member State of origin. However, the time which has passed since that judgment should not in any circumstances be taken into consideration.'

In addition, the expert for the United Kingdom indicated that the courts struggled with a case where the child did not have a place of habitual residence. In this case, jurisdiction was established on the basis of Article 13 and transferred to a more appropriate court on the basis of Article 15.[57]

Another practical difficulty can arise when parents have concluded **informal agreements, stating that the child can stay with one parent for a limited period of time**. This is becoming more frequent based on some of the stakeholders consulted. According to several interviewees, this causes problems, in particular relating to the establishment of jurisdiction, as such agreements are difficult to bring in line with the concept of 'habitual residence'. For example, a lawyer interviewed suggested that an exception to the jurisdiction rules to specify the consequences of agreements between parents that have a limited duration is currently missing.

In addition to these practical challenges for courts, the concept leaves a **possibility for lawyers to argue for different solutions, which has in some cases been detrimental to the best interests of the child**. These difficulties are also considered to arise mainly from the lack of guidance on the application of the concept. It is thus not implied that the concept itself is inadequate (although this was argued by a minority of stakeholders as explained below).

The Lithuanian expert indicated that the concept currently leaves room for parties and their lawyers to find solutions if they wish to hear a case in a Member State where the child is not habitually resident. A lawyer noted that there are a number of cases where this leads to situations in which cases are dealt with in a Member State that is not well-suited to deal with a case, because the child does not stay there permanently. Another interviewed lawyer supported this point, underlining that there are cases where the habitual residence of the child cannot be clearly established and is debated at length in the proceedings. In some cases, appeals were based solely on the determination of habitual residence.

Finally, a minority of stakeholders, including a branch of the International Social Service[58] responding to the public consultation, maintained that 'habitual residence' is no longer a clear criterion for determining jurisdiction. They argued that children whose parents live in different countries often have alternating places of residence. It is thus difficult to apply the concept of 'habitual residence'. If there is no amicable solution between the parents on where proceedings should be held, jurisdiction is often assumed by the court that was first seised. In this context, there is also a possibility for the parents to engage in forum shopping, thus to seise the court that entails more advantages for them as quickly as possible, in order to present their argumentation about the child's habitual residence. As noted above, this is a minority view; the majority of stakeholders believes that deficiencies owing to the flexibility of the concept may be accepted to a certain extent, as the concept itself is generally welcomed. Rather, it is regretted that there is not sufficient guidance available on its interpretation.

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[57] In *RE T (A CHILD: ART 15, BRUSSELS II REVISED)* [2013] EWHC 521 (FAM), a child is born in the UK to a Slovakian mother aged 16 who was subject to a Slovakian care order and who had entered the jurisdiction illegally. The mother had habitual residence in Slovakia due to the care order. Yet the child could have no habitual residence in Slovakia, never having been there (see *and ZA & Anor v NA (Abduction: Habitual Residence)* [2012] EWCA Civ 1396) and had not acquired habitual residence in England and Wales. This was therefore one of the rare cases where the child had habitual residence nowhere, which was expressly contemplated by Article 13. However, all the requirements of Article 15 were satisfied in relation to the facts of the case and a transfer request to Slovakia's courts could be made.

[58] The International Social Service is an international NGO that offers support to individuals, children and families facing social problems involving two, or more, countries. (see http://www.iss-ssi.org/2009/index.php?id=2).

The principle of perpetuatio fori is not consistent with the 1996 Hague Convention and may be detrimental to ensuring the well-being of the child

According to Article 8(1) of the Regulation, jurisdiction in matters concerning parental responsibility lies with the courts of the Member State of the child's 'habitual residence'. Whereas habitual residence is widely accepted as a connecting factor, Article 8(1) has been criticised because it refers to the **habitual residence of the child at the time the court is seised** and thus follows the principle of *perpetuatio fori*. This means that the court seised under Article 8(1) continues to have jurisdiction although the child has established his/her habitual residence in another Member State during the proceedings.

***Based on the study team's assessment, the following main findings result from the evidence collected: one reported issue is the fact that the provision was difficult to interpret for some courts. In cases where several instances were involved in the case, it was sometimes unclear which moment was to be regarded as 'the moment of application' and thus as decisive for establishing jurisdiction. In addition, the concept itself was mainly criticised on two grounds: first, the application of the principle has led to practical difficulties, for example because proceedings had to be held in a Member State where the child no longer lived. Second, the principle is considered inconsistent with the 1996 Hague Convention on the protection of children, because the Convention has adopted the opposite approach. If a child moves during proceedings that are covered by the Hague Convention, the jurisdiction will change as well. However, it was also noted that the approach entails positive effects. In some cases it may be more appropriate that the court initially seised retains jurisdiction, even though a child has moved, in order to prevent any delays that a transfer of jurisdiction would entail. It can also be noted that the Regulation provides sufficient flexibility to avoid negative effects of the principle of* perpetuatio fori*.**

The **interpretation of Article 8** has posed difficulties for the courts. In cases where several instances were involved, it was sometimes unclear which moment was to be regarded as 'the moment of application' and thus as decisive for establishing jurisdiction. Issues in this regard were identified by some of the national experts (BE, DE, ES, FR, HR, IE, LV, NL). For example, the Belgian expert stated that it is currently not clear at which moment the 'habitual residence' of the child should be determined when proceedings are pending in appeal. When a court of first instance has issued a ruling and that ruling is appealed, the question arises whether the court of appeal should investigate the child's habitual residence taking into account the circumstances existing at the time the initial proceedings were launched or at the time of the appeal[59]. In Latvia, a specialised competent authority (Orphan's court) deals with parental responsibility issues as the court of first instance. It is regarded as problematic that the involvement of the Orphan's court is currently disregarded by the higher Latvian courts when it comes to determining jurisdiction on the basis of Article 8. As a consequence, there were cases where Latvian courts decided that they are not responsible, although the child had his/her habitual residence in Latvia at the time the Orphan's court was seised.

Practical difficulties ensuing from the application of the principle of *perpetuatio fori* are based on the geographical distance between the child's new place of 'habitual residence' and the court that is still responsible for dealing with a case. If proceedings are held in a Member State where the child is not habitually resident, the child may have to travel during proceedings[60], there may be delays in collecting evidence, or the court that has jurisdiction may be unable to adequately take into account the circumstances in the new state of 'habitual residence'. On this basis, some of our interviewees

59 Adopting the first interpretation, see *e.g*. CA Ghent, 10 December 2009, *Revue@dipr.be*, 2010/1, 64 and CA Brussels, 11 March 2013, *Tijdschrift@ipr.be*, 2013/2, 40.

60 We note here that such costs could be avoided by using the procedures prescribed in Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001R1206).

argued that the principle has caused difficult situations that affected the well-being of the child. The Irish legal expert confirmed this observation by demonstrating that Article 8 has been interpreted in a strict manner by the Irish courts. There have been a number of judgments of the Irish courts in which they have made it clear that they retain jurisdiction over a case, notwithstanding factors and arguments to the contrary. This has led to situations in which the Irish courts exercised jurisdiction although the child had, by the time of the judgment, lived in a different Member State for a considerable period of time.[61]

We noted that some interviewees pointed out positive effects of the principle of *perpetuatio fori*, stating that it is in some cases useful that the court initially seised retains jurisdiction. It was argued that a change of jurisdiction always causes delays, because a new court must be seised and the proceedings must be re-started. Although no concrete case examples of positive effects were given, the Greek and Slovakian national experts indicated that the principle of *perpetuatio fori* is not considered problematic, because it is in line with the national laws of these countries and has not caused any complications so far.

The principle of *perpetuatio fori* has also been criticised by prominent authors on international family law[62], mainly on the grounds that the 1996 Hague Convention on the protection of children has opted for the opposite principle, stipulating that jurisdiction in matters of parental responsibility ends automatically where the child has moved to another country[63]. It is to be highlighted that in the current situation, a Member State court would retain jurisdiction if the child has moved to another EU Member State, but lose jurisdiction if the child has moved to another Contracting State of the Hague Convention which is not an EU Member State (or not a Member State of the Brussels IIa Regulation like Denmark). This difference is hard to justify and has been debated in legal literature.[64]

While the theoretical discussion in legal literature has focused on the fact that there are inconsistencies between the Brussels IIa Regulation and the 1996 Hague Convention, the discussion above shows that the question of *perpetuatio fori* is of eminent practical importance and relates to the well-being of the child. As regards the frequency of this issue, the Belgian and Hungarian national experts stressed that the question of the *perpetuatio fori* has often been raised in courts, as it is not uncommon for the habitual residence of children to change during the proceedings. However, the Croatian and Slovakian experts pointed out that the Regulation does entail sufficient flexibility to prevent situations in which a court has jurisdiction that is not appropriate in light of the child's best interests. Namely, Article 15 provides a possibility for courts to another court that is in their view better placed to hear the case. It is available for courts to use when Article 8 leads to situations that are present practical difficulties. Thus, the two experts do not regard the principle of *perpetuatio fori* as problematic. Considering the limited use of Article 15 (see below), this solution is not currently made use of.

Unspecific rules on prorogation of jurisdiction and potential negative effects on the well-being of the child if proceedings are held in a Member State where no family member lives (Article 12)

The Regulation allows for some flexibility with regard to jurisdiction in cases relating to parental responsibility, including the possibility for the holders of parental responsibility to choose a suitable court under certain circumstances (Article 12). According to Article 12(1) of the Brussels IIa Regulation, when divorce proceedings are pending in a Member State by virtue of Article 3, the

[61] See e.g. *MHA v AP* [2013] IEHC 611.

[62] See e.g. Pirrung, in: *Festschrift für Kerameus* (2009), sub. IV.2; Rauscher, in: Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht*, 2nd ed. 2011, Article 8 par. 9.

[63] C.f. Article 5(2) of the Hague Convention.

[64] See e.g. Pirrung, in: *Festschrift für Kerameus* (2009), sub. IV.2; Rauscher, in: Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht*, 2nd ed. 2011, Article 8 par. 9.

courts of that State, under certain additional conditions, also have jurisdiction in matters of parental responsibility connected with the divorce even if the child concerned is not 'habitually resident' in that Member State. According to Article 12(3) the courts of a Member State can also assume jurisdiction in relation to matters of parental responsibility if the child has a substantial connection to the Member State. In both cases, the establishment of jurisdiction must be "*accepted expressly or otherwise in an unequivocal manner*" by the relevant parties.

Based on the study team's assessment, the following main findings result from the evidence collected: the interviewees, national experts, participants in the expert panel and the respondents to the public consultation[65] pointed out practical shortcomings and ambiguities concerning the application of Article 12. The current provisions have given rise to difficulties of interpretation, notably with regard to when and how they should be used. In addition, ambiguities were reported with regard to several specific points of the article, which mainly relate to the requirements to be satisfied to establish jurisdiction on the basis of Article 12. We note, however, that some ambiguities are addressed by two recent judgments by the ECJ. In addition to these ambiguities, practical shortcomings were identified, which affect the well-being of the child.

Based on the analysis of the national reports, it seems that it has been **problematic to interpret** Article 12 **in several Member States** (AT, BE, BG, CY, CZ, ES, FR, HU, IT, LU, NL, PL, RO, SK, SE). This was confirmed by the responses to the public consultation, the interviewees as well as the expert panel. Questions relating to the interpretation of the Article were also raised in the European Commission's application report on the Regulation.[66] Several participants in the expert panel agreed that the provisions on prorogation of jurisdiction are unclear, notably with regard to when and how they should be used. In addition, ambiguities were reported with regard to several specific points of the article, which mainly relate to the requirements to be satisfied to establish jurisdiction on the basis of Article 12. Specific difficulties are outlined below.

The **interpretation of the significance of the acceptance of this jurisdiction by the spouses,** which is relevant in the two different situations covered by Article 12, has led to confusion,[67] as indicated by several experts (AT, BE, CZ, ES, FR, IT, LU, NL, RO, SE, SK) and by several respondents to the public consultation. In particular, the term "*or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility*" has created a significant amount of case-law as indicated by the national experts as well as some interviewees.[68] Courts have faced difficulties in determining the requirements of the agreement between the spouses.[69] Some respondents to the public consultation stated that difficulties arise when there is no express agreement and the court is instead asked to infer a prorogation of jurisdiction by the actions of a party to litigation. In such circumstances it is necessary for the court to conduct a form of fact finding exercise in order to determine whether or not there has been any agreement, or whether or not someone's conduct can give rise to the

[65] The results of the public consultation are mixed. Just over half (53%) of 169 respondents indicated that the conditions for the application of the provisions regarding prorogation of jurisdiction should be improved, while 47% do not. It is interesting to note that legal practitioners are more inclined to regard the provisions as satisfactory whereas private individuals represent the most prominent group seeking change in the area. However, many corresponding free text comments did not accurately reflect the question asked, so the extent to which respondents understood this question is uncertain. The question was preceded by an explanation of provisions which do not adhere to the general rule of 'habitual residence'. The question itself may have been interpreted by stakeholders as referring to general provisions in relation to parental responsibility. (Q12)

[66] COM(2014) 225 final.

[67] Our Romanian national expert reported that in Romania, a seminar was organised on this topic, where the experts invited were of the opinion that simply not raising an objection regarding the court's lack of jurisdiction does not amount to unequivocal acceptance, but that the judge must, given his or her active role, ask the parties to discuss this aspect.

[68] See, for example, the following cases: Judgment of Austrian Supreme Court of 15.05.2012, *Oberster Gerichtshof*, 2 Ob 228/11k or CA Brussels, 6 April 2006, Rev. trim. dr. fam., 2007, 223.

[69] See. e.g. Dijon 13 October 2011 RG No 10/00130, jurisdata 2011-033661; Paris 14 June 2012 RG No 11/04745.

inference that they have accepted jurisdiction. Such hearings can be lengthy and give rise to unnecessary delay.

A question that was dealt with by some courts in the Member States was whether an agreement to prorogate jurisdiction could be revoked by a party. For example, the District Court in Groningen was faced with a case where a mother intended to withdraw her acceptance to hold proceedings in the Netherlands although the proceedings had already been under way for an extended period of time. In this case, the District Court considered the contestation of the jurisdiction that existed under Article 12(3) Brussels IIa an abuse of procedural rights, because legal proceedings had been going on for a prolonged period in the Netherlands in respect of a child that was in a foster home in Germany.[70]

This question has also been dealt with by the ECJ upon a preliminary ruling request by the Czech Supreme Court in December 2013, addressing the question of whether Article 12(3) must be interpreted as "*meaning that acceptance expressly or otherwise in an unequivocal manner includes also the situation in which the party who has not initiated proceedings makes a separate application for the initiation of proceedings in the same case but immediately on doing the first act required of him objects that the court lacks jurisdiction in the proceedings previously started on the application by the other party*."[71] The Court answered this question in the negative, arguing that there is no unequivocal agreement concerning jurisdiction of a court when one party immediately pleads the lack of jurisdiction of that court.[72]

Closely related to the points above, courts have also struggled to determine the requirements as regards the **timing of the agreements by the parents**. A respondent to the public consultation from the United Kingdom mentioned the *case I (A Child), 2009, UKSC 10*, which identifies a difficulty with the wording of Article 12 in relation to the timing of any agreement regarding the jurisdiction of the court[73]. The United Kingdom Supreme Court questioned whether the addition of "*at the time the court is seised*" relates to the timing of the acceptance of jurisdiction or to those who had to give their agreement. A UK judge responding to the public consultation highlighted the same issue, confirming that the courts of England and Wales have encountered such difficulties.

With regard to Article 12(1), some courts have also struggled with the assessment of whether or not the exercise of jurisdiction is in the **superior interests of the child** (BE, FR, LU). According to the French expert, some French court of appeal decisions show that the application of this condition is difficult, as the general jurisdiction under Article 8 is already based on the child's interests.[74]

In addition, ambiguities specific to Article 12(3) were reported.

First, it was not clear whether jurisdiction under Article 12(3) could also be established if no other related proceedings were pending before the court. It was recently clarified by the ECJ that Article 12(3) allows for jurisdiction to be established in a Member State that is not the child's 'habitual residence' even where no other proceedings are pending before the court chosen.[75]

Another ambiguity was identified in relation to the **period for which the prorogation under Article 12(3) remains valid.** Some interviewees stated that it is problematic that the article does not define

[70] DC Groningen 31 July 2012, NIPR 2012, 446, LJN:BX6417.

[71] Case C-656/13, Request for a preliminary ruling from the *Nejvyšší soud České republiky* (Czech Republic) lodged on 12 December 2013 – L v M, R and K.

[72] Case L v M, C-656/13, paras. 53-59.

[73] According to Article 12(3)(b), the jurisdiction of the court has to be accepted "expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the *court is seised*".

[74] See Reims 29 October 2010 RG No 09/02470 and Chambéry, 18 October 2011 RG No 10/01739, where the criterion was applied.

[75] Case L v M, C-656/13, paras. 36-52.

it.[76] They underlined that as cases can be pending for a long time, after some time the choice can no longer be regarded valid if the couple no longer has a connection with the country in question. This can also create a disparity in the bargaining power at time of the divorce. A preliminary ruling by the ECJ solves questions relating to the period for which the prorogation remains valid. In August 2013, the Court of Appeal of England and Wales asked about the period during which the prorogation of jurisdiction remains valid. More specifically, the court asked whether a prorogation of jurisdiction under Article 12(3) only continues until there has been a final judgment in those proceedings or whether it continues even after there has been a final judgment.[77] The Court clarified that an agreement on prorogation of jurisdiction ceases following the final conclusion of the proceedings from which the prorogation of jurisdiction derives.[78]

In addition, courts have attempted to verify the existence of a '*substantial connection'* required by Article 12(3)(a) of the Regulation (BE, CZ).[79]

As regards the practical difficulties in applying this article, some interviewees indicated that there are cases in which a decision issued by a court whose **jurisdiction is based on Article 12 and not on the habitual residence of the child** has led to practical problems and delays. Several practitioners (e.g. BG, DE) explained that courts seised under Article 12 are not necessarily well placed to hear a claim, because the child lives abroad. This practice has negative impacts on the well-being of the child. Furthermore, a Slovakian interviewee explained that Article 12 allows for cases where divorce matters in combination with parental responsibility matters are dealt with in **a country where no one in the family is habitually resident**. In practice, this can have several consequences. From a practical perspective it is more costly and it takes more time to gather evidence, because all evidence needs to be obtained from abroad. Moreover, the decision might not be compatible with the living situation in the country of residence, as these differ between countries. This was confirmed by the Slovakian national expert, who also pointed to other problems that may ensue in such situations. For example, it is not possible under Slovakian law to appoint a guardian for the child according to the Slovak requirements if the child resides abroad.[80] According to the interviewee and the expert, Slovakian courts have been hesitant to refuse jurisdiction on the basis that the best interests of the child might not be ensured. This was confirmed by a response to the public consultation. A parent support network responding to the public consultation regards Article 12 as only operating effectively when there is absolute clarity as to the parental agreement. Otherwise they maintain that hearings can be lengthy, give rise to unnecessary delay and litigation and can possibly be derailed whilst the jurisdictional issue is being determined.

The **frequency with which Article 12 is used** seems to depend on the legislative framework in the Member States. While a German interviewee stated that Article 12 generally does not seem to be used extensively, according to a Bulgarian interviewee, Bulgarian courts apply Article 12 rather often, because it is in line with national procedural rules to handle aspects relating to divorce and parental responsibility matters in one proceeding. In such cases, courts often decide that they are competent to hear the questions relating to parental responsibility without checking the other requirements, such as the superior interests of the child. In line with the argumentation above, such practices need to be viewed critically.

[76] Article 12(2) defines the period for which prorogation under paragraph 1 (i.e. relating to a divorce) remains valid. Such a specification does not exist for prorogation under paragraph 3.

[77] Case C-436/13, Reference for a preliminary ruling from Court of Appeal (England & Wales) (Civil Division) (United Kingdom) made on 2 August 2013 – E. v B.

[78] Case C-436/13, *E. v B*.

[79] See e.g. District Court Prague 3, decision dated 27.9.2011.

[80] This is discussed further in the section *Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures*.

Limited use at present of the possibility to transfer a case and lack of detail as concerns the procedural rules

Article 15 offers the option to the court having jurisdiction as to the substance of the matter of parental responsibility to transfer the case to the court of another Member State better placed to hear the case.

Based on the study team's assessment, the following main findings result from the evidence collected: the possibility of transferring a case to the court that has the closest connection to a child to ensure the well-being of the child was considered useful by the majority of stakeholders. However, many interviewees, national experts and most of the respondents to the public consultation[81] confirmed that the current use of the article remains limited in the Member States and that Article 15 lacks sufficient clarity. It was pointed out by an association responding to the public consultation that the flexibility contained in Article 15 is in principle a positive feature but it is underused and misunderstood in practice.[82] In some cases, ambiguities have led to practical difficulties. Indeed, while several national experts indicated that courts have made use of Article 15 (BE, BG, CY, CZ, ES, FR, IE, IT, LV, LU, NL, PL, RO, SK, UK), most of them indicated that there were only a few cases. Furthermore, according to as many as ten national experts, there have been no reported cases in their country (AT, DE, EE, FI, GR, HR, LT, MT, PT, SE). This limited use of the article was also confirmed by the interviewees; most stated that they had not yet experienced the transfer of a case.

Many stakeholders consulted regret the fact that the possibility to transfer a case is rarely used, pointing to the potential it offers to ensure that cases are always heard by the most appropriate court.[83] As regards **the reasons why the article is seldom used**, some experts indicated that the article is interpreted as applying only in exceptional cases (DE, IT, RO). Furthermore, in Greece, the transfer of a case is not permissible under national law and in Portugal it does not comply with the national legal traditions. In addition, some experts indicated that ambiguities regarding the use of the Article may have caused the courts' hesitation (LT, PL). In addition, an Italian, a Belgian and a Lithuanian interviewee as well as some respondents to the public consultation all noted that **cooperation among courts** is currently not promoted to a sufficient extent, which could also be a reason for the limited use of the article. A Romanian and a Spanish interviewee and approximately 14%[84] of the respondents to the public consultation also stated that the limited use of the possibility to transfer cases is mainly caused by a **lack of trust** between courts of different jurisdictions, as well as **language barriers** hampering the cross-border cooperation of courts. In the interviews and the public consultation some stakeholders regretted the lack of **real dialogue** between courts **and** of **appropriate training of judges**.

Finally, some stakeholders pointed out that the Article also entails negative effects, which may be a further reason for its limited use. According to the Slovenian expert, the fact that a transfer from a competent court of a Member State also leads to an increase in costs, problems in executing evidence (e.g. interrogation of witnesses), as well as the potentially longer duration of the procedure or the time until the final decision might be made, should not be neglected. This was confirmed by

[81] 78% of the respondents to the public consultation (i.e. 127 of 163 responses) indicated that the cooperation mechanism for the transfer to the court better placed to hear the case could be improved).

[82] CCBE (Council of Bars and Law Societies of Europe) responding to the public consultation Q6. See also T v T (Brussels IIa: Art 15) 2010 EWHC 3928

[83] See also Pranevičienė, K. (2014), *Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges applying Regulation Brussels II bis* (http://www.degruyter.com/view/j/bjlp.2014.7.issue-1/bjlp-2014-0007/bjlp-2014-0007.xml).

[84] This percentage is quantified to an approximate number. It represents a trend which arises from the answers that about 22 stakeholders gave to an open question. The total number of respondents to this question is 163.

two interviewees, who argued that the article should only be used in exceptional cases, because it implies delays that may not be wanted by the parties.

However, the article seems to be used more frequently in a few Member States. The Bulgarian expert indicated, for example, that the rules are used in Bulgaria on a regular basis and the Irish expert indicated that the Irish courts had started using Article 15 with some frequency. Interestingly, the Polish national expert indicated that Article 15 was the provision that appeared before the courts most frequently, implying a regular use of the article. Also, Belgian courts do not hesitate to apply Article 15 *ex officio*, without waiting for a request to that end by the parties. However, it was noted that parties are not always willing to accept a transfer of proceedings to another Member State. In a number of cases, courts have faced opposition from the parties when suggesting a transfer on their own motion.

In Member States where the article has been used, some ambiguities were reported by national experts (e.g. BE, PL) and other stakeholders. In general, many interviewees and some respondents to the public consultation[85] pointed out that **the procedures for transferring a case are not laid out in a sufficiently detailed manner**.[86] This was also highlighted during the expert panel.

As regards **the initiation of a transfer**, a Dutch interviewee considered that it was not clear how (by what procedure) one can ask for transfer. A French interviewee also highlighted that it is currently not clear whether under Article 15(2)(a) the '*parties'* allowed to apply for the transfer of a case are only the parents or whether it may also include an authority in charge of a child. Furthermore, a legal scholar argued that the article currently excludes the situation when it is not the court with which the case is lodged that wants to initiate a transfer, but a court in a Member State to which the child has a specific link.[87]

The absence of further procedural clarifications, e.g. an obligation for the requested court to respond, the time limit for the reply, as well as an obligation to justify why jurisdiction needs to be transferred, were stated by several interviewees as causing practical problems. For example, a judge interviewed who had made use of Article 15 to transfer a case to another Member State argued that the effectiveness of the transfer is limited by the fact that the receiving court currently does not have a legal obligation to confirm (within a maximum time delay) the reception or rejection of a transferred case. Similar observations were made by a judge from the United Kingdom, who highlighted in the public consultation that due to the differences between Member States' legislations, the means by which court case is lodged with the courts of the requested State and how the courts accept jurisdiction within Article 15(5), are not clear. This confirms the finding of the Commission's Application Report on the Regulation that states that the fact that the requested court often fails to inform the requesting court in a timely manner that it accepts jurisdiction has caused difficulties.[88]

The Belgian expert indicated that there were several applications in which courts had difficulties in interpreting the following aspects of the article: whether the courts of another Member State were indeed '**better placed to hear the case'**, the criterion of the **'best interests' of the child**, and the test of the **'particular connection'** laid out in Article 15(3) of the Regulation. In addition, the question has arisen whether this provision could be used in order to transfer a case to a Member State where a child had been illegally removed by one of the parents to that Member State. The Court of Appeal of

[85] Four respondents made specific suggestions for improving Article 15.

[86] The Practice Guide of 2005 for the application of the new Brussels II Regulation gives more concrete guidelines on the general procedure to apply.

[87] Pranevičienė, K. (2014), *Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges applying Regulation Brussels II bis* (http://www.degruyter.com/view/j/bjlp.2014.7.issue-1/bjlp-2014-0007/bjlp-2014-0007.xml).

[88] COM(2014) 225 final, p. 6.

Brussels has ruled that Article 15 could not find any application in this case, as it would reward the parent who illegally removed the child.[89]

Concerning the **practicalities of the transfer**, an Estonian interviewee also indicated that some practical questions were not clear, such as the question of who is responsible (practically and financially) for translating the materials necessary for carrying out the transfer or what types of materials have to be sent to the court to which the case is transferred. Further, the mechanisms of translation are not covered by Article 15. The judges should try to find a pragmatic solution which corresponds to the needs and circumstances of each case.

1.2.3 Horizontal issues

This section discusses legal issues of a horizontal nature (i.e. concerning both matrimonial matters and matters of parental responsibility) related to the jurisdiction rules of the Brussels IIa Regulation. The legal issues covered include:

- Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court (rules on residual jurisdiction);
- Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court (no *forum necessitatis*);
- Unspecific rules on the application of the provisions on the seising of a court and on *lis pendens* causing practical problems;
- Non-application of the provisions on *lis pendens* if third countries are involved;
- Ambiguity with regard to the scope of the rules on provisional measures.

Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court (rules on residual jurisdiction)

The jurisdiction rules (Articles 3-5) of the Brussels IIa Regulation do not apply to families of different nationalities living in a third country. In these situations, **national rules are used to establish jurisdiction** (Article 7 for matrimonial matters and Article 14 for parental responsibility). In other words, the courts of the Member States may avail themselves of the national rules of jurisdiction (so-called '**residual jurisdiction**'. With regard to matrimonial proceedings, residual jurisdiction rules may be applied for instance if the spouses have nationalities of different EU Member States or one only has the nationality of a Member State and their habitual residence in a third country. For matters of parental responsibility, the rules on residual jurisdiction may be applied, where the child has his or her habitual residence in a third country and the parents cannot agree to give jurisdiction to the court of a Member State under Article 12.

The national rules of jurisdiction are not harmonised, but based on different criteria, such as nationality, residence or domicile. Indeed, the **national rules** to determine jurisdiction seem to **vary widely**. In about half the Member States the nationality of either a spouse or the child concerned is sufficient to bring proceedings in the EU. In the other half, it is not possible for residents of third countries to bring proceedings in the Member States' jurisdiction.[90]

In **matrimonial matters**, the possibility to bring proceedings before an EU court for EU citizens of different nationalities living in a third State is currently subject to Article 7 of the Regulation. The national rules on residual jurisdiction were reviewed in a study commissioned by the European

[89] CA Brussels, 25 October 2012, Rev. trim. dr. fam., 2013, 617, 626.

[90] Nuyts et al. (2007): *Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations, study commissioned by the European Commission,* pp. 94-97.).

Commission in 2007.[91] The study found that in fifteen Member States and England, jurisdiction is provided under national law as soon as one of the spouses is a national of the forum state.[92] In the other Member States, the citizenship of one spouse is not valid grounds of jurisdiction. Although there are other grounds of residual jurisdiction in these Member States, they do not guarantee that jurisdiction will be established in the EU. There is consequently a theoretical risk that EU citizens in third countries could be excluded from access to court in the EU to resolve conflicts in matrimonial matters.

In matters of **parental responsibility**, the possibility to bring proceedings before an EU court with respect to a child resident outside the EU, if the parents do not agree, is currently subject to the application of residual jurisdiction, pursuant to Article 14 of the Regulation. In some Member States, residual jurisdiction is based on international conventions (within their scope of application), and in particular on the 1961 Hague Convention[93] and the 1996 Hague Convention[94]. When these Conventions do not apply, residual jurisdiction depends on the application of national law. The review of such rules of residual jurisdiction in the above-mentioned study from 2007[95] shows that in eight Member States and England, the citizenship of the child constitutes valid grounds of jurisdiction, even if there is no other connection with the forum State.[96] In six further Member States jurisdiction can be based on the citizenship of either parent, which will often coincide with the citizenship of the child under the *ius sanguinis* system.[97] In one Member State, jurisdiction can be based on the citizenship of the parent plaintiff only.[98] In practice, this means that for the citizens of fifteen Member States, jurisdiction can in general be established in the EU even when the child (and the parents) are habitually resident in a third State. For the citizens of the remaining thirteen Member States[99], there will be residual jurisdiction in the EU only if there is another connecting factor relevant under national law. These other relevant connecting factors are quite diverse, and do not have any general application. In some Member States, matters of parental responsibility can be submitted to the court which is seised of any matrimonial proceedings. But this supposes of course that jurisdiction exists with respect to the matrimonial proceedings and that such proceedings be effectively started in the relevant Member State. In other Member States, jurisdiction is provided on the grounds of the domicile or habitual residence in the forum State of one of the parties or based on a *forum necessitatis* grounds included in national legislation.

As highlighted in the above-mentioned study from 2007, the situation in matrimonial matters and matters of parental responsibility is therefore similar: **some EU citizens living in third States risk being excluded from access to an EU cour**t, although they might have a close connection to a

[91] Nuyts et al. (2007): *Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations, study commissioned by the European Commission*, pp. 94-97.

[92] AT, BG, CZ, England, EE, FR, DE, EL, HU, IE, IT, LT, LU, PL, SK, SE. The study found that the citizenship of one spouse is not a valid ground of jurisdiction in the following Member States: BE, CY, DE, ES, FI, GR, LT, MT, NL, Scotland. This information is subject to any legislative changes that may have occurred since 2007. In Croatia, which became a Member State in 2013, the citizenship of one spouse is not a valid ground of jurisdiction, except if the plaintiff is a citizen of the Republic of Croatia and the law of the state whose courts would have jurisdiction does not provide for the institution of dissolution of marriage (Articles 61-63 of the Croatian Private International Law Act).

[93] To date, the 1961 Hague Convention has entered into force in 11 EU Member States: AT, FR, DE, IT, LV, LT, LU, NL, PL, PT and ES.

[94] To date, the 1996 Hague Convention has entered into force in all EU Member States except Italy.

[95] Nuyts et al. (2007): *Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations, study commissioned by the European Commission*, pp. 92 ff. This information is subject to any legislative changes that may have occurred since 2007.

[96] AT, BE, CZ, England, EE, HU, IE, LT, PL.

[97] BG, FR, EL, IT, LU. In Croatia, which became an EU Member State in 2013, the citizenship of both parents constitutes grounds of jurisdiction (Article 69 of the Croatian Private International Law Act).

[98] ES

[99] CY, DE, DK, FI, LT, MT, NL, PT, RO, Scotland, SE, SK, SI (however, the citizenship of both parents is a ground of jurisdiction).

Member State by means of their nationality, when the Member State of which they are a national does not recognise citizenship as grounds of jurisdiction.

However, there is a difference between the two matters which relates to the **considerations underlying the jurisdiction rules**: while in matrimonial matters the objective is to provide effective access to justice for spouses (resulting in a wide set of alternative grounds for jurisdiction), in matters of parental responsibility, the objective is to ensure the well-being of the child (resulting in the habitual residence of the child as the main grounds of jurisdiction).[100]

Based on the study team's assessment, the following main findings result from the evidence collected: it appears that the non-harmonisation of rules on residual jurisdiction has not led to any major practical problems related to the exclusion of certain groups of people. While a theoretical risk of exclusion of EU citizens who have their residence outside the EU from access to court – mainly based on nationality – exists, actual cases could not be identified.

Nonetheless, respect for the fundamental right of access to justice (Article 47 of Charter of Fundamental Rights of the European Union) might be considered to be endangered by the potential (i.e. theoretically possible) exclusions of certain groups of citizens to access a court in the EU due to the non-harmonisation of rules on residual jurisdiction.

None of the national experts identified specific practical problems related to the **exclusion of certain groups of citizens** due to the **non-harmonisation of rules on residual jurisdiction** in the Brussels IIa Regulation. Although numerous experts and stakeholders were consulted in the framework of this study, no actual cases where EU citizens were excluded from access to court were reported. Stakeholders interviewed indicated that the provisions are almost never used and that they only exist for exceptional cases. It was pointed out by some interviewees that according to legal literature, there are constellations in which third country nationals that are married to an EU citizen could have advantages from these provisions compared to their spouse. However, in practice the interviewees did not see an issue.

Some national experts (CY, GR, SE), however, pointed to ***potential*** **(i.e. theoretically possible) exclusions of certain groups of citizens** from access to a court in the EU due to the non-harmonisation of rules on residual jurisdiction. For instance, the Swedish law on jurisdiction in matrimonial matters could be used as a residual jurisdiction rule[101], which gives jurisdiction to Swedish courts if the applicant is a Swedish national *and* either is habitually resident in Sweden or has had habitual residence in Sweden after his or her 18th birthday. This rule **excludes Swedish nationals that have not had their habitual residence in Sweden after their 18th birthday** and **nationals of other countries**.

Even though there are no known cases on the exclusion of EU citizens who have their residence outside the EU from access to court in the EU, there is a concern of **ensuring access to justice to all EU citizens with a close link to the EU as a fundamental right**. Indeed, Article 47 of the Charter of Fundamental Rights of the European Union guarantees access to justice.[102] Respect of this fundamental right might be considered as endangered by the potential (i.e. theoretically possible)

[100] Nuyts et al. (2007): *Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations, study commissioned by the European Commission*, pp. 153-154.

[101] Ch. 3 Sec. 2 para 2 of the 1904 Act

[102] Article 47 of the Charter of Fundamental Rights of the European Union states:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

exclusions of certain groups of citizens from access to a court in the EU due to the non-harmonisation of rules on residual jurisdiction.

In its 2006 proposal for amending the Brussels IIa Regulation, the European Commission suggested abolishing the **residual jurisdiction of the Member States according to their national law**, as currently set forth in Article 7 of the Regulation for matrimonial matters. Instead, a uniform rule on residual jurisdiction was put forward in Article 7 of the proposal. However, as no unanimity could be reached within the Council with regard to the rules on applicable law included in that proposal, the European Commission withdrew the 2006 proposal to amend the Regulation.

According to some commentators, it may be worth reconsidering this European Commission proposal, as a uniform rule would strengthen the aim of harmonising national rules as far as possible, in order to ensure predictability for the parties concerned. In this regard, guidance can also be found in the Maintenance Regulation (EC) 4/2009, where the Council eliminated rules on residual jurisdiction of the Member States in maintenance matters and instead provided **for harmonised rules on residual jurisdiction and for a *forum necessitatis*** (Articles 6 and 7). The issue of *forum necessitatis* is discussed in the following section.

Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court (no forum necessitatis)

Unlike recent legislative instruments, such as the Maintenance Regulation or the Successions Regulation, the Brussels IIa Regulation does not foresee a ***forum necessitatis***[103] – i.e. a forum which is provided to individuals for whom no other forum is available and where the dispute has a sufficient connection with the Member State concerned.

Based on the study team's assessment, the following main findings result from the evidence collected: the absence of a **forum necessitatis** ***(i.e. a forum which is provided to individuals for whom no other forum is available and where the dispute has a sufficient connection with the Member State concerned) in the Brussels IIa Regulation in combination with its reliance on non-harmonised national rules for establishing jurisdiction may potentially lead to the exclusion of certain EU citizens from access to court.***

Numerous stakeholders and experts as well as a large majority of the respondents to the European Commission's public consultation noted that the absence of a **forum necessitatis** ***hampers legal certainty and the assurance of EU citizens' fundamental right of access to court.***

On the other hand, several national experts (AT, BE, CY, CZ, FR, HR, LU, NL, PT, SE, SI) and interviewees (CY, FR) pointed to the fact that the absence of a *forum necessitatis* in the Brussels IIa Regulation is irrelevant for nationals of their jurisdiction because **domestic laws on jurisdiction guarantee such a *forum necessitatis***. However, this is not the case in all Member States. Currently the issue of lack of access to court in the EU is thus limited to those Member States that do not provide for a *forum necessitatis* in their national rules on jurisdiction. Similarly, the above-mentioned study on residual jurisdiction from 2007[104] noted that *forum necessitatis* is recognised as valid

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[103] Grounds 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.
Such grounds of jurisdiction were sought by the European Parliament in its legislative resolution of 15 December 2010 on the proposal for the Rome III Regulation; Resolution P7_TA(2010)0477, point 3.

[104] Nuyts et. al (2007): *Study on Residual Jurisdiction (Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)*, study

grounds of jurisdiction in ten Member States either by statute or case law.[105] Also in Croatia, which joined the EU in 2013, *forum necessitatis* is recognised as valid grounds of jurisdiction by statute law for matrimonial matters.[106] Regarding the remaining Member States, the study found that although there is no statutory basis or case law supporting the existence of a *forum necessitatis*, this does not necessarily mean that the principle would be rejected by the courts. In some countries it had been considered that theoretically, under general principles of law, depriving a party of the right of access to court could not be accepted if this were necessary to assert his/her rights.

Case example: Absence of *forum necessitatis* in the Brussels IIa Regulation (Belgium)

The national expert for Belgium reported that in a limited number of cases, courts in Belgium have been faced with situations where no jurisdiction could be derived from the jurisdiction rules of the Brussels IIa Regulation. These instances mainly concern couples where the spouses have different nationalities and who did not have any residence within the EU before their separation.

In one case submitted to the Court of First Instance of Brussels, the couple did not share the same nationality (the husband was a Belgian national, while the wife possessed Chinese nationality). The couple had lived together in Singapore before the separation. After they split up the husband took up residence in Thailand while the wife settled in China. The husband could not file for divorce in Singapore, because Singaporean law only allowed for divorce after three years of marriage. In addition, a Thai lawyer had advised him not to file for divorce in Thailand either, as it was unsure whether the Thai courts would apply Belgian or Chinese laws correctly. He therefore filed for divorce in Belgium.[107]

In the second case, a Moroccan national had been married twice. The two marriages had been celebrated in Morocco. The second marriage had been terminated by a divorce decree issued in Morocco. When this decree was not recognised in Belgium, the Moroccan national sought to have his second marriage also terminated in Belgium. To that end, he filed for divorce. He had not lived in Belgium since 1975. His wife had never lived in Belgium. He alleged that he still possessed a substantial connection with Belgium because he had worked in Belgium until 1975 and his son lived in Belgium.[108]

In both cases, the court found that no jurisdiction could be exercised under the Articles 3 to 5 of the Brussels IIa Regulation. Looking further at the provisions of Belgian law (i.e. the Code of Private International Law), the court found in both cases that no jurisdiction existed under the regular rules.

The absence of a *forum necessitatis* in the Regulation was resolved, however, since such a forum exists under the Code of Private International Law. The court of first instance therefore examined whether such a *forum necessitatis* (Article 11 Code of Private International Law) could be applied in the two cases. It found that in the first case, there was a sufficient nexus with

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commissioned by the European Commission, http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf

[105] In Austria, Belgium, Estonia, the Netherlands, Portugal, and Romania, the ground is based on an explicit statutory provision. In the other four countries (France, Germany, Luxembourg, and Poland) it is based on case law.

[106] Article 63 of the Croatian Private International Law Act.

[107] CFI Brussels, 9 December 2011, *Rev. trim. dr. fam.*, 2012, 384

[108] CFI Brussels, 2 December 2011, *Rev. trim. dr. fam.*, 2012, 359; both cases have been commented by Caroline Henricot, *Le for de nécessité de l'article 11 du Code de DIP : premières illustrations jurisprudentielles en divorce*, *Rev. trim. dr. fam.*, 2012, 369-372

Belgium, while in the second case, the applicant had not shown that there was a sufficient connection with Belgium to justify the exercise of jurisdiction under *forum necessitatis*.

A large majority of respondents to the European Commission's **public consultation** (78%)[109] believed that the current provisions of the Brussels IIa Regulation are lacking a provision to ensure access to justice in cases where the responsible courts cannot exercise their jurisdiction, involving, for example, in exceptional cases where the proceedings prove impossible in a non-EU country, that a court of an EU country could exercise its jurisdiction to remedy the situation (i.e. a *forum necessitatis*).

While none of the national experts identified specific practical problems related to the absence of a *forum necessitatis* in the Brussels IIa Regulation, several national experts (BG, DE, GR, IT, SE, UK) and participants in the expert panel argued that the **establishment of a *forum necessitatis*** in Brussels IIa is needed in order to **avoid any exclusions of certain groups of citizens from access to court** – e.g. in cases of war – and to **increase legal certainty**.[110]

A French lawyer, for example, argued that a *forum necessitatis* is needed for spouses with EU citizenship that want to **obtain divorce from a citizen of a country applying Islamic law, where divorce is not provided for** (such as the United Arab Emirates (UAE), Iran, Afghanistan, etc.). He argued that in such cases, if children are involved, the impossibility of divorce (and possibly a return to the EU) could also go against the best interests of the child.

Similarly, the national expert for Germany pointed to a case in Germany's Federal Court of Justice[111], in which the court argued that a *forum necessitatis* should be opened to the applicant in divorce proceedings under the Brussels IIa Regulation if, in the State where the respondent is habitually resident, (or where both spouses are habitually resident) a divorce is not permitted.[112]

With regard to cases in **parental responsibility** matters, the establishment of a *forum necessitatis* was considered as a measure to overcome the risk of exclusion of EU citizens in third countries from access to court, where jurisdiction cannot be established based on national laws for residual jurisdiction (e.g. because of the absence of *forum necessitatis* provisions in some Member States). For children present in the EU, access to court in the EU is guaranteed by Article 13 para 1, which rules that where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present is to have jurisdiction. This guarantee of access to court also applies to refugee children or children internationally displaced because of disturbances occurring in their country (Article 13 para 2). However, it does not apply to refugee children or children that are internationally displaced outside of the EU. The provision of Article 13 respects the consideration that the well-being of the child must be ensured, as it only applies when the child is not habitually resident in any country within or outside the EU.

Unspecific rules on the application of the provisions on the seising of a court and on lis pendens causing practical difficulties

Article 16 of the Brussels IIa Regulation determines **when a court is deemed to be seised** and that the court is thus competent to hear a case: A court is deemed to be seised at the time when the

[109] I.e. 132 of 170 responses
[110] See for instance: Th.M. de Boer (2007): *The second revision of the Brussels II Regulation: jurisdiction and applicable law*, based on a presentation given at the CEFL Conference in Oslo on June 9, 2007).
[111] *BGH* 20.02.2013, unalex DE-2951
[112] Divorce is permitted in all Member States, although the grounds for divorce differ. See the European e-Justice Portal (https://e-justice.europa.eu) and the Council of Europe Family Policy Database (http://www.coe.int/t/dg3/familypolicy/database/default_en.asp)

document instituting the proceedings or an equivalent document is lodged with the court. This rule is of central relevance to the citizens, as the court first seised will have jurisdiction subject to Article 19 of the Brussels IIa Regulation (***lis pendens***). These rules aim at preventing parallel proceedings on the same case in courts of different Member States.

In view of differences in national substantive laws, there might be clear advantages or disadvantages for the spouses depending on which court was first seised. For example, the time before a divorce is granted may vary across countries because in some countries the spouses have a right to divorce directly, while in other countries they have to wait for some years. There might also be significant differences in the amount of maintenance payments determined by the court. The expectation of such differences can lead to **forum shopping** and **rush to court** by the parties (in view of maximising their perceived personal advantages by seizing a specific court).[113]

Based on the study team's assessment, the following main findings result from the evidence collected: while most experts and stakeholders acknowledged the contribution of the Brussels IIa Regulation's rules on jurisdiction in preventing parallel proceedings, a series of practical problems resulting from the application of the provisions on seising a court were identified. The problems identified mainly relate to the determination of the moment when a court has been seised, the potential non-identification of parallel proceedings and a misleading wording in the rules on seizing the court in cases of matrimonial matters.

A majority of respondents to the European Commission's **public consultation** (59%)[114] and of the national experts indicated that the existing rules of the Brussels IIa Regulation have helped to prevent parallel proceedings.

Nonetheless, some national experts (BG, DE, EE, FR, IT, NL, UK) pointed to **practical difficulties in relation to the application of the provisions on the seizing of a court** or the need for clarification based on issues encountered in their country. The problems identified mainly relate to the determination of the moment when a court has been seised and the potential non-identification of parallel proceedings.

(a) Determination of the moment when a court has been seised

There have been situations in which the spouses have applied for divorce at different courts in different Member States and where the time difference between the lodging of documents to institute the proceedings in the respective courts has been very small (typically on the same day). Consequently, it has been **difficult to determine which court has been seised first and thus has jurisdiction**. Several experts and stakeholders pointed to the lack of clarity and common procedures in the Brussels IIa Regulation to deal with such cases.

The spouses might thus face **legal uncertainty** as to which court has jurisdiction even after a court has been seised. The courts may, for example, not register the time at which the cases were received with the same level of detail. Some courts may record this by the hour and even minute, while other courts only register the date on which the case was received. Such diverging approaches to the determination of the moment when a court has been seised leads to legal uncertainty for the parties involved and potentially to unfair treatment of the party who filed his/her divorce application at a court that does not register the detailed time of submission.

[113] The issue of forum shopping/rush to court is discussed in more detail under the section "*Jurisdiction rules applicable to matrimonial matters*".
[114] I.e. 97 of 164 responses

Case examples: Diverging approaches to the determination of the moment when a court has been seised (Austria, Czech Republic, France)

In **Austria**, the Supreme Court (*Judgment of 19.12.2012, Oberster Gerichtshof, 6 Ob 217/12y*) clarified that a court is seised in the sense of Article 16 of the Brussels IIa Regulation on the **day on which an application is received by the court**.

In the **Czech Republic**, only a minority of courts register the exact time when a divorce application was filed; they **often only register the date**. Furthermore, interviewees from the Czech Republic noted that when an application is filed by postal service, it is impossible to determine the detailed submission time of an application.

In **France**, the specificity of the French divorce procedural rules that govern litigious or contested divorce cases have required clarity with regard to the moment when a court can be considered as seised. The French divorce procedure takes place in two stages: first an initial request is filed, which opens the conciliation stage; if a non-conciliation order is issued by the judge for family matters, one or both spouses can file for divorce by means of a divorce petition. According to the *Cour de cassation*, since two decisions of 2006[115], the date to be considered is the **date of the first formality initiating the divorce proceedings**, which is the date of the initial request for divorce that has been filed by one of the spouses, **on the condition that it is later followed by the second petition**. According to the national expert for France, this solution appears to be the most satisfying, as it avoids the risk of a rush to a foreign court by the defendant once the French court is seised by the initial request. It also seems to be the only way to give full measure to the conciliation stages of a divorce procedure. In practice, most **French courts register the detailed time (date, hour, minute) of the submission of divorce applications**.

More generally, some experts and stakeholders argued that instead of registering the time of submission in ever more detail, it would make more sense that the courts of two different Member States, which are seised on the same day, establish together which one is more appropriate, for example, to concentrate all the issues of the case, causes and consequences of a divorce or both the matrimonial and parental issues.

(b) Potential non-identification of parallel proceedings

Another problem that was identified by experts and stakeholders is that **parallel proceedings in different Member States cannot be easily identified in all cases by the responsible courts** if the parties retain relevant information on such proceedings. Indeed, in practice the parties sometimes do not establish this communication between the courts because this goes against their personal interest.

In this regard, several interviewees pointed to the **lack of a mandatory ex officio communication between courts** or other mechanisms and procedures – such as central databases of ongoing proceedings – that are hampering the cross-border information exchange of courts across the EU on potentially ongoing parallel proceedings.

Non-application of the provisions on lis pendens if third countries are involved

The **rules on *lis pendens*** in the Brussels IIa Regulation set out in Article 19 para 1 and 3 for matrimonial matters and in Article 19 para 2 and 3 for matters of parental responsibility are currently **restricted to conflicting proceedings before the courts of different Member States**; third countries are not covered by the *lis pendens* rules of the Brussels IIa Regulation. By contrast, the European

[115] Civ 1, 11 July 2006, No 04-20.405 and 05-19.231, *Bull civ* I No 374 and 375

legislator has extended the harmonised rules on *lis pendens* in civil and commercial matters in the Brussels I Recast Regulation (Article 33) to proceedings pending before the courts of third states.[116]

As a consequence, some commentators have considered that legal certainty and predictability are currently not ensured if an action is first filed by one spouse in a third country and afterwards by the other spouse in a Member State.[117] If the Member State concerned is a contracting party to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations, proceedings in that Member State may be suspended when proceedings are already pending in another contracting state (Article 12). If the Member State or the third country concerned is not a contracting party to the 1970 Hague Convention, uncertainty may arise as to how the Member State court must act in the event of parallel proceedings in a third country. Some commentators argue that the Member State court must accept jurisdiction in such cases. Others argue that it depends in such cases on the national jurisdiction rules of the Member State concerned whether a (national) *lis pendens* rule is applied in relation to third countries as well.

It appears that no significant practical problems have arisen from the non-coverage of third countries by the* lis pendens *rule of the Brussels IIa Regulation. The domestic laws on jurisdiction of some Member States already provide for* lis pendens *to be applied in cases involving third countries or possibilities for courts to decline jurisdiction in the event of parallel proceedings in third countries. While a potential extension of the* lis pendens *rule to third countries could enhance legal certainty, this was generally not considered a key priority. Moreover, concerns have been voiced about the need to secure reciprocity and the respect for fundamental rights by third countries.

Most national experts reported that **no practical difficulties** have arisen due to the **absence of provisions in the Brussels IIa Regulation covering third countries' courts in the *lis pendens* rule**.

Several national experts (AT, CY, FR, IT, NL, PT, RO, SE) reported that domestic laws on jurisdiction provide for *lis pendens* rules vis-à-vis third countries or possibilities for courts to decline jurisdiction in case of parallel proceedings in third countries. A similar *lis pendens* provision applicable to third countries within the Brussels IIa Regulation would thus be redundant in their jurisdiction.

Case examples: National rules applicable to parallel proceedings in third countries (Cyprus, Italy, Netherlands)

In Cyprus, courts seem so far to have overcome difficulties linked to parallel proceedings in third countries by **declining jurisdiction whenever the jurisdiction of another court has already been established**.

In Italy, **national rules apply to parallel proceedings in third States**. Article 7 of Law No 218/1995 addresses *lis pendens* even if one of the courts involved is located in a non-EU Member State. The Supreme Court (*Corte di Cassazione, Sezioni unite, No 21108 of 28 November 2012*) has provided a broad interpretation of the notion, as the identity of parties and subject matter are not required where the two proceedings lead to the same practical effects.

In the Netherlands, in case of *lis pendens* in relation to a court of a third state, Article 12 NL CCP applies. This **national provision on international jurisdiction gives the court discretionary powers to stay or to continue proceedings**. In the *CA 's-Gravenhage 10 October 2007, NIPR*

[116] Cf. Article 33 of Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

[117] See for example: Etienne Pataut (2008): *International jurisdiction and Third States: A View from the EC in Family Matters*, in Alberto Malatesta and Stefania Bariatti (eds): *The External Dimension of EC Private International Law in Family and Succession Matters*, p. 144.

2008, 9, case the court continued divorce proceedings and granted a divorce, although divorce proceedings had been instituted earlier in Switzerland, as the Swiss proceedings were not moving forward. On the other hand, in the *CA Amsterdam, 9 September 2008, NIPR 2009, 256*, case the court held that the wife's application for divorce was not admissible, and that she had to continue proceedings in Kenya. The Kenyan courts had granted a divorce in 2005 in the wife's absence, but the wife had later appealed against the Kenyan divorce decree.

However, in Member States where no domestic jurisdiction rules exist to deal with potential parallel proceedings in third countries, the legal certainty and predictability might be at risk due to the absence of such rules within the Brussels IIa Regulation. Several stakeholders interviewed argued that the non-applicability of the Brussels IIa *lis pendens* rules to third countries leads to situations where parallel proceedings and irreconcilable judgements (with third countries) cannot be avoided.

On the contrary, a French lawyer argued that the current *lis pendens* rules (Article 19) are functioning well and should be kept because in his view any decision by third countries needs to be verified to see whether it is in line with domestic and European standards. This lawyer stated that it would be unthinkable to provide jurisdiction to a third country where human rights are not respected according to a *lis pendens* rule applicable to third countries.

Similarly, several experts noted that an extension of *lis pendens* rules to third countries always needs to be circumscribed by certain conditions, such as reciprocity, in order to ensure legal certainty and predictability for EU citizens.

Ambiguity with regard to the scope of the rules on provisional measures

In urgent cases, based on Article 20, provisional (including protective) measures may need to be adopted by the courts of a Member State concerning a child present in their territory even if those courts do not have jurisdiction as to the substance of the matter. Such measures can relate to persons or assets.

Based on the study team's assessment, the following main findings result from the evidence collected: many stakeholders and experts do not consider the provisions on provisional measures to be sufficiently clear, in particular regarding their scope. Their interpretation has been left to the ECJ and courts of the Member States, leading to a risk of diverging interpretations and implementations. There is broad agreement among experts that no provisional measures relating to matrimonial matters can be imagined – even though the positioning of the provisions on provisional measures within the Brussels IIa Regulation suggests the later. Overall, the evaluation of the usefulness of the existing provisions on provisional measures by the respondents to the European Commission's public consultation is mixed (45% of positive evaluations).

The respondents to the European Commission's **public consultation** were asked to evaluate the usefulness of provisional measures by a non-competent court in urgent cases. Only a minority of respondents (45%)[118] considered the existent provisions on provisional measures as useful.

Experts and stakeholders identified several **issues preventing the functioning of the provisions on provisional measures from functioning well**, including a lack of clarity on the definition and scope of provisional measures as well as the impossibility of applying provisional matters in matrimonial matters.

Many interviewees and respondents to the European Commission's public consultation stated that the provisions of Article 20 are **not sufficiently clear**, including what actually qualifies as a provisional measure and under which precise criteria a court can use it. As a result of this lack of clarity, several

[118] I.e. 70 of 155 responses

aspects of Article 20 have given rise to **interpretation by the courts of the Member States** (AT, CZ, DE, ES, FI, FR, HR, HU, SK):

- The relationship between the jurisdiction based on Article 8 and proceedings on provisional measures under Article 20 in another Member State (CZ);
- The nature and scope of the competences that Article 20 creates (AT, FI, FR);
- The meaning of 'urgent' in the framework of Article 20 (AT, SK); and
- The question of whether the provisions of Articles 21 et seq. of the Brussels IIa Regulation according to Article 2(4) also apply to provisional measures in terms of Article 20, or only to decisions on the merits of a case (DE, HU).

Different legal interpretations at the level of the Member States may lead to diverging implementations of the provisions of the Brussels IIa Regulation across Member States. Some interviewees pointed to the risk of (intended or unintended) misuse of provisional measures that can potentially erode trust between the Member States.

The interpretations of the ECJ regarding provisional measures – including in *Detiček* (Case C-403/09 PPU)[119], *Purrucker I* (Case C-256/09)[120] and *Purrucker II* (Case C-296/10)[121] – are considered as insufficiently exhaustive guidelines by numerous experts and stakeholders.

Finally, numerous national experts and the participants in the expert panel argued that **no provisional measures** can be imagined that would be **applicable to divorce, legal separation and marriage annulment** in line with Article 1(a). Article 20 was considered as irrelevant for cases on matrimonial matters. According to the participants in the expert panel, it is not clear why the provisions on provisional measures are not included in the chapter on rules that are specific to parental responsibility matters.

1.3 Hearing of the child and the child's representation in court

As concerns the actual proceedings on parental responsibility matters and the return of an abducted child, the Regulation gives some guidelines relating to the hearing of the child and his/her representation in court.

The following points are discussed in this section:

- Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments); and
- Different practices related to the representation of the child in court.

[119] In *Detiček* (Case C-403/09 PPU) the ECJ 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 State.

[120] In *Purrucker I* (Case C-256/09) the ECJ 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.

[121] The ECJ clarified in *Purrucker II* (Case C-296/10) that the *lis pendens* 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 matter.

Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments)

As stated in the recitals of the Regulation, the hearing of the child is an important aspect of the Regulation. While the Regulation lays down principles on the hearing of the child in cross-border cases, national rules are not intended to be touched upon.[122]

Most of the national experts indicated that no specific challenges could be identified on the basis of the available case law regarding the hearing of the child in their countries. However, some actual or potential practical difficulties were highlighted by some experts (BE, CY, DE, FR, HU, IT, RO, SK), respondents to the public consultation, interviewees and participants in the expert panel. ***Based on the study team's assessment, the following main findings result from the evidence collected: On the basis of significantly varying rules on the hearing of the child, many practitioners do not trust that other Member States' rules take into account the interests of the child to a sufficient extent in all cases. This has led to reservations and refusals of the recognition and enforcement of judgments. Some stakeholders regretted that the importance of the hearing relating to all cases on matters of parental responsibility is not highlighted in the Regulation, but only in relation to return proceedings.***

As these difficulties are closely related to the different practices in the Member States, an overview of the practices is presented first. Afterwards, the different issues are outlined, relating to the following points:

- The interplay of the different provisions mentioning the hearing of the child;
- Doubts as to whether or not the child's interest is sufficiently protected on the basis of the current rules;
- Difficulties relating specifically to return proceedings; and
- Difficulties relating to the recognition and enforcement of judgments on the basis that the child was not heard.

(a) The interplay of the different provisions mentioning the hearing of the child

The Regulation is based on the principle that the child's views are to be taken into account in cases concerning it, as stated in the recitals of the Regulation.[123] This principle is reflected in different provisions of the Regulation.

With regard to **child abduction**, the Regulation explicitly stipulates that a child is to be given an opportunity to be heard in return proceedings in the Member State to which the child was unlawfully removed or in which it is unlawfully retained.[124]

No such statement is made with respect to **other proceedings relating to matters of parental responsibility**. Yet, the failure to hear a child can be a reason for **non-recognition** of a judgment on parental responsibility. Article 23(b) stipulates that if it is considered that the judgment "*was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought*", a Member State may refuse recognition of the judgment.

[122] Recital (19), Brussels IIa Regulation.
[123] Recital (19), Brussels IIa Regulation.
[124] Article 11(2) Brussels IIa Regulation: '*When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.*'

In addition, the failure to hear a child may hinder the enforcement of certain types of judgments. As regards **enforcement of decisions on access rights or return orders issued by the State of origin under Article 11(8)**, the certificates under Articles 41 and 42 may only be issued if the child was given an opportunity to be heard unless this was considered inappropriate.[125]

(b) Overview of the practices in the Member States

The right for children to be heard requires, according to the ECJ, that the child can express its views freely and that its views are obtained by the court. However, this does not necessarily entail an obligation to have a hearing in the court, as there may be cases in which this may be inappropriate or harmful.[126] It is up to the Member States to define the details relating to the hearing of the child but without undermining the effectiveness of the principle. While many Member States have introduced **specific national rules concerning the child's right to be heard**, the detailed rules vary significantly.[127]

Based on inputs by the network of national experts, 18 Member States have made the **hearing of the child obligatory in certain circumstances** (AT, BG, CY, CZ, DE, EE, ES, HR[128], HU, IE[129], IT, LT, LU, LV, MT, RO, SE, SL), whereas the consequences for not hearing a child in the absence of legitimate reasons vary across the Member States. In some Member States, not hearing the child can be classified as a procedural error and can thus lead to an appeal against the decision (e.g. AT, CY, LT). In other Member States, there are no specific consequences for not hearing the child, although the hearing is in principle obligatory (e.g. MT). In some Member States, there is no obligation for courts to hear the child, thus leaving a wide range of discretion to the court in question (e.g. GR, IE, PL, UK). Grounds for not hearing the child are either stipulated specifically or left to the discretion of the court.

In addition, in six Member States it is **mandatory to give the child the opportunity to be heard** in certain circumstances (BE, FI, FR, NL, PT). In three Member States, no such obligation exists (HE, PL, UK).

Typically, the **criteria for deciding whether a child will be heard** are age and/or maturity of the child. In some Member States, a specific age is indicated after which it is mandatory to hear a child. Across the Member States, the crucial age that determines whether or not it is considered suitable to hear a child is set between 10 and 15 years. In most Member States that have such an age limit in place, it is also possible to hear younger children based on their maturity and whether it is expected that the child can state a reasoned and uninfluenced opinion. The actual practices in this regard vary widely. There are, for example, some Member States, where children of three years are heard when appropriate (e.g. DE, HU). In addition to age and maturity, other criteria may be relevant. For example, in Hungary the child is not heard if there is agreement between the parents, as such agreement is considered sufficient to represent the child's opinion.

Practices also vary with regard to the **practicalities of the hearing**, in particular the persons who are typically conducting the hearing as well as the setting. As regards the former, in most Member States there are different possibilities depending on the circumstances. Hearings can typically be conducted by a judge, a court official, child welfare services or other relevant authorities, psychologists or

[125] Article 42(1)(a) Brussels IIa Regulation.
[126] Case C-491/10 PPU (Aguirre Zarraga v Pelz).
[127] See: Training module on Parental responsibility in a cross-border context, including child abduction, Annex 5.6 by Martina Erb-Klünemann (Available at: https://www.era-comm.eu/EU_Civil_Justice_Training_Modules/kiosk/pdf/EN_parental.pdf).
[128] In Croatia, there were until recently no specifications as regards whether and when a hearing is obligatory. Specifications were introduced by means of the 2014 Family Law Act.
[129] The implementation of the constitutional amendment introducing this rule is currently on hold pending the outcome of a Supreme Court appeal against an unsuccessful legal challenge to the outcome of the referendum that approved it.

mediators. In some Member States, hearings are, however, always conducted by the court (e.g. BE, CY, CZ). Typically, the setting of the hearing depends on the circumstances of the case. Children are heard either before the court directly, in a private room (*in camera*), or in alternative settings away from the court. In some Member States it is specifically required to ensure a pleasant atmosphere for the child (e.g. CY, HU). The hearings are not held in public in any of the Member States unless it is specifically considered appropriate. While it is necessary that the child is heard alone in some Member States, other Member States allow the parents to be present (e.g. BG, CZ). In Germany, the parents must be absent to ensure that the child is not influenced, but the guardian *ad litem* may be present. In some Member States, the statement of the child is read out loud in the courtroom after the hearing and is thus made available to the parents (e.g. BE). It can further be noted that a few Member States (e.g. LV, PL) allow the child's representatives to express the opinion of the child instead of hearing the child directly.

(c) Doubts whether or not the child's interest is sufficiently protected on the basis of the current rules

In general terms it was raised during the expert panel and some interviews that the hearing of the child is currently not promoted to a sufficient extent in the Regulation. Currently, it is mentioned in Article 11, but not as a general rule. The stakeholders regretted that it is not clear that a child must be given the opportunity to be heard for all cases, not only for return procedures.

Furthermore, some stakeholders stated that it is currently **difficult for the courts to apply the requirements of the Regulation due to a lack of precision or common guidelines**. As indicated above, the Regulation states in what types of proceedings a child must be given the opportunity to be heard, if it is considered appropriate. However, there are no guidelines specifying which criteria should be taken into account for determining whether a hearing is appropriate or not and how the hearing should be carried out. For example, the national expert for Cyprus indicated that there is ambiguity concerning the assessment of the degree of maturity of children. The wording of Article 42(2)(a) and Article 11(2) of the Brussels IIa Regulation (according to which a child is to be given an opportunity to be heard unless a hearing is considered inappropriate having regard to his/her age or degree of maturity) gives, in the national expert's view, significant discretion to the national courts to decide upon the handling of the matter. It is regretted that there are currently no common guidelines that could help courts in deciding on the appropriateness of the hearing of the child. This was also supported by the respondents to the public consultation. Most respondents make reference to the different standards across Member States for determining the suitable age or capacity of the child to be heard. In particular, the definition of '*age or degree of maturity'* found in Art. 42 (2)(a) is highlighted as being in need of a greater degree of certainty. Another prominent issue involves the modes of the hearing i.e. *who* should hear the child and *where*. As outlined above, there are diverging approaches from all Member States in these areas.

An interviewee from the United Kingdom noted that for the moment the question of how the *'in-depth examination'*[130] of the child suggested by the ECtHR should be put into practice remains unexplored.[131]

The conditions laid down in point c) of Article 41(2) of the Brussels IIa Regulation have caused problems in practice in Hungary as well, as pointed out by the Hungarian national expert. According

[130] The European Court of Human Rights ruled that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms requires the courts in a Hague Convention case 'to conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and [to make] a balanced and reasonable assessment of the respective interests of each person'. *X v Latvia* (Application No 27853/09)

[131] Related to this, see Perrins (2012): The Supreme Court's judgment in In the Matter of S (A Child) - An Analysis (http://www.familylawweek.co.uk/site.aspx?i=ed96554)

to Hungarian law, in cases relating to rights of access, no hearing of the child takes place, because it is not obligatory where the parents have come to an agreement concerning this issue and have made a statement to the same effect. However, despite the agreement of the parents, which is considered under Hungarian law, the condition of Article 41(2)(c) is formally not met, implying that a certificate on access rights could not be issued. According to the expert, this would be contrary to the purpose of the Brussels IIa Regulation and the best interests of the child. As a consequence, in Hungary this condition is interpreted widely ('*it was not deemed expedient to conduct a hearing*') and the relevant certificate is issued, although a hearing was formally not conducted.

According to several interviewees, there are currently practical **difficulties due to different practices in the Member States** (cf. the overview of the different practices above). On the basis of these differences, some practitioners argued that it can be questioned whether the best interests of the child is sufficiently taken into account in all cases. First, the child's best interests could be endangered due to delays ensuing when recognition or enforcement of a judgment are hindered due to different interpretations of the rules on the hearing of the child. Second, some practitioners indicated that there may be cases where children are not heard although this would be appropriate. The latter point demonstrates a lack of trust in the national procedures.[132] It is underlined in this regard that it is not assumed that it is best if children are heard in as many situations as possible. Rather, a decision of whether or not a child should be heard can only be taken on a case-by-case basis.

Some of the national experts (CY, ES, LV, LI, PT, SI, UK) indicated that the **introduction of common minimum standards for the hearing of the child** as well as an exchange of best practices across Member States could help to further promote the best interests of the child and ensure that the child's voice is taken into account. Similarly, many of the stakeholders interviewed and those responding to the public consultation regard the absence of common minimum standards as problematic[133], while indicating that the ECJ case law is insufficient to secure a smooth circulation of judgments within the Union, because failure to hear a child has often been used as a reason for non-recognition of a judgment.

Nonetheless, we note that the current legal framework allows for flexibility, which may help to ensure that suitable solutions can be found on a case-by-case basis and that the different legal traditions of the Member States are accepted. Similarly, a German judge pointed out that different traditions need to be accepted in the framework of international cooperation.

(d) Difficulties relating specifically to return proceedings

The Regulation aims at reinforcing the right of the child to be heard during the procedure, compared to the Hague Convention, which does not mention the hearing of the child as a requirement.

As concerns return proceedings in the Member State of abduction (Hague proceedings), the Brussels IIa Regulation stipulates that the court is to give the child the opportunity to be heard unless the judge considers it inappropriate due to the child's age and degree of maturity. No such statement is made with respect to proceedings in the Member State of origin on the basis of Article 11(6)-(8). However, in order for return orders issued by the Member State of origin on the basis of Article 11(8)

[132] This point was also raised in the 2010 Note by the European Parliament *Protection of Children in Proceedings* (http://www.europarl.europa.eu/RegData/etudes/note/join/2010/432737/IPOL-JURI_NT(2010)432737_EN.pdf)

[133] Specifically, 79% (129 of 169) respondents think that common minimum standards for the hearing of a child could help in avoiding the refusal of recognition, enforceability and/or enforcement of a judgment from another EU country. While this tendency is evident among most groups responding to the public consultation, Member States are divided with four (FR, NL, PT, UK) opposing the introduction of common minimum standards and four (BE, CZ, DE, PL) supporting their introduction.

to be certified and directly enforceable, the court must indicate in the certificate that the child was given the opportunity to be heard unless this was not considered appropriate.[134]

Generally, the child seems to be heard regularly in return proceedings but there is currently scope for **inconsistencies when it comes to deciding when a hearing is considered appropriate or not**. Indeed, several experts (CY, GR, IE, IT, LV, MT, PT, SI) indicated that the hearing of the child is carried out regularly as a recognised part of the return procedure, although there is a level of discretion to be exercised by the judges when deciding whether a hearing is appropriate to the specific circumstances. For instance, the Irish national expert pointed out that, as there is no dedicated mechanism for the hearing of the child under national law, courts carry out hearings as a matter of discretion, leading to inconsistencies in practice. However, as a positive factor, the Irish national expert pointed out that proceedings under Brussels IIa arguably involve the views of children being heard by courts more frequently and in a more consistent manner than is the case in domestic family law proceedings. According to him, this results from the mandatory language of Article 11(2) compared to existing domestic law, and the fact that consistent practice has been developed by a small cohort of judges who adjudicate on international child abduction cases in Ireland. Related to this, the German expert indicated that the Brussels IIa Regulation has been criticised in Germany because no similar sanction to Article 11(5) is ordered by Article 11(2) in cases where the child has not been heard. This is regarded as unequal, because Article 11(5) provides for a strict sanction (setting aside of the decision) in cases where the applicant had no occasion to be heard in the proceedings on the return of the child. A representative of the Czech Central Authority noted that there have been cases where the child was not heard at all but it was unclear whether this was due to a failure to abide by the rules in the Regulation.

Such inconsistencies became apparent in the ECJ case Aguirre *Zarraga*.[135] The case concerned the question of whether a certified judgment from Spain needs to be enforced in Germany, although the child was not given an opportunity to be heard according to the views of the enforcing court. The ECJ ruled that it is clear from Article 24 of the Charter of Fundamental Rights of the European Union and from Article 42(2)(a) of Regulation No 2201/2003 that those provisions refer **not to the hearing** of the child per se, but **to the child's having the opportunity to be heard,** and laid down guidelines as to the extent of the obligation to hear the child.

First, the ECJ recalled that it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24(2) of the Charter that, in all actions relating to children, **account must be taken of the best interests of the child**, since those interests may then justify a decision not to hear the child.

Then, it reaffirmed that **it is for the court which has to rule on the return of a child to assess whether such a hearing is appropriate**, since the conflicts which make necessary a judgment awarding custody of a child to one of the parents, and the associated tensions, create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly, while remaining a right of the child, **hearing the child cannot constitute an**

[134] See the section on 'Provisions specific to child abduction cases' for a more detailed explanation of the proceedings governed under Article 11.

[135] Case C-491/10 PPU *Aguirre Zarraga v Simone Pelz* (http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130deea77d085706a44a1aa8abe769a50857a.e34KaxiLc3eQc40LaxqMbN4Ob3qKe0?text=&docid=83464&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=123411).

absolute obligation, but must be assessed having regard to the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights.

According to the ECJ, it is not a necessary consequence of the right of the child to be heard that a hearing before the court of the Member State of origin take place, but that right does require that **the legal procedures and conditions which enable the child to express his or her views freely be made available to that child,** and that those views are obtained by the court.

The ECJ specified that where that court decides to hear the child, the court is 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 his or her views. With the same aim, it must, insofar 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 Regulation No 1206/2001.

Finally, the ECJ stated that **remedies have to be pursued in the Member State of origin** so that the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the grounds that the court of the Member State of origin which handed down that judgment may have infringed Article 42 of the Regulation, interpreted in accordance with Article 24 of the Charter of Fundamental Rights of the European Union, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin.

(e) Difficulties relating to the recognition and enforcement of judgments on the basis that the child was not heard

The majority of stakeholders consulted indicated that there is a **connection between the different practices relating to the hearing of the child and potential refusals to recognise or enforce judgments in parental responsibility**. Several experts assumed that a refusal of recognition and enforcement of a decision on parental responsibility according to Article 23(b) might be the consequence of the fact that there are currently no common minimum standards concerning the hearing of the child in court proceedings (BE, DE, FR, IT, LT, PT, RO). The majority of respondents to the public consultation also indicated that the current lack of common standards can be detrimental to the recognition and enforcement of judgments with 78%[136] indicating that common minimum standards for the hearing of a child could help in avoiding the refusal of recognition, enforceability and/or enforcement of a judgment from another EU country. On the other hand, another participant in the expert panel suggested that the problem might not lie in the lack of common minimum standards, but rather that Article 23(b) refers to national procedures instead of Union standards.[137] Indeed, Article 23 allows courts to judge the practices of other Member States by their own standards and refuse recognition of a judgment if their own national standards are not met.

While no statistics on the use of the grounds of refusal are available[138], specific cases where the lack of common standards on the hearing of the child has led to refusals of recognition and/or

[136] I.e. 134 of 171 responses.

[137] The expert suggested that fundamental principles could be defined in a recital to ensure that this is understood correctly.

[138] As part of this study we carried out a collection of decisions relating to the Brussels IIa Regulation. This exercise showed that only limited data is available. In many countries only decisions of superior courts and decisions with an element of novelty in the jurisprudence are published. Central databases, such as the unalex database do not cover all EU Member States. As a result of the limited availability and completeness of the published and accessible case law on the application of the Brussels IIa Regulation in the Member States, it is not possible to use the case law data as a representative quantitative source (Methodological annexes, section *Data concerning the application of the Brussels IIa Regulation*).

issuance of a declaration of enforceability were raised by several national experts. The Italian expert explained that differences in national practices can lead to difficulties in relation to the certificate under Article 39 of the Regulation, which is needed to apply for a declaration of enforceability,[139] the main grounds used to refuse judgments in Italy being the lack of a hearing of the child. In Italy, the hearing is deemed necessary except when it could cause prejudice to the child. In general, the lack of a hearing of the child cannot be legitimised with a general reference to age or immaturity, particularly when the child has already been heard in previous judicial proceedings in another Member State[140]. Despite the affirmed necessity of the hearing of the child, the judge holds discretionary power in deciding when it is appropriate or not, taking into account the specificities of the case and attaching importance to the potential prejudice including to the emotional involvement (most of all when the child is under 12 years old), justifying the decision based on the best interests of the child[141].

The situation is similar in Romania and Germany. An examination of Romanian judgments by the national expert led to the conclusion that only in exceptional cases have the courts found the applicability of any grounds for refusing recognition of foreign judgments or the declaration of enforceability. The grounds most often invoked by the parties have been those in Article 23 (a) on the public policy and (b) on the hearing of the child. In Germany, available case law mainly deals with a refusal of recognition and enforcement due to a violation of Article 23 (b) relating to the hearing of the child. In the case *OLG Schleswig 19.05.2008, unalex DE-2138*, the court ruled that it is not sufficient that the child was summoned for the hearing, but that the court has to take all necessary measures in order that the child may make use of its right to be heard in an effective manner. This right is not excluded by the fact that the child had been heard in the past before a court of the Member State of enforcement. The case *OLG Oldenburg 30.04.2012, unalex DE-2893* demonstrates that the hearing of the child is a fundamental principle of German law in parental responsibility proceedings. The recognition and enforcement of a foreign judgment cannot be refused, however, under Article 23(b) on the sole grounds that the hearing did not take place before a judge but before a psychological expert.

Other national experts pointed to the fact that courts in their own jurisdiction are rather restrictive when it comes to the hearing of the child and indicated that this may be a reason for non-recognition in other Member States. The Belgian expert pointed out that Belgian courts have been reluctant to hear children, as there is no obligation to do so under Belgian law[142], and that this can potentially lead to refusal of enforcement in other Member States. Belgian courts have also noted the difference between the Article 23 regime and the Article 41 regime: under Article 23 of the Regulation, recognition may be denied if the child has not been given the opportunity to be heard, except in the case of urgency, while Article 41 does not include any caveat for cases of urgency. One court has decided that the urgency caveat should also be read in Article 41.[143] Similarly, the French expert suspected that other Member States may refuse French judgments because certain practices that concern the hearing of the child may not be in line with the rules in other Member States. In particular, this could be the case if children are heard indirectly, i.e. if the child does not state its

[139] It was further explained by the Italian expert that, as far as Articles 41 and 42 of the Regulation are concerned, the lack of a hearing cannot represent a ground of non-recognition given the impossibility of opposing recognition and enforcement of a certified judgment.
[140] Corte di Cassazione No 12293 of 19 May 2010; Tribunale per i minorenni Milano, decree, 16 January 2011.
[141] Corte di Cassazione No 13241 of 16 June 2011.
[142] Courts have therefore refused to hear the children even when delivering Article 41 certificates (see *e.g*. CA Ghent, 10 December 2009, *Revue@dipr.be*, 2010/1, 64 – the Court notes that there is no obligation under Belgian law to hear the children; the Court then note that the children are too young to be heard; in this case, the children were 10, 7 and 4 y. old; CA Ghent, 6 November 2008, *Tijdschrift@ipr.be*, 2010/1, 83, at p. 91 – the Court likewise notes that there is no statutory duty to hear the child under Belgian law and that the child is too young to be heard; in this case, the child was 5 y. old).
[143] CFI Brussels, 13 February 2007, *Rev. trim. dr. fam.*, 2007, 792, at p. 794.

views personally but via a third party, which could be a judge or a lawyer. The possibility to hear children indirectly was also mentioned by the Hungarian expert, who stated that hearings by a psychologist are common in Hungary and that it is not clear whether this constitutes a hearing within the meaning of Articles 39-41. Two participants in the expert panel confirmed these assumptions, explaining that issues with regard to the non-recognition of child hearings mainly result from national differences in the practical operation of the hearings (e.g. who conducts the hearing, how the hearing is conducted, whether videoconferencing is allowed, etc.). Also, a fundamental lack of trust between the Member States relating to their practices of hearing the child was identified.

Different practices related to the representation of the child in court

The scope of the Brussels IIa Regulation with respect to matters of parental responsibility includes the establishment of '*guardianship, curatorship or similar institutions*' (Article 1.2.b) and '*the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child*' (Article 1.2.c). This refers to the representation of the child in court. The Regulation does not give any substantive rules or guidelines concerning the **legal representation of the child in court**, notably with regard to the form of representation, designation of a guardian *ad litem* as well as his or her functions and powers.

Based on the study team's assessment, the following main findings result from the evidence collected: The fact that the Brussels IIa Regulation does not include any rules or guidelines concerning the legal representation of the child in court appears to be a source of legal uncertainty due to different practices across the Member States and a lack of information on these practices. In some cases the representation of the child is not ensured. In the past, this was the case when the child was habitually resident and present in Member State other than the Member State of jurisdiction. In such cases, it was not clear according to which procedure a **guardian ad litem** ***was to be appointed.***

It can be noted that the conflict of law rules with regard to the legal representation of children were harmonised by the **1996 Hague Convention** in all EU Member States with the exception of Italy (Articles 16 et. seq. of the Convention). However, the substantive law of representation of children differs substantially between the Member States, in particular between the common law and civil law systems. More specifically, the **practices in the Member States vary with respect to the extent to which children are involved in court proceedings and therefore need representation, the persons that can act as guardians *ad litem*, the procedure of appointment, as well their functions and powers**.

In all Member States, the holders of parental responsibility are by default the representatives of the child, either solely or together, depending on the arrangements of custody. In most of these Member States, it is, however possible to appoint an external person, if there is a potential conflict between the parents and the child (e.g. AT, BG, CY, CZ, DE, ES, FR, HU, IT, PL, SK). A Slovakian expert pointed out that conflicts can be expected in the majority of cases relating to parental responsibility.

Many Member States have the possibility or requirement that the child is appointed a special guardian or guardian *ad litem* to represent him/her in the proceedings (e.g. BE, HR, CZ, DE, HU, IE, LU, MT, NL, PL, PT, RO, SK, SE, SI, UK). This role could, for example be fulfilled by relevant authorities (e.g. CZ, CY, SL) or by a natural person, such as a relative of the child (e.g. CZ, EE, FR, IT). In some countries, children could also be represented by lawyers (e.g. LU). The competences of the guardians differ, for instance, with regard to their powers of intervention in proceedings. Typically, the guardians have to promote the interest of the child and have to keep the child informed about the course of the proceedings. In some countries, the powers and functions are not or not strictly defined by law, but may for example be defined by the court on a case-by-case basis (e.g. BE, IE, ES,

LU). According to the French national expert, this is considered a shortcoming. It would be desirable to clarify the role of the child's representative[144] as regards competences and independence. Additional forms of representation or support to children were mentioned by some experts (e.g. AT, MT). In Austria, several possibilities exist to provide support to the child beyond its legal representative. For example, it is possible for the court to appoint a so-called child's support (*Kinderbeistand*), if the intensity of the dispute requires it and an appropriately qualified person is at the court's disposal. This person has access to files and can be present in hearings, but is neither a party to the proceedings nor the child's representative.

In some Member States, it is possible for children to participate in court proceedings directly (AT, BE, DE, RO). For example, some Belgian courts have in the past accepted that a child could intervene directly in court proceedings, inter alia in cases where courts are seised of disputes relating to a right to personal contacts with the child. In proceedings before the Belgian Juvenile Court[145], it is generally possible that the child participates without a representative, if the child has legal counsel.[146]

Some national experts (FI, GR, IT, NL, PL, UK) noted that the child is not usually involved in parental responsibility proceedings and therefore does not need representation (although there may be a possibility to appoint a guardian *ad litem*). In Finland, this is the case for custody and rights of access proceedings. There are possibilities for the child to participate in care proceedings.[147]

Despite this lack of harmonised provisions, a **large majority of national experts indicated that no specific issues seem to have occurred** based on the case law available. Nonetheless, some national experts (CY, ES, IT, NL, PT, SK, SI, UK) pointed to **difficulties** regarding the representation of the child in court, notably uncertainty generated by the differences in national rules as well as specific issues that relate to the application of the Regulation.[148] With respect to this latter point, the experts raised different challenges, which may be due to the fact that some Member States face individual challenges based on their national requirements.

In general terms, the differences in national rules concerning a child's representation in court seem to be a **source of uncertainty** as to the applicable processes in each Member State relating to matters of parental responsibility. This was, for example, raised by the Cypriot expert. The Slovakian expert indicated that problems or a lack of clarity occur mainly because there is insufficient information regarding practices in other Member States.

[144] In France, this role is fulfilled by an '*ad hoc* administrator'.

[145] We note the recent reform of courts in Belgium. Previously, the Juvenile Court was one of the three divisions of the Court of First Instance. The Juvenile Court has been replaced by a Family and Juvenile Court (Tribunal de la Famille et de la Jeunesse, Familie- en Jeugdrechtbank) (Loi du 30 juillet 2013 portant création d'un tribunal de la famille et de la jeunesse, Moniteur Belge, 27 septembre 2013, Ed. 2, 68429). The reform entered into force on 1 September 2014. Although it is difficult to predict how courts will react now that the Family and Juvenile Court has been created, there is no reason of principle why the previous case law, which accepted that a child could intervene directly in proceedings which concerned him/her directly, will not stand. This case law was grounded on the child's own right to intervene, even though the child is a minor, in matters which affect him/her directly. The creation of a family court has not changed this rationale. Hence, courts may still continue to refer to previous case law. For more information on the creation of the family court, see e.g. Didier Pire (2014)., "Tribunal de la famille et de la jeunesse: loi réparatrice", *Actualités du droit de la famille* 178.

[146] see e.g. T. Robert, "De burgerrechtelijke procesbekwaamheid van de minderjarigen", in De procesbekwaamheid van minderjarigen, CBR, Intersentia, 2006, (37), 68 ff**.**

[147] A few national experts commented on the national substantive rules in their Member State and noted that there may be certain shortcomings in their view. For instance, the national expert for the Netherlands pointed out that Dutch courts examined whether the national approach whereby a child cannot be party to proceedings is contrary to international law (European Convention on Human Rights and the International Convention in the Rights of the Child). The court held that the Dutch practices were in line with these standards (CA Amsterdam, 4 May 2010, NIPR 2010 392, LJN:BM2916). This is, however, beyond the scope of this study which deals only with the application of the Regulation.

[148] Such difficulties based on the varying practices and potential shortcomings have also been raised in the 2010 Note by the European Parliament *Protection of Children in Proceedings* (http://www.europarl.europa.eu/RegData/etudes/note/join/2010/432737/IPOL-JURI_NT(2010)432737_EN.pdf)

In addition specific issues that relate to the application of the Regulation were raised.

The Slovakian national expert and a Slovakian interviewee indicated that there have been cases where the **representation of the child in court was not ensured**. According to these stakeholders, such situations have occurred in proceedings regarding matters outside the scope of the Brussels IIa Regulation (for example, in questions relating to paternity or successions) in which the courts of Member State A had jurisdiction, but the child had his or her habitual residence in Member State B. If, in the course of the proceedings before the court of Member State A, a guardian *ad litem* has to be appointed for the child, the court of Member State A does not have jurisdiction to rule on this matter, but the courts of Member State B do, on the basis of article 1(2)(c) of the Brussels IIa Regulation. In practice, ad hoc solutions to this complication have been found in specific cases, but these have not always been in the best interests of the child.

Case example: Typical difficulties concerning the representation of the child in court (Slovakia)

An interviewee described a typical situation that could arise when, for example, a question relating to paternity is decided before a Slovak court. It is assumed that the father is of Slovak nationality and the child has its habitual residence in Austria. Under Slovak procedural law, the child needs to have appointed a guardian *ad litem* in such proceedings. However, the appointment of the guardian is not a matter of procedural law, but relates to the parents' rights and responsibilities and, thus falls under the Brussels IIa Regulation. According to the Brussels IIa Regulation, the Austrian courts in these circumstances have jurisdiction in matters of parental responsibility. The Austrian courts would apply *lex fori* which did not provide for the appointment of a guardian.

From discussions at an EJN meeting, it seems that about half the Member States were in a similar situation to Slovakia. The other half indicated that they would act like Austria and would not appoint a guardian.

Finally, an issue relating to the scope of the Regulation with respect to matters of parental responsibility became apparent in a recent request for a preliminary ruling submitted by a Czech court. The question concerned proceedings in a successions case. In that case an inheritance settlement agreement concluded on behalf of a minor by his or her trustee required the approval of a court in order to be valid. The court asked whether the decision falls within the scope of Article 1(1)(b) or Article 1(3)(f) of the Brussels IIa Regulation.[149] The case is still pending.

1.4 Recognition and enforcement

Beyond the issue of the hearing of the child specifically examined under section 1.3, the Brussels IIa Regulation aims at ensuring speedy and unproblematic recognition and enforcement of judgments in another Member State and avoiding undue non-recognition (*operational objective 2*).

This section assesses the extent to which the Regulation has achieved this operational objective and examines legal issues that have emerged in this regard. The section is structured in three sub-sections relating to:

- Horizontal issues (i.e. issues that are applicable to matrimonial matters, matters of parental responsibility and return of the child);
- Matrimonial matters; and
- Parental responsibility.

[149] Case C-404/14, Request for a preliminary ruling from the Nejvyšší soud České republiky (Czech Republic) lodged on 25 August 2014 — Marie Matoušková, court commissioner in inheritance proceedings v Misha Martinus and Elisabeth Jekaterina Martinus, represented by David Sedlák as trustee; Beno Jeriël Eljada Martinu, OJ C 431, 1.12.2014, p. 10–11.

1.4.1. Horizontal issues

This section discusses legal issues of horizontal nature (i.e. concerning matrimonial matters, matters of parental responsibility and return of the child) related to the recognition and enforcement rules of the Brussels IIa Regulation. The legal issues covered include:

- Practical difficulties with the recognition of judgments (relating to awareness);
- Uncertainties relating to applications for non-recognition;
- Incorrect application of the system of certificates laid down in Articles 39, 41(2) and 42(2); and
- Legal aid systems that do not sufficiently take into account the specific needs and costs related to proceedings under the Brussels IIa Regulation.

Practical difficulties with the recognition of judgments (relating to awareness)

Generally, there is no procedure required for the **recognition of judgments** in matrimonial matters or in matters of parental responsibility stemming from another Member State.[150] However under Article 21 para 3 of the Brussels IIa Regulation, any interested party may apply for non-recognition of a judgment.

In this regard, the ECJ clarified in *Case C-195/08 PPU, Rinau (11.07.2008)* that, except where the procedure concerns a decision certified pursuant to Articles 11 para 8 and 40 to 42 of the Brussels IIa Regulation, **any interested party can apply for non-recognition of a judicial decision – even if no application for recognition of the decision was submitted beforehand**. An application for non-recognition of a judicial decision is not permitted if a certificate has been issued pursuant to Article 42 of the Regulation. In such a situation, the decision which has been certified is enforceable and no opposition to its recognition is permitted.

Based on the study team's assessment, the following main findings result from the evidence collected: it appears that the automatic recognition of judgments in matrimonial matters and cases of parental responsibility functions well in most cases in practice, with only very few practical problems in parental responsibility matters in some Member States relating to the understanding of a term "any interested party" (Latvia), the practical co-existence of automatic recognition and the exequatur procedure for access rights (Luxembourg) as well as the non-recognition of interim orders (Netherlands).

The national experts of a large majority of Member States reported that there are **no practical difficulties with regard to the recognition of judgments** in matrimonial matters or in parental responsibility. Similarly, most experts and stakeholders interviewed indicated that the system is **functioning well**: it is perceived as an advantage that judgments are recognised automatically across the EU Member States. Most interviewees had heard of no or very few cases, where the recognition of a judgment was refused.[151] Specific cases regarding the (non-)recognition of judgments were only reported by the national experts for IE, LU, LV, NL, PL and RO.

Nonetheless, according to several national experts, the **lack of or inappropriate hearing of the child** is a widely used as grounds for refusal of recognition. Different national practices for the hearing of the child and a lack of mutual trust in this domain have led to a series of cases where recognition and

[150] Article 21 (1) Brussels IIa: "*A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required*".

[151] For instance, a judge from Sweden pointed out that applications for the recognition of judgments under Brussels IIa are not very common compared to other Union instruments, such as the Brussels I Regulation. There are about 10-15 cases per year in Sweden (rough estimate).

enforcement of judgments from other Member States have been rejected.[152] A more detailed discussion of the issues relating to the hearing of the child and differences in national practices across the EU is contained in the section '*The right of the child to be heard and its representation in court' (section 1.3)*.

Apart from that parental responsibility matter, very few **practical problems** have occurred in relating to the understanding of a term '*any interested party*' (Latvia).

In Latvia, practical difficulties have been observed with regard to Article 21 para 3 of the Brussels IIa Regulation, in particular the **understanding of a term '*any interested party*'**. The provision states that "*[…] any interested party may […] apply for a decision that the judgment be or not be recognised.*"

The national expert for Latvia reported several cases where a court of another Member State has granted custodial rights for a Latvian child to a guardian or competent institution in this Member State (e.g. the United Kingdom or Ireland). Consequently, the guardian or institution is entitled to perform all actions on behalf of the child, e.g. to manage issues relating to the acquisition of another citizenship for the child, to submit an application for the issuance of identity documents for the child, etc. There have been cases where the **Citizenship and Migration Office of Latvia** considered itself as an '*interested party*' within the meaning of Article 21 para 3 and – in order to proceed with the child's citizenship or passport matters – applied to the Latvian courts for judgments on the recognition of judgments by the courts of other Member States in relation to the child's custodial rights. However the Central Authority of Latvia intervened and clarified that '*any interested party*' is a **party that took part in the proceedings**.

Uncertainties relating to applications for non-recognition

Articles 22 (relating to matrimonial matters) and 23 (relating to matters of parental responsibility) of the Brussels IIa Regulation provide similar lists of **grounds for not recognising a judgment that originates from another Member State**. In addition, Articles 25 and 26 provide guidance by respectively clarifying first, that the recognition may not be refused on the grounds that the law of the Member State in which recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts and secondly, that no review as to the substance of the judgment in matrimonial or parental responsibility matters should be undertaken.

Commentators have noted that different interpretations and use of the grounds for refusal may lead to legal uncertainty and a lack of predictability for citizens. Moreover, the grounds for non-recognition could potentially be considered as too broad, leading to unnecessary costs and time delays for citizens in cases in which judgments are not recognised.

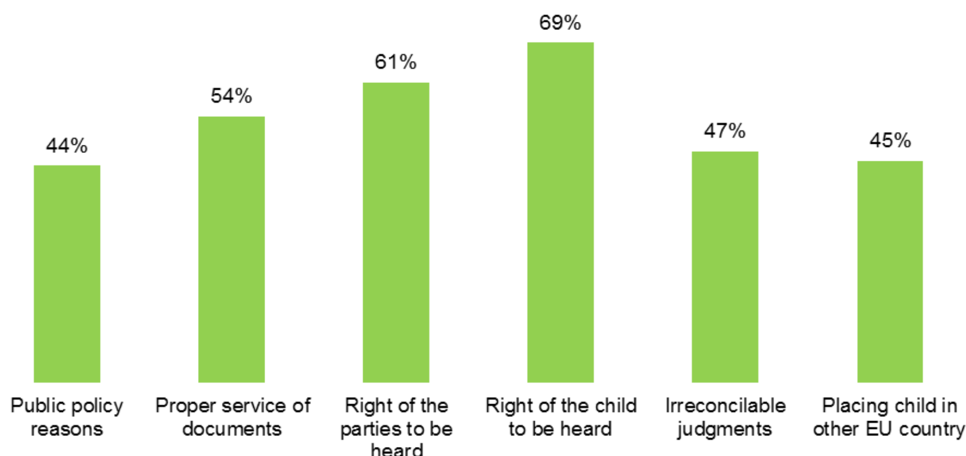
Based on the study team's assessment, the following main findings result from the evidence collected: it appears that no major practical problems have been reported in relation to these lists of grounds for the non-recognition of judgments from other Member States. The current grounds for refusal have only generated a very limited amount of case law and are generally considered as appropriate by experts and stakeholders.

Generally, the respondents to the European Commission's **public consultation** supported the existent grounds for non-recognition to a varying degree, with strongest support for the 'right of the

[152] Similarly, in its 2014 Application Report concerning the Brussels IIa Regulation, the European Commission noted that 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 heard.
Cf. European Commission (2014): *Report from the Commission on the application of 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*, COM(2014) 225 final, p.11.

child to be heard' and the 'right of the parties to be heard' (153 responses; respondents could chose multiple options). The detailed results are depicted below.[153]

Figure 1: Evaluation of the grounds for non-recognition by respondents to the European Commission's public consultation (percentage of support)



Similarly, the current grounds for refusal were considered as appropriate by most participants in the expert panel. The experts refused the proposal to establish a hierarchy within the grounds in the Brussels IIa Regulation.

According to the national experts of all Member States, there are **no practical problems** with the lists of grounds for non-recognition of judgments, which are largely considered as appropriate. While specific case law on the non-recognition of judgments based on the grounds listed in Articles 22 and 23 was reported by the national experts for AT, CY, DE, FR, IT, LU, NL, PT, RO and SI, in none of these cases have any practical problems put the appropriateness of the lists of grounds into question. With regard to matrimonial matters, this is confirmed in a recent *Study of the European Parliament on the Interpretation of the Public Policy Exception* (hereinafter: the 2011 EP study).[154] From the national reports it was found that there is almost no pertinent case law on the recognition of divorce judgments. Only five cases were reported; one from Austria, one from England, two from France and one from Germany.[155] In parental responsibility matters, the national reports referred to two Austrian decisions, 12 decisions in England (two appealed) and four in Germany (one appealed). One appellate decision was reported from Lithuania, one from Spain and one from Finland. The study observed that the most important issues in practice relate firstly to the hearing of the affected child and, secondly and more generally, to whether the foreign order serves the best interests of the child.

Several national experts noted that most decisions on the refusal of recognition by the Member States' courts have been based on national public policy reasons and the best interests of the child (Article 22 (a) and Article 23 (a)) and the conditions/lack of the hearing of the child (Article 23 (b)).

[153] Respondents were asked to indicate which safeguards they considered appropriate to keep in the abolition of exequatur. The safeguards as demonstrated in the figure correspond to the grounds of non-recognition in articles 22 and 23.

[154] European Parliament, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, 2011, http://www.europarl.europa.eu/studies.

[155] The Austrian case concerned the recognition of a German judgment on spousal maintenance where the Austrian Supreme Court decided on the recognition as an incidental question and held that it operated automatically under point (a) of Article 22 of Regulation (EC) No 2201/2003.

(a) Public policy and best interests of the child (Article 22 (a) and Article 23 (a)

In matrimonial matters, Article 22 of the Regulation contains a public policy exception to the recognition of judgments: *'A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought'.* In decisions relating to parental responsibility, a similar rule is set out in Article 23: *'A judgment relating to parental responsibility shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child'.* The test of public policy referred to in these articles may not be applied to the rules relating to jurisdiction set out in Articles 3-14.[156]

National experts and interviewees highlighted several general considerations and specific cases referring to national public policy reasons and the best interests of the child as grounds for refusal.

In general terms, the national expert for Cyprus noted that a judgment concerning the **parental responsibility of a child whose parents are of the same sex would most probably not be recognised and enforced in Cyprus** on public policy grounds, as such a judgment would go against domestic public policy principles.

The national expert for Italy noted that it is generally accepted that there is **no violation of the public order** if the **foreign divorce has been obtained without a previous period of separation**, which is required in Italy (*Corte di Cassazione No 16978 of 25 July 2006; Corte d'Appello Perugia 10 March 2011*), and **without regulating the collateral matters of parental responsibility, maintenance or matrimonial property** (*Tribunale Belluno 5 November 2010*).

Some experts and stakeholders interviewed indicated that legal certainty is currently harmed by the **lack of clarity regarding the interpretation of 'public policy'** in practice. Some interviewees believed that it is necessary to have a practical guide on what constitutes 'public policy' in the different Member States. A Belgian interviewee suggested referring only to 'violations of human rights', instead of 'public policy'.

An Austrian expert argued that the current **grounds for non-recognition** do not sufficiently give weight to the best interests of the child because an examination regarding the observance of the best interests of the child is not mandatory. Article 23(a) requires recognition to be refused if a foreign judgment is '*manifestly contrary to the public policy of the Member State in which recognition is sought* ***taking into account the best interests of the child****.*' This argument is illustrated by the case below.

Case examples: Decisions against the best interests of the child (Austria)

In a case involving a Hungarian couple and their child, the family had lived in Austria prior to the separation of the parents. After the separation of the parents, the child had continuously lived with the father in Austria. However, when the child was ten years old, the mother took the child to Hungary. Within three weeks, she filed an application for custody with the Hungarian courts. The Hungarian courts found that the child was habitually resident in Hungary and accepted jurisdiction. During the proceedings, an expert opinion was requested, which indicated that the child should live in Austria with its father, to where the child had returned in the meantime. However, the Hungarian courts decided against the opinion and established that the child should live with the mother.

The mother applied for a declaration of enforceability of the judgment in Austria. The

[156] Article 24 of the Regulation.

application was refused on the basis of Articles 31(2) and 23(a) of the Regulation.

While the Austrian judge did take into account the best interests of the child and refused to declare the Hungarian judgment enforceable in this specific case, the Austrian expert stated that the judge could also have decided otherwise without violating the provisions of the Regulation. It should be noted, however, that no other stakeholders raised similar concerns.

(b) Hearing of the child (Article 23 (b)

According to several national experts, the lack of or inappropriate hearing of the child is the most widely used grounds for refusal. Different national practices for the hearing of the child and a lack of mutual trust in this domain have led to a series of cases where recognition and enforcement of judgments from other Member States have been rejected.[157] A more detailed discussion of the issues relating to the hearing of the child and differences in national practices across the EU is contained in the section '*The right of the child to be heard and its representation in court'* (section 1.3).

Incorrect application of the system of certificates laid down in Articles 39, 41(2) and 42(2)

Article 39 of the Brussels IIa Regulation provides for a **system of certificates concerning judgments in matrimonial matters and on parental responsibility**. Articles 41 para 2 and 42 para 2 also provide for a system of certificates for cases relating to access rights and the return of a child. Standard forms are included in Annexes III and IV of the Regulation.

Based on the study team's assessment, the following main findings result from the evidence collected: the system of certificates is broadly well-functioning and considered as useful for the recognition and enforcement of judgments, as confirmed by experts and a majority of respondents to the public consultation (61%). While no major practical difficulties were identified, there is some room for improvement in the system's practical functioning, mainly relating to the awareness and training of legal professionals.

The functioning of the system of certificates has been the subject of **clarification by the ECJ**.

Firstly, regarding the issuing of a certificate under Article 42, the ECJ clarified in *Rinau* (C.-195/08 PPU) that once a non-return decision has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42, that this decision has been suspended, overturned, set aside or, in any event, has not become *res judicata* or has been replaced by a decision ordering return, insofar as the return of the child has not actually taken place. Since no doubt has 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 is not permitted.

Secondly, with regard to Articles 41 para 2 and 42 para 2, the ECJ has decided that the examination of whether the prerequisites of issuing the respective certificates have been fulfilled lies exclusively with the courts of the Member State of origin, and the courts of the Member State of enforcement are not entitled to any review. In particular, the courts of the Member State of enforcement are not allowed to refuse the recognition of the certified judgment arguing that the child has not been sufficiently heard in the proceedings before the court of origin (*C-491/10 PPU – Aguirre Zarraga*).

[157] Similarly, in its 2014 Application Report concerning the Brussels IIa Regulation, the European Commission noted that 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 heard.
Cf. European Commission (2014): *Report from the Commission on the application of 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*, COM(2014) 225 final, p.11.

Overall, a majority of respondents to the European Commission's **public consultation** (61%)[158] found that the **system of certificates** is **useful** and **functions in a satisfactory manner**.

Similarly, the national experts of most Member States as well as the stakeholders interviewed considered the system of certificates as useful for the recognition and enforcement of judgments, and reported that **no major practical difficulties** have occurred, while some room for improvement remains regarding the practical functioning of the system.

For example, an Estonian judge underlined the usefulness of the certificates by comparing cases involving other EU Member States to cases with third countries. She noted that there are many problems with the recognition and enforcement of judgments from the Ukraine and Russia. Often, relevant information is missing in requests from these countries, e.g. on whether the defendant appeared before court or not. The Brussels IIa Regulation has improved the situation in the EU in this regard.

Some experts and stakeholders have, however, reported **practical difficulties**, mainly relating to the awareness and training of legal professionals. Some concerns have also been voiced regarding language/translation issues, the recognition and enforcement of certified judgments as well as the impossibility of appeal against a certificate in a Member State where recognition and enforcement are sought.

(a) Lack of awareness and training

Several experts and stakeholders, including several respondents to the European Commission's public consultation, underlined that **insufficient awareness and training of legal professionals** with regard to the system of certificates is **preventing it functioning well**.

For instance, several lawyers interviewed and respondents to the European Commission's public consultation noted that it is often required for the parties to explicitly ask the judge to produce the certificate and to refer him/her to the forms included in the annex of the Brussels IIa Regulation. They stated that judges are often not fully aware of the functioning of the system of certificates.

A Hungarian interviewee believed that as certificates e.g. about a child's hearing are often very difficult to obtain from courts (which hence increase delays), it should be required by the Brussels IIa Regulation that courts automatically issue certificates.

The national expert for Belgium reported that, while no difficulties have arisen with certificates under Article 39, a core difficulty with certificates issued under Articles 41 and 42 is that bailiffs ("*huissiers de justice*"/"*gerechtsdeurwaarders*") appear to believe that such certified judgments may only be enforced in Belgium after having been the subject of a declaration of enforceability. Bailiffs routinely turn down requests to proceed to enforcement of judgments from other Member States with such certificates, arguing that such judgments should first be declared enforceable by a court in Belgium. According to the national expert for Belgium, this is an erroneous reading of Articles 41 and 42. However, until now, it has not proven possible to convince bailiffs to enforce Article 41 and 42 certified judgments directly.

Finally, several participants in the expert panel noted that practical difficulties and misunderstandings have occurred because the certificates issued based on the Brussels IIa Regulation do not include clear explanations of the rights linked to the certificates and, where applicable, an explanation that no opposition is possible.

[158] I.e. 91 of 148 responses

(b) Language and translation issues

Numerous respondents to the European Commission's public consultation noted that **language and translation issues** are often detrimental to the effectiveness of certificates in practice.

The main difficulty lies in the **absence of rules on the language that has to be used to complete the certificates** and **in which cases translations need to be provided** under Article 37 of the Regulation. For instance, it might be unclear whether the certificate should be translated in the language of the Member State where recognition and enforcement are sought.[159] In this regard, one may note that Articles 20 and 28 of the Maintenance Regulation define clear language rules: "*a transliteration or a translation of the content of the form […] into the official language of the Member State of enforcement or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where the application is made, in accordance with the law of that Member State, or into another language that the Member State concerned has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the completion of the form.*"[160]

Another issue relates to **errors in the official translation** published of the certificates (as annexed to the Regulation). In particular, an Austrian judge has stated that the wording in the certificates differs in meaning across some languages. This was reiterated by an Austrian Central Authority staff member and an Italian NGO staff member. In this regard, it is important to note that different corrigenda have already been published in the Official Journal of the EU to overcome this issue.[161]

(c) Recognition and enforcement of certified judgments

Some experts noted that the actual **recognition and enforcement of the certified judgments** still poses challenges and is not always achieved in practice (BE, DE, FR, IE, LT).

In this regard, the national expert for Ireland reported that certificates issued by Irish courts were not always recognised or enforced by courts in other countries. For example, in *AOK v MK* [2011] IEHC 360, the Irish District Court ordered that the mother should have sole custody of the child, and issued a certificate pursuant to Article 42(1) in respect of the order. An appeal was lodged by the father against the order of the District Court; the Circuit Court ordered that the appeal be struck out and the order of the District Court affirmed. A certificate was issued by the Circuit Court pursuant to Article 39 of the Regulation. The above orders were not enforced in Poland.

According to a German judge, it is sometimes not clear on the basis of the certificate whether the whole ruling or only parts of it should be enforced. For example, in some cases only part of a ruling should be enforced, but the whole ruling is included in the certificate. This has led to misunderstandings in the past, which caused delays because the judge had to read the original judgment and ask the person responsible about the meaning of the certificate. At the moment the form for the certificate does not provide enough space to clarify e.g. which sentence of a ruling is relevant. It may be an option to amend the form by providing an open field, where the exact sentence to which the certificate should apply can be inserted. This would be very important, because the certificate can have important implications, as it is the basis for enforcement measures.

[159] Article 38(2) only provides that 'If the court so requires, a translation […] shall be furnished' and that the translation 'shall be certified by a person qualified to do so in one of the Member States'.

[160] Articles 20 and 28 of 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

[161] Cf. http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003R2201

(d) Impossibility of appeal against a certificate in the Member State where recognition and enforcement are sought

With regard to certificates issued under Articles 41 and 42 of the Regulation, Article 43 of the Brussels IIa Regulation provides that "*the law of the Member State of origin shall be applicable to any rectification of the certificate*" and that "*no appeal shall lie against the issuing of a certificate […]*"." From this results an **impossibility to appeal against the validity and correctness of a certificate in the Member State where recognition and enforcement are sought**.

The impossibility to appeal against the validity and correctness of a certificate in the Member State where recognition and enforcement are sought was confirmed by the ECJ in the *Povse* (C-211/10 PPU) and *Aguirre Zarraga* (C491/10 PPU) cases. In the *Povse* case, the ECJ noted that "the issue of a certificate is not subject to appeal, and a judgment thus certified is automatically enforceable, there being no possibility of opposing its recognition". The ECJ further noted that "a certificate should be rectified only where there is a material error" and that "the law of the Member State of origin is to be applicable to any rectification". This was reiterated in the case *Aguirre Zarraga.*[162]

A German lawyer considered it problematic that there is no possibility to check the validity and correctness of the certificate (issued under Articles 41 and 42) in the Member State where the recognition and enforcement are sought. However, no other stakeholders raised this issue. It should also be noted that in any event there are remedies available in the Member State of the judgment, i.e. where the certificate has been issued.

Legal aid systems do not sufficiently take into account the specific needs and costs related to proceedings under the Brussels IIa Regulation

According to Article 50 of the Brussels IIa Regulation, the standards of **legal aid** are defined on the basis of national legislation. Article 50 is part of Chapter III on recognition and enforcement of foreign decisions. Its scope is restricted, therefore, on legal aid for proceedings on the recognition or enforcement of a decision made in another Member State. In such proceedings an applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21, 28, 41, 42 and 48 to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement.

Based on the study team's assessment, the following main findings result from the evidence collected: it appears that no major practical difficulties related to the guarantee of legal aid were identified. Yet, there are some concerns as to whether the legal aid systems are taking the specific needs and costs related to complex international proceedings sufficiently into account.

Apart from the provisions of Article 50, the Brussels IIa Regulation does not contain any provision on the granting of legal aid for the proceedings on divorce or on parental responsibility in the Member State of origin. For these proceedings a minimum standard of legal aid was established by Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes[163]. In view of specific **additional costs of international procedures** (such as costs for interpretation and translation), some interviewees considered the existing legal aid systems as insufficient to ensure an equal access to justice. They therefore called for specific state support for such costs linked to the international nature of proceedings. Some interviewees voiced **doubts as to whether state-aid lawyers**

[162] For more details regarding this case, please refer to the previous section "*Hearing of the child and its representation in court*".
[163] O.J. EU 2003 No L 26, p. 41

necessarily have the required language skills and subject matter expertise to deal with complex international cases of matrimonial matters and parental responsibility.

According to the national expert for France, the **cost related to the return of the child to a foreign country can be a problem for the parent 'victim'**, even though he/she can obtain legal aid from the French Legal Aid Office. This aid will not necessarily cover all the costs, especially not those concerning the practical aspects of repatriation of the child.

Potential difficulties may emerge from the Brussels IIa Regulation's reliance on national standards for legal aid in combination with the existing differences in the Member States' regimes. Furthermore, representatives of the European Judicial Network noted that in some Member States the losing party, even if benefitting from legal aid, may have to bear the other party's legal representation or court fees. Moreover, costs for the return of a child are generally not covered by legal aid but can be imposed on a party by the judge in some systems.[164] Likewise, there is no common denominator as to the requested State's responsibility for the applicant's travel costs.[165]

Nonetheless, none of the national experts identified any significant difficulties with regard to the guarantee of legal aid. Most stakeholders interviewed similarly concluded that the **legal aid systems** are **functioning well**.

One may note that the **Maintenance Regulation contains more detailed provisions on legal aid** than the Brussels IIa Regulation.[166] Legal aid can be obtained for all proceedings under the Maintenance Regulation if the conditions are met. Furthermore, taking on board the Legal Aid Directive[167], the Maintenance Regulation defines what kind of support needs to be covered as a minimum, notably: pre-litigation advice with a view to reaching a settlement prior to bringing judicial proceedings, legal assistance in bringing a case before an authority or a court and representation in court, costs of proceedings and the fees to persons mandated to perform acts during the proceedings, costs of the opposing party (where applicable), interpretation, translation of the documents required by the court or by the competent authority and travel costs.

1.4.2. Matrimonial matters

This section discusses the main legal issue found in matrimonial matters related to the recognition and enforcement rules of the Brussels IIa Regulation. Essentially, practical difficulties relating to the automatic updating of civil status documents is the most significant issue facing international couples in this area.

Difficulties relating to the automatic updating of civil status documents

Article 21(1) of the Regulation stipulates that a judgment given in a Member State is recognised in the other Member States without any special procedure being required.

Article 21(2) of the Regulation specifies that in particular, no special procedure may be required to update a civil status record in one Member State on the basis of a judgment on divorce, legal separation or annulment of marriage issued in another Member State. Article 52 further stipulates that no legalisation or other formality is required with regard to the recognition and enforcement of civil status documents.

[164] See Article 26(4) of the 1980 Hague Convention.

[165] European Judicial Network: *The method for processing and hearing incoming return cases under the 1980 Hague Convention in conjunction with Regulation (EC) No 2201/2003 – Best practices and common minimum standards*, p 8.

[166] Cf. Article 44-47 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.

[167] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, *OJ* L 26/41, 31.1.2003.

On the basis of the Commission's on-going work on the effects of civil status documents, it can be deduced that the recognition of civil status documents generally causes practical problems for citizens, mainly relating to delays, language and costs.[168] According to the Eurobarometer survey on civil justice carried out in 2010 "*six out of every ten questioned replied that they had had to fulfil several formalities when presenting a document in the Member State of residence"*. 'Formalities' included translation (26%), legalisation (24%), producing an apostille (i.e. an additional authentication document) (16%) or a certified copy (19%).[169]

While this issue did not come out strongly during the Evaluation, some of our interviewees also reported practical difficulties regarding the automatic updating of civil status documents. In particular, a Czech interviewee noted that some Member States request an **apostille** for the updating of civil status documents – even though this is explicitly excluded by the Brussels IIa Regulation. This interviewee believed that the processes for the automatic updating of civil status documents were not clear.

Similarly, two interviewees stated that there are practical problems with regard to the updating of civil status records in Bulgaria. Generally, parties are not only required to provide a copy of the relevant judgment, but also have to provide additional documents on the basis of Bulgarian rules.[170] This was believed to cause costs and delays for citizens.

There are specific aspects relating to the recognition and enforcement of judgments that are only practically relevant for matters of parental responsibility. In particular, questions relating to the recognition and enforcement of *authentic instruments and agreements* were only identified with regard to matters of parental responsibility. In addition, the rules on enforcement are only relevant to matters of parental responsibility, as the scope of matrimonial matters is limited under the Regulation to matters that do not need to be enforced.[171]

1.4.3. Parental responsibility

Formalities to recognise and declare enforceable judgments, authentic instruments and agreements from another Member State (exequatur) have been abolished in some areas of the Brussels IIa Regulation but remain in others. Currently, the exequatur procedure does not exist in respect of certified judgments on access rights to children and certified return orders in child abduction cases. It still applies in some cases, namely, in relation to judgments concerning the placement of a child in another EU country, and custody rights over children. It also applies for Hague return orders. While these are normally enforced in the Member State that issued the return order and thus do not require a declaration of enforceability, there could be cases where they need to be enforced in another Member State. For example, if a return order contains conditions to safeguard the well-being of the child upon return, these must be implemented by the Member State to which the child is returned. Moreover, there are cases where the abductor flees to another Member State after a return order has been issued.

The following section deals with issues that are related to the recognition and enforcement of decisions on matters of parental responsibility.

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[168] For further information see: http://ec.europa.eu/justice/civil/family-matters/civil-status/index_en.htm. See also the Commission's Green Paper on this issue, COM(2010) 747 final (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF)

[169] The Commission's Green Paper COM(2010) 747 final (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF)

[170] One of these interviewees also stressed that in absence of an *expressis verbis* clarification, in the Bulgarian translation, it is currently not clear that no *apostille* is necessary.

[171] The regulation only applies to actions related to breaking the marriage link. Other related matters, such as the division of assets or property, are not within the scope of the Regulation.

The legal issues relating to the ***recognition of judgments*** covered include:

- Different interpretations of the term 'recognition' leading to differing practices as to which judgments require a declaration of enforceability; and
- Uncertainty as to which types of authentic instruments and agreements are recognised under the Regulation.

The legal issues relating to the ***enforcement of judgments*** covered include:

- Practical difficulties relating to the enforcement of judgments, including the following points:
  - Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement;
  - Lack of information for citizens about national rules on enforcement;
  - Difficulties relating to the possibility to specify decisions on access rights under Article 48;
  - Lack of guidance on the enforcement of provisional measures; and
- Exequatur proceedings are still in place for some types of judgments.

Different interpretations of the term 'recognition' leading to differing practices as to which judgments require a declaration of enforceability

Article 21 governs the modalities for the recognition of judgments under the Brussels IIa Regulation. Generally, no procedure is required for the recognition of judgments in matrimonial matters or in matters of parental responsibility stemming from another Member State (Article 21.1). However, under Article 21(3) of the Brussels IIa Regulation, any interested party may apply for non-recognition of a judgment. The Regulation does not provide a definition of the term 'recognition'.

Based on the study team's assessment, the following main findings result from the evidence collected: as outlined in the Commission's application report on the Regulation and supported by the stakeholders we consulted, there is currently no uniform interpretation of the term 'recognition'. The difficulties mainly concern the distinction between recognition, enforceability and enforcement. Although recognition should be automatic based on the Regulation, this is sometimes not understood with respect to cases on matters of parental responsibility. This leads to uncertainty as to whether or not a decision declaring a judgment as 'recognised' or even a declaration of enforceability is needed before a foreign judgment is considered valid.

It appears that there is confusion over the terms recognition, enforceability and enforcement. As a consequence, there have been cases when decisions were required to declare that a decision is recognised or where declarations of enforceability were needed, even though the respective act was not an act of enforcement. This was raised in the Commission's applications report on the Regulation, by some of our legal experts (LT, HU, PT, SI), several interviewees and during the expert panel.[172]

According to the Hungarian legal expert, claimants mix up the terms 'recognition', 'enforceability' and 'enforcement', in most cases based on applications submitted, although the terms are applied correctly in legal practice. The question of when recognition is necessary also came up in the *Health Service Executive* case. The case concerned a cross-border placement order. The court asked whether the order must be recognised and declared enforceable in order to be enforceable. Concerning the question on recognition, the ECJ explained that a judgment issued "*in another Member State is*

[172] The Commission's application report as well as some of the stakeholders consulted referred to this issue as 'different interpretations of the term *enforcement*'. The problem is in fact based on the distinction between recognition and enforcement, which is why either denomination may refer to the same issue. It was, however, decided that the reference to 'recognition' is more adequate based on the specific issues uncovered.

entitled to recognition in the latter State, unless and until an order of non-recognition has been made in that other Member State", referring to Article 21 and Recitals (2) and (21) of the Regulation.[173] This implies that no act should be needed to render a decision recognised. However, the fact that Member States do not interpret the term 'recognition' in a uniform manner has led to **differing practices as to whether the recognition of a judgment requires a separate procedure or even a declaration of enforceability**, which has important consequences. For example, where 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 such cases, some Member States only require the recognition of the judgment attributing the guardianship, whilst others consider the issuing of the passport an enforcement act and thus require a declaration of enforceability before the passport can be issued.[174] Such procedures can cause delays for citizens. This issue was also highlighted by one of the participants in the expert panel.

Closely related to this, the Portuguese expert highlighted that it is arguable whether the civil registration of decisions actually corresponds to an implementing act in Portugal and would, therefore, require a prior declaration of enforceability. The Swedish and Lithuanian experts note that there are cases where declarations of enforceability are required even though the act concerned is not an act of enforcement, for example with respect to the updating of civil status documents. The Lithuanian expert reported a case where a lower instance court considered it necessary to declare enforceable judgment in relation to the establishment of fatherhood. The Supreme Court of Lithuania indicated that in such cases the Brussels IIa Regulation is not applied correctly.[175]

Uncertainty as to which types of authentic instruments and agreements are recognised under the Regulation

In addition to judgments, the Brussels IIa 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 (Article 46). 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 notaries. While we note that Article 46 is applicable to both matrimonial matters and matters of parental responsibility, difficulties were only encountered with regard to matters of parental responsibility. For matrimonial matters, there is ambiguity whether there are any agreements in matrimonial matters that could fall under Article 46 of the Regulation and no concrete example could be given.[176] For matters of parental responsibility, the scope of Article 46 includes, for example, agreements on access rights drawn up in the framework of mediation sessions.

Articles 57 and 58 of the Brussels I Regulation and Article 1 b) and c) of the Brussels I recast Regulation refer to authentic instruments which have been formally drawn up or registered as an authentic instrument and court settlements enforceable in the Member State of origin (Articles 58 to 60 of Brussels I recast). Maintenance Regulation (Articles 2 (1) No 3 and 48) and Regulation No

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[173] Case: *Health Service Executive*, paras. 100-106.

[174] COM(2014) 225 final, p. 10.

[175] Case No 3K-3-63/2014, 2014-03-05. The decision of the lower instance court is not publicly available.

[176] There is a theoretical discussion about whether private divorces, which are allowed for in some third countries, could potentially fall under Article 46. While private divorces cannot be concluded in most Member States, a few Member States do allow for private divorces on the basis of third country law. It was pointed out by some interviewees that a private divorce agreement would not be recognised in their state because of its incompatibility with national law or contradiction of public policy. However, as this issue has not yet come under the scope of the Regulation, there are currently no practical difficulties associated with recognition of private divorce agreements.
For more information on the treatment of private divorces, see Annex 3 – *Contextual factors found important for the scope of the Regulation*.

805/2004 creating a European enforcement order for uncontested claims (Article 4 No 3)[177] include enforceable courts settlements and 'authentic instrument', including arrangements relating to maintenance obligations concluded with administrative authorities of the Member State of origin or authenticated by them. Unlike in Maintenance Regulation and Regulation No 805/2004 creating a European enforcement order for uncontested claims, the term '*authentic instrument*' is not defined in the Regulation.

Based on the study team's assessment, the following main findings result from the evidence collected: according to the majority of national experts, no specific problems could be identified with respect to their jurisdiction. This said, issues relating to the applicability of the Regulation to authentic instruments and agreements were raised by some interviewees, as well as by some national experts. In particular, it was reported that the concept of authentic instruments and agreements is not sufficiently clear. In addition, there are certain types of agreements that are currently not within the scope of the Regulation, although they are relevant in the framework of parental responsibility cases.

As regards ambiguities relating to the concept of authentic instruments and agreements, issues were raised by our national experts, as well as some of the interviewees. The Lithuanian national expert, for example, indicated that the **concept of authentic instruments and agreements is not sufficiently clear** and that questions have arisen as to what types of agreements can be recognised under the Regulation. However, based on the limited availability of case law, no specific cases could be identified.

A number of stakeholders also pointed to **types of agreements that may currently not be recognised under the Regulation**. While all these stakeholders indicated that the concept is not sufficiently wide, they all identified different challenges. For example, a German interviewee indicated that sometimes parents reach agreements before a court, which are part of the protocol but not of a decision. It is currently not clear to what extent such agreements, which are informal but concluded before a court, may be recognised under the Regulation. Somewhat similarly, undertakings (i.e. essentially a formal promise to the court) are very frequently used under common law. It is not clear if they are covered by the Regulation or not, i.e. whether foreign courts will enforce an undertaking.[178] A further potential problem was raised by the expert for the United Kingdom, who indicated that problems could arise where parents agree arrangements for children and these are not recorded in a court order. This could be an important challenge in the future, because in England and Wales the emphasis is put on mediation and agreement without court order.

An Irish mediator indicated that even though the situation has improved since the entry into force of the EU Mediation Directive 2008/52/EC, there are **difficulties with the recognition of agreements established through mediation**. This is believed to be due to the differences in the mediation laws of the Member States. The French national expert indicated that the recognition of parental agreements that are possible under French law[179] might pose difficulties in other Member States.

A further **potential problem preventing the recognition of authentic instruments and agreements** was reported by the German expert. Unlike Articles 57 and 58 of the Brussels I Regulation, Article 46 of the Regulation includes agreements between the parties which have not been integrated in an authentic instrument or have not been approved by a court. The only prerequisite is that the agreement is enforceable in the Member State of origin. According to German law, such agreements

[177] See *Hausmann* IntEuSchR J No 256 et seq.

[178] According to some in the UK, based on recital 22, yes, but the interviewee had doubts.

[179] The following two are relevant: A parental joint declaration made in front of the chief clerk of the district court (*greffier en chef du TGI*) to move from a unilateral exercise of parental responsibility to a joint exercise of parental responsibility (in the situations of art.372 Code civil), and parental agreements approved by the judge, by which parents organise the exercise of parental responsibility (art. 373-2-7 Code civil).

would not be enforceable in Germany; therefore private agreements made under German law are not recognisable in other Member States under Article 46.

As concerns the enforcement of authentic instruments or agreements, it is noted in the application report on the Regulation[180] that there have been difficulties due to the fact that certificates used in the exequatur procedure refer only to 'judgments'. However, no difficulties in this regard were raised by the stakeholders consulted. We note here that the recitals of the Regulation clarify that "*Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to 'judgments' for the purpose of the application of the rules on recognition and enforcement*'.[181]

Practical difficulties relating to the enforcement of judgments

The Regulation provides some guidance related to the enforcement of judgments (Chapter 3). Article 28 stipulates that foreign judgments related to matters of parental responsibility which are not certified under Article 41 are to be enforced in another EU Member State on the basis of a declaration of enforceability. In order to apply for enforceability, citizens need to produce a copy of the judgment as well as a certificate according to Article 39. The enforcement procedure is governed under national law (Article 47 (1)). However Article 47 (2) 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 there. [182]

In general, the Regulation has, according to the perception of many stakeholders, contributed to a smoother enforcement of foreign judgments in the EU. However, some **ambiguities and practical difficulties** were reported concerning related provisions in Chapter II of the Regulation.

Based on the study team's assessment, the following main findings result from the evidence collected: as concerns applications for enforceability, the requirements that need to be met are not clear in all cases. Moreover, the vast differences across the Member States in actual enforcement are considered problematic. Based on the widely differing interpretations and practices in relation to enforcement, the main problems identified are the variance of national standards as well as the lack of information available to citizens on these standards. Finally, the network of legal experts identified cases in which the enforcement of provisional measures was hindered.

(a) Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement

Additional difficulties related to enforcement arise from the **differences of national laws with regard to the enforcement of judgments in matters of parental responsibility**. Such differences have been highlighted by previous studies on enforcement of judicial decisions in other areas within the European Union[183]. These have found that considerable and structural differences exist and that enforcement procedures depend significantly on the qualification and the organisation of the enforcement bodies[184]. This was confirmed by the information provided by the network of legal

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[180] COM(2014) 225 final, p. 9.

[181] See Recital (22) as well as Article 46 of the Regulation.

[182] Also Articles 49-52 contain provisions in matters of costs, legal aid, security and legalisation.

[183] See for example: Prof. Burkhard Hess 'Study No JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and Protective Measures'; *Comparative study on enforcement procedures of family rights* (prepared by T.M.C. ASSER Institute in 2007, available at: study_family_rights_synthesis_report_en.pdf)

[184] Cf. W. Kennett, The Enforcement of Judgments in Europe (2000), ch. 3, pg. 61 – 98; Kerameus, Enforcement in the International Context, 264 RdC, 215 et seq. (1997) in Prof. Burkhard Hess p 8.

experts. When describing the general legal characteristics of enforcement, a number of aspects deserve consideration.

As concerns the **modalities of initiating enforcement**, in many Member States it is necessary to apply to the court in order to enforce a family law decision.[185] When an application is made to the court, another issue regards the extent to which the application will cause the court to order measures that are focused on actual enforcement, i.e. ensuring that the actual situation complies with the judgment that must be enforced, or that the court will first try to conciliate parties and induce 'voluntary' compliance.[186]

As concerns the **conditions before a judgment becomes enforceable**, differences exist, for example with regard to whether a judgment that is still open for appeal is enforceable. In one group of Member States, judgments are normally enforceable notwithstanding appeal, unless a judge suspends enforceability. In the other group, enforceability is suspended during appeal. In most of these Member States there are exceptions to this rule.[187] In this respect it is interesting to note that the time limits for filing an appeal vary significantly, namely between five days and three months, whereas most Member States' time limits are set between 14 and 30 days.[188]

In addition, the rules vary with regard to **the extent the will of the child can influence the enforcement of a judgment**. In some Member States there is a possibility to stop enforcement based on the child's resistance (e.g. AT, HR, RO).[189] In other Member States, judgments may also be enforced against the will of the child. In Estonia, the well-being and the best interests of the child are to be taken into account while enforcing a judgment on parental responsibility matters. However, the minor is not seen as having the legal capacity to oppose the enforcement of judgments. Thus, the court and the legal representative (the parents or other guardians) have the right to decide on the matters relating to a minor.

Based on the reports of the national experts, considerable differences have been found with regard to the **measures that may be taken by authorities in different Member States** when enforcing

[185] Based on the *Comparative study on enforcement procedures of family rights* (prepared by T.M.C. ASSER Institute in 2007, available at:
study family rights synthesis report en.pdf), an application to the court is necessary in Austria, Belgium, Cyprus, Germany, Czech Republic, Spain, Finland (except for decisions on the residence of the child), Ireland, Hungary, Italy, Slovenia, and Slovak Republic. In many Member States where an application to the court is necessary the function of this application is to draw the court's attention to the fact that a court judgment is not complied with. It may not be necessary for the application to set out the measures that the court is requested to order. This description is subject to any changes that occurred after 2007.

[186] An example of the contrasting approaches that exist in the national laws of Member States can be found in the differences between Greek and Belgian law. In Greece the court is bound to grant one of two possible coercive measures (or a combination of these measures), whereas under recent Belgian legislation the court would in principle first try to reconcile the parties or propose mediation. Only if there is an absolute necessity would the Belgian court immediately order coercive measures.

[187] Cf. 2007 Comparative study on enforcement procedures of family rights, prepared by T.M.C. ASSER Institute, available at:
http://ec.europa.eu/civiljustice/publications/docs/family_rights/study_family_rights_synthesis_report_en.pdf , p. 41.

[188] Cf. 2007 Comparative study on enforcement procedures of family rights, prepared by T.M.C. ASSER Institute, available at:
http://ec.europa.eu/civiljustice/publications/docs/family_rights/study_family_rights_synthesis_report_en.pdf, p. 35. In a few Member States the time limits are longer for foreign residents (p. 91).

[189] This depends on the child's age and maturity and the judges are given some discretion in this regard. For example, Austrian courts have to refrain from enforcing the right of access if a minor older than 14 years of age refuses to exercise the contact order and an instruction on his/her rights and duties and the importance of the contact for his/her well-being as well as an attempt for reconciliation remains unsuccessful. Section 108 Austrian Non-Contentious Proceedings A.

[189] Section 110 (2) Austrian Non-Contentious Proceedings Act.

decisions relating to measures of parental responsibility, including in which coercive measures may be used and the extent to which they may be used.[190]

In addition, **the consequences of a child's opposition** to enforcement vary. For example, in France the aim to implement a judgment is pursued in all cases, even if a child opposes implementation. If a child is opposed, the responsible parent has to ensure that the judgment is respected. If the parent cannot convince the child, family mediators or child defenders may be asked to step in. Some Member States specifically allow for coercive measures against children under specific circumstances (e.g. AT, CY, DE, IT, PT). For example, in Austria direct coercive measures may only be taken to enforce decisions on custody, but not on access rights[191]. Hence, fetching the child in order to enforce the right of contact is not permissible.[192] In Germany, direct coercive measures against the child are only permitted if this is compatible with the welfare of the child and there is no other possibility to enforce the obligation of the respondent parent. In other Member States, there are no specific rules as to **whether or not coercive measures against children are allowed** (e.g. BG, SK, SE) or coercive measures against children are not permitted towards the child but may only be used against parents (e.g. GR, RO, UK).

Differences exist also with regard to the **parties that are involved in the enforcement of decisions on parental responsibility**. In general the actual enforcement of a family law decision is the task of the public prosecutor's office or of specialist court officials. Nevertheless, in a few Member States[193] the actual enforcement, or at least the responsibility for actual enforcement, rests with the courts. The person or authority that carries out the actual enforcement may be different according to the nature of the decision.[194] This is supported by a comparison of the country reports prepared by the national experts for this study. Whereas enforcement is carried out by court officials in some Member States (e.g. LI, MT), it is carried out by law enforcement authorities in other Member States (e.g. PT, SE). Some Member States have created specific mechanisms to create an agreement between the parents. For example, mediators or psychologists might be involved by default, i.e. in all cases, or only if there are difficulties (e.g. in Romania a psychologist may be involved if the child opposes the enforcement of a judgment).

Based on these differences it can be expected that the **effectiveness of enforcement** varies depending on the Member State. In general terms, the stakeholders consulted for this study indicated that enforcement is often delayed, for example because of appeals or because the procedures used are not efficient. Another factor may be insufficient awareness of practitioners

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[190] Cf. 2007 Comparative study on enforcement procedures of family rights, prepared by T.M.C. ASSER Institute, available at: http://ec.europa.eu/civiljustice/publications/docs/family_rights/study_family_rights_synthesis_report_en.pdf, pp. 11ff. The study categorises the Member States into different groups, depending on the possibility of using coercive measures directly towards the person who opposes enforcement.

[191] When it comes to the enforcement of access rights, it is interesting to note that Member States' rules on whether parents should be required to visit their children also differ. For example, in Germany, unlike Austria (see AußStrG, Article 108), the right of access is framed so as to entail an obligation on the parent's part (BGB, Article 1684(1)). Thus, there may be different interpretations of whether or not a parent failed to comply with a decision on access rights by not visiting the child (see European Parliament, Directorate-General for Internal Policies Policy Department C, 2010 Study on the cross-border exercise of visiting rights, prepared by Dr Gabriela Thoma-Twaroch, President of Josefstadt District Court, Vienna. The entire study is available at: http://www.justicewatch.eu/IPOL-JURI_NT%282010%29432735_EN.pdf)

[192] Section 110 (2) Austrian Non-Contentious Proceedings Act. This was also highlighted in European Parliament, Directorate-General for Internal Policies Policy Department C, 2010 Study on the cross-border exercise of visiting rights, prepared by Dr Gabriela Thoma-Twaroch, President of Josefstadt District Court, Vienna. The entire study is available at: http://www.justicewatch.eu/IPOL-JURI_NT%282010%29432735_EN.pdf

[193] In Germany, Finland, Latvia and Hungary the bailiff is not responsible for the actual enforcement of all family law decisions.

[194] If different persons or authorities are responsible for the actual enforcement, a rough division can be made between decisions on custody (and especially those involving the handing over of the child) and decisions on contact and/or access.

about the rules on enforcement of cross-border cases[195], for example about the fact that judgments may not be reviewed as to substance at the stage of enforcement. The fact that judgments are sometimes reviewed at the stage of enforcement was also highlighted by the Commission's application report.[196]

The differences between national systems were generally seen as the most significant area for improvement by public consultation respondents. In particular, 92% of the 26 lawyers who responded were of the view that the enforcement of decisions concerning parental responsibility could be improved.[197] The most significant problem identified was the variance between the national systems, and many respondents were of the opinion that the lack of uniform enforcement procedures across the Member States poses challenges.[198] In addition, several respondents indicated that enforcement is not sufficiently speedy.

Such difficulties may have severe consequences based on the sensitivity of the subject matter. several of our national experts as well as all interviewees that commented on this issue highlighted how particularly sensitive and stressful to the parties involved the enforcement of judgments on parental responsibility matters is.

(b) Lack of information for citizens about national rules on enforcement

Based on the differences outlined above, some respondents to the public consultation, interviewees and national experts regretted that information regarding the national rules on enforcement of judgments in family law matters is not widely available. Currently, it is difficult for citizens to predict and understand the consequences of a judgment in parental responsibility matters that is enforced in another Member State.

(c) Difficulties relating to the possibility to specify decisions on access rights under Article 48, arising from the different levels of specification in the Member States and the risk that the court of enforcement can substantially modify the original judgment

Related to the different practices with regard to enforcement, practical difficulties were raised by an interviewee and a national expert with **Article 48**, which allows the courts of the Member States of enforcement to substantiate a judgment, for example, by **making practical arrangements for organising the exercise of access rights**. According to the interviewee, this is difficult for German judges, because the requirements as regards the level of detail of a decision are very high compared to other Member States. For example, access cases that are decided in Italy sometimes only refer to a general period in which a father may see his child (e.g. during the summer holidays). In Germany, the exact weekends and times need to be specified. Practical difficulties occur because enforcement should generally be automatic. Thus, judges should normally add any specification to the judgment without speaking to the parties and find out their preferences. This is difficult, because the preferences may not be clear and some parents might not want any specification at all. However, without the necessary specifications, the judgments would not be enforceable in Germany.

Another issue in relation to this Article is evidenced in a Maltese decision. The Maltese national expert indicated that a Maltese court had difficulties in applying Article 48. In view of the expert, the

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[195] Cf. 2007 Comparative study on enforcement procedures of family rights, prepared by T.M.C. ASSER Institute, available at:
http://ec.europa.eu/civiljustice/publications/docs/family_rights/study_family_rights_synthesis_report_en.pdf , p. 92.

[196] COM (2014) 225 final, p. 15.

[197] Overall, of the 166 responses to this question, 83% (i.e. 137 of 166 responses) regard the enforcement of decisions concerning parental responsibility handed down in another Member State as an important area for improvement.

[198] In particular approximately 31% of 90 respondents who suggested improvements for the actual enforcement of decisions concerning parental responsibility referred to some level of common standard between the Member States. Suggestions ranged from the overall harmonisation of EU enforcement procedures to the development of common standards in one specific area. Note: 31% is significant in this case given the variance of responses.

court went too far in the specification, in fact substantially modifying the original judgment.[199] Thus, a retrial has been applied for. Difficulties in relation to this Article were only mentioned by two stakeholders, possibly because it is only relevant for specific Member States.

Our national expert for Germany explained that Article 48 does in fact facilitate the enforcement of judgments that are not sufficiently detailed in the context of the relevant Member State (which would not be possible if there were no possibility of specification), although practical solutions may need to be found to apply the Article in the interest of the parties.

(d) Difficulties relating to the enforcement of provisional measures

An additional challenge relates to the **enforcement of provisional measures**. It was noted by some interviewees and national experts that there is currently a lack of guidelines in this regard. According to the national expert for Germany, the question whether the provisions of Articles 21 et seq. Brussels IIa Regulation according to Article 2(4) also apply to provisional measures in terms of Article 20, or only to decisions on the merits of a case, has been the subject of controversial academic debate.[200] It is noted that this was dealt with by the ECJ. The Court ruled that the provisions laid down in Article 21 et seq. of the Regulation do not apply to provisional measures relating to rights of custody ordered under Article 20 of the Regulation.[201] On the basis of this ruling, the German Federal Court has defined specific guidelines regarding the conditions that must be met for provisional measures to be recognisable and enforceable under the Regulation.[202] Such detailed guidelines do not exist in the Regulation.

Exequatur proceedings are still in place for some types of judgments

According to Article 28(1) of the Regulation, a judgment on the exercise of parental responsibility in respect of a child given in a Member State (which is enforceable in that Member State and has been served) is to be enforced in another Member State only if it has been declared enforceable there (via an exequatur procedure). Exceptions have only be made so far for the orders that are covered by Articles 41 and 42 (access rights and return orders under Article 11 (8), as stipulated in Article 40).[203]

[199] 396/2012 Id-Direttur tad-Dipartiment Għal Standards fil-Ħarsien Soċjali vs Lara Maria Merlevede neè Borg St. John.

[200] See e.g. Scherpe, J., & Dutta, A. (2010). Cross-border enforcement of English ancillary relief orders: Fog in the channel: Europe cut off? Family Law, 40, 385– 390.

[201] Case C-256/09 – *Purrucker/Valléz Pérez.* See also Dutta, A. and Schulz, A. (2014). "First Cornerstones of the EU rules on cross-border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation – From *C* To *Health Service Executive". Journal of Private International Law*, Vol. 10, Nr 1, pp. 19 ff for an analysis of the case law on the enforcement of provisional measures.

[202] *BGH* 09.02.2011, FamRZ 2011, 542 = unalex DE-2038: (1) Should a court with jurisdiction as to the substance of a matter pursuant to Articles 8 et seq. Brussels IIa Regulation order provisional measures on parental responsibility, the recognition and enforcement of those measures in other Member States is governed by Articles 21 et seq. of the Regulation. Should a court, on the other hand, order provisional measures only on the basis of Article 20, then Articles 21 et seq. do not apply. In such a case, recognition and enforcement of the measures are governed by national law or by international conventions being in force in the Member State of enforcement. Should, finally, the requirements of Article 20 not have been fulfilled, a provisional measure falling into the material scope of Brussels IIa Regulation cannot be recognised and enforced in another Member State. (2) When differentiating whether provisional measures have been ordered by a court with jurisdiction as to the substance of the matter under Articles 8 et seq. Brussels IIa Regulation, the deciding factor is not whether the court ordering the provisional measures actually had such jurisdiction but whether the court had the intention to base its jurisdiction on Articles 8 et seq. (and not only on Article 20 in combination with national law). (3) Should a judgment ordering provisional measures not contain a clear foundation with regard to the jurisdiction of the court, and if jurisdiction is not self-evident from the judgment, it is to be assumed that the judgment has not been based on the jurisdiction rules of Articles 8 et seq. Brussels IIa Regulation (and cannot be recognised and enforced, therefore, according to Articles 21 et seq. of the Regulation in other Member States).

[203] We note here that on the other hand, such exequatur proceedings have been abolished in civil and commercial matters by the recast Brussels I Regulation No 1215/2012 (Articles 39 et seq.) and in some areas of family law such as in the Maintenance Regulation.

Based on the study team's assessment, the following main findings result from the evidence collected: the abolition of exequatur for some types of judgments was evaluated as positive by many stakeholders. Some practical difficulties inherent in the current system were, however, reported by some national experts (AT, DE, HU, LT, LU, LV, MT, SI, SK), respondents to the public consultation, interviewees and participants in the expert panel. Some of the national experts pointed to situations in which declarations of enforceability were still required although the judgment was within the scope of Article 40. In addition, some stakeholders identified barriers related to the fact that exequatur was only abolished for some types of decisions. There were also some stakeholders who referred to the negative consequences of abolishing exequatur proceedings for any types of decisions, including that it is not possible to check whether a judgment is in the best interests of the child. However, other stakeholders argued that difficulties in this regard were an indication that there is regrettably still a lack of mutual trust within the EU.

As highlighted in the Commission's Application Report[204], the abolition of exequatur in the area of civil law was identified in the Stockholm Programme and the Stockholm Action Plan as key for the Commission's future work in civil matters. Many national experts, respondents to the public consultation[205], interviewees and participants in the expert panel regard the **abolition of exequatur as a positive process**. In particular, it was argued that the abolition of the exequatur for some types of decisions has helped to reduce delays and ensure a well-functioning free movement of judgments and persons. Underlining the positive effects of the partial abolition of exequatur proceedings, the expert from Cyprus pointed out that the abolition of exequatur with regard to 'rights of access' and 'return of the child' judgments/orders has, in fact, facilitated their enforcement in Cyprus by rendering the whole process of enforcement much simpler and more time- and cost-efficient. However, the current status of abolition of the exequatur was criticised by some stakeholders on the grounds that it is not yet working in practice or that it does not go far enough.

Some of our national experts (e.g. BE, FR, LT, LU) indicated that the **abolition of exequatur proceedings is not always applied in practice**. Some of these experts pointed to cases where courts in their own jurisdiction or in another jurisdiction had not ordered a certificate under Article 41 or 42 although the requirements were met. For return orders in particular, the Spanish expert argued that the basic problem lies in the fact that in the majority of cases the judges do not issue the certificate described in Article 42 ex officio, because the obligation to do so is not sufficiently clear.

Additional barriers relate to the fact that exequatur has been abolished only for some types of decisions. Different challenges were reported in this regard. In general terms, some of the national experts and interviewees regretted that the enforcement of judgments not covered by Article 40 still involves administrative formalities and time for citizens because a declaration of enforceability is required. Several national experts regretted that there are still decisions that require a declaration of enforceability (CY, DE, GR, LI, RO, SE, SI, SK). Results from the public consultation confirm that the process of abolishing exequatur proceedings is welcomed. Indeed, it was found that 68%[206] of 165 stakeholders considered that all judgments, authentic instruments and agreements concerning parental responsibility should circulate freely between EU countries without exequatur. This point was supported by different arguments by the different stakeholders. According to the Hungarian, Latvian and Swedish national experts, the requirement to apply for declarations of enforceability is regrettable, because exequatur proceedings can often not be handled expeditiously due to several factors. Obtaining the documents and, in particular, translations takes a long time. From the Swedish

[204] COM(2014) 225 final.

[205] Respondents to the public consultation were asked whether the exequatur should be further abolished and a high majority replied in the affirmative, implying that the beginning of abolishing the exequatur can be considered as a positive process that should be continued.

[206] i.e. 113 of 165 responses.

perspective, the Brussels IIa Regulation[207] re-introduces exequatur proceedings for the enforcement of administrative decisions for the protection of children between Sweden and Finland. This was regarded by the Swedish national expert as hindering the enforcement process. Two interviewees from Estonia pointed out that exequatur was abolished in the Maintenance Regulation and the Brussels I recast, and that similar considerations apply in parental responsibility cases. In particular, it was noted that parental responsibility proceedings need to be handled as quickly as possible. On this basis, it was argued that the need to apply for a declaration of enforceability causes an additional burden for citizens. It is noted, however, that part of these challenges seem to be related to the way in which exequatur proceedings are handled in some Member States. Based on reports from different stakeholders, decisions on declarations of enforceability can be made very quickly (e.g. between one and two weeks), depending on the Member State and specific case concerned.

Additional difficulties, specifically related to Article 56 on the placement of the child in another Member State, were raised by the Italian expert. The Italian expert noted that enforcement of decisions under Article 56 still requires extensive formalities. Firstly, the double evaluation required by this provision (the judge of the State of origin and the Central Authority of the Member State of enforcement if public authority intervention in that Member State is required) can prolong the proceedings. Secondly, exequatur implies the possibility of opposing the enforceability and this can also cause an excessive extension of the proceeding. All this can frustrate the aim of the Regulation, which is to define the situation of the child in the shortest time possible as his/her best interests requires. This supports the findings of the Application Report, which indicated that experts reported the application of the exequatur procedure to placement decisions to be very cumbersome, considering the needs of the child in such situations. In this regard the ECJ ruled that, considering the urgency of such decisions, appeals against a decision on a declaration of enforceability for placement decisions must not have suspensive effect so as to not hinder enforcement.[208]

Further difficulties relating to the fact that only some types of decisions are exempted from exequatur proceedings were raised by some of the interviewees as well as the Slovenian national expert. She explained that a decision could contain information relating to different matters relating to parental responsibility. Accordingly, only part of the decision may be directly enforceable. This has caused practical difficulties for judges. Thus, a declaration of enforceability is still necessary.

On the basis of some of the points mentioned above, it was **regretted by some stakeholders that the Brussels IIa Regulation still retains exequatur proceedings for some types of decisions**. For example, a Dutch interviewee was not convinced that exequatur was needed at all, as in his experience the judge often does not actually look into the case; exequatur is often done by a court clerk. The interviewee saw no value in exequatur, and rather believed this procedure only adds costs. Similarly, some legal experts (CY, DE, GR, LI, SE, SI, SK, RO), participants in the expert panel and interviewees commented that expanding the abolition could be considered on condition that adequate safeguards are introduced to ensure the best interests of the child and the realisation of the child's right to be heard.[209]

[207] As interpreted by the ECJ in case C-435/06, "C", [2007] ECJ I-10141.

[208] Case C-92/12 PPU *Health Service Executive.* As stated in the Application Report on the Regulation (COM(2014) 225 final) it was confirmed by the ECJ in Case C-92/12 PPU *Health Service Executive* that a placement judgment must be declared enforceable before it can be enforced. One of the grounds that can be used to oppose 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 Regulation. The ECJ added that particular expedition should be applied in deciding on the application for a declaration of enforceability. Furthermore, appeals brought against that decision will not have a suspensive effect.

[209] Some interviewees who were in favour of expanding the abolition of exequatur underlined that the further abolition of exequatur needs to be accompanied by the introduction of **common procedural standards** and further harmonisation/**approximation of substantial laws of the Member States**. Several interviewees also stated that further abolition of exequatur requires more **trust** between Member States. In general, members of this set of interviewees

However, a minority of stakeholders regarded even the partial abolition of exequatur as problematic. In this regard it can be noted that an Austrian interviewee argued that the abolition of **exequatur proceedings for access rights has caused considerable difficulties**. Some decisions on access rights taken in another Member State are not practicable when it comes to their enforcement in the Member State where the child is present, possibly because the situation in that Member State could not fully be taken into account. It was noted, however, that 'rethinking' valid decisions should be avoided as this would give the opportunity to parents to go abroad in order to be able to obtain a new judgment if they were not happy with the old one. Accordingly, the re-introduction of exequatur proceedings for access rights may be desirable to ensure the well-being of the child, but may entail negative effects relating to the behaviour of the parents.

In addition, a Latvian interviewee underlined that parental responsibility cases may be very sensitive and that there are cases in which the enforcement can entail severe effects for the parties involved and in particular the well-being of the child. On the basis of the current rules, there may be situations in which it is not possible to check whether a judgment is indeed in the best interest of the child, because it is directly enforceable. While this may indeed cause difficulties in certain cases, it must be noted that several interviewees indicated that there are different interpretations of the concept '*best interests of the child*'. It was argued that such differences need to be accepted and that they should not hinder the smooth enforcement of judgments within the EU. In this context, it is interesting to consider the *Sofia Povse and Doris Povse v. Austria* judgment [210] where the ECtHR ruled that the automatic enforcement in the Member State of enforcement on the basis of Article 42 did not constitute a breach of fundamental rights, because it was possible to examine the legitimacy of a return in the Member State of origin. It was also argued that a correct application of EU law could not constitute a breach of fundamental rights, as it is accepted that the protection of fundamental rights by the EU was '*equivalent*' to the protection provided by the Convention.[211]

1.5 Provisions specific to child abduction cases

One of the main objectives of the Regulation is to deter child abductions between Member States and to protect the child from harmful effects by establishing procedures to ensure the child's prompt return to the Member State of habitual residence immediately before his/her abduction. To this end, the Regulation provides in its Article 11(3) 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*". There are two different kinds of return orders under the Regulation: return orders made by courts in the Member State to which the child was abducted and those made under Article 11(8) by a court in the Member State of the former habitual residence of the child, which are automatically enforceable in all Member States if certified under Article 42.

The procedures contained in Article 11 were commented upon by many interviewees, participants in the expert panel, and respondents to the public consultation. Based on the analysis of the national experts, Article 11 has been the subject of extensive case law in the Member States. While it was

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believed that the only safeguards to be maintained should be "*public policy reasons*" and "*irreconcilable judgments*". This was confirmed by the findings of the public consultation. It was found that a number of safeguards should be maintained in the expansion of abolishing exequatur. The most important safeguard to be maintained was identified as "the right of the child to be heard". Following this, respondents thought that safeguards should also be established in areas relating to (in order of importance according to respondents): "the right of the parties to be heard", "proper service of documents", "irreconcilable judgments", placing the child in another EU country and "public policy reasons".

[210] Application No 3890/11.

[211] The Court referred to the case *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi,* Application No 45036/98.

acknowledged by some stakeholders that return proceedings are generally functioning well, some problems were reported. The following points are discussed in this section:

- The return procedure under Article 11(1) to 11(5), including the following points:
  - Difficulties relating to the time limit for return procedures (i.e. not clear and not effective);
  - Questions on the practical application of Article 11(4) and ambiguity as regards the concept of 'adequate arrangements' under that provision;
  - Difficulties relating to the hearing of the child in the framework of return proceedings;
- Hearings under Article 11(6)-(8), including the following points:
  - The system stipulated in Article 11(6) to (8) may endanger the well-being of the child if a child is returned in spite of a risk that has been established in the return proceedings and possibly after a long time has passed;
  - Disadvantages for the abducting parent in subsequent hearings; and
- Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplication of the Regulation and reservations against the content of decisions.

The return procedure under Article 11(1) to 11(5)

In general, many stakeholders consider the system established by the 1980 Hague Convention as complemented by the provisions in the Brussels IIa Regulation as effective. Some interviewees welcomed the procedures having become faster since the adoption of the Regulation and the Regulation having made it more difficult to refuse the return of a child. According to a German interviewee, due to the Brussels IIa Regulation child abductions within the EU have in theory almost become redundant as they would be unsuccessful in most cases.[212] Several participants in the expert panel agreed that in most cases **returns** are working well and are resolved quickly. The 1980 Hague Convention, which also deals with this matter, is considered successful and the Brussels IIa Regulation has strengthened its provisions.

Based on the study team's assessment, the following main findings result from the evidence collected: while the general system is accepted by most stakeholders, some difficulties have occurred. First, there are several difficulties relating to the time limit set in Article 11(3). The time limit is not sufficiently clear and is not effective due to shortcomings in Member States' procedures. Second, some provisions contained in Article 11 are currently not sufficiently clear, in particular it is not clear how to interpret and apply the concept 'adequate safeguards' that are needed to counter a refusal of return based on Article 13(b) of the 1980 Hague Convention. Finally, there are difficulties relating to the hearing of the child in the framework of return proceedings, notably based on the different practices in the Member States[213].

The following points are discussed below:

- Difficulties relating to the time limit for return procedures (i.e. not clear and not effective);

[212] We note, however, that abductions still occur. According to estimates prepared by Deloitte based on Eurostat data and the DG Justice Study on Missing Children, between 150,000 and 190,000 children were affected in 2012. See Annex 6 where we present information related to the number of persons affected by the Regulation. Some interviewees pointed out that in some cases the abducting parent may not be aware that taking the child to another Member State without the other parent's consent constitutes an illegal action. This lack of awareness may be part of the reason why some parents abduct their child without reflecting on the consequences. This point is discussed in the main body of the report in the sections *Predictability, clarity, and reliability for citizens involved in cross-border cases* and *Well-being of the child and parent-child relationship* under *Effectiveness*.

[213] This is further discussed in the section *Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures*.

- Questions on the practical application of Article 11(4) and ambiguity as regards the concept of 'adequate arrangements' under that provision;
- Difficulties relating to the hearing of the child in the framework of return proceedings

(a) *Difficulties relating to the time limit for return (i.e. not clear and not effective)*

There are several difficulties relating to the time limit set in Article 11(3). In particular, the time limit is not sufficiently clear and it is not effective due to shortcomings in Member States' procedures. A minority of stakeholders also criticised the time limit for not being realistic (i.e. too short) or that there are no consequences in the event it is not kept. The individual points are discussed below.

The **interpretation of the six-week time limit** set out in Article 11(3)[214] seems to vary across Member States. In particular, it **is not clear** whether the six weeks refer to the time between an application and the final decision, or whether each instance has six weeks. Based on discussions during EJN meetings, it currently seems to be understood as meaning the latter. In contrast to this understanding, a Swedish interviewee indicated that she would interpret the time limit to refer to the final decision. In fact, the European Commission's *Practice Guide on the application of the Brussels IIa Regulation* implies that the only interpretation which would effectively guarantee the objective of ensuring the prompt return of the child within the strict time-limit is to adhere to the former understanding. According to the European Commission's Practice Guide, although it is not specified in Article 11(3), return orders should be *enforceable* within six weeks.[215] In this context it can be noted that the Article 11 Working Group advises that Member States should limit the number of possible appeals so as to ensure that the time limit can be kept.[216].

In addition, **the time limit is not effective**. Indeed, while there are large differences across Member States, many cases can in fact not be resolved within six weeks. There is strong evidence suggesting that this is due to the fact that **Member States' procedures are not sufficiently efficient**. There is a minority of stakeholders arguing that the time limit is too short because it does not give sufficient time to deal with a case properly. It is noted in this regard that six weeks is also considered an adequate target in the 1980 Hague Convention.

Difficulties with the delay were highlighted by a study prepared for Hague Conference on Private International Law (HCCH)[217], which shows that only 15% of the applications between Member States were actually resolved within the six week time limit. In fact the average number of days taken to resolve a return application in 2008 was 165, but as noted by the study, the time taken varied considerably depending on the outcome of the case. Further, some jurisdictions concluded applications more quickly than others. Of the Brussels IIa applications to Sweden, 67% were resolved in six weeks (two of every three applications), 33% of those to Cyprus (1 in 3), 28% of those to the United Kingdom - England and Wales (37 of 130) and 28% of those to Austria (5 of 18). By contrast, the following States did not resolve any applications within six weeks: Bulgaria (which received 12 applications), Estonia (3 applications) Hungary (7 applications), Ireland (18 applications), Spain (18 applications) and United Kingdom - Northern Ireland (5 applications)[218]. This study also concludes that

[214] Six weeks is also set out as an adequate time to handle cases in the 1980 Hague Convention on Child Abduction. Article 11 of the Convention stipulates that if the judicial or administrative authority concerned has not reached a decision within six weeks the court may be asked to state the reasons for this delay.

[215] EU (2014), *Practice guide on the application of the Brussels IIa Regulation* (http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf), p. 41.

[216] See Article 11 Working Group Best Practices Guide available on https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en.

[217] *'A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction'*: http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf

[218] See page 11: http://www.hcch.net/upload/wop/abduct2011pd08be.pdf

the time taken in Hague Convention cases did not become less as a result of the Brussels IIa Regulation.

Issues in meeting the time limit have also been reported by other national experts (ES, CZ, PT, RO, MT, NL) and our interviewees. Referring to the Practice Guide, the Dutch expert indicated that the time limit as understood by the Commission's practice guide cannot be kept in the Netherlands according to the approach currently followed, which allows for twelve weeks of proceedings preceded by a six week intake phase.[219] In most Member States, proceedings last already at least six weeks and decisions are usually not enforceable within six weeks. According to the Maltese national expert, courts are generally taking much longer than six weeks. For example, one case lasted for one year. According to this expert, courts leave too much time between court sessions and sometimes hear witnesses who are not relevant in return proceedings. Similar observations were made by the Czech Central Authority. The Authority indicated that the authorities in some Member States do not respect the six-week time limit provided for in Article 11(3). In some cases proceedings in a court of first instance take several months followed by appeal and remedy proceedings, so the whole return proceedings take more than two years. These differences between Member States were confirmed by the interviewees. While a German interviewee indicated that the six-week deadline (applying to each instance) could be met in most cases in Germany, an interviewee from Bulgaria indicated that return procedures can take up to two years in complex cases.

Finally, there have been cases where **delays in the return procedure have led to a refusal of return**. A Bulgarian interviewee indicated that the delays in the return procedure encountered in Bulgaria lead to a frequent application of Article 13 of the Hague Convention. After long proceedings it is sometimes argued that the child has acquired habitual residence in Bulgaria and that it would be against his/her best interests to return to the State of origin at that point.

As noted above, according to the majority of stakeholders consulted **these shortcomings are mainly based on the fact that national procedures are not sufficiently efficient to meet the time limit**. Indeed, considering the practices in the Member States as outlined above, there is still room for improvement as concerns the measures that are taken to ensure expeditious handling of cases.

For example, according to the Portuguese expert, the Portuguese authorities have been unable to meet the suggested six week term, especially because national law does not set a deadline for the decision, other than to say that it should be delivered urgently, does not limit the number of appeals that can be brought against a return order and does not prevent a suspensive effect on appeal.

We know from the study of the Article 11 Working Group that it takes an average of 2-3 working days for Central Authorities to even formally acknowledge receipt of an application[220]. Further we found that in Austria or Ireland the different steps of the procedure that are necessary to give all parties an opportunity to be heard and react could already exceed the six weeks' time limit if the parties make use of all possibilities to let their views be known. The Article 11 Working Group also indicates that **concentration of jurisdiction** (i.e. limiting the number of courts that deal with return applications) is a good method for ensuring that return applications are dealt with in a more efficient manner. However, according to the Working Group, several Member States appear not to have implemented concentration of jurisdiction.[221] Thus, any difficulties faced in meeting the time limit are

[219] See: http://www.kinderontvoering.org/sites/default/files/media/en/docs/downloads/formulieren/Handreikingkinderontvoering-ENG.pdf

[220] Article 11 Working Group; https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en

[221] Estonia, Latvia, Lithuania, Poland, Slovenia and Spain. Article 11 Working Group; https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en. A question on concentration of jurisdiction under Article 11(6)-(8) has recently been posed in a request for a preliminary ruling (C-498/14). This is further dealt with in the sub-section on Article 11(6)-(8) below.

not due to the time limit being inappropriate but rather to Member States not having taken sufficient measures to ensure expeditious handling of cases. Furthermore, the Article 11 Working Group suggests that the number of appeals should be limited as far as possible.[222] This does not seem to be applied in all Member States.

A minority of stakeholders argued that the time limit is too short. Indeed, the Swedish national expert indicated that the tight time limit has negative consequences. The Swedish courts do in fact manage to deal with return cases within six weeks in 67% of all cases.[223] However, the expert noted that it is difficult for practitioners to gather the necessary evidence in order to challenge a return (the presumption is for a return). Yet, this can be contrasted with the views of other stakeholders. Some of the interviewees who indicated that the deadline is not realistic indicated that it is still good that the time limit is short, because it leads to a priority treatment of child abduction cases. Similarly, the Belgian expert pointed out that courts have been sensitive to the need to proceed diligently with requests based on Article 11. For example, a Belgian court refused to allow additional time for the parties to exchange written submissions in view of the need to proceed diligently.[224]
Finally, some stakeholders argued that the effectiveness of the time limit is undermined by the fact that there are **no consequences in the event it is not kept**. Some interviewees indicated that the time limits are not effective, as there are currently no penalties. For example, the Maltese expert explains that such practices are common because no penalties are imposed in the event the deadlines are not kept. However, it was also highlighted by these stakeholders that the introduction of penalties could have negative effects on the best interests of the child, which should be considered carefully.

(b) Questions on the practical application of Article 11(4) and ambiguity as regards the concept of "adequate arrangements" under that provision

Some of the national experts commented on **Article 11(4)** regarding the possibility to **refuse the return of the child**, which has been the subject of interpretation in several Member States (AT, BE, BG, DE, FR, HU, LU, LV, MT, PT, SK). The following issues were identified and are discussed below:

- The definition of the term 'adequate arrangements' and the procedure to establish their existence are not clear, leaving a wide room for discretion;
- The fact that some Member States do not stipulate the grounds for a refusal after applying Article 11(4);
- The fact that protective measures under Article 11(4) often combine mere practical measures and measures that are related to the exercise of parental responsibility in general has caused practical difficulties; and
- The coordination of Article 11(4) with Article 13(1)(b) of the Hague Convention.

One challenge that was mentioned by many stakeholders, including the national experts, respondents to the public consultation and the interviewees, is the **interpretation of the term '*adequate arrangements*'**.

A Dutch interviewee stated that interpreting '*adequate arrangements'* under **Article 11(4)** is difficult as the provision is too general and not clear enough. In the experience of this interviewee Member States answer that they indeed provide adequate arrangements, but it is not clear how a court can assess whether this is really the case. A guideline regarding the procedural and substantive requirements is missing, which limits legal certainty, as it is currently difficult for the party to know

[222] Article 11 Working Group https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en
[223] *'A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction'*: http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf
[224] CFI Verviers, 7 June 2007, *Rev. trim. dr. fam.*, 2008, 217.

whether the measures taken will be sufficient. In addition, it is currently not clear who has to implement the measures – practically and financially. Finally, an academic respondent from UK also stated that Article 11(4) does not specify to what extent investigations should be conducted in intra-EU abductions when, assessing whether the Article 13(1)(b) of the 1980 Hague Convention applies, the court should determine if the grave risk of harm or an intolerable situation caused by returning the child to the country of his/her habitual residence can be removed by adequate protection measures.

In addition, it is not clear from the provision itself and the Practice Guide on the Regulation, where the burden of proof lies with respect to establishing 'adequate arrangements'. This was pointed out by several stakeholders, including interviewees and respondents to the public consultation. For example, an academic responding to the public consultation indicated that it is not clear whether the left-behind parent must demonstrate that adequate arrangements are in place in the Member State of origin or whether it is to be assumed that adequate arrangements to protect the child have been made unless the alleged abductor shows otherwise.

Typical case example: Practical difficulties in the application of Article 11(4) (Sweden)

A child was removed from another EU Member State to Sweden. It was not clear whether it was safe to return the child. In the other Member State, a social authority had been granted custody for a limited period of time. The authority was thus involved as a party in the case. The same authority took measures in order to ensure protection of the child. For the Swedish court, it was not clear how to assess whether the measures were in fact 'adequate arrangements'. Firstly, it was not clear whether proof could be accepted from a party that was in fact involved in the case. Moreover, the information provided by the authority was not clear. It was thus difficult for the court to decide whether the measures were sufficient to fulfil Article 11(4).

These issues are of high relevance, as the lack of precision of the article leaves open the possibility of legitimising a refusal of return, since a non-return order can be issued whenever it is not possible to establish, within six weeks, that 'adequate arrangements' have been taken.[225] For example, the Maltese expert highlighted the fact that the provision leaves a considerable level of discretion to the judges in deciding whether safeguards provided are adequate or not. According to her, this is the reason that in spite of the stricter rules contained in the Regulation, Maltese courts have nevertheless issued a number of non-return orders. In general terms, the stakeholders noted that **Article 13 of the Hague Convention**[226] **is used quite sparingly in the framework of Brussels IIa**.

Another difficulty in relation to the application of that provision is that **in some Member States orders refusing the return do not directly include the grounds of the refusal** making then difficult to

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[225] This was also noted by Eppler, J. (Forthcoming*): Grenzüberschreitende Kindesentführung – Zum Zusammenspiel des Haager Kindesentführungsübereinkommens mit der Verordnung (EG) Nr. 2201/2003 und dem Haager Kinderschutzübereinkommen*, Dissertation to be published by Peter Lang GmbH.

[226] "*Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –*

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

identify whether the case falls under Article 11(4) and lengthening the procedure. This has been pointed out to the Commission by Central Authorities.

From the public consultation it was found that another issue regarding the application of **Article 11(4) of the Regulation concerns coordination with Article 13 of the Hague Convention**. According to the rules set out by Article 13(1)(b) of the Hague Convention, the court is not obliged to order the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or place the child in an intolerable situation. An academic from the UK stressed that, in contrast, Article 11(4) of the Brussels IIa Regulation requires the court to order the return of the child even if it will put the child at risk. This stakeholder stated that the automatic return of the child should be interpreted as a less rigid principle in this context, as the child's welfare still has to be safeguarded. An Austrian judge responding to the public consultation opined that the limits on refusing return by way of Article 13b of the Hague Convention may be interpreted as a violation of fundamental rights and regretted that a review of the effects of the time elapsed between abduction and application for return is currently not given sufficient consideration under Brussels IIa. The judge referred to the case of *Neulinger and Shuruk vs. Switzerland* where the ECtHR ruled that the return of a child cannot be ordered automatically.[227] We note here that the ECtHR made it clear, however, that the aim should still be the return of the child and that a return could be accepted in spite of a risk if there were sufficient safeguards.[228] This is in line with Article 11(4) of the Regulation, which still allows for the possibility of a case-by-case decision.[229]

An additional challenge related to Article 11(4) was raised by the French national expert. **Protective measures under Article 11(4) often combine mere practical measures (especially against the violence of one parent) and measures that are related to the exercise of parental responsibility in general (for example, assistance or control by social services)**. This has posed challenges to courts, because the treatment of the abduction situation and more general aspects of parental responsibility are merged in this context. Thus, it is not always easy for a court only seised with the question of the return of the child to respect the delineation between the treatment of the abduction situation and the substance of parental responsibility.

(c) Difficulties relating to the hearing of the child in the framework of return proceedings (Article 11(1) to (5))

Article 11(2) stipulates that the child shall be given an opportunity to be heard when a court decides about an application on the return of the child. There have been difficulties relating to the hearing of the child in return proceedings, which have an implication on the enforcement of return orders. This is discussed in the dedicated section on the *Hearing of the child*.

Further difficulties relating to the question of how to interpret the outcome of the hearing of the child in child abduction cases were reported by the Romanian and Slovakian national experts. According to them, courts have struggled with deciding on the consequences of a hearing in abduction cases, in particular when the child refused to go back to the Member State of origin. In Romania, there was a case where the District Court interpreted the minor's refusal to return as a

[227] *Neulinger and Shuruk vs. Switzerland [2010] ECHR 1053,* (para. 78). .

[228] See. e.g. para. 91 of *Neulinger and Shuruk vs. Switzerland [2010] ECHR 1053.* The ECtHR argued in that specific case that, although a return did entail a risk, it was convinced that there were sufficient safeguards. Therefore, the Court did not find that a return would mean a violation of Article 8 ECHR in that case. ,

[229] In this context, in *Povse v. Austria* (Application No 3890/11) the ECtHR relied on *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (*Application No 45036/98) to conclude that correct application of EU law could not constitute a breach of fundamental rights, as the protection of fundamental rights by the EU was 'equivalent' to the protection provided by the Convention. This case concerned the enforcement of a judgment that was certified on the basis of Article 42, which is discussed in the section on "*Recognition and enforcement"*.

formal one, which had been induced by the defendant's family. This was later amended by the Court of Appeal, where the child's refusal was considered legitimate.[230]

The system stipulated in Article 11(6) to (8) may endanger the well-being of the child if a child is returned in spite of a risk that was established in the return proceedings and possibly after a long time has passed

Article 11(6)-(8) lays down the procedure to be followed after unsuccessful return proceedings in the state of abduction (carried out on the basis of the 1980 Hague Convention as complemented by Brussels IIa). Based on Article 10, the court of origin remains competent to decide on the substantive aspects of parental responsibility. This includes the possibility for a decision on the return of the child taken by the court of origin on the basis of Article 11(8). Thus, a child may need to return although a return was previously refused. A return order issued by the court of origin under Article 11(8) is directly enforceable in all Member States if certified according to Article 42.

Based on the study team's assessment, the following main findings result from the evidence collected: several different issues deserve to be mentioned with respect to Article 11(6)-(8). First, certain aspects were ambiguous, which has resulted in clarification by the ECJ. Second, the practical application of these provisions has proven difficult, in particular because the procedures do not take place in the Member State where the child is present and because the abducting parent is often not cooperative. Third, the procedure contained in Article 11(6)-(8) has been criticised by several stakeholders on the grounds that it undermines mutual trust between the Member States and that it has negative effects on the well-being of the child. Problems occur in particular because decisions on the custody, which can potentially overrule a previous decision on the return of the child, are often delayed. In general terms, a lack of information on the functioning of these provisions became apparent.

Based on the evidence collected, there are certain ambiguities with respect to the procedures under Article 11(6)-(8). Indeed, the procedure under Article 11(6)-(8) has been the subject of case law in various Member States (AT, BE, ES, IE, IT, LT, LU, LV, SK).

One ambiguity became apparent in *Rinau* where a child with habitual residence in Germany was unlawfully retained in Lithuania.[231] Initially, return was refused by the Latvian court of first instance dealing with the matter. However, the return was then ordered by the court of second instance. This was not enforced, because of several appeals that were lodged in the enforcement proceedings. In the meantime, the German courts transferred custody to the father in Germany and ordered the return of the child on the basis of Article 11(8). The Lithuanian courts referred the question to the ECJ of whether the German courts were able to invoke Article 11(8), as there had not been a final refusal to return the child in Lithuania. According to the ECJ, an application of Article 11(8) does in fact require a previous decision refusing the return of the child. However, it is not necessary that this decision be the final decision.[232]

Another ambiguity that became apparent is the question of the relationship between a new judgment on custody of the court of origin and a return order issued by the court of origin on the basis of Article 11(8). The Austrian national expert pointed to the fact that the Austrian Supreme Court has held that a return order under Article 11(8) is only valid if there is a final judgment on the

[230] See Civil Decision No 379/24.02.2011.

[231] Case C-195/08 PPU, *Rinau*.

[232] Rinau, paras. 56-89. The court concludes that "*once a non-return decision has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in Article 42 of the Regulation, that that decision has been suspended, overturned, set aside or, in any event, has not become res judicata or has been replaced by a decision ordering return, in so far as the return of the child has not actually taken place.*"

custody of the child that implies return of the child.[233] In its request to the ECJ, the Austrian Court argued that the enforcement of a return order before a judgment on custody is final could endanger the well-being of the child. If the final judgment on custody differs from the earlier return order on the question whether or not the child should be returned,[234] the child will have to move twice in order to comply with the contradictory decisions. However, the ECJ[235] held that such negative consequences must be accepted because "*the importance of delivering a court judgment on the final custody of the child that is fair and soundly based, the need to deter child abduction, and the child's right to maintain on a regular basis a personal relationship and direct contact with both parents, take precedence over any disadvantages which such moving might entail*".[236] Moreover, the return may even be necessary to facilitate an eventual decision on the custody of the child.[237] Similarly, the Belgian expert stated in general terms that courts have faced difficulties in understanding the connections between the different types of procedures and decisions that can be based on Article 11.[238]

A recent request for a preliminary ruling posed by a Belgian court is also about the role of custody proceedings in the state of origin that follow a non-order. The court asks whether it is possible to refer the question of custody to a court that is specialised return proceedings instead of the court that was previously seised for parental responsibility proceedings. The ECJ replied in the affirmative.[239] In general terms, specialisation of courts can contribute to a faster handling of return cases, as discussed in the previous sub-section.

According to the Irish legal expert, Article 11(7) has generated some particularly complex and problematic case law in the Irish courts involving conflicting decisions being made by the courts of different jurisdictions. The question came up how the courts should deal with cases where a significant period of time has elapsed since the child was abducted or wrongfully retained. In particular, it was not clear whether the assessment of a child's best interests should be informed by present circumstances or the circumstances that would have pertained had the child not been abducted or wrongfully retained.[240] Similarly, Article 11(8) has posed challenges to Irish courts. The lengthy delay that can arise in dispatching these proceedings presents difficulties for the courts when faced with a factual scenario where the child has lived in a particular setting for a significant period of time. It can also create difficulties in ascertaining the views of the child if the child is resident in another jurisdiction.[241]

Indeed, as concerns the **practicalities of the proceedings under Article 11(7)**, a judge interviewed noted that it is often very difficult to organise such hearings after a refusal to return the child, because the parent who abducted the child and the child are not in the Member State where the proceedings take place.[242] This is demonstrated in the text box below. We note in this regard that a similar situation also arose in the *Aguirre Zarraga* case. In that case, the ECJ stressed that a child must be given a genuine and effective opportunity to make his/her views known. If necessary, the

[233] Judgment of 23.11.2010, Oberster Gerichtshof, 1 Ob 194/10a. This is further discussed in the next sub-section on the enforcement of return orders.
[234] If a final judgment is rendered on the custody without ordering the return of the child, Austrian courts are competent according to Art 10 (b) Brussels IIa Regulation.
[235] Judgment of 01.07.2010, European Court of Justice, C-211/10 PPU *Doris Povse v Mauro Alpago*.
[236] See para. 63 of C-211/10 PPU *Doris Povse v Mauro Alpago.*
[237] *Povse*, paras. 52-53.
[238] The expert e.g. referred to case CFI Brussels, 15 June 2006, *Act. dr. fam.*, 2008, 117.
[239] Case C-498/14, David Bradbrooke v Anna Aleksandrowicz.
[240] See e.g. *AOK v MK* [2011] IEHC 360.
[241] See e.g. *MHA v AP* [2013] IEHC 611.
[242] General aspects related to the hearing of the child are discussed in the section *Hearing of the child and its representation in court*.

Evidence Regulation should be used which provides an opportunity to request the use of techniques facilitating a hearing without the child having to be present (e.g. video conferences).[243]

Typical case example: The functioning of Article 11(6)-(8) on subsequent custody proceedings

If a parent makes a submission under Article 11(7), the competent court in the Member State of origin must hear the case. However, such custody hearings can be very difficult to organise if the other parent does not react to the invitations by the court. Therefore, it may be that a hearing is conducted with the parent who is in the Member State of origin. However, if the parent who is in the other Member State with the child ignores the courts, this parent and the child cannot be involved in the hearing. If the court of origin were then to grant custody to the parent in the country of origin, the decision requiring the return would be enforceable in accordance with Article 11(8). However, in order to issue a certificate under Article 42, the child should have been given an opportunity to be heard. As this is not practically possible in many cases, this situation is very difficult. It is noted in this regard that the condition for issuing a certificate is that the child have been given an opportunity to be heard. If the child does not cooperate or refuses to be heard, this is not an impediment to issuing the certificate. Yet, ideally the child would be involved whenever appropriate. In practice, such cases have been resolved by persuasion or by conducting the hearing in the other country. However, this had to be paid for by the parties and was, therefore, associated with additional costs.

According to the Slovakian national expert, it is problematic that in some countries the child is automatically given into the custody of the left-behind parent without any further investigation, e.g. concerning the situation of the child and parents or the capability of the left-behind parent to take care of the child. In this respect we highlight that a return order on the basis of Article 11(8) is normally in contradiction to a refusal to return the child due to a grave risk. Thus, before issuing a return order under Article 11(8), the court of origin has to take into account the reasons for which the other court refused the return of the child. However, according to some stakeholders, courts often overrule the reasons provided in the first return proceedings in favour of the left-behind parent.[244] The Slovakian legal expert noted further that in some cases, criminal prosecution is instituted against the abductor, preventing the abducting parent to be present in the proceedings in the country of origin. Under such circumstances, the rights of defence of the abducting parent are endangered and the impartiality of the court of origin can be doubted. As a consequence, there may be serious reservations by the judge responsible against the enforcement of the foreign judgment issued on the basis of the Article 11(8) and certified according to the Article 42, as this can be qualified as a violation of human rights protected by the ECHR and by the EU Charter of Fundamental Rights. The Slovakian expert referred to a statement by the Slovakian Ministry of Justice, indicating that it is regrettable that the Regulation does not clearly state that the abducting parent should not be disadvantaged in subsequent custody proceedings simply on the basis that he or she abducted the child.

In addition, **Central Authorities are not equally involved** in such hearings, although they could potentially support the application of these provisions. First, we learnt from some stakeholders that parties are sometimes not sufficiently informed about these provisions. Second, there are no details on how Central Authorities can help in organising such hearings as efficiently as possible, e.g. by promoting the use of videoconferencing. Third, the application of these provisions can be particularly

[243] *Aguirre Zarraga*, paras. 63-68.

[244] Cf. Henrich in Eppler, J. (Forthcoming): *Grenzüberschreitende Kindesentführung – Zum Zusammenspiel des Haager Kindesentführungsübereinkommens mit der Verordnung (EG) Nr. 2201/2003 und dem Haager Kinderschutzübereinkommen*, Part C section II.3.c.bb.2. Dissertation to be published by Peter Lang GmbH. Eppler refers to Henrich who indicated that courts are often missing neutrality in cases relating to child abduction.

stressful for parties, which is why it is regrettable that mediation is not explicitly promoted in this context.

A final practical problem relates to the **transmission of documents to the original court** which is prescribed in Article 11(6) in cases of **non-return orders on an abducted child.** It was indicated by representatives of a Central Authority that the translation regime relating to these provisions is not clear. In addition, there is limited anecdotal evidence that these provisions are not always applied in practice. This was reported by a Spanish interviewee. Similarly, a French interviewee questioned the necessity of Article 11(6), which they felt was creating redundant administrative obligations, also noting that many judges do not seem to understand the purpose of this obligation and hence often do not comply with it.

In general terms, the **usefulness of the provisions contained in Article 11(6)-(8) was questioned by several stakeholders**, including some national experts, respondents to the public consultation and interviewees, as well as most of the participants in the expert panel, **on the grounds that the effects are not in the best interests of the child and undermine trust between the Member States**. In particular, it was argued by different stakeholders that a refusal of return could be altered by the procedures under Article 11(6)-(8), meaning that the child would need to be returned in the end. Indeed, most of the participants in the expert panel did not see any added value in Article 11(6)-(8). It was argued that these provisions rather increase uncertainty for citizens and prolong the overall procedure. As the time limits for return procedures do not apply to these provisions, cases can take years. In the meantime, the child usually stays in the Member State of abduction, which can have severe consequences: the child may get used to his/her new surroundings, which may make an eventual return even more confusing. The public consultation's results confirm these doubts, stressing that it was found that the procedure of Article 11(6)-(8) risks undermine mutual trust between Member States by allowing the requesting State to override a non-return order issued by the requested State.

In addition, the Slovakian legal expert raised and other stakeholders, e.g. at the expert panel, supported the argument that any partial win or lose in return proceedings in the state of abduction and in proceedings on custody carried out simultaneously in the state of origin do not have any meaning, because the state of origin always has the last word. On the basis of the current set up, parents are led to fight proceedings that have no meaning, which further antagonises parties and hinders the possibility of an amicable solution of the case, which should be the aim.

Furthermore, legal commentators have criticised the ECJ's ruling in *Povse* which is explained above. For example, in a legal paper by Dutta and Schulz, the ECJ's ruling in *Povse* is criticised, because it does not sufficiently stress the connection between the custody proceedings referred to in Article 11(7) of the Regulation and a return order under Article 11(8). According to the authors, by stating that a return order under Article 11(8) does not require a final decision on custody, the ECJ "*degraded the return proceedings between the Member States under the Hague Child Abduction Convention to mere preliminary proceedings in the Member State of refuge. The CJEU permits the Member State of origin to carry out its own "return proceedings" – in the shape of a mere return order within custody proceedings pending in accordance with Article 11(6) and (7) of the Regulation – without a prior or simultaneous custody judgment on the merits*."[245] The authors further doubt that the court in the Member State of origin is in fact best suited to deal with the question of the return of the child if the return as there is no need for a close examination of the situation in custody

[245] Dutta, A. and Schulz, A. (2014). "First Cornerstones of the EU rules on cross-border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation – From *C* To *Health Service Executive". Journal of Private International Law*, Vol. 10, Nr 1, pp. 22 ff.

proceedings. Instead, the return is decided on the basis of mere summary proceedings.[246] This is supported by Eppler, who adds that this wide interpretation of Article 11(8) leads to a situation where two proceedings with the same purpose, i.e. the mere return of the child, can be held in two Member States.[247]

In general terms, it was pointed out by some stakeholders that there is not sufficient information on the functioning of these provisions. For example, it was raised at the EJN meeting in November 2011 that it would be useful to collect statistics about Article 11(6)-(8).

Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplication of the Regulation and reservations against the content of decisions

Based on the study team's assessment, the following main findings result from the evidence collected: the actual enforcement of return orders is considered by many stakeholders as one of the most problematic areas related to enforcement. Despite applicable ECJ jurisprudence, speedy and unproblematic enforcement is often delayed or not carried out at all. This leads to severe consequences for the well-being of the child and the parent-child relationship. Specific reservations were reported in relation to return orders that are taken under Article 11(8) subsequent to a refusal of return issued by the Member State to which the child was abducted.

Barriers relating to the practicalities of enforcement were identified by many stakeholders. In particular, the enforcement of return orders is often not carried out at all. A large majority of the respondents to the public consultation 79% (i.e. 127 of 160 responses) stated that the enforcement of return orders was an important area for improvement. In particular, lawyers expressed this view the most clearly, with 85% of 26 agreeing it should be improved.

In this regard, the **lack of effective sanctions for non-compliance** was criticised by respondents to the public consultation, interviewees and participants in the expert panel. The participants in the expert panel confirmed that there have been cases where return orders were simply not enforced in the Member State of abduction. Referring to an ECJ ruling that implied the return of a child from Germany to Spain which has not been enforced by Germany[248], it was argued during the expert panel that there is currently a lack of repercussions in the event a Member State refuses to enforce a decision implying the return of a child. It was suggested that some Member States are not complying with the Regulation due to a lack of mutual trust and because there have not yet been legal consequences for not doing so.[249] We note here that effective sanctions should be provided for in the Member State of enforcement by its national law.

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[246] Dutta, A. and Schulz, A. (2014). "First Cornerstones of the EU rules on cross-border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation – From *C* To *Health Service Executive". Journal of Private International Law*, Vol. 10, Nr 1, p. 24.

[247] Eppler, J. (Forthcoming): *Grenzüberschreitende Kindesentführung – Zum Zusammenspiel des Haager Kindesentführungsübereinkommens mit der Verordnung (EG) Nr. 2201/2003 und dem Haager Kinderschutzübereinkommen*, Part 4, section C.II.1.b. Dissertation to be published by Perter Lang GmbH. Eppler argues that this interpretation by the ECJ implies that there can be two parallel decisions that decide on the same matter, i.e. the mere return of the child where the question of custody has not yet been clarified. According to her, the initial justification of the procedure stipulated in Article 11(6)-(8) was that the decision by the court of origin is more comprehensive than that of the court in the Member State of abduction (that faces strict time limits any only decides on the return, not on the custody of the child). If, however, a return order on the basis of Article 11(8) can also be issued when a final decision on custody has not yet been taken, this justification no longer applies. In addition, Eppler argues that an unnecessary move of the child is to be viewed critically, in particular taking into account that the court in the Member State of abduction would have previously refused the return under the strict conditions of Article 11 (4).

[248] Reference was made to Case C-256/09, *Purrucker.*

[249] Similarly, one respondent to the public consultation noted that effective sanctions would avoid critical cases such as *Mamousseau;* Case No 39388/05 – *Maumousseau and Washington v. France*/Decision of 06-12-2007

In this regard, several experts pointed to the **severe consequences of not enforcing return orders**, which was also confirmed by the European Court of Human Rights (ECtHR). In Shaw v. Hungary (Application No 6457/09), the court condemned Hungary for the protraction of the proceedings for the return of the child and, in connection with this, for the violation of the right to family life of the applicant living abroad. It held that there had been a violation of rights also because an unjustifiably long period of time had passed between the making of the enforceable final decision ordering the return of the child and the first enforcement act carried out with the participation of the police. As mentioned in the text box below, in Hungary these difficulties were in particular based on insufficient actions by competent authorities. The Hungarian expert underlined that the enforcement of a decision ordering the return of the child is a sensitive area from the aspect of the child and the parent living with him/her, on the other hand, the failure of enforcement injures or may injure the interests of the absent parent (and, in the long run, also the interests of the child) and affects the basic human right to family life.

Similarly, our Maltese national expert indicated that such a situation **can have irremediable consequences for the relations between the child and the left-behind parent** who is not living with the child. She indicated that proceedings in Malta tend to take much longer than necessary, because national laws allow for the possibility for appeal of a return order and meanwhile suspend the enforceability of that decision, without imposing any time limit on the appeal procedure. In the meantime, the life of the child may have moved on.

Further drawbacks with regard to Article 11 were identified by the respondents of the public consultation when a return order is issued: it does not list specific duties of the Central Authorities in securing the safe return of the child; it does not take into consideration the fact that often it will be not only the child, but also the abducting parent, whose safety will be at risk upon the return to the requesting State. An additional significant practical problem identified on the basis of the public consultation was the lack of cooperation between Member States. Central Authorities and courts do not communicate as effectively as they could and information exchange is an area for improvement. Central Authority cooperation is elaborated on in the section *Support to citizens in cross-border proceedings by Central Authorities*.

The successful enforcement of return orders may depend on the national structures put in place to ensure their enforcement. **Policies on the practical enforcement of return orders vary across Member States** in particular with regard to the parties involved and the measures that may be taken. According to the Hague Practice Guide on Enforcement of Return Orders[250], once a return order has been made, it is important to have effective coercive measures available for enforcing it. This is in line with the understanding of the ECtHR which has held that "*although coercive measures against the children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live.*"[251]

In most legal systems where the Convention is in force, one or more of the following "*coercive enforcement measures*" exist: (1) fines[252], (2) imprisonment of the abducting parent[253], and (3) the physical removal of the child from the abducting parent by enforcement officers[254]. The Practice

[250] Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement, available at: http://www.hcch.net/upload/guide28enf-e.pdf

[251] In Shaw v. Hungary (Application No 6457/09 [Judgment of 26 July 2011, point 67].

[252] Available in, e.g. Austria, Bulgaria, Czech Republic, Finland, France (*astreinte*: a recurring penalty whereby the contemnor is fined a fixed sum for each day that he/she does not comply with the court order), Germany, Greece, Latvia, Lithuania, Luxembourg (*astreinte*), Netherlands, Romania, Slovakia, Sweden, United Kingdom (Scotland).

[253] Available in, e.g. in Austria, France (the criminal proceedings can be initiated by the left-behind parent), Germany, Greece, Malta, Netherlands, United Kingdom (Northern Ireland, Scotland) and the Isle of Man.

[254] This was mentioned by e.g. by Austria, Czech Republic, Finland, Germany, Luxembourg, Malta, Romania, Slovakia, Sweden.

Guide stresses that these three types of measures not only come under different labels[255], but not all of them exist in every legal system.

Furthermore, even where they exist they are often not used due to consideration of the child's best interests. In this context, the European Court of Human Rights has ruled that, for the enforcement of Hague return orders in States Parties to the ECHR, it is not sufficient to provide for "*indirect and exceptional*" means of coercion,[256] in particular where these measures require steps to be taken by the applicant.[257] The national law should also provide for the direct implementation of the return order by State organs.

As regards the parties involved, in some Member States, the Central Authorities play an active role in the enforcement of return orders (e.g. BE, FR, MT). For example, in Belgium the Central Authority is the principal actor in such enforcement. Usually, the Central Authority examines first whether a voluntary execution of the order is possible and will accordingly allow a period of time for voluntary compliance. The Hague Practice Guide also highlights an additional issue in the fact that in a few jurisdictions, the applicant has to request that the enforcement officer enforce the return order.[258] In these cases, where the court has ordered that the child be handed over to the applicant, co-ordination with the applicant is essential before coercive enforcement can start. However, applicants may not be aware of the requirement of a formal request/application and may not know to whom it should be made. This is particularly relevant where the application is not made through the channel of Central Authorities. Furthermore, other difficulties can arise from the fact that while in a large number of jurisdictions no further separate authorisation or other decision is required for the actual enforcement of a return order[259], some legal systems require a separate formality for enforcement[260].

The Hungarian expert elaborated on the practical difficulties that arise in relation to the enforcement of return orders. There were severe deficiencies in the Hungarian system, which have been amended by a change of law. The changes are aimed at ensuring cooperation between the different parties involved in the enforcement of return orders as well as that the family care staff of child welfare services nationwide perform their duties properly.

Example of practicalities related to the enforcement of return orders (Hungary)

Difficulties based on the rules in force until 2012

Difficulties in the efficiency of the Hungarian system became apparent in *Shaw v. Hungary* (Application No 6457/09)[261]. A complaint about the enforcement procedures was filed with the European Ombudsman and investigated by the Hungarian Ombudsman, who highlighted that in this specific case the child protection system did not seem to be aware of the child's situation and did not fulfil its tasks properly. On this basis, the Ombudsman:

- asked the Minister of Public Administration and Justice, and the Interior Minister to consider the re-regulation of the cooperation of the bailiff and the police in enforcement proceedings relating to children whose whereabouts are unknown; and

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[255] Such as "contempt of court" or "coercive enforcement measures". The former was highlighted, *inter alia*, in the responses of the Cyprus, United Kingdom (Northern Ireland) and Isle of Man to the 2004 Questionnaire.

[256] e.g., a fine imposed upon the abducting parent, his or her imprisonment or the institution of criminal proceedings.

[257] See the decision of the European Court of Human Rights in *Ignaccolo-Zenide v. Romania*, judgment of 25 January 2000, Application No 31679/96 (available at http://www.echr.coe.int/echr),

[258] Austria, Bulgaria, Greece, Latvia, Lithuania, Romania, Turkey.

[259] Austria, Cyprus, Czech Republic, Finland, Germany, Italy, Netherlands, Slovakia, Sweden, United Kingdom (England & Wales, Northern Ireland, Scotland), and Isle of Man and Montserrat.

[260] It exists in Bulgaria, Chile, Greece, Latvia, Lithuania, Malta, Romania, and Spain. It may come under different names, e.g., authorisation to enforce, *formule exécutoire, certificado de ejecutoriada, auto que despacha ejecución*, executory engrossment (exequatur), enforcement order, *grosse*, execution document or registration.

[261] This case is also mentioned further below in this sub-section.

- asked the Minister of National Resources to assess whether the family care staff of child welfare services nationwide perform their duties properly and to take the necessary measures taking into account the results of the survey, and to promote compliance of the members of the signalling system with their obligations through methodological guidance and further training courses.

Changes that entered into force in 2012

In March 2012 the amended Act on Judicial Enforcement by Act CLXXX of 2011 Act entered into force. The following changes were introduced, in line with the Hague Conference on Private International Law "Guide to Good Practice":

- The amended Articles 180-180 /A. of the Enforcement Act have **reduced the number of means of enforcement** applicable concerning the delivery of the child (abolition of the possibility of imposing fines and of the obligation to obtain a social inquiry report), they **enable the enforcement to take place at the actual place of residence of the child** as well as the removal of the obligor or other persons from the scene where the child should be handed over if they obstruct the enforcement by their conduct.
- If the court decision is not performed voluntarily, the court orders the return of the child with the participation of the police. However, the court ensures **the protection of the child's interests through the involvement of the guardianship authority** in the procedure; the child and his or her personal belongings are also handed over to this authority.[262]
- A bailiff and the guardianship authority are involved in enforcement and there are specific provisions on how the different parties are to cooperate.

The Hungarian expert assumes that the amendment makes judicial enforcement proceedings more effective in cases relating to the surrender of the child, although this cannot be established yet due to the short time these provisions have been in force.

The importance of cooperation between the different parties was also highlighted by the French expert (see text box below).

Example of practicalities related to the enforcement of return orders (France)

If a judgment is not voluntarily complied with, the public prosecutor, in conjunction with the French Central Authority, will see to the enforcement and, once the decision has been served on the defendant parent, will see that he complies with it. Failing that, the prosecutor can seek the assistance of the police which ought to be avoided if possible, so as not to escalate the conflict. The specialisation of the courts dealing with child abduction cases is of help here, as they will have the better field experience. The prosecutor may summon the parent to find out how he/she will execute the return order; this audition can also be held by police forces or by

[262] The amended Act on Judicial Enforcement by Act CLXXX of 2011 Act states the following: *The bailiff has a central role in the enforcement. After a decision is issued, the bailiff informs the citizen about consequences of non-compliance. In the event of non-compliance the bailiff shall schedule the on-site procedure and shall notify the party requesting the enforcement, the guardianship authority and the police. If the proceedings fail, the bailiff shall directly notify the aforementioned parties concerning the date set for the new proceedings. If after having issued a warrant the police apprehends the child, the bailiff shall be forthwith notified, also at short notice, and shall place the child in the nearest children's home designated for providing temporary care, of which the bailiff shall be notified simultaneously. Before placement, the relative accompanying the child at the time of apprehension shall be given the opportunity to remain with, and to care for, the child, except if this may put the child in danger or jeopardize the outcome of the proceedings. The costs of detention of the child, as specified by law, shall be covered by the respondent, and they shall be construed as enforcement costs where no advance payment is required. As regards the verification, calculation, recovery and payment of said costs, the provisions governing the costs of police actions taken with a view to eliminating resistance shall apply.*

the educative service by the court. The French Central Authority offers assistance in this matter, facilitating through social service workers the setting up of meetings between both parents, to allow the child to be handed over to the parent "victim" of the abduction (if present in France).

A particularly tricky part of enforcement can be locating the child if the parent is not cooperative and hides with the child. Locating the child is of crucial importance and has in the past sometimes hindered enforcement. For example, in some Member States the search is carried out by the police, who are not necessarily specialised in such cases, and the search is abandoned if not successful. This meant in some cases that parents had to hire a private investigator to search for the child. This was pointed out by some respondents to the public consultation. The challenges surrounding this matter are also signalled in the Practice Guide on the Hague Convention[263].

In addition, it is problematic that the parties carrying out enforcement are not always familiar with the specificities of child abduction cases, as was pointed out in the public consultation.[264] For example, if the police is involved in enforcement, it is possible that the officers do not come in contact with child abduction cases on a regular basis. A lack of training was also identified with respect to Central Authority staff in general.[265]

Finally, a participant in the expert panel pointed out that in the case where after a return order was given in the Member State to which the child was abducted, the child is removed again to another Member State, the first return order should be recognised and enforced without exequatur in that latter State and without the need for introducing another return procedure in that State, as is the case under Article 42(1) for certified return orders issued under Article 11(6) to (8).

With regard to decisions requiring the return under Article 11(8), which are taken after a non-return has been issued, the enforcement has been particularly problematic. This is related to the controversies surrounding Article 11(6)-(8) which are described in the previous sub-section.

In some cases, the judges responsible for ordering enforcement have been reticent to enforce such decisions. One judge interviewed, who also works as a trainer for judges, pointed out that the same court that once refused the return of the child might later have to initiate the enforcement of a judgment on custody and thus return the child. This is very difficult for some judges from a personal and dogma perspective. However, based on the case law of the ECJ, this rule is acceptable and judges need to learn to separate the two different issues. This issue was examined by the Austrian Supreme Court that made a reference for a preliminary ruling on the enforcement of decisions under Article 11(8) (cf. also the previous sub-section). **Before the ECJ's ruling in this case, the Austrian Supreme Court tended not to enforce judgments ordering the return of a child that were not final judgments on custody**.[266]

1.6 Support to citizens in cross-border proceedings by Central Authorities

The Brussels IIa Regulation aims at ensuring support to citizens in cross-border proceedings, in particular through the active and efficient participation of the Central Authorities, social and local authorities, as well as mediation (*operational objective 3*).

This section assesses the extent to which the Regulation has achieved this operational objective and examines legal issues that have emerged in this regard. The issues covered include:

[263] See Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I - Central Authority Practice, pp. 47-48 (http://www.hcch.net/upload/abdguide_e.pdf).

[264] The relevance of training for all staff involved with child abduction cases was also highlighted by the Hague Conference Practice Guide on enforcement, pp. 72-73 (http://www.hcch.net/upload/abdguide_e.pdf).

[265] This is outlined in the section *Rules relating to the obligation for Central Authorities to collect and exchange information on the situation of the child that are not specific enough, and thus cause practical problems* in Annex 1.

[266] Judgment of 20.04.2010, Oberster Gerichtshof, 4 Ob 58/10y. See also the explanation in the previous sub-section.

- Rules relating to the obligation for Central Authorities to collect and exchange information on the situation of the child that are not specific enough, and thus cause practical problems;
- Insufficiently specific provisions on the procedure for the placement of a child in another Member State;
- Difficulties concerning the delineation of the scope of the Regulation in relation to the role of the Central Authorities (relating to awareness);
- Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children; and
- The use of mediation is currently not promoted to a sufficient extent.

Rules relating to the obligation for Central Authorities to collect and exchange information on the situation of the child that are not specific enough, and thus cause practical problems

Article 53 of the Brussels IIa Regulation requires the Member States to establish one or more **Central Authority/ies** to assist with the application of the Regulation. Article 55 gives the Central Authorities in the Member States a central role in cases that involve children. More specifically, Central Authorities shall (1) collect and exchange information on the situation of the child, on any procedures under way or on decisions taken concerning the child, (2) 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, (3) facilitate communications between courts, in particular for the application of the rules on the return of the child and the transfer of a case to a court of another Member State better placed to hear the case, (4) provide information and assistance as is needed by courts to apply the rules on placements of children in other Member States, and (5) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

Properly functioning **cooperation between the Central Authorities** is of significant importance to reduce time delays in cross-border proceedings, *inter alia* in the interest of the well-being of the child.

In practice, the types of authorities that fulfil the roles under Articles 55 and 56 of the Regulation vary across the Member States. While the Ministry of Justice has been designated as the competent authority in many Member States (AT, BE, BG, CY, EE, ES, FI, FR, DE, GR, HU, IE, IT, LV, LU, NL, PL, RO), others have chosen to involve authorities such as social welfare authorities or child protection authorities (HR, HU, LI, MT, PT, SK, SI). Some Member States have opted for involving two different authorities with different tasks (FR, HU, LT). In all Member States, the same authorities are competent for cases that arise under other related instruments, such as the 1980 Hague Convention.[267]

Based on the study team's assessment, the following main findings result from the evidence collected: it appears that the cooperation between the Central Authorities of the Member States is generally running smoothly. Nonetheless, it was reported that a series of (potential) issues is hampering the well-functioning of the cooperation at times and resulting in a mixed appreciation (47% of satisfaction) by the respondents to the European Commission's public consultation. In particular, the issues include a lack of clarity on the scope of responsibilities of Central Authorities, slow response times, language issues, insufficient resources and training, distrust as well as ineffective means of communication and information provision.

[267] An overview of Central Authorities under the Brussels IIa Regulation is available under: http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_centralauthorities_de_en.htm
An overview of Central Authorities under the 1980 Hague Convention is available under: http://www.hcch.net/index_en.php?act=conventions.authorities&cid=24

The assessment of the cooperation of and support by Central Authorities is mixed among stakeholders and experts. While most actors acknowledge the essential contribution that Central Authorities are providing for a smooth implementation of the Brussels IIa Regulation, many also point to a series of (potential) issues that are hampering the effective cooperation between the Central Authorities. Similarly, the European Commission's recent report on the application of the Brussels IIa Regulation concluded that the functioning of the Central Authorities is generally positive but suffers from a few practical difficulties.[268]

For instance, when asked about the quality of the cooperation between Central Authorities, a slight majority of respondents (53%)[269] to the European Commission's **public consultation** concluded that it is not functioning well. Many respondents identified a lack of cooperation and communication, excessive procedural formalities, distrust and slow transfers of information as main issues.

On the other hand, a large majority of the national experts reported generally **smooth cooperation between the Central Authorities** – a situation that some experts explained with the previous long experience in the context of the Hague Conventions. The role of the Central Authorities was considered as very useful by all interviewees. For example, it was indicated that the Central Authorities may prevent misunderstandings that could otherwise be caused by direct communication between judges or local authorities due to insufficient language skills (AT, FI, LV). Furthermore, the involvement of the Central Authorities is perceived to reduce delays according to some interviewees (e.g. HR) – a view that is contested by other observers.

However, similarly to many of the respondents to the European Commission's public consultation, several national experts (BE, CY, CZ, ES, HR, HU, LV, MT, PT, SK) as well as interviewees and participants in the expert panel pointed to a **series of (potential) issues preventing the cooperation between Central Authorities from functioning well**. These include a lack of clarity on the scope of responsibilities of Central Authorities, slow response times, language issues, insufficient resources and training as well as ineffective means of communication and information exchange.

(a) Scope of responsibilities

Several interviewees noted that Article 55 requires more clarification on the **scope of the role of Central Authorities**. Notably Article 55 (a) is very widely formulated and allows for different interpretations across the Member States. This has led to misinterpretation and misuse of Central Authorities in some cases, e.g. for the transmission of documents between the parties, etc. Furthermore, as a result, there are significant differences between Member States with regard to the assistance provided by Central Authorities to holders of parental responsibility that seek enforcement of access rights judgments.[270]

Several participants in the expert panel agreed that the scope of the tasks of the Central Authorities needs to be elaborated in the Brussels IIa Regulation. Currently, a lot of time is lost on discussing whether or not certain tasks are within the responsibility of Central Authorities. One expert noted that a clear definition of responsibilities would also make it easier for Central Authorities to request adequate funds/staff.

[268] European Commission (2014): *Report from the Commission on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction ans the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, COM(2014) 225 final, p.11.

[269] I.e. 86 of 161 responses

[270] European Commission (2014): *Report from the Commission on the application of 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*, COM(2014) 225 final, p.11.

(b) Time to respond

Several interviewees and national experts (CZ, HU, HR, LV, SK) noted that **information provision** among Central Authorities can sometimes be **very time-consuming**. These issues were also confirmed by the European Commission's recent report on the application of the Brussels IIa Regulation.[271]

Relating to this aspect, it was pointed out that **delays** in the framework of the **gathering of evidence** by authorities can occur in both national and international cases. For instance, an interviewee from Latvia indicated that it can take up to 6 months, depending on the region, until a situation report by the authorities is produced. While urgent national cases can be handled quicker, language barriers can slow down the procedures in international cases. Communication often takes place in written form and involves translation, because many officials do not have a sufficient level of English or do not feel secure of their language skills and fear misunderstandings (LV, AT).

There are examples of cases, where the necessary information was provided late or not provided at all.

Case example: Request for information met with delays (Estonia)

In one case the Estonian mother had moved to Ireland and applied for custody with an Estonian court, while the child was still in Estonia. In order to assess the mother's request for custody, the Estonian court sent a request for information about the child's potential living situation to the Irish authorities, first using the Taking of Evidence Regulation and then under Brussels IIa. The Irish authorities refused to give the necessary information on the grounds that the child was not in Ireland. In this case, the Estonian Central Authority had to convince the Irish authority to cooperate and it took over one year until the information could be obtained. This delayed the judgment by the Estonian courts, as they needed a social report to take a judgment.

In some severe cases, delays cause a risk that the child is abducted if the parent does not want to wait for the judgment on custody, as pointed out by an Estonian interviewee. Accordingly, the well-being of the child is endangered.

(c) Language issues and translation costs

Several interviewees and national experts (MT, PT) concluded that the cooperation between Central Authorities is challenging in those cases where **Central Authorities persist in requiring that information be sent in their own national language**. Several stakeholders argued that translations are time-consuming and expensive, and could be avoided considering that all Member States' Central Authorities are able to communicate in the French and/or English language.[272] These issues were also confirmed by the European Commission's recent report on the application of the Brussels IIa Regulation.[273]

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[271] European Commission (2014): *Report from the Commission on the application of 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*, COM(2014) 225 final, p.11.

[272] In this context one may note that Article 24 of the 1980 Hague Convention defines the following language regime: "*Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English. However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.*"

[273] European Commission (2014): *Report from the Commission on the application of 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*, COM(2014) 225 final, p.11.

Issues relating to the **translations costs** were also raised. Representatives of a Central Authority stated that in it is not always clear which Central Authority is in charge of and who pays for the translation costs (e.g. under the return procedures or the transfer of jurisdiction under Article 15). The interviewees suggested that, as a principle (to be included in the Regulation), the receiving Central Authority/court should always be responsible for and pay for the translations – if such are required. Indeed, the receiving court/Central Authority will potentially make use of these documents and, should the documents not be needed, unnecessary translations can be avoided.

(d) Insufficient resources, training and exchange

Several experts and stakeholders argued that the effectiveness of the cooperation of Central Authorities is hampered by **insufficient training, staffing and funding**. Some interviewees also took the view that the European Commission is providing insufficient support to foster and facilitate the exchange and mutual learning of the Central Authorities. Similarly, throughout the responses to the European Commission's public consultation, inadequate training of all professionals using the Brussels IIa Regulation was referred to numerous times. This is also applicable in the case of Central Authorities, where it was found that lack of knowledge and adequate training significantly hampers cooperation.

In order to exchange views on their practices as well as bilaterally to discuss on-going cases[274], Central Authorities meet regularly within the framework of the **European Judicial Network in civil and commercial matters**. In addition, the Central Authorities have used this forum to develop a guide on best practices and common minimum standards for cases of child abduction.[275] Nonetheless, a French Member of Parliament interviewed questioned the intensity of cooperation of the Central Authorities beyond the treatment of practical cases. He argued that in his view there is an insufficient **training and exchange between Central Authorities on more fundamental topics of (national) family law** in view of ensuring a **mutual understanding** of possibly diverging policy priorities and values in the different Member States and of building mutual trust. A better mutual understanding of the Central Authorities was seen as a first step to overcome issues.

(e) Means of communication and information exchange

Several experts and stakeholders noted that **ineffective means of communication and information exchange** are preventing cooperation among Central Authorities from functioning well. The specific issues identified relate to a lack of mandatory forms for information exchange, insufficient use of digital communication technologies and restrictions by national data protection laws.

Within the European Judicial Network on Civil and Commercial matters, a non-mandatory request form for a return procedure between Central Authorities has been drawn up and translated. For instance, a large majority of respondents to the European Commission's **public consultation** (85%)[276] believed that the **lack of mandatory forms translated into all EU languages** is hindering the exchange of information among Central Authorities. The national expert for Slovakia reported that, as a result of the lack of mandatory forms, requesting Central Authorities from other Member States often do not provide all the necessary information to identify the child or the case. Therefore, typically several iterations between the Central Authorities are required to address the information gaps.

[274] Since 2010, 155 cases have been discussed in bilateral meetings. See: European Commission (2014): *Report from the Commission on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction ans the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, COM(2014) 225 final, p.11.

[275] European Judicial Network: *The method for processing and hearing incoming return cases under the 1980 Hague Convention in conjunction with Regulation (EC) No 2201/2003 – Best practices and common minimum standards*, 20 pp.

[276] I.e. 140 of 165 responses

Furthermore, issues relating to the **means of communication** between Central Authorities were reported by several interviewees and participants in the public consultation. It was noted that necessary information from foreign authorities is sometimes sent by regular mail, causing delays of one week to one month (EE, LV). In this regard, it was considered useful to underline in an amended Brussels IIa Regulation that the **newest technologies should be used** (as is the case in the Maintenance Regulation) so as to ensure that all communication is sent via e-mail. A Croatian interviewee also suggested that it would be useful to encourage the use of video calls.

Finally, the national expert for Cyprus noted that effective cooperation between Central Authorities is also to some degree dependent on the particular **data protection laws of each Member State**, while common minimum standards have been defined by the European Data Protection Directive[277]. If one of the Member States involved in the exchange of information applies stricter personal data protection laws, thus prohibiting access to vital information about the person (parent or child) in question, then the effectiveness of the whole process under Article 55 may be jeopardised. Under the Cypriot Personal Data Law, the processing of personal data is prohibited unless the data subject has unambiguously given his/her consent. However, non-sensitive data may in exceptional circumstances be processed, provided that any of the specific reasons mentioned in the Law apply in the circumstances. In practice, Cyprus' Central Authority, i.e. the Ministry of Justice and Public Order, duly relies on the exceptions stated in Sections 5 (2) (d) and (e) of the Law so as to justify the communication of personal data to the Central Authorities of other Member States or holders of parental responsibility under Article 55 of the Regulation. In this context, one may also note that contrary to the Brussels IIa Regulation detailed rules on the use and protection of personal data by Central Authorities have been defined within the Maintenance Regulation.[278]

Insufficiently specific provisions on the procedure for the placement of a child in another Member State

Article 56 of the Brussels IIa Regulation defines the procedures for the **placement of a child in another Member State**. These procedures go beyond the mere cooperation between the Central Authorities. The placement of a child in another Member State may be crucial to safeguard the well-being of the child and the parent-child relationship. Costs and delays may occur if the process does not function properly.

It appears that practical difficulties have occurred in the cooperation of Central Authorities in relation to the procedure for the placement of a child in another Member State. The procedure provided for by the Regulation is considered as inadequate to the urgency of most cases of placement of children in other Member States. A majority of respondents (60%) to the European Commission's public consultation confirmed their dissatisfaction with the existing provisions. Several experts and stakeholders called for a revision of the Regulation's provisions in this regard as a key priority.

A majority of respondents to the European Commission's **public consultation** (60%)[279] believed that the rules in the Regulation governing the placement of a child in another EU country do not function in a satisfactory manner. Furthermore, a majority of respondents (59%)[280] indicated that the provision relating to the Central Authorities' obligation to provide information and assistance as

[277] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

[278] Cf. Articles 61-63 of 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

[279] I.e. 85 of 141 responses

[280] I.e. 63 of 107 responses

needed by courts in connection with the placement of a child in another EU country should be improved.

Similarly, most participants in the expert panel agreed that the provisions on the placement of a child in another Member State are often difficult to implement in practice due to the **non-abolition of exequatur**[281] and the **complex procedure provided for by Article 56**. These issues were also confirmed by the European Commission's recent report on the application of the Brussels IIa Regulation.[282]

In a majority of Member States, the national experts reported that there is limited experience and evidence with regard to the placement of children in other Member States according to the Article 56 procedure. However, the national experts for CZ, CY, HR, IE and SK as well as several interviewees reported a series of **practical difficulties in the implementation of Article 56**. These practical difficulties relate to the scope of the term "placement of a child", the legal impossibility to place children in other Member States as well as the placement procedure.

(a) Scope of the term "placement of a child"

Several national experts, interviewees and participants in the expert panel argued that the **scope of Article 56 is insufficiently clear**; in their view it needs to be clearly stated within the Brussels IIa Regulation to whom and in what circumstances the provision applies.

More specifically, with regard to the **scope of the term "placement of a child"**, representatives of a Central Authority noted that Article 1 para 2 (d) as well as Article 56 of the Brussels IIa Regulation are not fully clear on whether or not the placement of a child to another family member (e.g. to the grandparents) is to be considered as a placement in a foster family. In the interviewee's view, this leads to unnecessarily burdensome and lengthy procedures if a child is placed to a family member in another Member State.

Furthermore, the national expert for Ireland reported that the **lack of clarity surrounding the question of whether a foster family taking a child in care on a holiday abroad falls within the meaning of the term "placement"** in Article 56. This issue regularly arises at District Court level in Dublin. There are no written judgments available, but the practice appears to have been for the District Court to require compliance with Article 56 every time it is envisaged that a foster child is to be taken abroad on holiday.

(b) Impossibility to place children in other Member States

In the Czech Republic, the introduction of a new Civil Code is hampering the implementation of Article 56 of the Brussels IIa Regulation. Indeed, the national expert for the Czech Republic highlighted the fact that the placement of a child in another Member State has become problematic or even impossible with the new Czech Civil Code which entered into force on 1 January 2014. The new **Czech Civil Code does not allow the placing of a child into the care of a person or fostering by other than a person domiciled on the territory of the Czech Republic.** However, this does not mean that Czech authorities cannot apply the provision when a placement is made from abroad in the Czech Republic.

(c) Placement procedure: Consent from the competent authority

The **placement procedure provided for by Article 56** of the Brussels IIa Regulation was been considered **inadequate for the urgency of most cases of placement of children in other Member States** by experts and stakeholders interviewed. The **mandatory consent of the competent authority**

[281] Please refer to the section "*Abolition of exequatur of some type of judgments*" above for a detailed discussion.

[282] European Commission (2014): *Report from the Commission on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction ans the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, COM(2014) 225 final, p.16.

of the requested Member State for the placement where public authority intervention in that Member State is required for domestic cases of child placement (Article 56 para 2)[283] was considered particularly burdensome and time-consuming.

For example, the interpretation of the **modalities of the consent from the competent authority** that is necessary under Article 56 para 2 has caused difficulties in several Member States (EE, FI, FR, HR). In some cases, the courts asked for the consent of the authority only after the placement had already been conducted.[284] Such mistakes have occurred because the persons involved did not know that consent should be given *before* a placement of a child in another Member State is made.

The national expert for Cyprus also noted that the fact that the **placement can only be made with the consent of the competent authority of the requested State** may prove, at times, to be **significantly time-consuming**. In addition, a possible refusal by the competent authority as to the child's placement in a certain State will naturally eliminate any chances that the child is placed in that particular Member State – a fact which may ultimate prove to be to the detriment of the child.

Two officials of a Central Authority indicated that it is crucial to wait for the consent of the Central Authority, because the Brussels IIa Regulation does not clarify who is to carry responsibilities of financial and practical nature in relation to the placement of the child.

Finally, the national expert for Slovakia noted that foreign Central Authorities often interpret Article 56 para 2 of the Brussels IIa Regulation in such a way that they ask the Slovak Central Authority to **give consent to the placement of a child in an institutional care or with a foster family**. However, this **decision is not within the competence of the Central Authority**.

Difficulties concerning the delineation of the scope of the Regulation in relation to the role of the Central Authorities (relating to awareness)

Based on the study team's assessment, the following main findings result from the evidence collected: it appears that practical difficulties have occurred concerning the delineation of the scope of the Brussels IIa Regulation in relation to the role of the Central Authorities. In several Member States cases have occurred where requests from/to Central Authorities have been sent under other instruments – the 1996 Hague Convention and the Evidence Regulation – instead of the Brussels IIa Regulation due to a lack of clarity of rules delineating the role of Central Authorities within the Brussels IIa Regulation.

There has been confusion in relation to the identification of the measures that are expected by the Central Authorities, because requests are sometimes not linked to a specific legislative instrument or linked to the wrong instrument, such as the **1996 Hague Convention** (HR, SK, FI). Moreover, it was reported that it was sometimes not clear when requests should be sent on the basis of the Brussels IIa Regulation and when on the basis of the **Evidence Regulation**.

Some interviewees indicated that the rules stipulated in the Brussels IIa Regulation are not sufficiently detailed (LT, SK). For instance, according to an expert from Slovakia, the fact that authorities from the United Kingdom have sometimes sent requests under the 1996 Hague Convention to Slovakia (instead of using the Brussels IIa Regulation) shows that the rules in the Hague Convention may be easier to use, as they are more specific.

[283] With regard to the application of Article 56 para 2, the ECJ clarified in *Health Service Executive* (Case C-92/12 PPU) that the consent referred to in Article 56 para 2 must be given by a competent authority, governed by public law before a judgment on the placement is taken. The consent by the institution where the child is to be placed is not sufficient in this regard.

[284] This was also pointed out in the contributions to the European Commission's public consultation as a general issue.

Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children

Child welfare authorities play an important role in cross-border situations where the child's best interests have to be considered. Although the Regulation does not contain any direct provisions concerning the potential role of child welfare authorities, it seems that in some Member States they are actively involved in the enforcement of decisions relating to parental responsibility (access and custody rights as well as the return procedure). The role and involvement of child welfare authorities was reported as problematic, at least in some Member States.

Based on the study team's assessment, the following main findings result from the evidence collected: it appears that practical difficulties have occurred regarding the cooperation between Central Authorities and local authorities, mainly because there is currently no legal basis for that. It was regretted by several stakeholders that the role of competent authorities is currently not specified in the Regulation. In addition, several stakeholders reported that, while the social and local authorities are indeed actively involved in cases that are based on the Regulation, there seems to be a lack of awareness within these authorities on the Regulation.

Before turning to the problems identified, the **role of social and local authorities** will briefly be outlined. The social welfare authorities play a significant role in relation to cross-border cases on parental responsibility, as indicated by most of our national experts (AT, BG, CY, DE, FR, GR, HR, HU, LT, LV, PT, RO, SI, SK, UK). To give an example of their role: according to the expert from Cyprus, the Social Welfare Office of the Republic of Cyprus usually acts as the connecting link between the Central Authority and the child being the subject-matter of cross-border proceedings, due to the wide mandate which the national legislation has bestowed upon it.[285] In some Member States, the competent authorities, e.g. child welfare authorities, must (DE) or can be heard in cases relating to matters of parental responsibility (AT, CY).

The social or local authorities may also be **involved in the enforcement of judgments under the Regulation** (e.g. FR, HU). According to the French national expert, the intervention of different authorities in the enforcement of return order, some with specific field experience, helps to ensure the enforcement of the return order. In Hungary, the tasks of the child welfare service concerning the return of the child who has been removed from the family include:

- The provision of family support services – in cooperation with the institution in charge of providing a home and regional special child protection services – in order to create appropriate conditions or improve conditions for the family concerning the upbringing of the child and to restore the relationship between the parent and the child; and
- Providing after-care – in cooperation with the institution in charge of providing a home and regional special child protection services – in order to reintegrate the child into the family.

The extensive involvement of competent authorities in cross-border cases can have far-reaching consequences for the parties. For example, competent authorities in some Member States have to issue opinions in the framework of parental responsibility proceedings. This can be problematic in cases when the involvement is inaccurate or detrimental to the proceedings. In fact, the European Parliament receives numerous petitions about problems in this regard, involving authorities from various Member States.[286] These contributions show that social authorities can have an impact on the

[285] As such, within the applicable legal framework, the Social Welfare Office may, inter alia: a) hold an interview with the child for the purposes of preparing a report on its well-being, living conditions etc., and ascertaining the child's best interests in the circumstances, b) represent the child in Court, c) collect and provide to the Central Authority all relevant information concerning the child, its parents, the holder(s) of parental responsibility etc., d) facilitate or enable the communication between the Central Authority and the child or the holders of its parental responsibility etc., e) facilitate the implementation of any rights of access etc.

[286] http://www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/cm/1003/1003798/1003798en.pdf,

extent to which the Brussels IIa Regulation is implemented. Negative implications were particularly noted with regard to the role of the German Youth Office[287], as outlined in the text box below.

Case study: Litigation concerning the German Youth Office (Jugendamt)

The "*Jugendamt*" is the public administration in charge of youth protection, social and family assistance in Germany, which plays an extensive role in matters relating to parental responsibility. In addition to providing educational support, it has a right to be heard in all proceedings (in particular on parental authority, determination of residence of the children and right of visit concerning children) and can be a party if it requests this or if the well-being of the child is endangered[288]. It has a right of appeal against any judicial decision and has to attend every hearing. In civil matters concerning a minor (such as adoptions and guardianship), the *Jugendamt* can also be granted parental authority when the child is removed from the parents.[289] As a particularity, it is autonomous in initiating proceedings when it believes a minor to be in danger.[290] It can remove a child from his/her parents' authority against their will, calling on the police force if necessary. A law of 2008 expanded its mandate, authorising preventive placement without prior approval from the judicial authority, on simple denunciations.

Critics[291] have argued that, in view of the powerful role of the *Jugendamt* in proceedings, it is not sufficiently supervised and possibilities of recourse are limited.[292] In addition, fathers of children born outside marriage and foreign spouses in binational marriages are felt to have been discriminated against in the framework of the activities of the *Jugendamt*.

Since the 1990s, several NGOs[293] have raised awareness about the problems foreign spouses have to face in Germany, including the strict rules they have to follow if they want to keep on seeing their children (e.g. obligation to speak German with the child or supervised visits) and loss of custody. Given the exponential number of petitions[294] it received, the European Parliament created a permanent working group on the *Jugendamt* in 2006, which confirmed that non-German parents could face discrimination in Germany.[295] In 2007, the Bamberg declaration issued by the INGO Conference of the Council of Europe detailed the different breaches of rights by the *Jugendamt*. It referred, for example, to the involvement of the *Jugendamt* in return proceedings, stating that rapid returns are often not ensured and that "*the child very often gets alienated from parents by direct manipulation of the child and/or by*

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http://tinyurl.com/qbpct4f, http://tinyurl.com/maws8uo, http://tinyurl.com/np6bkhk

[287] http://tinyurl.com/k6onfw2

[288] The Jugendamt has to be heard in all cases concerning minors and has a right to ask for being involved as a party. In cases where the well-being of the child is endangered, the Jugendamt has to be involved as a party (§ 162 Family Law Act, http://www.buzer.de/gesetz/8530/a158144.htm).

[289] http://www.senat.fr/lc/lc170/lc1701.html#toc1

[290] Council of Europe, 28th national report on the application of the European Social Charter submitted by Germany, 3.01.2011 http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/XIX4_en.pdf

[291] League for Children's Rights http://tinyurl.com/ovmgmpe,

[292] This is of particular relevance as it is involved in an exponential number of forced placements with removal of parental authority: in 2011, there were more than 9600 cases where custody was granted to youth welfare offices. See https://www.destatis.de/EN/PressServices/Press/pr/2012/07/PE12_248_225.html (50 times more than in France).

[293] For example, the CEED (*Conseil Européen des Enfants du Divorce*), and the Polish Association *Dyskryminacja*.

[294] e.g. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-418.136%2B04%2BDOC%2BPDF%2BV0%2F%2FEN

[295] http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/668/668349/668349en.pdf http://www.europarl.europa.eu/RegData/commissions/peti/document_travail/2009/418136/PETI_DT%282009%29418136_EN.pdf

procrastination of the proceedings by the youth welfare office and the courts."[296]

As noted above, issues relating to the **cooperation between Central Authorities and local authorities/child welfare authorities** were reported by the national experts and the participants in the expert panel, as well as the respondents of the public consultation.

According to the public consultation results, there is a need to adapt the cooperation between the Central Authorities and the local child welfare authorities to take better account of cross-border cases according to 71%[297] of respondents. Indeed just 38%[298] believe that the cooperation between Central Authorities and local child welfare systems works as well as it should in order to ensure the smooth operation of the Regulation. There are several types of difficulties involved, which are outlined below. They relate to:

- Cooperation between Central Authority and its national social welfare authorities;
- Potential cooperation between the social authorities of one Member State and the Central Authority of the Member State where the child should be placed.

First, **the Central Authority requested by another Central Authority may need to obtain information from its national welfare authorities**. For example, in the context of placement decisions, the Central Authorities need to obtain information from domestic registries or child welfare services. On this basis, cooperation between the social welfare authorities and the Central Authorities is regarded as essential by the national experts and participants in the expert panel. This was highlighted, for example, by the Portuguese expert, who argued that only a close collaboration between Central Authorities, social security institutions and courts can allow the effective and expeditious operation of the Regulation and, consequently, a real protection of children in the context of cross-border situations. The cooperation internally between the requested Central Authority and its national welfare authorities is not regulated in the Regulation. Some stakeholders have raised problems relating to the cooperation between Central Authorities and local/social authorities in the same Member State. These mainly relate to inefficient procedures causing delays, as explained under the point "*Rules relating to the obligation for Central Authorities to collect and exchange information on the situation of the child that are not specific enough, and thus cause practical problems*". In addition, several stakeholders indicated that difficulties arise because of a lack of knowledge within the social/local authorities about the functions of the Central Authorities. This is a general difficulty, which is discussed below.

Second, difficulties have been encountered in relation to the link **between the social authorities of one Member State and the Central Authority of the Member State where the child should be placed**. It was noted, however, that the involvement or role of social welfare authorities is currently not specified in the Regulation. The Czech expert pointed out that there has been successful cooperation between the Czech Central Authority and foreign social or local authorities. However, there is formally no legal basis for this. In relation to these difficulties, it can be noted that there may be a possibility for courts in the Member States of origin to make use of the Taking of Evidence Regulation to retrieve information for the placement abroad.

[296] http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/DE/LCR_GER_UPR_S4_2009anx_BambergDeclaration.pdf
[297] I.e. 113 of 160 responses
[298] I.e. 58 of 152 responses

Case example: Cooperation without a legal basis (Czech Republic)

In 2012, there were some parental responsibility proceedings in the UK concerning children of Czech nationality. In these proceedings a request was made to place the child in the care of relatives living in the Czech Republic. The competent British child welfare authorities wanted to ascertain the social conditions of the families in the Czech Republic. The Czech Central Authority was asked for assistance and in some cases the British social officials actually visited the Czech families. Such cooperation, however, is limited. There is no legal base for this type of cooperation and therefore, an action of a foreign official on the territory of the Czech Republic cannot be seen as an act of exercising of a state power and might be successful only in cases where the relevant families voluntarily accept the visit. According to the Czech national expert, it would be more appropriate to act on the basis of the Regulation on Taking of Evidence in such situations.

In addition, there are currently difficulties because there is **not always sufficient knowledge about the procedure laid down by the Regulation within the social and local authorities**. As Adair Dyer (Deputy Secretary General of the Hague Conference on Private International Law) regularly pointed out in his reports about the Hague Convention, quite apart from the fundamental legal issues to overcome, local social authorities and logistics are not adapted to solving international problems.[299] Scholars insist on the key role of Central Authorities in tackling these issues (through coordination and training), but regret that is currently not achieved due to a lack of resources.[300] Such difficulties were also reported by the national experts and the participants in the expert panel. According to three experts (HR, LT, ES), difficulties have arisen because of a lack of knowledge on cross-border cases in general and the Regulation in particular. In Lithuania, the Central Authority has tried to close this gap by means of collaboration and communication. In addition, workshops and training are provided for employees at the social welfare authorities. Similarly, the Croatian national expert demonstrated on the basis of a case example that Croatian courts are sometimes not aware of the role of the Central Authority and how to retrieve information from competent authorities in other Member States. Also, the Croatian welfare authorities are reluctant to use the Regulation as the legal basis for their activities.

This was confirmed during the expert panel. One expert reported that local child welfare authorities very often file requests under the Brussels IIa Regulation even though this is normally not provided for by the Regulation. The expert stated that this involvement of child welfare authorities does not generate a problem per se; the problem is rather linked to the lack of knowledge/understanding of the instrument among these types of authorities and the legal uncertainty on whether their involvement is covered by the Regulation or not. In this regard, another participant noted that the **title of the Brussels IIa Regulation** contributes to this lack of knowledge and understanding among child welfare authorities because – contrary to the Hague Convention – it does not include the term "*child protection*" and is thus sometimes considered as irrelevant by these authorities.

The use of mediation is currently not promoted to a sufficient extent

Article 55 (e) of the Brussels IIa Regulation encourages Central Authorities "*to facilitate agreement between holders of parental responsibility through mediation or other means*".

Based on the study team's assessment, the following main findings result from the evidence collected: it appears that the effectiveness and efficiency of mediation as an alternative conflict

[299] Detrick, Sharon and Vlaandingerbroeck, Paul, *The Globalization of Child Law: The Role of The Hague Conventions*, Martinus Nijhoff Publishers, The Hague, 1999, p.34.
[300] Ibid, p.35.

resolution mechanism in international cases of matrimonial matters and parental responsibility is widely acknowledged. Experts and stakeholders, including a majority of respondents (61%) to the European Commission's public consultation, called for a stronger promotion of mediation within the Brussels IIa Regulation and through soft measures, such as training and certification programmes for mediators. However, a mandatory use of mediation was not considered as effective by a majority of experts.

Several experts interviewed insisted on the importance of further fostering the promotion and take-up of **mediation** as an effective alternative conflict resolution mechanism in international cases.

For instance, a majority of the respondents to the European Commission's **public consultation** (61%)[301] confirmed their support of mediation as an alternative conflict resolution mechanism and indicated that it would be useful for the Brussels IIa Regulation to provide for additional provisions so as to enhance the use of mediation.

As regards the **effects of mediation**, it was argued that mediation could help to further **reduce costs**, **delays** as well as **stress** and could, importantly, help to **improve the well-being of the child and the parent-child relationship**. Furthermore, agreements that have been reached through mediation are often longer lasting and more sustainable compared to agreements reached before courts. This is due the fact that the mediator tries to ensure all arguments and perspectives are taken into account. This may go beyond the matters that are covered by a legal dispute.

A Croatian official at the Central Authority indicated that there have been positive experiences in Croatia in using mediation for Hague Convention cases. In her experience, child abduction cases that go to court sometimes take very long and there are sometimes difficulties in enforcing the decisions. Mediation has in the past helped to find faster solutions, as the parents can be involved more. In any cases where children are involved, it would be very useful to try this in order to come to agreements in a faster and more sustainable way.

As regards the **potential savings on costs and delays**[302], a Polish mediator explained that in simple cases, only one session needs to be held, while most cases are resolved in about two sessions. In complicated cases, around six sessions can be held. In Poland, one session takes three hours and costs EUR 50 per person for the first session. Each subsequent session costs EUR 25 per person. Compared with legal proceedings, mediation can thus be faster and more cost-efficient for the parties. This was supported by an Irish mediator, who further noted that mediation can prevent court disputes in the majority of cases.

It can be noted that some Member States provide for a formalised and in some cases mandatory involvement of mediators for family conflicts, which could serve as an inspiration for cross-border

[301] I.e. 100 of 164 responses

[302] In general terms, the effectiveness and efficiency of mediation as an alternative conflict resolution mechanism has been confirmed by numerous studies, including:

- According to the European Parliament's study ''*Rebooting the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU*" (2014), the average duration of a mediation in the EU is 43 days compared with 566 for litigating the same dispute, which has been calculated in the "*Doing Business 2014"* Report of the World Bank. The study assessed that the duration of a mediation can vary from 30 days up to 68 days, while a litigation in court have a much wider variation from 300 days in Lithuania to 1300 days in Greece. Furthermore, the study indicates that – despite its proven and multiple benefits – mediation in civil and commercial matters is still used in less than 1% of the cases in the EU.
- The Council of Europe's CEPEJ report "*Efficiency and Quality of Justice*" (2012) highlighted that the fact that the public justice system is becoming financially weaker making it less likely to address the needs of its users in a timely and effective manner. Therefore, the report emphasized the actual savings potential of mediation. It states that "*The trend in Western and Northern European states would be globally in favour of limiting the number of courts, mainly for budgetary reasons, but sometime also for seeking more efficiency through specialisation and economies of scales*."

cases (e.g. HR, PL). However, it was underlined by an Irish mediator that mediators involved in cross-border cases should be certified based on targeted training due to the complexity of such cases.

Example of rules on the use of mediation in family conflicts (Poland)

In Poland, there has been an obligation for parents to go to mediation since 2009. In this context, parents are asked to go to mediation sessions with the aim of reaching a "parenting agreement". Normally, such an agreement is concluded in two to three sessions. Afterwards, the agreement needs to be confirmed by a court. Often, lawyers are invited to the sessions to assist with the preparation of a plan that will be of substance before a court. In Poland, they introduced an incentive for parents to be cooperative in this regard: if parents do not manage to agree on a plan, only one parent will be granted custody. However, a negative effect was mentioned of mothers manipulating the proceedings by not agreeing on a plan, as in Poland mothers are traditionally granted custody.

According to a Polish mediator, mediation saves time and costs for the family, as the proceedings are considerably shorter. Usually, there are no appeals against such decisions, because they contain what has been agreed upon beforehand. This strengthens the well-being of the child, as the solutions are found in a positive atmosphere and because the situation of the child can be considered as well.

The interviewee argued that such a system would be very useful for international cases, as these are usually more complicated than national ones. Usually, parents have a negative attitude, because the situation seems unpromising and difficult. Mediators try to consider the situation in the different countries that are involved and make the parents aware that there always is a solution that could function well. Moreover, the parents learn to act as partners rather than competitors. As the agreement then merely needs to be confirmed before a court, fewer emotions are involved and there is less stress for the parents as well as the child.

Numerous interviewees, respondents to the European Commission's public consultation and participants in the expert panel argued that the **current provisions of Brussels IIa Regulation insufficiently promote the use of mediation in international cases** of matrimonial matters and parental responsibility. More specifically, experts and stakeholders pointed out a number of weaknesses of Article 55 (e) that have led to an insufficient take-up and promotion of mediation in the Member States:

- No reference to the Mediation Directive (Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters) is currently included in the Brussels IIa Regulation;
- The recommendation for the use of mediation in the Brussels IIa Regulation is limited to a sub-item of Article, suggesting that the recommendation is of low importance;
- No rules exist in the Brussels IIa Regulation in the mutual recognition rule for mediation agreements across all Member States;
- No obligation exists for Central Authorities to establish a list of certified mediators specialised in international cases of matrimonial matters and parental responsibility. This is already implemented by some Member States, such as France, and is a recommended practice of the Hague Conference Good Practice Guide on Mediation[303];
- No obligation exists for judges in the Brussels IIa Regulation to inform the parties at the beginning of the proceedings about the possibility of mediation. According to several legal

[303] HCCH (2012): *Mediation – Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, http://www.hcch.net/upload/guide28mediation_en.pdf

practitioners, practical experience shows that parties rarely refuse such a proposition by the judge.

Some experts and stakeholders also argued that European Commission support for the practical implementation of Article 55 (e) – e.g. through the funding of training, certifications and awareness raising campaigns – is currently insufficient in scale in order to effectively promote mediation in international case of matrimonial matters and parental responsibility.

Several stakeholders pointed **Hague Conference Good Practice Guide on Mediation**[304] as a useful tool and guidance to promote mediation in family matters covered by the Brussels IIa Regulation. In particular, the guide considers the **specificities of mediation in cross-border family disputes**, including short timeframes/expeditious procedures in abduction cases, the need for close co-operation with administrative/judicial authorities, the enforceability of the mediation agreement in several jurisdictions, different cultural and religious backgrounds, language difficulties, distance, the voice of the child in mediation, potential accusations of domestic violence as well as potential criminal proceedings against the abducting parent.

1.7 Information and awareness

This operational objective is not discussed within this annex, but in Section *3.3.3. "Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States*" in the main evaluation report.

[304] HCCH (2012), opt. cit.

Annex 2. Context of the Brussels IIa Regulation

This annex introduces the Brussels IIa Regulation and sets out the context for evaluation of the Regulation.

2.1. The Brussels IIa Regulation

This section examines the Brussels IIa Regulation in terms of its policy context, objectives and scope.

2.1.1. Policy background and adoption of the Regulation

Since the adoption of the Treaty of Amsterdam in 1997, the EU has had the objective of establishing an area of freedom, security and justice, which is to ensure the free movement of persons as laid down in Article 67 of the Treaty on the Functioning of the European Union (TFEU). In this context, the EU is to develop judicial cooperation in civil matters that have cross-border implications based on the principle of mutual recognition of judgments and decisions in extrajudicial cases, as stipulated in Article 81 TFEU. In the 'Stockholm Programme', the European Council pointed out that the main policy objective in this area is *"[…] that borders between countries in the European Union should not constitute an obstacle either to the settlement of civil law matters or to initiating court proceedings, or to the enforcement of decisions in civil matters."*[305]

The development of cross-border cooperation in the field of civil matters had already started in 1968 – prior to there being a direct legal basis – with the 'Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (Brussels I Convention).[306] The aim of this Convention was to establish common rules concerning the jurisdiction and the mutual recognition of judgments among the Member States. However, matrimonial matters, in particular, divorce, legal separation, marriage annulment, parental responsibility and child abduction, were excluded from its application as national laws in this field were found to be incompatible at the time.[307]

This said, a number of problems have emerged as 'international families' have become more common as a result of the growing mobility of citizens.[308] When international couples want to break their marriage link, the spouses may face a number of practical and legal difficulties due to the differences in legislation between the Member States. First, it may be unclear which courts have jurisdiction to handle the divorce, legal separation or marriage annulment, as the competent court is determined in different ways in different Member States. Second, it may not be clear which national law is applicable. This is determined by means of the conflict-of-law rules of the Member State where the action is filed, using, for example, factors such as nationality or habitual residence. As the conflict-of-laws rules are legally very complex and vary among the Member States, the applicable law may differ depending on the country in which the action is filed and the outcome is difficult to foresee.[309] This can have serious repercussions, considering the vast differences in substantive law. For example, the possible grounds for divorce vary, and some Member States have introduced a higher threshold than others. Furthermore, the concepts of legal separation and annulment are not known in all Member States. Third, these differences may lead to issues concerning the enforcement

[305] The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Doc. 17024/09, 2 December 2009, p. 30 (Available at: http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf)
[306] Available at: http://curia.europa.eu/common/recdoc/convention/en/c-textes/_brux-textes.htm
[307] http://www.europeancivillaw.com/content/brusselstwo011.htm
[308] See for instance: EU Employment and Social Situation Quarterly Review, supplement June 2014, prepared by the Employment Analysis and Social Analysis Units in DG EMPL. It presents data on the intra-EU mobility of workers in the European Union.
[309] "EU and family law", http://www.citizensinformation.ie/en/birth_family_relationships/eu_and_family_law.html

of judgments. Fourth, when spouses or unmarried couples have children, issues may arise with regard to cross-border rights of access to children.[310] These issues potentially hinder the free movement of persons and judgments and are thus at tension with the goal of setting up an area of freedom, security and justice. Similar problems are faced in relation to parental responsibility, with further complications and sensitivities e.g. in cases of child abduction.

In view of this context, it was planned that the 1968 Brussels I Convention should be extended to cover matrimonial matters as well. The text of the new 'Brussels II Convention' is thus based on the existing rules in the field of civil and commercial matters. After the EU had been given the mandate to adopt instruments in this field, the Convention agreed upon was replaced by a Regulation, while the contents largely remained the same.[311] Subsequently, Regulation (EC) No 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (the 'Brussels II Regulation') was adopted. The Brussels II Regulation regulated jurisdiction and the recognition and enforcement of judgments in matrimonial matters, including divorce, legal separation, marriage annulment, and in matters of parental responsibility for joint children. It was the first EU measure in the area of family law.

However, the scope of the Brussels II Regulation was soon considered too narrow, particularly as not all issues relating to parental responsibility were covered. More specifically, stakeholders stated that there was a need to extend the rules on mutual recognition and enforcement of Brussels II to all decisions on parental responsibility and to reinforce the obligation of the courts to order the return of children abducted within the EU. As a result, the Commission proposed to revise the Brussels II Regulation and adopt a new measure to ensure the coverage of matrimonial matters and matters of parental responsibility in one instrument, as there are often close links between these issues.[312]

Consequently, Regulation (EC) No 2201/2003 was adopted and entered into force on 1 March 2005. It repealed the previous Brussels II Regulation and is referred to as the Brussels IIa Regulation or the Brussels II bis Regulation (the former is used as a working title in this study).

As concerns the changes to the previous Brussels II Regulation, the rules relating to matrimonial matters were largely maintained, while new provisions on parental responsibility were added.

It can be noted that while the Brussels IIa Regulation establishes grounds for jurisdiction and rules regarding the mutual recognition and enforcement of judgments, it does not lay down rules on the applicable national law.

In 2006 the Commission presented a proposal to amend the Brussels IIa Regulation.[313] The Commission had identified vast differences between the national conflict-of-law rules, which led to a situation of uncertainty for international married couples who wished to break their marriage link, who were stated to be facing difficulties in establishing which law is applicable to their matrimonial proceedings. Therefore, the proposal aimed at introducing common standards with regard to the applicable law. However, no agreement could be reached in the Council and the Proposal was subsequently withdrawn.[314] Instead, a group of countries decided to move forward regarding this matter in the framework of enhanced cooperation.

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[310] Commission Impact Assessment "Annex to the 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/SEC(2006) 949; http://ec.europa.eu/justice/civil/family-matters/index_en.htm.

[311] http://www.europeancivillaw.com/content/brusselstwo011.htm

[312] Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance – COM (2002) 222 final, pp. 2-4.

[313] 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.

[314] http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=194499

By means of Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation[315], a uniform set of rules on the law applicable to divorce and legal separation was established in 2010. Initially, fifteen Member States decided to join this instrument (Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain). Lithuania decided to join in 2012.[316] Although Greece withdrew its request in 2010[317], the country joined again in 2014.[318]

Council Regulation (EU) No 1259/2010 is universal, i.e. it can indicate that the applicable law is that of any state. Spouses are in principle allowed to choose the applicable law of a state with which they have a special connection. In the absence of a choice, the applicable law is decided based on four hierarchical criteria relating to habitual residence and nationality. Where none of the conditions apply, the law of the court dealing with the case will be applicable.[319] The national conflict-of-law rules are still used to determine which national law should be applicable to a case in those Member States that do not participate in this instrument. With regard to cases on parental responsibility and the protection of children, rules on applicable law are set down in the 1996 Hague Convention[320]. The Convention is in force in all EU Member States with the exception of Italy.

The 2006 Proposal contained additional elements, which were not retained in Regulation (EU) No 1259/2010. This concerns in particular the possibility for spouses to choose the competent court in matrimonial proceedings, a uniform and exhaustive rule on residual jurisdiction, and the deletion of Article 6 of the Brussels IIa Regulation.[321]

The EU institutions have commented that future amendments in the field of judicial cooperation in civil matters may be relevant. In the 'Stockholm Programme', the European Council reaffirmed that the process of abolishing intermediate measures to the recognition of judgments (exequatur) should be continued, while inviting the Commission to examine which safeguards are necessary in this regard. It also stated that the harmonisation of conflict-of-law rules should be further considered in areas where this may be beneficial, pointing in particular to separation and divorce.[322] In addition, it invited the Commission to examine the option of establishing common minimum standards in relation to the recognition of decisions on parental responsibility.[323] The Commission has picked up on these issues in the 'Action Plan implementing the Stockholm Programme'.[324] The European Parliament has identified the addition of a clause on *forum necessitatis*, enabling courts to exercise jurisdiction when no other forum is available, as a priority for the amendment of the Brussels IIa Regulation.[325]

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[315] OJ L 343, 29.12.2010, p. 10–16, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:EN:PDF

[316] Commission Decision 2012/714/EU confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation.

[317] Council Decision 2010/405/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation laid down the basis for this cooperation.

[318] The Regulation will be applicable in Greece as of 29 July 2015. Cf. Commission Decision (2014/39/EU) of 27 January 2014 confirming the participation of Greece in enhanced cooperation in the area of the law applicable to divorce and legal separation.

[319] Articles 5 and 8 of Council Regulation (EU) No 1259/2010.

[320] 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 (available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=70)

[321] Terms of Reference, p. 10.

[322] The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Doc. 17024/09, 2 December 2009, para. 3.1.2 (Available at: http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf)

[323] The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Doc. 17024/09, 2 December 2009, para. 3.3.2 (Available at: http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf)

[324] Communication from the Commission: Action Plan Implementing the Stockholm Programme, COM (2010) 171 final.

[325] European Parliament legislative resolution of 15 December 2010 on the proposal for a Council regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (COM(2010)0105 – C7-0315/2010 –

2.1.2. Objectives and scope of the Brussels IIa Regulation

The core **objective** of the Brussels IIa Regulation is to contribute to the proper functioning of the internal market by simplifying the free movement of judgments, authentic instruments and agreements and by establishing a unified set of rules on conflict of jurisdiction for matters relating to matrimonial matters and parental responsibility.[326]

Moreover, with regard to matters relating to parental responsibility, the Regulation aims to provide for a unified and comprehensive set of rules, covering all decisions that fall under this matter, in order to ensure the equality of all children.[327]

The types of proceedings to which the Regulation applies and their subject-matter are stipulated in Article 1, to be understood in combination with the relevant definitions as set down in Article 2.

As concerns **scope**, the Regulation applies to '**civil matters' relating to matrimonial matters or parental responsibility**. The term 'civil matters' is to be understood broadly as including all the matters listed under Article 1 of the Regulation, although specific aspects of these may indeed be public law under national law.

According to Article 2, the Regulation applies to '**matrimonial matters'** in terms of measures that relate to breaking the marriage link. This includes divorce, annulment and legal separation. It does not include any matter relating to prior circumstance or consequences, such as grounds for divorce or property consequences.[328] As indicated above, the Regulation does not establish substantive or applicable law rules, but its scope is limited to conflict of jurisdiction, and provisions on free movement of judgments, authentic instruments and agreements.

In addition, the Regulation applies to "**the attribution, exercise, delegation, restriction or termination of parental responsibility"**. Again, the term 'parental responsibility' is to be understood broadly, referring to all rights and duties relating to the child or to property of the child. It includes rights of custody and rights of access. In this regard, it can be noted that the repealed Brussels II Regulation only applied to matters of parental responsibility when they were raised in matrimonial proceedings. Under Brussels IIa, the scope is extended to all matters relating to parental responsibility, regardless of whether or not the parents are/were married and regardless of whether both of them are the biological parents. Examples of measures that may be included under parental responsibility are provided for in Article 1(2) of the Regulation:

- Rights of custody and rights of access, which includes in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;
- Guardianship, curatorship and similar institutions;
- The designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- The placement of the child in a foster family or in institutional care; or
- Measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

Concerning the child's property, the Regulation is limited to protective measures, such as the appointment of a person or a body to assist and represent the child with regard to the property. In contrast, other measures that relate to the child's property, not concerning the protection of the child, are not covered by the Regulation, but by Council Regulation No 44/2001 of 22 December 2000

2010/0067(CNS)), P7_TA(2010)0477, point 3 (Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2010-0477+0+DOC+PDF+V0//EN)

[326] Terms of Reference, pp. 1-2, Brussels II Regulation Recitals (1) – (4), Brussels IIa Regulation Recitals (1), (22).

[327] Brussels IIa Regulation Recitals (5), (6).

[328] http://www.citizensinformation.ie/en/birth_family_relationships/eu_and_family_law.html. See also: Case C-435/06.

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation"). In this regard, we highlight the Regulation on mutual recognition of protection measures in civil matters[329], adopted in 2013. The relationship between these instruments is discussed in the following sub-section.

Moreover, the following matters are excluded from the scope of the Regulation, as stipulated in Article 1(3):

- The establishment or contesting of a parent-child relationship;
- Decisions on adoption [regulated by the 1993 Hague Intercountry Adoption Convention];
- The name and forenames of the child;
- Emancipation;
- Maintenance obligations (these are covered by the Maintenance Regulation No 4/2009 and the Hague Maintenance Protocol of 2007; they are, however, often dealt with in the same proceedings as matters relating to parental responsibility);
- Trusts or succession (regulated by Regulation 650/2012); and
- Measures taken as a result of criminal offences committed by children.

In the areas that fall within its scope, the Regulation establishes rules to decide which court has jurisdiction and will thus deal with a case (Chapter II) and rules on the recognition and enforcement of judgments (Chapter III). The term judgment is to be understood broadly, and includes a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility pronounced by a competent court or other authority of a Member State, whatever the judgment may be called, including a decree, order or decision. The terms 'judge' and 'judgment' are defined by Article 2 of the Regulation. Chapter III contains specific provisions on child abduction and access rights. Moreover, with regard to parental responsibility, the Brussels IIa Regulation provides for rules on the cooperation between Central Authorities of the Member States.

Guidance on how to interpret the Regulation can be found in the Commission's 'Practice Guide for the application of the new Brussels II Regulation - October 2005',[330] which focuses on matters relating to parental responsibility. The rules governing matrimonial matters have largely been adopted from the old Brussels II Regulation and the preceding Convention, which is why the literature on these instruments is still relevant according to the Commission.[331] The explanatory report concerning the Convention of 28 May 1998 (Borrás Report) provides guidance in this regard. Moreover, as the latter notes, the Brussels IIa Regulation should be interpreted in the same way as the 1968 Brussels Convention in which terms are identical.[332] It can be noted that the terms relating to the scope of the Regulation need to be defined autonomously under EU law in order to allow for a consistent application of the Regulation.[333]

As concerns geographical scope, the Regulation applies in all Member States with the exception of Denmark.[334]

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[329] Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0004:0012:en:PDF.

[330] Available at: http://ec.europa.eu/justice/civil/document/index_en.htm

[331] Commission Practice Guide for the application of the new Brussels II Regulation, p. 59 (available at: http://ec.europa.eu/justice/civil/document/index_en.htm)

[332] The Borrás Report (1998) O J C 221/27, the Explanatory Report on Brussels II, available at: http://www.europeancivillaw.com/legislation/borrasreport.htm).

[333] Case C-435/06 "C", Reference for a preliminary ruling: Korkein hallinto-oikeus – Finland, ECR [2007] I-10141, paras 46-50, 53; Case C-523/07 "A", Reference for a preliminary ruling: Korkein hallinto-oikeus – Finland, ECR [2007] I-02805.

[334] Brussels IIa Regulation, Recital (31).

2.1.3. The functioning of the Brussels IIa Regulation

In line with its objectives, the Brussels IIa Regulation establishes grounds for **jurisdiction**, with the aim of ensuring that a case is decided upon in the most suitable Member State.

The grounds for jurisdiction with regard to **matrimonial matters** are based on the principle that there should be a 'real link' between the party concerned and the Member State in which a case is decided upon. Article 3 contains several alternative grounds of jurisdiction without indicating a hierarchy. However, once a court has been seised and has declared itself competent, any subsequent application in a court of another Member State must be dismissed in order to ensure legal certainty and to avoid parallel actions that might result in irreconcilable judgments [Article 19 (1) and (3), *lis pendens*].[335]

In relation to jurisdiction in matters of **parental responsibility**, the Regulation is based on the aim of ensuring the best interests of the child, considering, for example, the criterion of proximity. This means that jurisdiction should, by default, lie with the Member State of the child's habitual residence, as reflected in Article 8.[336] The Regulation allows for some flexibility with regard to jurisdiction in cases relating to parental responsibility, including the possibility for the holders of parental responsibility to choose a suitable court under certain circumstances (Article 12). Furthermore, the Regulation provides for the possibility of transferring a case or part of a case to another Member State if the latter is better placed to hear it and if the transfer reflects the best interests of the child (Article 15).

There are **specific rules on child abduction**, which stipulate that jurisdiction should, in such a case, stay with the Member State where the child was habitually resident immediately before the wrongful removal or retention, thus complementing the (restricted) application of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction with regard to the return of the child. Indeed, the Regulation restricts the application of the Convention in this regard. In line with Article 24 (1) of the Charter of Fundamental Rights of the European Union[337], the Brussels IIa Regulation stipulates that the child must have the opportunity to be heard in such cases (Articles 11 (2) and 42). Moreover, the Regulation establishes a set of rules on the **recognition and enforcement** of judgments, based on the principle that recognition and enforcement should happen as 'automatically' as possible so as to ensure legal certainty and so as not to hamper the free movement of persons. The rules are based on the principle of mutual trust between Member States, thus keeping the grounds for non-recognition of judgments to a minimum.[338]

For judgments on rights of access to children and on the return of abducted children ordered under Article 11 (8), the exequatur requirement governing the recognition and enforcement has been abolished (Articles 40, 41 and 42). The consequence is that it is no longer possible to refuse recognition and enforceability of a certified access order to ensure that contact is granted even if a child moves across borders, and the same is true for return orders under Article 11 (8). To this end, certificates are issued by the court that decides on the access or return order. They are the basis for the direct recognition and enforcement of such orders.[339]

To facilitate **cooperation between Central Authorities in matters of parental responsibility**, each Member State is to designate one or more responsible authorities. According to Article 54, their main functions are to communicate information on national laws and procedures and to take measures to improve the application of Brussels IIa, which includes strengthening their cooperation.

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[335] Commission Practice Guide for the application of the new Brussels II Regulation, pp. 60-61 (available at: http://ec.europa.eu/justice/civil/document/index_en.htm)

[336] Brussels IIa Regulation, Recital (12).

[337] 2010/C 83/02, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF

[338] Brussels IIa Regulation, Recitals (12) and (16).

[339] Commission Practice Guide for the application of the new Brussels II Regulation, p. 33 (available at: http://ec.europa.eu/justice/civil/document/index_en.htm)

Cooperation takes place upon request by a Central AuthoritCentral Authority of another Member State or by a holder of parental responsibility. To this end, the authorities are to take part in the European Judicial Network (EJN) in civil and commercial matters created by Council Decision 2001/470/EC, establishing a European Judicial Network in civil and commercial matters. Specific measures may include the collection and exchange of information on the situation of the child, assistance to the holder(s) of parental responsibility, facilitation of communication between courts and mediation between the holders of parental responsibility. Furthermore, the Central Authorities are to be consulted when a court decides to place a child in institutional care or with a foster family in another Member State (Article 56).

2.2. The setting of the Brussels IIa Regulation

The promotion of the free movement of persons, goods and services and the resulting increased use of these rights increases the potential number of cross-border disputes. [340] Some examples of such potential cases arise, for example, when:

- individuals are involved in an accident while on holiday;
- individuals order goods from abroad over the Internet which are never dispatched or which turn out to be faulty; or
- a parent leaves with the children and settles in another country without the consent of the other parent.

In such cases, the need arises for a European area of justice which does not allow for individuals to be discouraged from exercising their rights due to differences between legal systems among the different EU Member States. The facilitation of cross-border justice is, therefore, necessary in view of this context. The main tools for facilitating access to cross-border justice are:

- the principle of mutual recognition, based on mutual trust between the EU Member States;
- direct judicial cooperation between national courts.

To address those challenges that are linked to free movement within the EU, more than 20 legislative instruments have been put in place at EU level in the past decade in order to facilitate access to cross-border justice.

The Brussels IIa regulation is designed to facilitate disputes that are a result of the free movement of people within the EU and especially when these people are involved in divorce-related disputes and/or parental responsibility matters.

In the case of divorces, if two spouses who decide to divorce:

- are of different nationalities,
- have lived in different EU countries during their marriage, or
- no longer live in the same EU country,
- or have the same nationality and have always lived in one other country

they need to know before which courts (and their location) they will need to apply for their divorce. The provisions established at EU level under the Brussels IIa Regulation determine before which courts these nationals may file for a divorce, and allow for divorces issued in one EU country to be more easily recognised by another EU country.

[340] See also: http://ec.europa.eu/justice/civil/index_en.htm

The increase in the number of international married and unmarried couples and the related divorces and break-ups creates a need to protect children's rights in cases where cross-border disputes are involved. This includes the following areas in which the Brussels IIa Regulation plays a role:

- *parental responsibility*: in the context of a divorce, a decision needs to be taken on the exercise of parental responsibility and custody between spouses who are separating in the context of an "international marriage". The same is relevant for unmarried couples who split up;
- *maintenance obligations*: decisions on maintenance payments in case of a divorce, depending on who has custody of the children. In this context, parental obligations are important in the case of adoption, family benefits, or a child's removal to another country.

Issues such as the ones mentioned above are those that the Brussels IIa Regulation aims to address in the context of international "families".

Annex 3. Contextual factors and unsubstantiated issues

This annex presents contextual factors found to be important for the scope of the Regulation and other issues that were highlighted by some stakeholders but are not supported by sufficient evidence.

3.1 Scope

Matrimonial matters

Same-sex marriages

Member States determine whether same-sex marriage falls within the scope of the Regulation on the basis of their national legislation. Registration and recognition of same-sex marriages in countries where this institution does not exist is problematic.

According to the reports of our national experts, **only eight Member States** (BE, ES, FR, LU[341], NL, PT, SE, UK) have allowed **same-sex couples to marry**.

Some stakeholders interviewed believe that the Brussels IIa Regulation does not aim to cover same-sex divorce, as many EU Member States do not have (and do not recognise) same-sex marriages in their jurisdiction. Other interviewees believed that same-sex marriages do fall within the scope of the Regulation. This seems to be confirmed by interviewees explaining that in Member States where same-sex marriage is legal, courts tend to hold that same-sex marriage falls within the scope of the Regulation. Furthermore, our Belgian national expert reported:

Case example: Application of the Regulation for a same-sex marriage (Belgium)

A court of first instance applied the rules of jurisdiction included in the Brussels IIa Regulation when seised of a divorce petition between two women. Unfortunately, the court did not comment on the applicability of the Regulation. Apparently, this applicability was taken for granted.[342]

As our national expert on the country reports, in the United Kingdom, the only difference between same-sex and different-sex marriage is that the grounds for divorce do not include adultery (which is defined heterosexually) and nullity will not include non-consummation as there is no requirement to consummate a same-sex marriage.[343]

In Belgium, as our national expert reports, the main difference between same-sex marriage and different-sex marriage between man and woman is that there is no legal presumption that the spouse is the father/mother of the child of the other spouse. If a married woman gives birth to a

[341] As our Luxembourg national expert reports, same-sex marriage was introduced in Luxembourg's unicameral legislative body, the *Chambre des députés* and enacted on 18 June 2014. However, because of a greater controversy surrounding adoption by same-sex couples, the proposed legislation was split into two separate parts so that the deputies could vote on same-sex marriage, but deferred the question of the ability for same-sex couples to adopt children to a later time. The proposal regarding the marriage itself has been adopted on 18 June 2014 and published in the official journal on 17 July 2014. It enters into force on 18 January 2015.

[342] CFI Brussels, 19 June 2013, *Tijdschrift@ipr.be (Tijdschrift voor Internationaal Privaatrecht)*, 2013/4, 70, with comments P. Wautelet, *http://www.ipr.be/tijdschrift/tijdschrift49.pdf*. Wautelet, *http://www.ipr.be/tijdschrift/tijdschrift49.pdf*.

[343] Similarly, the suffering of venereal disease does not render the marriage voidable, as is the case for civil partnerships.

child, her spouse is not deemed to be the mother the child. This has very recently changed, however, with the coming into force of the Act of 5 May 2014 on 'co-parentage'. According to the new Article 325/2 of the Civil Code, a child born during the marriage has a 'co-parent', the spouse of the biological mother. The same presumption does not apply for marriages between two men.

According to several interviewees, and to some of our expert panel participants, **registration and recognition** of same-sex marriages in countries where this institution does not exist is problematic.

However, a Bulgarian and a Spanish interviewee stated that on one view *ordre public* clause would prevent the recognition of decisions on same-sex marriages, thus having a negative impact on the free circulation of judgments within the EU. They believe it is problematic that the scope of Brussels IIa does not in some way explicitly include the dissolution of the same-sex marriage link.

We also note that a Hungarian interviewee pointed out that avoiding defining marriage in the Regulation seems to be supported by the case law of the ECtHR which in cases *X and others vs. AT (19010/2007)* and *Gas and Dubois vs France (25951/2007)* stated that while same-sex couples should not be discriminated against, Member States nevertheless remain free to regulate the form of acknowledging their relationship.[344]

The Rome III Regulation explicitly excludes the validity of a marriage from its scope and thus permits member States to determine whether, under their own conflict rules, a same sex marriage is valid.

In those Member States where same-sex marriage is held, as falls under the scope of the Regulation, no practical difficulties were signalled by our national experts regarding **dissolving** same-sex marriages. In the situation where a same-sex marriage would need to be dissolved in a Member State where such union is not recognised, those Member States that apply Rome III can refer to Article 13 of that Regulation[345].

Case example: Dissolution of same-sex marriage or registered partnership (Ireland)

In Ireland, the Civil Partnership and Certain Rights of Cohabitants Act 2010 allow the Minister for Justice to specify legally recognised relationships in other jurisdictions (including both marriage and civil partnerships) that share similar essential characteristics to an Irish civil partnership as being automatically recognised under Irish law as a civil partnership. In the event that a relationship classified as a marriage in the jurisdiction of origin but classified as a civil partnership in Ireland were to be dissolved under s.110 of the 2010 Act, it is unclear whether this dissolution would be recognised as a dissolution of the marriage in the jurisdiction or origin or in any other jurisdiction. Moreover, there is no mechanism in the 2010 Act for recognising a foreign dissolution of a Civil Partnership entered into in Ireland – only for recognising a foreign dissolution of a foreign legal relationship recognised as a Civil Partnership under Irish law.

Furthermore, our German national expert also reports that in Germany, same-sex marriages entered into in Belgium are not recognised as “marriages”, but treated as registered partnerships. Therefore, the Regulation is not applied in Germany when it comes to the dissolution of Belgian same-sex marriages. However, Belgian courts would apply the Regulation to the divorce of a same-sex marriage entered into in the Netherlands.

[344] ”The Court reiterated that the European Convention on Human Rights did not require member State Governments to grant same-sex couples access to marriage. If a State chose to provide same-sex couples with an alternative means of recognition, it enjoyed a certain margin of appreciation regarding the exact status conferred.” http://www.coe.int/t/dghl/standardsetting/media/Article%208/Gas%20and%20Dubois%20v.France.pdf

[345] Article 13 (Differences in national law): “Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.”

Similarly, in Austria a joint statement of the Ministry of Interior and the Ministry of Justice (August 2011) has clarified that marriages of same-sex couples validly concluded abroad are treated as registered partnerships.[346]

However, our national expert reports give an indication of an **absence of interpretation guidance** regarding the possibility of **dissolving same-sex marriages in those Member States not applying Rome III, which do not recognise same-sex marriage** in their national legislation.

Registered partnerships

The registered partnerships that exist in some Member States have very different rights and administrative procedures for their dissolution. Despite not being explicitly covered by its scope, some Member States' courts do apply the Regulation to registered partnerships, which are increasingly entered into by EU citizens.

The **analysis of our national experts' reports** (presented in the Table below) shows that the there are 10 Member states where the status of registered partnership does not exist (Bulgaria, Cyprus, Estonia, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia). In most of the Member States where it does exist, it is available for same-sex couples only. The dissolution of the registered partnership in the case of most Member States takes place via court procedure.

Table 3: Registered partnership in the Member States

Member State	Sexual orientation of the couple	Dissolution
Austria	same-sex	via court procedure
Belgium	same-sex or heterosexual	via administrative procedure
Croatia [347]	same-sex	via court procedure
Czech Republic	same-sex	via court procedure[348]
Finland	same-sex	via court procedure
France	same-sex or heterosexual	via administrative procedure
Germany	same-sex	via court procedure
Greece	heterosexual	via administrative procedure
Hungary	same-sex	via administrative or court procedure[349]
Ireland	same-sex	via court procedure
Luxembourg	same-sex or heterosexual	via administrative procedure

[346] http://www.queernews.at/archives/2599 (3.10.2012); Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe, in: Boele-Woelki/Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, 2nd edition, 2012, p. 158 *et seq.*, p. 165 *et seq*.

[347] The Life Partnership Act was passed in the Croatian Parliament on 15 July 2014 and it entered into force on 5th August 2014, 8 days after its publication in the Official Gazette No 92/14.

[348] Entered into at a registry office, dissolved by court.

[349] The registered partnership ceases on the death of one of the partners, or if it is dissolved by the court or terminated by a notary public. Concerning the termination of a registered partnership, the regulations relating to the termination of a marriage are applicable. The notary public terminates the registered partnership on the basis of the parties' mutual agreement in the framework of an out-of-court procedure.

Member State	Sexual orientation of the couple	Dissolution
Malta	same-sex or heterosexual	via administrative or court procedure
Netherlands	same-sex or heterosexual	via administrative[350] or court procedure[351]
Slovenia	same-sex	via administrative procedure[352]
Spain	*information to be clarified*	via court procedure
Sweden[353]	same-sex	via court procedure
United Kingdom	same-sex	via court procedure
No registered partnership status		
Bulgaria, Cyprus, Estonia, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia		

Registered partnerships are currently excluded from the scope of the Regulation, as Article 1 (*Scope*) only refers to "*divorce, legal separation or marriage annulment*" as scope for matrimonial matters. However, similarly to the case of same-sex marriages described above, in practice, there does not seem to be a uniform interpretation among Member States regarding this issue.

Nevertheless, a Czech interviewee noted that courts in the Czech Republic have already made use of the Brussels IIa Regulation in order to dissolve registered partnerships.

Several interviewees considered that registered partnerships, which can typically be broken unilaterally by sending a registered letter to the court or authority, do not fall under the scope of the Regulation as they are different in nature to the institution of marriage.

A UK interviewee pointed out that within the diversity of registered statuses across the Member States, most jurisdictions with registered civil partnerships provide fewer rights and entitlements, and a lesser status than marriage. This interviewee believes these lesser statuses cannot be dealt with as if they equate to marriage for the purposes of the Regulation.

On the other hand, a specialised lawyer who was interviewed stated that the scope of the Brussels IIa Regulation in matrimonial matters is inadequate as it only covers marriage and no other type of union or registered partnership, which are increasingly entered into by European citizens. In this interviewee's opinion, there is a need for clarification as to how far such types of unions could also be covered by the Regulation. The interviewee has observed more and more legal differences across Member States with regard to the different forms of union – a situation that this interviewee believed may foster forum shopping.

Moreover, one has to take into account the recent developments in EU law on this issue. Indeed, in 2011, the Commission presented two parallel proposals distinguishing marriages and registered

[350] A registered partnership can be dissolved by mutual agreement between the partners. The agreement, when concluded with the assistance of one or more attorneys or civil notaries (*advocaten* or *notarissen*)),) only requires registration.
[351] If mutual agreement cannot be concluded between the partners, dissolution takes place at the simple request of one of the partners in court proceedings similar to divorce proceedings.
[352] However, in order to end their registered partnership regarding the legal consequences (e.g. maintenance), they have to address the court of justice (except if they conclude an agreement in the form of a notary act).
[353] As of 2009, when marriage was made available to same-sex couples (the sole beneficiaries of registered partnership status till then), some couples who had previously entered into a registered partnership were allowed to keep that status and not convert to marriage. New registered partnerships can no longer be concluded, as of 2009.

partnerships on property issues, containing provisions on jurisdiction, applicable law and the recognition and enforcement of authentic instruments. This proposal would facilitate the movement of decisions and instruments among the Member States and increase registered couples' access to justice in the EU, guaranteeing the right to an effective remedy and to a fair trial. By setting out objective criteria for determining the court which is to have jurisdiction, parallel proceedings and appeals precipitated by the most active party would be avoided. Moreover, if courts handling the separation of the partners have their jurisdiction over those matters extended to the property consequences of the partnership, citizens will have the same court dealing with all aspects of their situation.

Therefore, the Commission has started to take into account the specificity of this relatively new institution, on which there are still few figures[354], but which, as stated above, is increasingly entered into by EU citizens.[355]

Recognition of private divorces

Private divorces are not recognised in any Member State law but it was noted by some national experts that private divorce from a third country could be recognised if it adheres to particular rules and is not against the public policy of that Member State.

Private divorce by agreement between the parties or by unilateral declaration of one spouse is not allowed in the national laws of the Member States, but it is in many third countries, in particular in Israel, most Islamic countries and Eastern Asia (Japan, Thailand). However, according to legal literature, some Member States allow for private divorces between third State parties; these divorces are then concluded in a Member State according to the law of the third State that allows for such private divorces.

Our interviewees expressed diverging views regarding the possibility of the Regulation covering private divorces. According to several interviewees, private divorces should not be recognised because none of the EU Member States' law systems foresees private divorces. A judge who was interviewed argued that both private and judicial divorces of third countries are always out of scope of the Brussels IIa Regulation, which covers only recognition and enforcement matters between EU Member States.

Several interviewees also noted that private divorces from third countries can be regarded a **minor issue** as there are very few cases, and thus do not require a change to the Brussels IIa Regulation.

As recognition is restricted, according to Article 2(4), to *decisions* made by a Member State *court*, the question has to be answered only in the event that a court or another public authority (Article 2(1)) is involved in the private divorce, for instance by a duty to review the validity of the divorce and/or by registering the divorce in a public record.

While most of our national experts reported an absence of relevant cases in their Member State, the majority of the experts noted that private divorces are not or would not be recognised by their respective national law.

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[354] Report on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0254+0+DOC+PDF+V0//EN), p.70

[355] In 2007, there were about 211 000 registered partnerships in the EU, of which over 41 000 had implications for property in more than one Member State. Of these, 8 500 (4%) were ended by separation, Figures from: Commission staff working document (Impact Assessment) of 16.3.2011, SEC(2011) 0327

Relevant case examples

In **Cyprus** there is no domestic case law on the recognition of private divorces; it is understood that such agreements for the dissolution of a marriage are not to be recognised in Cyprus for a number of reasons: a) due to being interpreted as not falling within the definition of the term ‘’judgment’’ in the Regulation, b) due to being in clear contradiction with the domestic legislation (i.e. the Marriage Law) which, as explained in detail in Section 1 of the present report, allows for the dissolution of a marriage only by the appropriate Family Courts, or c) due to being considered incompatible with the applicable public policy principles.

In **Spain**, Articles 96(3) and 97 of the Registration Law (Ley de Registro civil) of 2011 (which is applied from 22 July 2014 onwards), following a case law approach initiated by the Order of the Supreme Court of 1 October and of 19 November 1996 (and followed by many others), allows for the recognition of divorces by mutual agreement by non-legal authorities, demanding that the intervention of the authority not be confined to that of a mere notary public, but that it have certain competencies in accordance with the legislation of origin on the conditions of the marriage breakdown, etc. When these circumstances and conditions cannot be met, that is to say, when the public authority does not participate constituently in decreeing the divorce, but is limited to registering the will of the spouses, then the Supreme Court has deemed that it would be contrary to Spanish public policy following the case law approach initiated by the Order of the Supreme Court of 13 June 1995 and followed by many others, to thereby recognise divorces in these cases. In paragraph 4 of the aforementioned article 97 of the Registration Law of 2011, it keeps the non-registration of a foreign document which is manifestly incompatible with public policy.

The **Austrian** Supreme Court ruled that private divorces cannot be recognized according to Articles 21 *et seq.* of the Brussels IIa Regulation if they have not been decided with the collaboration of an authority of a Member State (excluding Denmark), because in this case private divorces are not included in the scope of these provisions.[356] *Argumentum a contrario* it could be stated that private divorces can, if they occurred in a member state, be recognised by or with the involvement of a local authority, but the Supreme Court did not expressly address this issue in its judgment.

The case involved an Iranian wife and her Iranian-Austrian husband. The marriage was concluded in Iran, where the husband also filed for divorce. However, when the local authorities decided that the woman would not receive any maintenance or assets, she filed a divorce suit in Austria. As mentioned above, Austrian courts did not apply the Brussels IIa Regulation. Nonetheless, they denied the recognition of the Iranian private divorce according to Austrian law, because it violated the public order of the Austrian legal system.[357]

Private divorces do not exist under **French** law, where a divorce is always granted by a judge. This does not however, on principle, exclude the recognition in France of foreign private divorces.

Outside the scope of the Regulation, the difficulty lies mainly in the method used to control the foreign private divorce, which cannot in itself be considered a “decision”, since no authority “grants” the divorce as such. Thus begging the question of whether they should be recognised as a “judgment” or public act, or whether, as they are private acts, only the conflict of law rules should be used.

Within the scope of the Regulation, Article 46 tends to treat authentic instruments and agreements in the same procedural way as judgments. In this sense, if the private will of the spouses has been registered by a foreign authority of a Member State – even without a decision of this authority in a strict sense – this form of divorce should be recognized in France under the

[356] Judgment of 13.11.2011, Oberster Gerichtshof, 6 Ob 69/11g.
[357] Section 97 (2) No 1 Austrian Non-Contentious Proceedings Act.

Regulation, as would a judicial divorce. It remains necessary, as stated in article 46, that this act be enforceable in the Member State of origin.

In the same sense, even though the question remains in discussion, it could be admitted that a religious divorce be recognized under the Regulation if the religious authority can be considered as an "authority of a Member State" in the sense of article 2§1.

Conversion of marriage into registered partnership

As highlighted by our German and Dutch national experts, some Member States provide for the judicial conversion of a marriage into a registered partnership. It is however currently unclear whether the Brussels IIa Regulation applies to such decisions.

Case example: Conversion of marriage into registered partnership (Netherlands)

The Dutch applicant married a Dutch national in the Netherlands.[358] On 7 November 2002, this marriage was converted into a registered partnership according to Dutch law. The partnership was terminated on 7 January 2003 by declaration of the partners before a notary. The applicant who intended to marry again in Germany applied for the recognition of the Dutch decision. In the court's view it was doubtful whether the Dutch proceedings on the conversion of a marriage into a registered partnership could qualify as 'matrimonial proceedings' in the meaning of Article 1(1) (a) Brussels IIa Regulation.

Another relevant case was reported by our Belgian national expert.

Case example: Conversion of marriage into registered partnership (Belgium)

An issue was raised in court in respect of a same-sex couple, i.e. the question of whether the Regulation could apply to proceedings whereby a marriage had first been transformed into a registered partnership, after which the partnership was terminated. The transformation took place in the Netherlands under Dutch law, at the time when such transformations were still allowed. A court of first instance found that neither the process whereby the marriage was transformed into a partnership, nor the resulting partnership or its dissolution, could benefit from the application of the Brussels IIa Regulation.[359]

Parental responsibility

The term "civil matters"

The term "civil matters" has caused minor difficulties to Finnish courts. However, ambiguities have been resolved by the ECJ.

The interpretation of the term "**civil matters**" has been dealt with by Finnish courts on several occasions in the context of cases relating to parental responsibility matters. Despite the lack of a positive definition of civil matters in the Regulation, the ECJ has clarified this notion through its case law.

[358] *OLG Celle* 06.07.2005, unalex DE-1102.
[359] CFI Malines, 12 January 2006, *EJ*, 2006, 153.

Several decisions concerned related to legal instruments. Case *LTU v. Eurocontrol* (1976)[360] stated that this notion had to be interpreted autonomously from the objectives and scheme of the 1968 Brussels Convention[361] and the general principles stemming from the corpus of the national legal systems. It defined the notion through a negative delimitation from public law matters. However, *Sonntag v. Waidmann* (1993)[362] stated that some judgments given in actions between a public authority and a person governed by private law may fall within the scope of application of the Convention if the State acts in the same way as a private person in relations governed by private law (*acta iure gestionis*), and not in the exercise of sovereign authority (*acta iure imperii*).[363] This case law was confirmed in 2007 in *Lechouritou and others v. Germany*.[364]

In 2007 the Court dealt with a question posed by a Finnish court relating to the understanding of the term "civil matters" in the Brussels IIa Regulation.[365] Case *C* concerned the decision of a Swedish social welfare board taking two children into care in order to subsequently place them in a foster family in Finland.

The court ruled in *C* that the term "*civil matters*" in Article 1(2) has to be understood in a broad sense including the exercise of sovereign powers by State authorities competent in the field of child protection. It was argued that the term has to be interpreted autonomously, and not on the basis of national law, allowing for the inclusion of all matters of parental responsibility to ensure that the objectives of the Regulation can be achieved. The court further noted that "*Parental responsibility is given a broad definition in Article 2(7) of the regulation, inasmuch as it includes all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. It is irrelevant in that respect whether parental responsibility is affected by a protective measure taken by the State or by a decision which is taken on the initiative of the person or persons with rights of custody.*"

It has been highlighted in this respect by Dutta and Schulz that the term limitation of the Regulation to civil matters does not have a significant impact with respect to child matters and that this interpretation helps to ensure that matters that are closely related to each other can be dealt with under the same legal instrument. If the Brussels IIa Regulation were only applicable to child matters covered by private law, related matters would be excluded.[366]

The Court confirmed this interpretation in the later rulings *A*[367] and *Health Service Executive*[368].

The *Health Service Executive* case concerned the placement of a teenager habitually resident in Ireland in secure care in England. The placement occurred against the will of the teenager but in agreement with the holder of parental responsibility, which was the Health Service Executive, and the mother.[369] The Court confirmed that matters that are defined as public under national law fall

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[360] Case 29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol,* 1976 E.C.R. 1541 (*Eurocontrol*)

[361] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1978 L 304.

[362] Case C-172/91, *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann,* 1993 E.C.R. I-1963 (*Sonntag*)

[363] See "The Brussels Convention and Reparations – Remarks on the Judgment of the European Court of Justice in *Lechouritou and others* v. *the State of the Federal Republic of Germany",* by *Veronika Gärtner* http://www.germanlawjournal.com/pdfs/Vol08No04/PDF_Vol_08_No_04_417-442_Developments_Gaertner.pdf

[364] Case C-292/05, *Lechouritou and others v. the State of the Federal Republic of Germany*, OJ C 243, 1 October 2005 (*Lechouritou*)

[365] *C*, Case C-435/06.

[366] Dutta, A. and Schulz, A. (2014). "First Cornerstones of the EU rules on cross-border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation – From *C* To *Health Service Executive". Journal of Private International Law*, Vol. 10, Nr 1, p. 6.

[367] Case *A* C-523/07.

[368] Case *Health Service Executive* C-92/12 PPU, paras. 56-66.

[369] Irish statutory authority with responsibility for children taken into public care.

within the scope of the Regulation if they concern parental responsibility. In addition, it was clarified that this is also the case when children are placed in secure care, implying a deprivation of liberty, and when the placement has a therapeutic or educational purpose. The case also shows that it is of no consequence that parental responsibility has been transferred to an administrative authority.[370]

Different interpretations of the term 'child' across the Member States

Different interpretations of the term 'child' across the Member States and the fact that the term is not defined in the Regulation leads to a lack of clarity. There are situations in which it may not be clear whether a person is to be considered as a child under the Regulation. This may result in legal uncertainty and may affect the well-being of the child, as the treatment of children differs between the Member States, as well as in third countries. However, this issue is not considered as severe, because it only applies to a minority of cases in practice.

The Brussels IIa Regulation does not define the term 'child'. Based on the input from the interviewees and the national experts, there seem to have been **few cases in which the lack of a common definition has caused specific problems**. Most national experts indicated that no problems could be identified on the basis of the available sources (AT, BE, BG, CY, CZ, EE, FI, MT, HU, LV, LU, NL, PL, PT, RO, SK, SE, UK). Indeed, the determining age is 18 in all Member States (cf. text box below). This is in line with Article 2 of the 1996 Hague Convention on the protection of children, which stipulates that the Convention applies to children until they have reached the age of 18. It is noted that the 1980 Convention on child abduction only applies to children until the age of 16. On this basis, the lack of definition is likely to cause difficulties only in exceptional cases.

However, the current situation may lead to uncertainties. We note that due to the lack of a definition of the term "child" it is not clear which law will be used to determine whether the person concerned is considered a child. It could either be decided on the basis of the substantive law of the forum State or the law to which the conflict of law rule of the forum State refers. In the latter case, the conflict of law rule may use the nationality of the child as a connecting factor [371] and refer to a law of another Member State or a third state. In the latter case, it is possible for majority to only be reached at 21 years of age (this is the case in Argentina or South Africa for example). National approaches on the way to deal with such a situation differ. From a German point of view, a 20-year-old South African national is still a 'child', because he/she has not yet obtained full legal capacity and is therefore still under parental responsibility. It is, however, not clear whether this person would also be a 'child' within the meaning of the Regulation.

In addition, a comparison of the national laws of the Member States shows that the approaches towards defining the child differ, as outlined in detail in the text box below.

Excurse: Overview of the understanding of the concept of 'child' in the Member States

From a comparison of national laws, it has become clear that not all Member States have a definition of a child in place. Where this is not the case, it is usually the age of majority that is considered relevant. Nine national experts indicated that there is an explicit definition of a "child" (AT, BE, BG, FR, GR, IE, LV, RO, UK). Fourteen experts indicated that there is no explicit definition, but that the concept of a child is understood to be equal to that of a minor (DE, HR, HU, IT, LU, MT,

[370] Dutta, A. and Schulz, A. (2014). "First Cornerstones of the EU rules on cross-border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation – From *C* To *Health Service Executive". Journal of Private International Law*, Vol. 10, Nr 1, p. 7.

[371] See e.g. Article 7 of the German EGBGB.

NL, PL, SE, SK). Other experts indicated that the definition of the UN Convention on the Rights of the Child[372] is relevant (CZ, EE, ES, HU, SI,).

In all of the Member States, the age of 18 is crucial in determining whether a person is to be considered a child (or a minor) or not. However, there are differences as regards the possibility of being emancipated earlier than that. About half of the experts indicated that it is possible to lose the status of a child, for example as a consequence of marriage (e.g. CY, ES, FI, FR, IT, LT, LV, NL, RO, SI, SK). In some of these Member States, there are specific provisions stating that it is only possible to lose the status of a child if the person is at least 16 years old (e.g. ES, IT, LT, NL, RO, SI, SK).

In Portugal, there are also situations in which persons of up to 21 years can be considered as persons in need of protection. Similarly, in Slovenia there is a possibility of prolonging parental responsibility by means of a court decision, for instance due to mental illness, for as long as the reasons for the prolongation last.

In addition, practices differ with regard to whether or not unborn children are included in the definition of the term 'child'.

Actual or potential difficulties have also been raised by some of the legal experts.

The Spanish expert noted that issues have occurred that are related to the different approaches towards defining the term 'child'. According to the Spanish expert, the inclusion of emancipated minors raised questions, although the most widespread practice seems to be that the laws on the protection of children are to be applied if the applicable text includes a specific age, without reference to the age of legal majority or minority of the child (taking into account the best interests of the child).

In addition, some of the national experts indicated that there could be potential problems (DE, FR, IE, LT, SI). For example, the Irish expert noted that it has frequently been observed in the literature that this is a possible source of problems for Ireland, particularly since one of Ireland's neighbouring jurisdictions (i.e. Scotland) uses a different definition of "child" to Ireland. The French expert pointed out that different opinions exist within France as to how to determine whether a person is to be considered a child. In particular, she pointed out that questions might arise in relation to unborn children.

The term 'parental responsibility'

The term "parental responsibility" is perceived to be quite comprehensive, although the exclusion of succession has posed difficulties in some cases. In addition, it was noted by several experts that, in some cases, it was not clear whether a specific situation would be covered by this term or not. However, this did not cause any severe difficulties.

Some experts pointed to cases in which courts had had difficulties in deciding whether specific situations related to "parental responsibility" (AT, BE, CZ, IE, IT, FI, NL, LU, PL, RO). For example, the Irish expert explained that clarification has been sought in a number of Irish cases as to whether this concept extends to child protection cases, including cases involving placing a child in a secure care unit involving a deprivation of liberty. This question was clarified by the ECJ in the case *Health Service Executive*. Polish courts have considered whether the Regulation should be applicable to the issue of contacts of grandparents with grandchildren, coming to the conclusion that this is not the case. The same issue has been considered by Dutch courts. The courts in Luxembourg have dealt with the question of whether the delegation of parental responsibility falls within the scope of the Regulation,

[372] See: http://www.ohchr.org/en/professionalinterest/pages/crc.aspx

deciding that it does. The Czech national expert pointed to difficulties based on the exclusion of succession in Article 1(3)(f) of the Regulation and more generally the interpretation of "measures for the protection of the child relating to the administration, conservation or disposal of the child's property" in Article 1(2)(e). One of the most common issues in this context is the lack of jurisdiction in the state where the interest (e.g. property) of the child is situated or where a legal action on behalf of the child is needed (e.g. appointment of a guardian or approval of a transaction).

Two national experts welcomed the wide notion of "parental responsibility", because various relevant situations can be understood as falling under this term and thus within the scope of the Regulation) (FR, LT).

Issue of surrogacy

One of our interviewees highlighted the currently vast differences in national legislations concerning the ***issue of surrogacy***. The interviewee regarded it as an issue which is expected to be more prominent in the future and yield more and more cases, but for which some Member States have at present no provisions. As a result, parents of a child may be recognised as the parents in one country but not in another.

3.2 Jurisdiction rules

Parental responsibility

Difficulties concerning the transitional period when a child changes habitual residence (Article 9)

Article 9 of the Brussels IIa Regulation on "**continuing jurisdiction of the child's former habitual residence**" stipulates that "*where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence*."[373] When a child moves from one Member State to another, it is often necessary to review and adapt the access rights, or other contact arrangements to ensure that they suit the new circumstances.[374]

That transitional period of three months is considered inappropriate by a few stakeholders but for differing reasons. Some argued that the transitional period would be useful, but is not applied in practice because the three-month period is too short. Other stakeholders questioned the utility of the transitional period altogether, because they consider that a court in the new Member State of habitual residence should have jurisdiction on any new judgments relating to parental responsibility. In general terms, there were almost no practical examples, which is why the mentioned difficulties are not considered to be severe.

[373] According to the Practice Guide of 2005 for the application of the new Brussels II Regulation, the three-month period is to be calculated from the date the child physically moved from the Member State of origin. 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. Article 9 applies only if the child has acquired habitual residence in the new Member State during the three-month period.

[374] Article 9 thus serves a different purpose from Article 48, which allows for a specification – not an adaptation – of a decision on access rights for the purpose of enforcement.

More specifically, it was noted by one interviewee from Estonia and two from Germany that this **provision is usually not applied** at all, because the three-month period provided for by the Regulation is too short. Usually, the parties do not file a new application within three months after moving. These points were confirmed by a participant in the expert panel, who stated that **Article 9** is very rarely used because of its restrictive nature. The expert considered the transitional three-month period to be impractical, as it usually takes at least three months for a family to move and settle, and before the parents consider a revision of a decision of parental responsibility.

The Belgian national expert agreed that there may be cases in which a 'continuous' jurisdiction of a court is justified, although the child has moved to another Member State, on account of the fact that the ruling already issued may be modified if circumstances change. The court may therefore need to revisit its initial ruling. However, the expert confirmed that the article could not be used due to its restrictive nature. In the past it was not possible to ground such continuing jurisdiction on Article 9, as the three months had usually already passed by the time a new application was filed. In some cases, Belgian courts have still accepted jurisdiction after the child had already moved, although the conditions for Article 9 were not fulfilled.[375]

In addition, practical difficulties in relation to this provision were highlighted by other interviewees, notably that it was more difficult to involve the family in the proceedings and to assess the potential living situation of the child if the child and one parent do not live in the country any longer. It was thus not considered relevant to have a transitional period, because the court of the current habitual residence should always be responsible for hearing a case.

Difficulties due to the absence of provisions allowing for declining jurisdiction in favour of a court in a third State

The Brussels IIa Regulation provides the possibility, in matters of parental responsibility, for a Member State court to transfer the case to a court of another Member State which is better placed to hear the case (article 15). By contrast, the Regulation is silent on the transfer of a case to a court of a third country.

In all Member States except Italy, courts can rely on the 1996 Hague Convention in order to decline jurisdiction in favour of the court of a third country which is better placed to hear the case, provided that the third country concerned is a Contracting Party to the 1996 Hague Convention.[376]

According to a European Commission study[377], the absence of provisions in the Brussels IIa Regulation which determine which cases Member State courts can decline jurisdiction for, in favour of a court in a third country generates uncertainty, particularly in cases where the court which is better placed to hear the case is located in a third country which is not a Contracting Party to the 1996 Hague Convention.

It appears that the absence of provisions which determine which cases Member State courts can decline their jurisdiction for, in favour of a court in a third state, may generate uncertainty for the parties involved. However, based on the information available, this has not created any practical difficulties in a large majority of the Member States.

[375] See *e.g.* CA Ghent, 10 December 2009, *Revue@dipr.be*, 2010/1, 64 and CA Brussels, 11 March 2013, *Tijdschrift@ipr.be*, 2013/2, 40, where the court argued that jurisdiction should be based on Article 8, although the child had already moved and jurisdiction should have been decided in light of Article 9. In this case, it was not clear whether the conditions of Article 9 would have been fulfilled. See also: Supreme Court, 21 November 2007, Rev. trim. dr. fam., 2008, 176.

[376] Article 8 of the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation, in respect of parental responsibility and measures for the protection of children.

[377] European Commission (2007): *Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations*, JLS/C4/2005/07-30-CE)0040309/00-37, p. 154.

According to the national experts, the absence of provisions which determine which cases Member State courts can decline their jurisdiction for, in favour of a court in a third state has, however, **not created any practical difficulties in a large majority of Member States**. Only one national expert has reported on a specific case, in which a Croatian court is considering declining jurisdiction in favour of a court of a third state (Montenegro). As Montenegro is a party to the 1996 Hague Convention, the absence of provisions in the Brussels IIa Regulation does not constitute a problem.

Case example: Declining jurisdiction in favour of a court in a third state on the basis of the 1996 Hague Convention (Croatia)

In a pending case (No P-.R/1 2/2014, of 8 January 2014), the court of first instance of Dubrovnik is dealing with a case for which it may be relevant to decline jurisdiction in favour of a court in a third State (Montenegro).

In this case, the father, a Dutch national with Dutch habitual residence filed a law suit to the court of first instance in Dubrovnik to assign him the parental rights and entrust him with the full care of a minor child (the child has dual Dutch and Montenegro citizenship), born out of wedlock, who had been living with his mother (national of Montenegro) in the Netherlands, but moved to live in Croatia. The court founded its jurisdiction based on the Brussels IIa Regulation since the child had lived in Croatia for a period of time and was enrolled in social activities and school; the court concluded that the child has gained habitual residence in Croatia. Once the procedure was initiated, the mother moved with the child to a third country, Montenegro. Although the court had validly established its jurisdiction, due to the fact that child changed its habitual residence, the Croatian Court asked the social welfare service of the third state to submit a report on living conditions and health of the child, as the child had serious health issues and needed adequate medical treatments. The court took this action on the basis of 1996 Hague Convention, Article 35(1).

The court is now considering transferring the jurisdiction to a third country court. The basis is found in this particular case in Article 8(2) a), d) of Hague 1996 Convention. The Croatian court is of the opinion that the competent authorities of the new habitual residence are better placed in this particular case to assess the best interests of the child. The court confirms such standing by the fact that the child no longer has any connection to Croatia and the child is a national of the country of its new habitual residence. The court is still not acquainted with the situation and conditions the child lives in. The court is concerned that even if it continues with the procedure and enacts a judgment, the enforcement that should be carried out in third country of the child's new residence would be problematic.

By contrast, the national expert from Italy indicated that due to the fact that Italy has not ratified the 1996 Hague Convention, difficulties may arise for an Italian court when it is seised in a parental responsibility case while the better placed court is located outside the EU. However, no examples of concrete cases were given.

3.3 Recognition and enforcement

Parental responsibility

Difficulties relating to the application for a declaration of enforceability

Two interviewees pointed to a **lack of information about national requirements for enforceability of judgments under the Regulation**. According to an Irish interviewee, there are issues with the practical implementation of Article 28. In particular, with regard to the United Kingdom, it may not be clear what needs to be done before a judgment can be enforced. While it is stated in Article 28(2) that judgments need to be registered, it is not clear where and how this needs to be implemented.

With regard to Article 45(1)(a)[378], it was pointed out by a judge interviewee that it is sometimes difficult to know whether the copy of a judgment provided satisfies the requirements of authenticity, because the judge may not be familiar with the rules applicable. Several interviewees regretted that there is no central platform providing information on the national requirements for enforcement.

3.4 Provisions specific to child abduction cases

Parental responsibility

Jurisdiction in child abduction cases

Article 10 specifies jurisdiction rules in cases of child abduction, stipulating that in the event of a wrongful removal or retention of a child, the court of origin shall retain jurisdiction as long as the child has not changed its place of habitual residence under specified conditions.
However, **the relationship between Article 10, Article 11 and Article 8 is currently not sufficiently clear**, as reported by several national experts, interviewees and the participants in the expert panel. On the basis of the analysis of the national experts, the interplay between Articles 8, 10 and 11 has been the subject of case law in the Member States and was not always used correctly.

Cases currently occur for which jurisdiction is based on Article 8, because Article 10 is not understood properly. According to the Romanian national expert, courts have in the past relied on Article 8 in cases where Article 10 should have been applied. This was also noted by one of the participants in the expert panel. A clear stipulation of when Article 10 must be used is currently missing, which is why it is not possible to clearly criticise jurisdiction for being based on Article 8 when it should be based on Article 10. The other participants in the panel agreed that there is indeed no specification on the use of Article 10. Similarly, the Hungarian and Dutch national experts noted that the current rules on jurisdiction in child abduction are not sufficiently clear.

A different aspect was the subject of interpretation in Austria. The Austrian expert indicated that the Austrian Supreme Court had stated that Article 8 only requires a "*habitual residence*", whether this "*habitual residence*" was established legally or not is irrelevant.[379] However, in consideration of Article 10 of the Brussels IIa Regulation, the Austrian Supreme Court held that in the event of a "*wrongful removal […] the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction*" until the conditions stated in Article 10 Brussels IIa Regulation are fulfilled.[380]

Difficulties related to the hearing of the parent under Article 11(5)

Difficulties related to the hearing of the parent under Article 11(5) were raised by a limited number of stakeholders.

The procedure for the **hearing of the parent under Article 11(5)** has been under discussion by the Member States' courts. It was, for example, reported by the Irish expert that the type of procedure to be used for the hearing of the parent has been the subject of national case law. In particular, **it is not clear whether the Regulation requires an oral hearing**. The Irish court responded in the

[378] According to this provision of the Regulation, a party seeking enforcement of a judgment shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.
[379] Judgment of 19.12.2012, Oberster Gerichtshof, 6 Ob 217/12y.
[380] Judgment of 13.10.2009, Oberster Gerichtshof, 5 Ob 173/09s; Judgment of 13.10.2009, Oberster Gerichtshof, RS0125592.

negative, indicating that the Brussels IIa Regulation does not lay down any details and that the possibility to provide a written statement would, therefore, fulfil the conditions set out in Article 11(5). A similar understanding is applied in Latvia and Belgium. The national experts reported that courts questioned whether parties that did not appear before the court after having been informed about their right, but whose views are represented by a lawyer, are considered as having been given an opportunity to be heard. In past cases, such circumstances were understood as being in line with Article 11(5). As a matter of fact, the Practical Guide on the application of the Regulation identifies the Evidence Regulation[381] as an appropriate tool for deciding the arrangements for hearing. Pursuant to Art 10(2) of the aforementioned regulation*, the requested court shall execute the evidence request in accordance with the law of its Member State.* However it does note the usefulness of video-conferencing and telecommunication as provided for in the Evidence Regulation.

Difficulties related to the administrative formalities involved in applying Article 11 (6) to (8)

Difficulties related to the administrative formalities involved in applying Article 11 (6) to (8) were raised by a limited number of stakeholders.

In cases of **non-return orders on an abducted child** issued on the basis of Article 13 of the 1980 Hague convention, Article 11(6) foresees a **transmission of documents to the court in the Member State of origin**. There is some limited anecdotal evidence that these provisions are not always applied in practice. This was reported by a Spanish interviewee. Similarly, a French interviewee questioned the necessity of Article 11(6), which they felt was creating redundant administrative obligations, also noting that many judges do not seem to understand the purpose of the obligation to transmit the documents to the Member State of origin and hence often do not comply with the obligation. It is noted that these difficulties were not reported by other stakeholders and were not apparent in national case law.

An additional question was raised by the Belgian expert. In the situation where no time limit for issuing the decision is provided for by the Regulation, that is to say where a court in the Member State of origin is seised on the basis of Article 11(7), the question was raised of whether that court should stay proceedings in case of other applications (e.g. when criminal proceedings have been initiated against the parent who modified the child's habitual residence). The Court of Appeal of Brussels has determined that no such stay should be granted, as requests based on Article 11 should be treated with priority.[382]

[381] 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”)

[382] CA Brussels 17 June 2010, *Act. dr. fam.*, 2010, 191.

Annex 4. Analysis of the public consultation

This annex discusses the quantitative and qualitative data collected in relation to the European Commission's public consultation on the functioning of Brussels IIa Regulation. The consultation (launched on 15 April 2014 and closed on 18 July 2014) received a total of 192 responses. The questionnaire was addressed to the broadest public possible in order to obtain views and input from all interested stakeholders.

4.1 Methodological notes

The consultation was **addressed to the broadest public possible** in order to obtain views and input from all interested individuals, legal practitioners, academics, organisations, courts, national authorities and Member States. Contributions to the consultation were submitted through an online survey.[383]

The information collected by this public consultation was analysed with the use of a mixed methodology, both **quantitatively and qualitatively**. The consultation contained a mix of closed and open questions.[384] Closed questions are analysed quantitatively. Open questions are analysed both quantitatively and qualitatively. The qualitative analysis involves considering each response and identifying main trends among all answers. In a limited number of cases, trends were not significantly apparent and so the more detailed or comprehensive answers are summarised in the findings.

Of all respondents to the survey, 34% (i.e. 65 of 190 responses) submitted answers in English. In other cases, respondents preferred to use their own mother-tongue or a different language. These answers were then translated by the study team.[385]

Consultation results were also investigated through **segmentation analysis,** which allows for identification of trends among certain groups of stakeholders. In this report, we have taken into account the geographical distribution of the stakeholders, as well as their practical experience of the Regulation and their role.

The results of the stakeholders' **segmentation analysis** are only shown in cases where they lead to interesting and relevant insights. Samples which are not representative and do not bring any additional insights, are not included in the report. This report only presents the highlights and the most important insights of the segmentation analysis.

Survey sample

The consultation received a total of 190 survey responses that are all represented in this analysis. The analysis also includes two separate contributions, from the United Kingdom and the Council of Bars and Law Societies of Europe (CCBE). Although they did not respond directly to the survey, they gave their inputs in the form of open replies to the general questions of the public consultation. All stakeholder input is treated equally i.e. there is no weighting of responses.

The consultation was responded to by stakeholders inside and outside the EU. Overall, 97% (i.e. 184 out of 190 responses) come from Europe while 3% come from outside Europe (Canada, Malaysia,

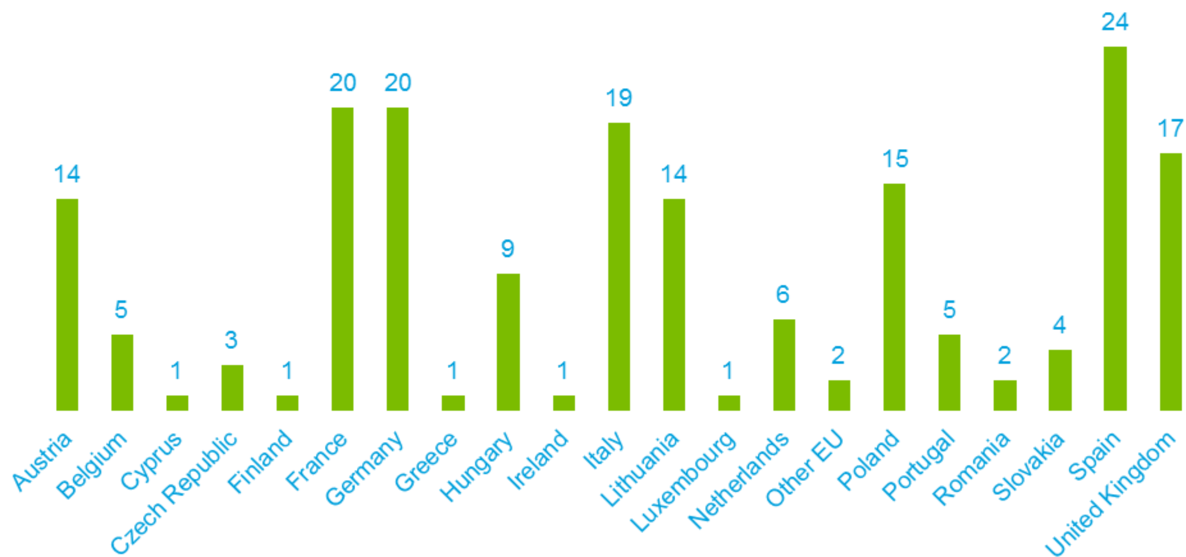
[383] In addition, some stakeholders (also) submitted written contributions and position papers, which are also reflected in the analysis below.

[384] Closed questions were presented primarily in yes/no format and some multiple choice questions. Open questions were asked where further information was sought regarding reasons for the respondent's choice of answer and suggestions for improvement.

[385] With the help of electronic translation tools where necessary.

Nigeria, Peru, US). The figure below illustrates the geographical distribution of respondents within the EU.

Figure 2: Number of survey respondents from the EU

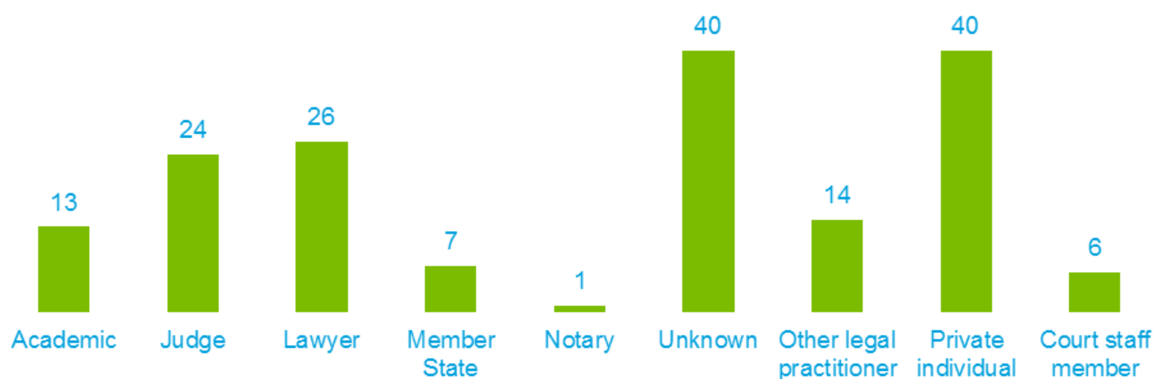


Total number of respondents: 184

Spain is the most represented Member State with 24 responses. It is followed, in descending order, by: France, Germany, Italy, the United Kingdom, Poland, Austria and Lithuania.

Different categories of stakeholders responded to the public consultation, including legal professionals[386], academics, Member States and private individuals. The figure below shows the number of representations for each stakeholder group in the consultation results:

Figure 3: Number of responses from different stakeholder groups

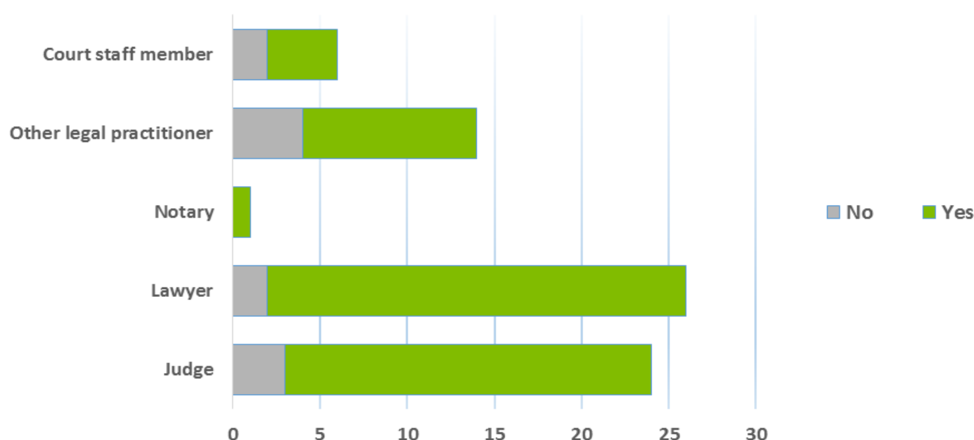


Total number of respondents: 170

[386] Legal professionals includes the following categories: 'Judge', 'Lawyer', 'Notary', 'Other Legal Practitioner', 'Court Staff Member'

Regarding the level of experience of the survey sample, 75% (i.e. 141 of 190 responses) of all respondents indicated that they have practical experience of the provisions of the Regulation. Of the European respondents, 74% (i.e. 136 of 184 responses) stated that they have practical experience of the Regulation. Also, 83% (i.e. 5 of 6 responses) of respondents from the rest of the world stated that they had practical experience of the Regulation. We note that 16% (i.e. 11 of 71 responses) of legal professionals declared that they did not have experience of the regulation, while 84% (i.e. 60 of 71 responses) indicated that they did have experience (the majority of whom are lawyers).

Figure 4: Legal professionals with practical experience with the Regulation



Total number of respondents: 71

Only 25% (i.e. 47 of 190 responses) of respondents declared that they did not have practical experience of the Regulation. This may be considered somewhat limiting for the responses to some questions, but responses from these stakeholders are nevertheless regarded as valid and taken into account for the analysis.

It is important to note that the survey sample is not equally representative of all stakeholder groups or Member States.

4.2 Functioning of the Regulation

This section covers questions aimed at finding out if the Regulation is perceived as an effective tool in reaching the desired outcomes for its core objectives. The consultation included one question concerning the helpfulness of the regulation in matrimonial matters (Q5) and three questions concerning its helpfulness in matters of parental responsibility (Q6 – Q7 – Q8). The first question (Q5) investigated whether the regulation was perceived as an effective tool in solving issues related to divorce/legal separation/marriage annulment cases with cross-border implications. Q6, Q7 and Q8 collected stakeholders' opinions on the Regulation's effectiveness as a legal tool in cross-border cases concerning, respectively, custody over a child, access rights to children, and parental child abduction.

Helpfulness as a tool for spouses in cross-border matrimonial matters (Q5)

Respondents were asked about the helpfulness of the regulation as a tool for spouses involved in cross-border divorce/legal separation/marriage annulment.

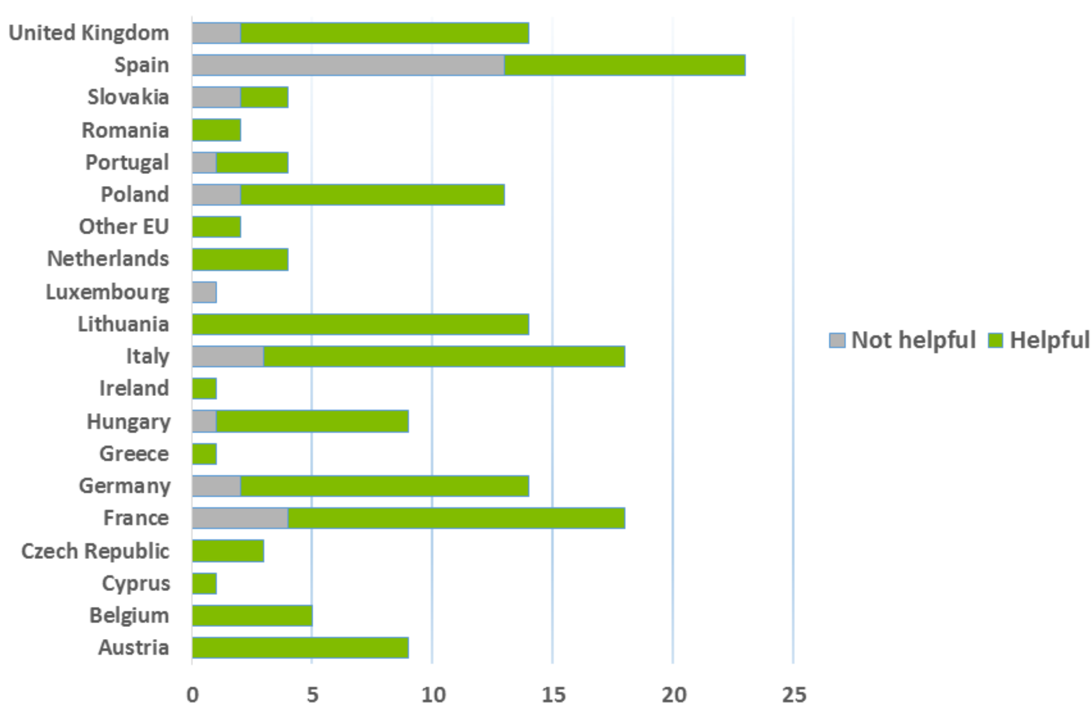
Overall findings

In response to this question, 81% (i.e. 134 of 166 responses) believed that the Regulation was helpful as a tool for spouses in cross-border matrimonial matters whereas 19% (i.e. 32 out of 166 responses) did not.

Segmentation analysis

Most of the respondents who answered positively had practical experience of the Regulation. Only 20% (i.e. 9 of 44 respondents) who did not have any practical knowledge of the Regulation responded negatively. The majority of respondents with practical experience of the Regulation gave a positive answer regarding the effectiveness of its provisions in the cases they had encountered. Also, the majority of legal professionals (94%, i.e. 58 out of 62 responses) thought the Regulation was a helpful tool in cross-border matrimonial matters.

Figure 5: Helpfulness of the Regulation in cross-border matrimonial matters according to EU respondents (Q5)



Total number of respondents from EU countries: 160

Qualitative findings

We note that 71% (i.e. 95 of 134 responses) of the respondents who answered positively justify their answers with free text. Most of the stakeholders are of the opinion that the Brussels IIa Regulation is helpful because it provides **more legal certainty** for the affected spouses by setting out clear rules on the determination of the competent court in cross-border divorce cases, as well as by **establishing the principle of mutual recognition of judgments** in all Member States, reducing the amount of collateral satellite litigations. Another trend among the positive respondents highlights the helpfulness of the Regulation insofar as it sets accelerated procedures and lower legal costs for the parties. Additionally, some respondents state that the Regulation is helpful because it allows a harmonisation of family matters at EU level, hence preventing “forum shopping”.

All of the eight Member States that responded to the public consultation agree on the helpfulness of the Regulation as a tool for spouses involved in cross-border matrimonial matters. Belgium specifies

that the Regulation facilitates cross-border relations between spouses in cases involving a break of the marriage link and provides greater legal certainty by establishing the principle of mutual recognition of judgments.

On the other hand, of the few negative responses (19%, i.e. 32 of 165 responses), the main opinion is that the Regulation does not provide effective solutions and is **not correctly executed by Member States**. A number of respondents specifically point to issues regarding the application of the Regulation in Germany and Austria. According to these respondents, divorce or legal separation is often pronounced in absentia of the non-German spouse (who is not even represented by his/her lawyer). One stakeholder who places emphasis on this German/Austrian situation, states that these countries take advantage of the Regulation to make these unfair decisions be recognised by other Member States.

Helpfulness as a tool in cross-border cases of custody over a child (Q6)

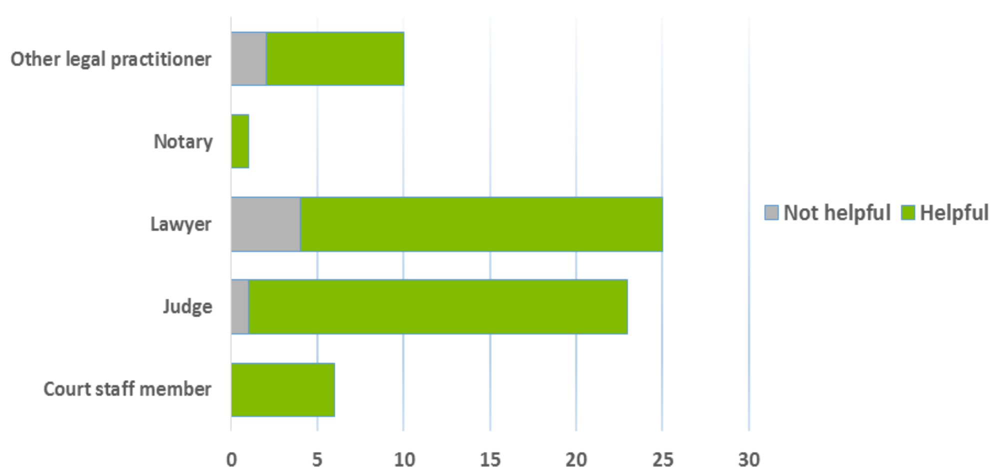
Overall findings

There were 177 survey responses to this question. Of these, 77% (i.e. 137 of 177 responses) of respondents believe that the Regulation is helpful in cross-border cases of custody over a child whereas 23% (i.e. 40 of 177 responses) do not.

Segmentation analysis

We note that 75% (i.e. 99 of 132 responses) of the respondents with experience with the Regulation think that it is a helpful tool in cross-border cases concerning custody over a child. The same answer is given by the majority of respondents (84%, i.e. 36 of 43 responses) who do not have any experience with Brussels IIa Regulation.

Figure 6: Helpfulness of the Regulation in cross-border cases of custody over a child according to legal professionals (Q6)



Total number of legal professionals responding to this question: 65

Qualitative findings

We observe that 65% (i.e. 89 of 137 responses) of the positive respondents explain why they think the Regulation is helpful in cross-border cases of custody over a child. Several respondents think the Regulation is helpful because it acts in **compliance with the principle of the best interests of the child**, defining the jurisdiction according to the principle of the habitual residence of the child, which guarantees that the court responsible is the one best connected to the child. Another frequent

answer to this question, as for the previous one, is that the Regulation is helpful insofar as it **allows harmonisation at EU level of cross-border cases concerning custody over a child**.

The trend arising from the answers of the eight Member States generally confirms the overall opinion of the stakeholders responding to this question of the public consultation. Germany, Belgium, Poland and Portugal highlight the fact that the Regulation is helpful insofar as it sets out clear rules on the determination of jurisdiction, allowing a harmonisation at EU level of cross-border cases concerning custody over a child. The United Kingdom and Portugal also show their satisfaction with the habitual residence of the child as the general rule of jurisdiction in matters of parental responsibility. Germany appreciates Articles 55 and 56 of the Regulation, which oblige and entitle Central Authorities to communicate and gather information about the social environment of the child. The Czech Republic highlights the positive impact of the Regulation on legal certainty and on cooperation between Member States. Nevertheless, Belgium stresses the fact that many difficulties have been faced regarding the recognition and enforcement of judgments, especially when it comes to deciding whether or not to remove children from their family environment.

Additionally, some of the stakeholders who think that the Regulation is not helpful as a legal tool in cross-border cases of custody over a child stress that the Regulation is often not applied effectively in the Member States. These stakeholders ascribe this issue to the complexity of the structure and provisions of the Regulation or, in a few cases, to the unfair interpretation of the principle of the best interests of the child.

For example, a number of respondents point out that a few instances in Germany and Austria have allowed their nationals to bring cases before the local courts, after a foreign judgment has been recognised, in order to obtain a new judgment which allows the "abducted" child to remain in the state.

A stakeholder from Italy highlights two main shortcomings of the Regulation: it is perceived as ignoring custody rights over children conceived out of wedlock and it allows national legislation to discriminate against parents in relation to their gender, indiscriminately preferring women to hold custody rights over children.

Helpfulness as a tool in cross-border cases of access rights to children (Q7)

Overall findings

This question, concerning the helpfulness of Brussels IIa Regulation in cases of access rights to children with cross-border implications, received 172 responses in total. Out of these, 71% (i.e. 122 out of 172 responses) are positive, 29% (i.e. 50 out of 172 responses), are negative.

Segmentation analysis

We observe that 67% (i.e. 86 of 129 responses) of respondents with practical experience of the Regulation and 83% (i.e. 34 of 41 responses) of respondents with no experience express a positive opinion abthe helpfulness of the Regulation in cross-border cases of access rights to children, while only 33% of experienced respondents (i.e. 43 of 129 responses) and 17% of respondents with experience (i.e. 7 of 41 responses) state that the Regulation is not helpful in these cases. Respondents from the EU also mostly agree (71%, i.e. 118 of 166 responses) that the Regulation is helpful in these cases.

Qualitative findings

We note that 42% (i.e. 72 of 172 responses) of respondents explain why they think the Regulation is helpful in cross-border cases of access rights to children. Most of the stakeholders agree on the fact that it establishes an efficient system of jurisdiction.

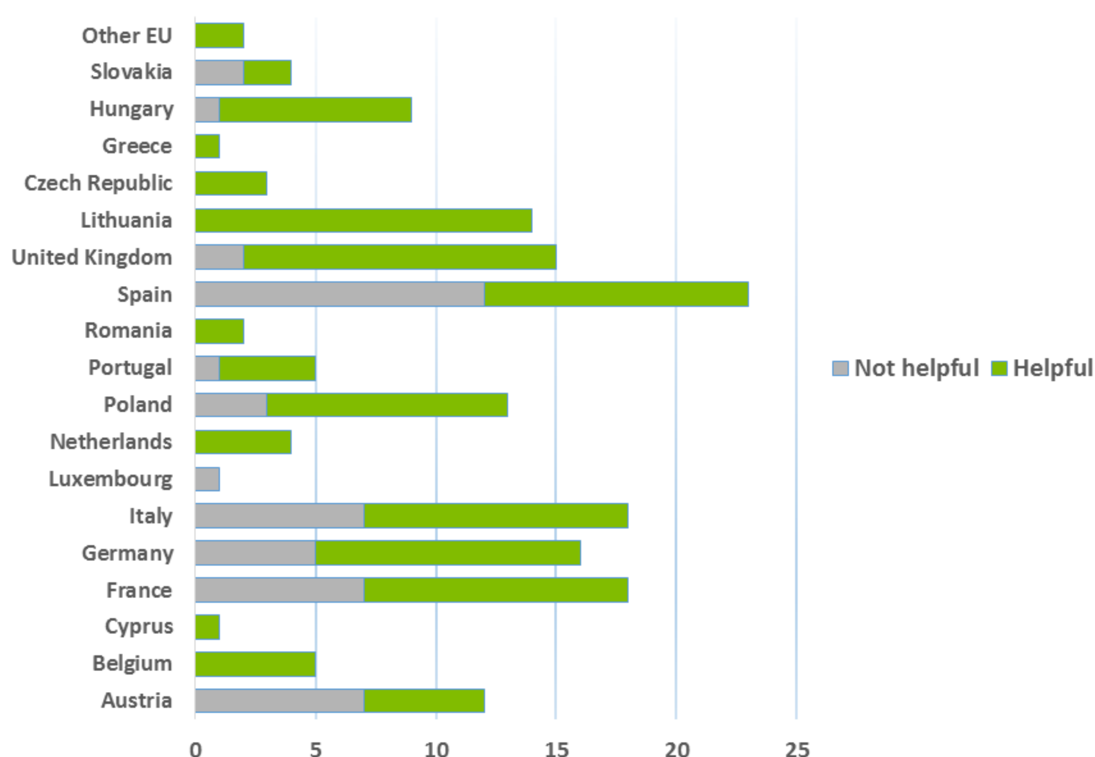
Among the stakeholders who responded negatively to this question, some consider that one weakness of the Regulation is the **lack of provisions aimed at obtaining an actual enforcement of a**

judgment concerning access rights to children in a different Member State. Some respondents suggest that the Regulation should provide for specific sanctions in the case that an authority does not comply with the Regulation.

A French lawyer and the Belgian organisation state that the main obstacle to the actual application of the Regulation is the judges' lack of appropriate knowledge of Articles 41 para 2 and 42 para 2 which provide for a system of certificates for cases relating to access rights and the return of the child; this, *de facto*, makes it difficult for these provisions to be enforced.

According to the contribution of an Austrian judge, the lack of actual enforcement of the Regulation's provisions on access rights to children is due to inadequate coordination with Article 21 of the Hague Convention of 1980 with regard to the effective exercise of access rights.

Figure 7: Helpfulness of the Regulation in cross-border cases of access rights to children according to EU respondents (Q7)



Total number of respondents from EU countries: 166

Helpfulness and efficiency as a tool in cross-border cases of parental child abduction (Q8)

Overall findings

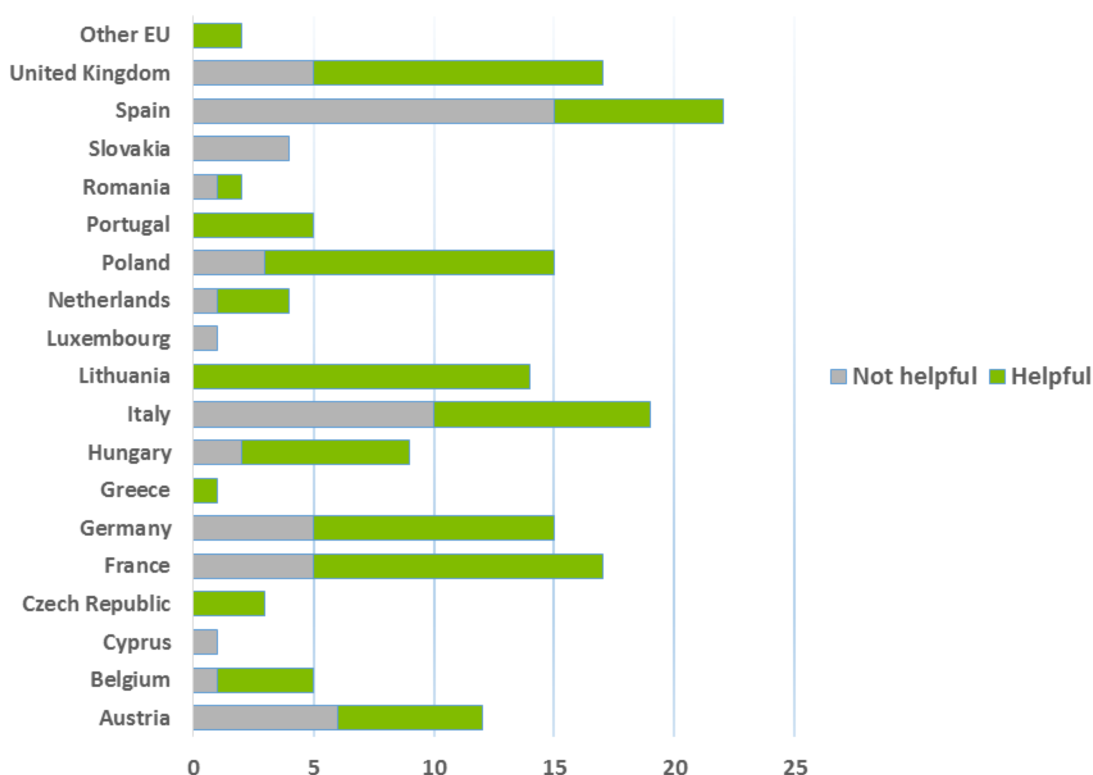
There were 174 responses to this question. Of these, 66% (i.e. 114 of 174 responses) regard the Regulation as a positive tool in cross-border cases of parental child abduction, whereas 34% (i.e. 60 of 174 responses) do not.

Segmentation analysis

We observe that 64% (i.e. 83 out of 130 responses) of respondents with practical experience of the Regulation state that the Regulation is a helpful tool in cross-border parental child abduction cases,

while 36% (i.e. 47 of 130 responses) think the opposite. Of the responses from stakeholders with no practical experience of the Regulation, 71% (i.e. 30 of 42 responses) are positive while 29% (i.e. 12 of 42 responses) are negative. We note that 64% (i.e. 108 of 168 responses) of stakeholders from the EU think the Brussels IIa Regulation is helpful in cases of cross-border parental child-abduction.

Figure 8: Helpfulness of the Regulation in cross-border cases of parental child abduction according to the EU respondents (Q8)



Total number of respondents from EU countries: 168

Qualitative findings

We note that 64% (i.e. 73 of 114 positive responses) of the respondents who believe that the Regulation is a helpful tool in cross-border cases of parental child abduction provided further information. Most respondents make reference to the effectiveness of the Regulation in **identifying the jurisdiction**, **accelerating procedures** and **facilitating investigations** in cases of international parental child abduction. The Regulation confirms and reinforces the summary return principle set out in the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Art 11(4)). It also reminds the courts of the need to hear the child (Art 11(2)) and highlights the importance of speedy adjudication of return applications (Art 11(3)).

With the exception of the Netherlands, the Member States that contributed to the public consultation (i.e. BE, CZ, DE, PL, PT, UK, FR) generally agree on the helpfulness and efficiency of the Regulation as a tool in cases of cross-border parental child abduction. Germany and Portugal appreciate its complementarity with the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The Brussels IIa Regulation confirms and reinforces some principles of the latter, such as the need to hear the child (Art 11(2)) and the acceleration principle, which entails the speedy adjudication of return applications (Art 11(3). This is also particularly appreciated by Poland. The

United Kingdom states that even though the Regulation has not always been completely effective in every case, Central Authorities generally cooperate well on these cases.

Some respondents, despite answering positively to question Q8, stress some shortcomings. For example, a Belgian lawyer suggests that the Regulation should not allow any unilateral transfer to another country than that of the principal residence of the child without an agreement signed by both parents or a clear judgment delivered by the country where the child had previously resided.

Also, a Polish lawyer recognises the positive effect of the Regulation on the enforcement of the rules concerning cases of international child abduction by one parent, but he also says it is urgent to drive specific agreements with third States to make the Regulation's provisions really effective.

An academic from the United Kingdom states that Article 11(3), which has replaced the 'soft' provision of Article 11 of the Convention on the Civil Aspects of International Child Abduction, imposes an unrealistic time limit of six weeks for the court to issue its judgment.[387] This remark is also made by a Member State (Czech Republic) who responded to this question. The academic from the United Kingdom also stresses that, according to the rules set out in Article 13(1)(b) of the 1980 Hague Abduction Convention, the court is not obliged to order the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or would place the child in an intolerable situation. In contrast, Article 11(4) of the Brussels IIa Regulation requires the court to order the return of the child even if it puts the child at risk. This point should warn against making a provision that is too over-encompassing: as the child's welfare still has to be safeguarded, the automatic return of the child should be interpreted as a less rigid principle.

A judge from Austria also specifies that the ECHR, in its decision in the case of *Neulinger and Shuruk vs. Switzerland*, stated that the return of a child cannot be ordered automatically, and that the effects of the time elapsed since the child moved to another country must be taken into consideration. As Brussels IIa Regulation clearly pursues the aim of facilitating return orders, these considerations are set aside. If the court of the country of origin overrules the decision based on Article 11(8) of the Regulation by issuing a return order, the court of the country of residence of the child is forced to enforce that decision even though it is contrary to its own conviction that the return endangers the child.

4.3 Jurisdiction

This section includes all the questions concerning the provisions of the Brussels IIa Regulation that are aimed at establishing the relevant jurisdiction in ***matrimonial matters*** (sub-section (a)), ***matters of parental responsibility*** (sub-section (b)) and in cases ***common to both*** (sub-section (c)).

4.3.1 Matrimonial Matters

Sub-section (a) includes three questions which investigate how stakeholders perceive the effectiveness of the Regulation's jurisdiction rules that apply to matrimonial matters. Q9 explores the opportunity of mitigating the risk of a 'rush to court' or of 'forum shopping'. The last two questions explore the possibility, respectively, of introducing the choice of the competent court by common agreement of the spouses (Q10), and of taking inspiration from other EU instruments to define the formal requirements of such an agreement (Q11).

[387] This point is also made by the UK and is elaborated on under Q19 of this annex.

Revising methods to reduce risk of 'rush to court' (Q9)

Overall findings

In relation to whether the Regulation should be revised so as to better reduce the risk of a 'rush to court', 167 stakeholders responded. Of these, 69% (i.e. 116 out of 167 responses), believe that the ways of identifying the court responsible in matrimonial matters should be revised while 31% (i.e. 51 of 167 responses) do not.

Segmentation analysis

We note that 63% (i.e. 76 of 120 responses) of respondents with practical experience of the Regulation and 89% (i.e. 40 of 45 responses) of respondents with no experience express a positive opinion regarding the possibility of revising the ways of identifying the court responsible in matrimonial matters to reduce the risk of a "rush to court".

Qualitative findings

Respondents who believe the Regulation could be improved to reduce the risk of a 'rush to court' were asked to specify how this could be achieved. 97% (i.e. 113 of 116 positive responses) of the respondents provided this information.

We observe that the majority (69%, i.e. 78 of 113 responses) think the risk of a 'rush to court' might be reduced by **establishing an order of priority of the several alternative grounds for jurisdiction** provided by Article 3 of the Regulation in cases of matrimonial matters, so as to prevent spouses from beating each other in filing a claim in the Member State with the most favourable outcome for them.

We further observe that 20% (i.e. 23 of 113 responses) of respondents suggest that the other spouse's agreement should be required when the court responsible has been identified on the basis on the habitual residence of the applicant.

Interestingly, an opposite trend arises when comparing the overall answers to those from Member State contributions. Indeed, five Member States (BE, CZ, FR, PL, NL) state that the ways of identifying the court responsible in matrimonial matters should not be revised in order to reduce the risk of a 'rush to court'. According to France, even though the existence of several grounds of jurisdiction theoretically increases the risk of a 'rush to court', in practice, the grounds of jurisdiction set out by Article 3 of the Regulation mostly correspond to specific factual situations that occur when the habitual residence criterion cannot be applied. Therefore, France highlights the idea that promoting a process of unification of the national rules on the conflict of laws (by taking inspiration from Rome III), would be preferable to modifying Article 3 of the Regulation. Germany responds positively to this public consultation question, pinpointing, as its preferred criterion, the first one listed in the European Commission questionnaire. According to Germany and Portugal, the risk of a 'rush to court' might be reduced by establishing an order of priority of the different alternative grounds for jurisdiction provided for by Article 3 of the Regulation, so as to provide more legal certainty. The United Kingdom supports consideration of a hierarchy of jurisdiction instead of the existing list of alternatives for establishing jurisdiction set out in Article 3 of the Regulation. According to the United Kingdom, potential development of a hierarchy of jurisdiction should not be based on jurisdiction rules in recent Regulations on other subjects (including the Rome III Regulation).

Choice of court by common agreement (Q10)

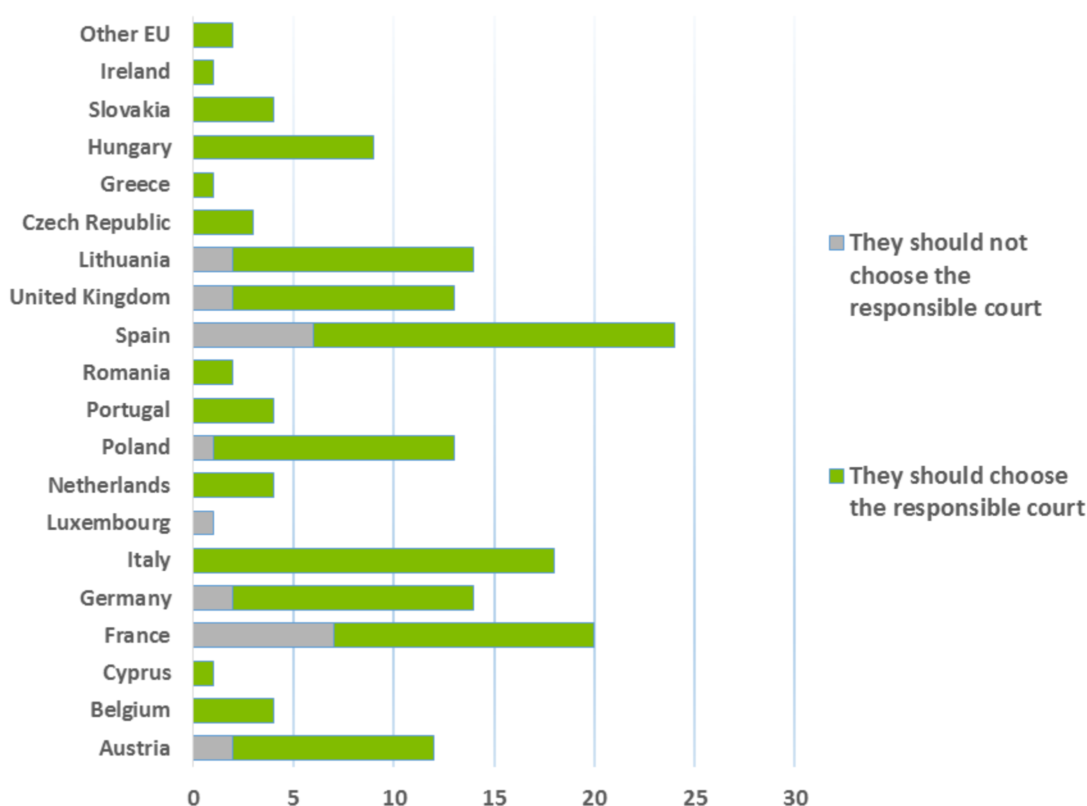
Overall findings

The majority (85%, i.e. 145 out of 170 responses) of respondents think that the Regulation should include the possibility for spouses to choose the court responsible by common agreement.

Segmentation analysis

The majority of respondents who do not have practical experience of the Regulation (87%, i.e. 39 out of 45 responses) and of respondents with practical experience of the Regulation (85%, i.e. 105 out of 123 responses) responded positively to this question. We note that 86% (i.e. 141 out of 164 responses) of stakeholders from the EU agree. The country segmentation of these responses are shown in the figure below.

Figure 9: Opinion of EU respondents on the possibility for spouses to choose the court responsible by common agreement (Q10)



Total number of respondents from EU countries: 164

Qualitative findings

We observe that 97% (i.e. 140 out of 145 responses) of respondents who gave a positive answer to Q10 specify which criteria the Regulation should adopt in order to let the spouses define the competent court by common agreement.

According to 65% (i.e. 91 out of 140 responses) of respondents, at the time the agreement is concluded, the Member State whose courts have been chosen by the spouses should be the country

where the spouses have had their habitual residence for at least a certain period of time, provided that this residence period had not ended more than a certain period of time prior to the court being seised.

Also, 33% (i.e. 47 out of 140 responses) believe that at the time the agreement is concluded, one of the spouses should have the nationality of the chosen Member State.

A further 34% (i.e. 48 out of 140 responses) believe that at the time the court is seised, the courts of that Member State should have responsibility to hear the case under the main jurisdiction provisions of the Regulation.

Most of the Member States (BE, DE, NL, UK, CZ, PT, PL) that respond to this question are concerned about the lack of provisions allowing the spouses to choose the court responsible by common agreement. Poland chose the first three options listed in the questionnaire. According to both Belgium and the Netherlands, at the time the agreement is concluded, the Member State whose courts have been chosen by the spouses should be the country where the spouses have had their habitual residence for at least a certain period of time. The Czech Republic, the Netherlands and Portugal choose a second possible criterion as well, stating that, as an alternative, at the time the agreement is concluded, one of the spouses should have the nationality of that Member State. Belgium also shows itself open to the possibility of adopting other criteria that are not listed, as do the Czech Republic, Germany and Portugal. Germany highlights the idea that the introduction of the possibility for spouses to choose the court responsible would be consistent with Article 12(3), which already considers such an option for matters of parental responsibility. The UK also supports consideration of the possibility of allowing spouses to choose the court with jurisdiction by mutual agreement. According to the United Kingdom, if the agreement has to be binding, the spouses must have had the opportunity to take independent legal advice at the time of the agreement and the absence of duress has to be showed. It would also be necessary to consider whether provisions are needed in terms of when the agreement was made and whether it should be open to review if circumstances have changed since the time when the marriage broke down. The only Member State which is contrary to the introduction of a provision allowing the spouses to agree on the competent court by common agreement is France. Indeed, France states that it seems unlikely to consider a choice of jurisdiction by agreement *ab initio* while the spouses do not intend to file a joint petition. Furthermore, France stresses that even in the event of a joint petition, the criterion of the habitual residence of one of the spouses is particularly useful as it allows for matrimonial and parental responsibility issues to be joint into one proceeding.

Use of other EU instruments (Q11)

Respondents were asked whether the agreements for allowing the spouses to choose the court responsible should draw inspiration from other EU instruments.

Overall findings

The majority of respondents (63% i.e. 69 of 110 responses) indicated that such an agreement should take inspiration from the Maintenance Regulation, Article 4(2), while 31% (i.e. 34 of 110 responses) of the respondents answer “Other” without specifying the EU instrument. It should also be noted that 6% (i.e. 7 of 110 responses) answered with both “Other” and “Maintenance Regulation”.

Segmentation analysis

We observe that 58% (i.e. 50 of 86 responses) of respondents with practical experience of the Regulation and 79% (i.e. 19 of 24 responses) of respondents with no experience of the Regulation state they would take inspiration from the Maintenance Regulation to define the formal requirements of the agreement mentioned in the previous question (Q10).

Qualitative findings

Those respondents who indicated another EU instrument were asked to specify which one. In this case, some of the respondents suggest the Rome III Regulation as an instrument for possible inspiration in defining the requirements of the common agreement.

Five Member States (BE, DE, PL, CZ, PT) directly responded to this question. The Czech Republic, Poland and Portugal indicate that the formal requirements of the common agreement between the spouses should take inspiration from the Maintenance Regulation. Germany and Belgium both chose "Other" and state that taking inspiration from the Rome III Regulation would be conceivable. According to Belgium, the three criteria listed in the questionnaire are all acceptable insofar as they guarantee that the chosen court has a solid link with the spouses. This Member State also specifies that, as regards the criterion of the habitual residence, the time provided between the end of the habitual residence and the referral to the court should be short (less than one year). As regards the criterion of the nationality of either spouse, it should be matched with a requirement of residence. In its separate contribution to the public consultation, the United Kingdom states that the formal requirements of any agreement would need to be relevant to the specific circumstances of marriage breakdown, without interfering with the provisions of each Member State's domestic law.

4.3.2 Parental Responsibility

Sub-section (b) contains two questions on parental responsibility matters: one concerning the opportunity to improve the provisions of Brussels IIa Regulation pertaining to custody and access rights (Q12) and one concerning the possibility to improve mechanisms of cooperation between Member States to facilitate the transfer of hearings (Q13).

Improvement of provisions relating to prorogation of jurisdiction (custody and access rights) (Q12)

Overall findings

We note that 53% (i.e. 89 of 169 responses) of respondents think that the conditions for the application of the provisions of the Brussels IIa Regulation relating to custody and access rights should be improved, while 47% (i.e. 80 of 169 responses) do not.

Segmentation analysis

We observe that 59% (i.e. 72 of 123 responses) of respondents with practical experience of the Regulation state that the provisions of the Regulation concerning custody and access rights should be improved, while 41% (i.e. 51 of 123 responses) think the opposite. Respondents with no practical experience show an opposite trend in response to this question: the majority (64%, i.e. 28 of 44 responses) answer negatively, while only 36% (i.e. 16 of 44 responses) answer positively. We note that 38% (i.e. 27 of 71 responses) of legal professionals respond "yes" to this question.

Qualitative findings

We note that 82% (i.e. 73 of 89 positive responses) of respondents who want to see these provisions improved specify their reasons. A clear trend is visible among the contributions of the stakeholders who think that the Regulation's provisions concerning custody and access rights should be improved. The majority of them agree on the fact that it may be convenient to resolve some ambiguities within Article 12(3)(b) in order to provide legal certainty as to the proper construction of this Article.

A stakeholder from the United Kingdom mentions the judgment of the United Kingdom Supreme Court in the case *I (A Child), 2009, UKSC 10*, which identifies a difficulty with the wording of Article 12 in relation to the timing of any agreement that the courts of a Member State should exercise jurisdiction. Article 12(3)(b) reads as follows: "*the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.*" The Supreme Court questions whether the

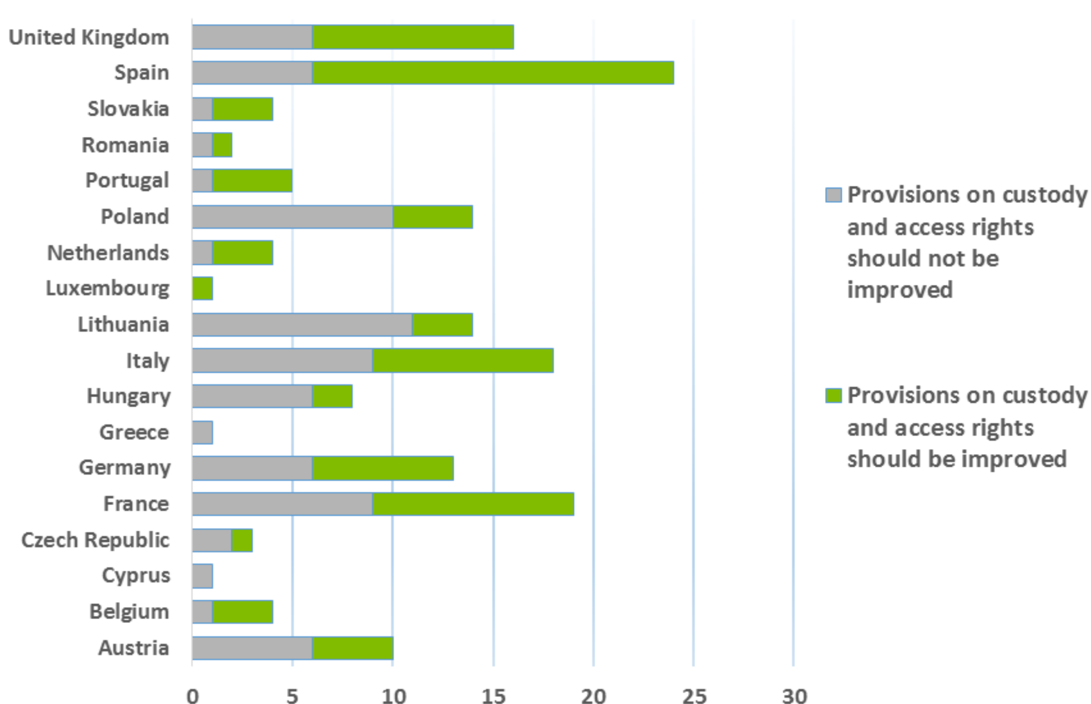
addition of "at the time the court is seised" related to the timing of the acceptance of jurisdiction or to those who had to give their agreement.

A judge from the United Kingdom raises the same issue. He states that the courts of England and Wales have encountered difficulties in interpreting what is meant by the words "at the time the court is seised". Clarification should be brought to the manner in which the jurisdiction of a court will be determined to have been accepted expressly or otherwise in an unequivocal manner "at the time the court is seised".

Other respondents state that other difficulties arise when there is no express agreement and the court is instead asked to infer a prorogation of jurisdiction by the actions of a party to litigation ("otherwise in an unequivocal manner"). In such circumstances it is necessary for the court to conduct a form of fact finding exercise in order to determine whether or not there has been any agreement, or whether or not someone's conduct can give rise to the inference that they have accepted jurisdiction. Such hearings can be lengthy and give rise to unnecessary delay.

While four Member States (BE, CZ, NL, PL) state that the conditions for the application of the provisions of the Brussels IIa Regulation relating to custody and access rights should be improved, the remaining three (DE, FR, PT) state the opposite, while the United Kingdom prefers not to comment on this topic. Poland requires clarifications about the wording "expressly or otherwise in an unequivocal manner" of Article 12(3)(b). Belgium highlights the lack of a clear time limit in Article 12(3)(b), which creates ambiguities in defining the jurisdiction of a court which has been accepted expressly or otherwise in an unequivocal manner "at the time the court is seised". As regards Article 12(3)(b), the Netherlands also highlights the idea that in the case of no express agreement and the court is instead asked to infer a prorogation of jurisdiction by the actions of a party to litigation, the acceptance of jurisdiction might also be determined on the basis of a written or oral statement or of the attitude of the parties during the process.

Figure 10: Perception of EU respondents on improving the provisions on access and custody rights (Q12)



Total number of respondents from EU countries: 161

Improvement of cooperation mechanisms for transfer to the court better placed to hear the case (Q13)

Respondents were asked whether they thought there was a need for improvements to the cooperation mechanism aimed at ensuring a smooth functioning of transferring a case to another Member State court which is better placed to hear the case.

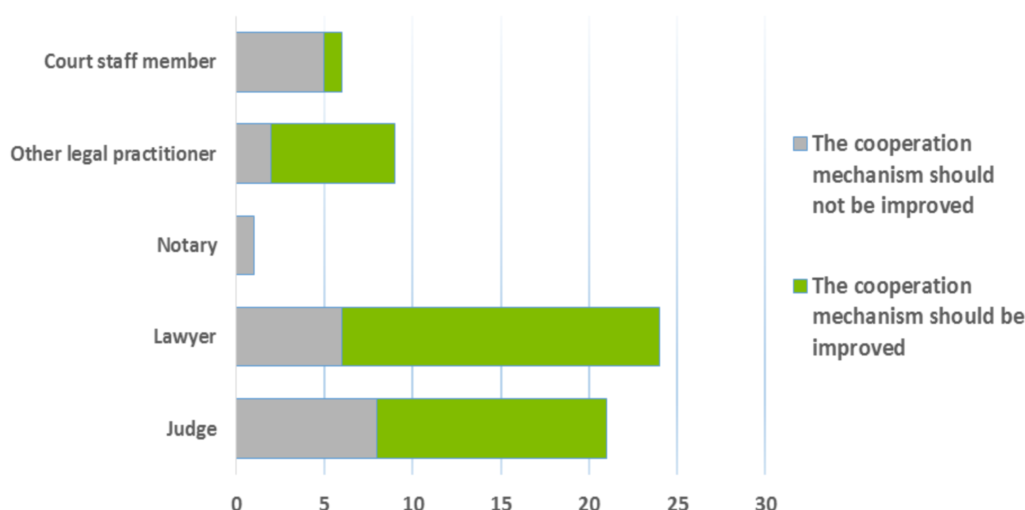
Overall findings

Of the 163 respondents to this question, 78% (i.e. 127 of 163 responses) think that the cooperation mechanism aimed at ensuring a smooth functioning of the transfer should be improved, while 22% (i.e. 36 of 163 responses) think the opposite.

Segmentation analysis

The majority of respondents with practical experience of the Regulation state that the provisions of the Regulation concerning the cooperation mechanism for transfer of hearings should be improved, while only 20% (i.e. 24 of 121 responses) answered negatively. The trend for the respondents with no practical experience of the Regulation is exactly the opposite: only 36% (i.e. 16 of 44 responses) of them answered positively, while 64% (i.e. 28 of 44 responses) answered negatively. More than half (64% i.e. 39 of 61 responses) of legal professionals who answered this question agree that the provisions should be improved.

Figure 11: Perception of legal professionals on improving cooperation mechanisms for transfer to the court better placed to hear the case (Q13)



Total number of legal professionals responding to this question: 61

Qualitative findings

We note that 80% (i.e. 102 out of 127 positive responses) of respondents who want to improve the provisions concerning cooperation mechanisms for the transfer to the court better placed to hear the case hearings offer suggestions to do so.

Several respondents suggest improving these **mechanisms by ensuring a better system of information and cooperation between the courts and the Central Authorities of the Member States**, by establishing **strict deadlines** and by providing **penalties in case of non-compliance**. Some stakeholders suggest making the communication faster by using e-documents and English as an

official language for the exchange of information. A few respondents suggest providing special training for judges dealing with the Regulation.

The contribution of a judge from the United Kingdom seems particularly relevant. He states that the means by which a transfer is effected should be clearly identified in order to ensure the process is completed expeditiously. This relates both to the structure of Article 15 and to the manner in which it is implemented in practice. With regard to its structure, the judge stresses that, because of differences between Member States' legislations, the means by which the courts of the requested State are seised ("of their seisure") and "accept jurisdiction" within Article 15(5), are not clear. Greater clarity would be achieved if Article 15 were to prescribe the required documents (and timeframes for their transmissions) and if it were to make clear with whom responsibility for action lies. This stakeholder also asks for clarification as to whether the six week-time limit is absolute or not.

All Member States that responded to this question, except Germany, think the cooperation mechanism aimed at ensuring a smooth functioning of the transfer should be improved. France and Poland regret the lack of clarifications regarding Article 15 of the Regulation, especially in the event that the requested court fails to timely notify the requesting court that it has accepted jurisdiction. Furthermore, France notes that better visibility of the European Judicial Network would be desirable in order to facilitate the practical exchange of information between courts. The Netherlands highlights the idea that it would be useful to separate the three types of referral currently set out together by the Regulation. The United Kingdom considers that the mechanism in Article 15 for the transfer of jurisdiction to a court better placed to hear the case when this is in the best interests of the child is very valuable. The United Kingdom would wish to continue with the flexibility of the alternatives in Article 15(1) and (2), so that the court better placed can deal with the case in the best interests of the child. The Czech Republic highlights the idea that it might nevertheless be helpful, at operational level, for Member States to take steps to assists courts and Central Authorities in understanding the process by encouraging the use of the new Brussels IIa Practice Guide. Furthermore, the United Kingdom notes that the process and timings for handling such transfers within each Member State is a matter of each Member State's domestic law.

4.3.3 Horizontal issues

Sub-section (b) includes five questions common to matrimonial matters and matters of parental responsibility. In Q14, the question is about the helpfulness of Brussels IIa Regulation in avoiding parallel proceedings between the same parties on the same subject matter (*lis pendens*) and in preventing irreconcilable judgments rendered by courts in different EU countries. Q15 asked if stakeholders think the Regulation should include a provision to prevent *lis pendens* in case the proceedings between the same parties on the same subject matter are pending in parallel before the courts of a Member State and the courts of a non-EU-country. Q16 investigated the effectiveness of the existent provisions concerning provisional (including protective) measures that, in urgent cases, can be adopted by the courts of a Member State even if these courts do not have competence as to the substance of the matter. In Q17, stakeholders are asked to give their opinion on the possibility for the Regulation to address which Member State's courts are responsible in all situations of unpredictability and unequal access to justice for EU citizens, given the lack of uniform rules. Finally, Q18 asks whether, according to the stakeholders, the regulation should ensure access to justice in cases where the non-EU court responsible is incapable of delivering justice.

Lis Pendens Principle in parallel proceedings (Q14)

Overall findings

Respondents were asked if they thought that the existing rules of the Brussels IIa Regulation have helped in preventing parallel proceedings. Of those who answered, 59% (i.e. 97 of 164 responses) responded positively, while 41% (i.e. 67 of 164 responses) responded negatively.

Segmentation analysis

Of the respondents with practical experience of the Regulation, 61% (i.e. 73 of 120 responses) state that the current provisions of the Regulation concerning the jurisdiction have helped effectively in preventing parallel proceedings, while 39% (i.e. 47 of 120 responses) think the opposite. More than half of the respondents with no practical experience of the Regulation answer positively as well, while 48% (i.e. 20 of 42 responses) respond negatively.

Qualitative findings

We note that 69% (i.e. 46 of 67 responses) of the respondents who think that the existing provisions of the Regulation have not been helpful in preventing parallel proceedings, explain their answer, and 26% (i.e. 42 of 164 responses) specify their reasons or suggestions.

Most of these agree on the fact that the *lis pendens* rule has helped in preventing parallel proceedings. No relevant trends arise from the analysis of these suggestions.

A stakeholder from the United Kingdom stresses the fact that, in England and Wales, the High Court is the only court with jurisdiction for these matters, thus ensuring that international family cases are dealt with by a small pool of dedicated family judges aware of the inherent complexities. This respondent would suggest that other Member States adopt this model.

All Member States that contributed to the public consultation, apart from the Czech Republic and Portugal, responded positively to this question, confirming the general trend arising from the analysis of the overall results. Both the Czech Republic and Portugal (as well as France among the positive respondents) highlight the fact that some ambiguities concerning Article 19 of the Regulation have been solved by the ECJ.[388] Therefore, the integration of this case law in future provisions would be welcome. Poland, Germany and Belgium state that the existing rules of the Regulation have been useful in preventing parallel proceedings, although, as the effectiveness of this mechanism depends heavily on good communication between courts, it is essential for it to be facilitated via Central Authorities or through the European Judicial Network. Therefore, integration of this case law in future provisions would be welcome. The United Kingdom states that, in considering any changes to these provisions, it would be important to make sure the different legal systems of Member States are respected.

Parallel proceedings in a non-Member State (Q15)

Overall findings

We note that 70% (i.e. 117 of 168 responses) of respondents think the Regulation should include a provision to prevent *lis pendens* before the courts of a Member State and the courts of a non-EU-country, while only 30% (i.e. 51 of 168 responses) answer negatively.

Segmentation analysis

We observe that 71% (i.e. 87 of 123 responses) of stakeholders with practical experience of Brussels IIa Regulation answered positively to this question, as well as the majority of legal professionals who took part in this public consultation. Only 29% (i.e. 36 of 123 responses) of experienced respondents and 33% (i.e. 14 of 43 responses) of respondents with no practical experience of the Regulation answered negatively.

[388] ECJ 15 July 2010 Case C – 296/10, Purrucker II.

Qualitative findings

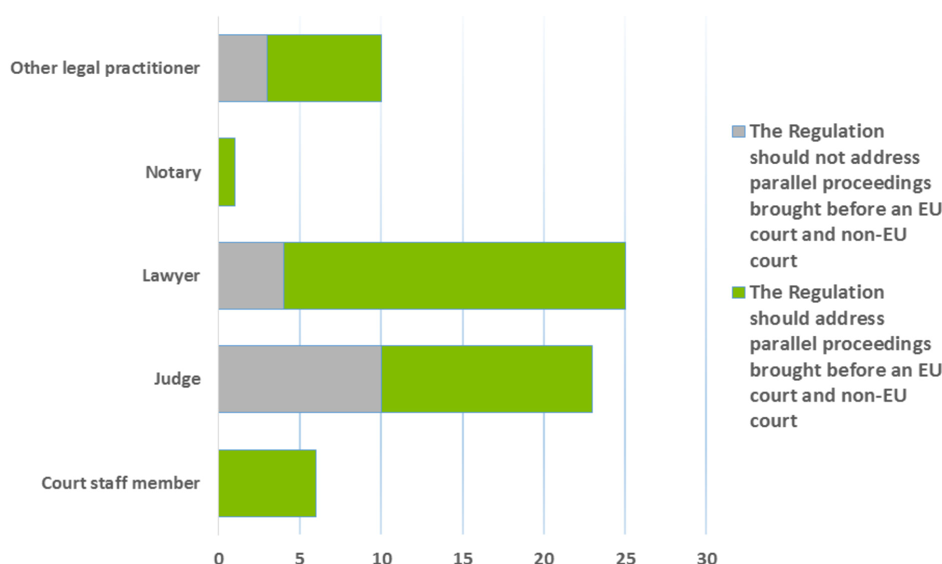
We noted that 64% (i.e. 75 of 117 responses) of respondents who think a provision should be introduced to prevent proceedings between the same parties on the same subject matter from pending in parallel before the courts of a Member State and the courts of a non-Member State specify their reasons.

These respondents mostly agree on the fact that, in these cases, the solution or prevention of *lis pendens* currently depends entirely on informal judicial cooperation, while it would be preferable for *lis pendens* issues with third States to be solved by introducing a formal provision within the Regulation, so as to ensure standardised approaches by all Member States. The Regulation should, on the one hand, address its own relation with bilateral treaties adopted with third States, and on the other hand, provide a mechanism for the courts of the Member States to take into account proceedings pending before the courts of third States between the same parties and concerning the same issue. However, such a provision should be construed with the consideration of whether a judgment of the third State court would be capable of recognition and enforcement within the EU, and whether the matter falls within the exclusive jurisdiction of the court of third State. As enforceability of judgments by the third States' courts is governed by national laws of the Member States, it is important to ensure that the minimum standards embedded in the Regulation are abided by (i.e. hearing of a child, ensuring the opportunity for both of the spouses to be heard in custody proceedings and so on). Article 33 of the recast of Brussels I regulation (No 1215/2012) could serve as the basis for formulating such a provision.

Belgium, the Netherlands, Poland and the United Kingdom believe that it would be important to consider the possible inclusion of provisions enabling Member States to decline jurisdiction in favour of a non-EU State, particularly in parental responsibility matters. However, the Czech Republic, France, Germany and Portugal respond negatively to this question. France mentioned that such a provision is not strictly necessary in France, as an exception of international *lis pendens* has already been introduced at national level.[389] On the contrary, the United Kingdom, which welcomes this possibility, highlights the idea that that the question of whether any provision on the same lines should be limited to non-EU Contracting States to the 1996 Hague Convention on the Protection of Children or whether it should also address transfer of jurisdiction outside the 1996 Hague Convention should be open to discussion.

[389] Civ, November 26, 1974, appeal No 73 – 13820, Miniera di Fragne.

Figure 12: Perception of legal professionals on the Regulation addressing parallel proceedings before an EU and non-Member State (Q15)



Total number of legal professionals responding to this question: 65

Provisional measures by a non-competent court in urgent cases (Q16)

Overall findings

Regarding provisional measures (which, in urgent cases, can be adopted by the courts of a non-competent Member State), 55% (i.e. 85 out of 155 responses) of respondents do not think that the existing provisions have been useful. We observe that only 45% (i.e. 70 out of 155 responses) think they have been useful.

Segmentation analysis

Only 43% (i.e. 49 of 113 responses) of stakeholders with practical experience of the Regulation answer this question positively, while 57% (i.e. 64 of 113 responses) answer negatively.

Qualitative findings

From the analysis of suggestions that respondents give for improving the existing rules concerning provisional measures, no specific trend arises, but a significant amount of respondents mention that it is necessary for **the transmission of information to be made easier and quicker**. In this respect, to facilitate the effective resolution of emergency cases, the notion of **mutual trust between Member States is crucial**. Some stakeholders also suggest **clarifying the notion of 'urgent cases'** in order for the notion to be interpreted consistently by all Member States.

Four of the eight Member States that contributed to the public consultation (DE, FR, NL, UK) responded positively to this question, while the rest (BE, PL, CZ, PT) responded negatively. While Belgium regrets the lack of an effective communication network to allow for the determination of a competent judge and for information exchange, Poland states that these provisions are not interpreted equally by all Member States. France, instead, states that the existing provisions

concerning provisional measures (which, in urgent cases, can be adopted by the courts of a non-competent Member State) have been useful. According to the Czech Republic, France and Portugal, as the ECJ has already clarified Article 20,[390] it would be desirable for this case law to be inserted in the Practice Guide for the application of the new Brussels II Regulation rather than revising the existing rules. On the other hand, a review of the Regulation might cause a reconsideration of this case law which is already effectively applied by French practitioners.

Uniform rule for the determination of court (Q17)

Respondents were asked whether a uniform rule should exist in all situations for determining which Member State's courts are responsible to hear the case.

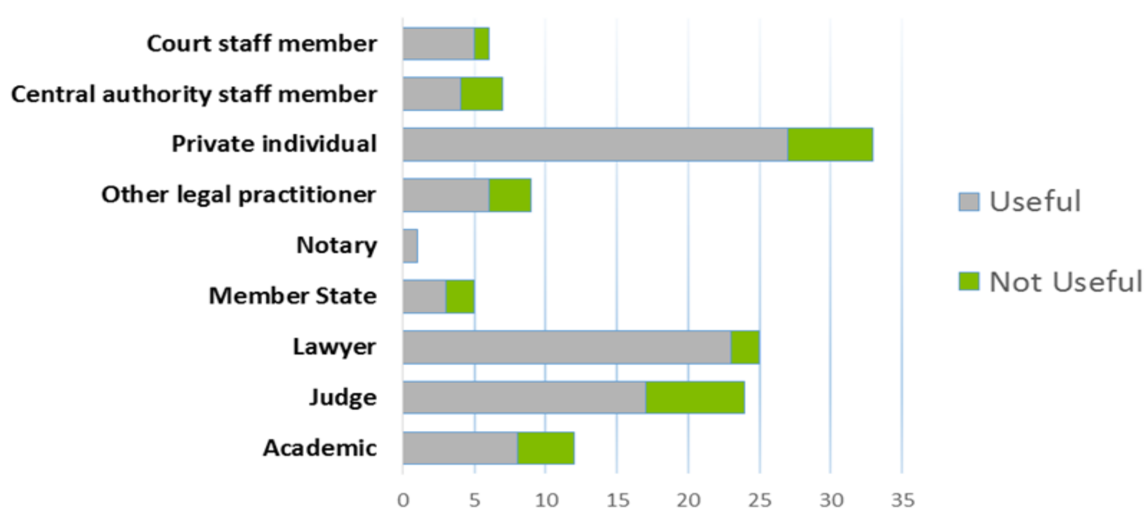
Overall findings

A significant majority (77% i.e. 128 of 166 responses) of respondents maintain that it would be useful to address the lack of a uniform rule for all cases and 23% (i.e. 38 of 166 responses) do not.

Segmentation analysis

Among the respondents who have practical experience of the Regulation, answers reflect the overall findings, with 77% (i.e. 94 of 122 responses) of these respondents indicating that they think it would be useful to address the lack of a uniform rule so as to allow for the identification of the court responsible in all situations. Results are similar for segmentation of the respondent roles, in which 79% (i.e. 46 of 58 responses) of legal practitioners[391] and 82% (i.e. 27 of 33 responses) of private individuals agree. Academics, however, are slightly more divided; 67% (i.e. 8 of 12 responses) feel that the rule should be addressed.

Figure 13: Perceived usefulness of addressing the lack of a uniform rule to allow in all situations the identification of the responsible court (Q17)



Total number of respondents excluding "other": 122

[390] ECJ, Case C – 403/09 PPU Deticek.
[391] Judges, lawyers and 'other legal practitioners'.

Qualitative findings

Respondents were further asked to explain why they think it would be useful to address this issue. The majority of respondents do not offer any substantial additional information but simply reiterate the usefulness of uniform rules. Respondents think that it will make the process **more efficient**, **reduce litigation** in family matters, **encourage fairness** and **enhance legal certainty**.

Forum necessitatis (Q18)

Respondents were asked if they thought it would be useful to allow the Regulation to ensure access to justice in cases where the courts responsible cannot exercise their jurisdiction (*forum necessitatis*). This would involve, for example in an exceptional case where the proceedings prove impossible in a non-Member State, the court of a Member State being able to exercise its jurisdiction to remedy the situation.

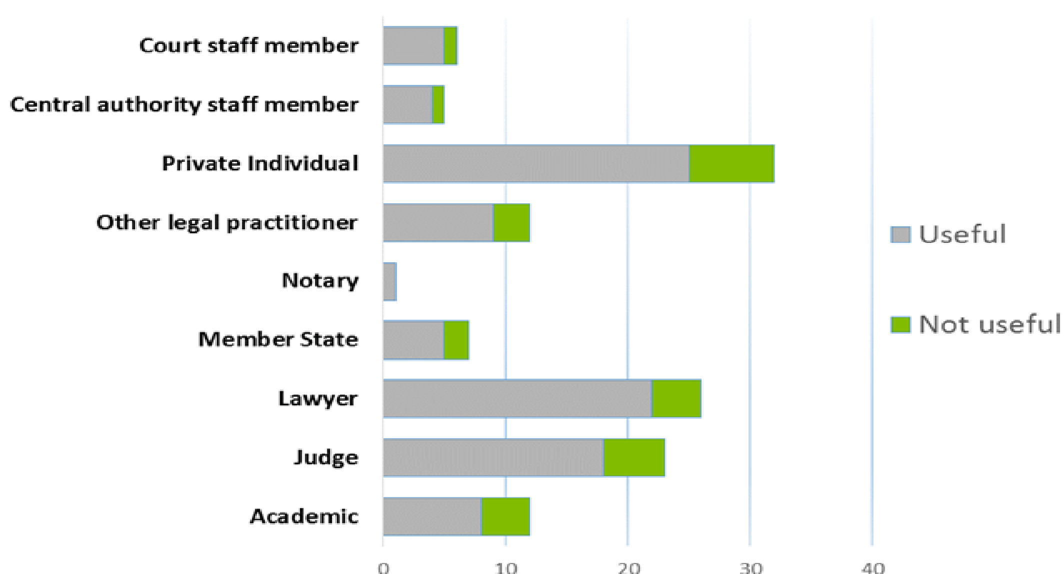
Overall results

The majority of respondents (78% i.e. 132 of 170 responses) believe that in these cases the Regulation should allow an EU court to exercise its jurisdiction and 22% (i.e. 38 of 170 responses) do not.

Segmentation analysis

The segmentation analysis is generally consistent with the overall results. Among practitioners, 80% (i.e. 49 of 61 responses) think that the Regulation should allow *forum necessitatis.* This resembles responses from private individuals (78% i.e. 25 of 32 responses) and from academics (67% i.e. 8 of 12 responses). Moreover, the majority of those with practical experience agree that the Regulation should ensure access to justice through *forum necessitatis*, with 76% (i.e. 96 of 126 responses) indicating this.

Figure 14: The usefulness of allowing the Regulation to ensure access to justice in cases where the responsible courts outside the EU cannot exercise their jurisdiction (forum necessitatis) (Q18)



Total number of respondents excluding "other": 124

Qualitative findings

Respondents were asked to further explain why they think the Regulation should ensure access to justice in these cases. In their explanation, many reiterate that justice and human rights should be

ensured in all circumstances. Some respondents add that the rule should only apply to parties with a **sufficient connection with the Member State** seeking jurisdiction i.e. with EU citizenship.

A number of respondents indicate that a *forum necessitatis* rule should be inspired by or akin to that in the Maintenance Regulation and Succession Regulation.

4.4 Return of the child in cases of cross-border parental child abduction within the EU

This section assesses the reinforcement of the requirements laid down in the Hague Convention 1980 on the Civil Aspects of International Child Abduction to ensure the immediate return of the child, for example by introducing time limits (six weeks to adopt a decision on return) and by limiting the possibilities for a judge to refuse the return. The section looks at the functionality of these rules and how procedures may be improved.

Ensuring immediate return of the child (Q19)

Respondents were asked if they thought that the Regulation had ensured the immediate return of the child within the EU.

Overall results

Of the respondents to this question 61% (i.e. 102 of 166 responses) do not think that the Regulation has ensured the immediate return of the child within the EU whereas 39% (i.e. 64 of 166 responses) do.

Segmentation analysis

The responses from private individuals and practitioners were quite different. Among the private individuals who answered this question, 78% (i.e. 25 of 32 responses) believe that the Regulation **has not** ensured the immediate return of the child within the EU and just 22% (i.e. 7 of 32 responses) believed that it had. However, practitioners were divided, with 49% (i.e. 29 of 59 responses) indicating they that they believe the Regulation **has not** ensured the immediate return and 51% (i.e. 30 of 59 responses) indicating they believe it has. In particular, lawyers are almost completely divided – 54% (i.e. 14 of 26 responses) **do not think** the Regulation has ensured the immediate return of the child.

Furthermore, the majority (63% i.e. 78 of 123 responses) of respondents with practical experience of the Regulation think that it **has not** ensured the immediate return of the child within the EU.

Qualitative findings

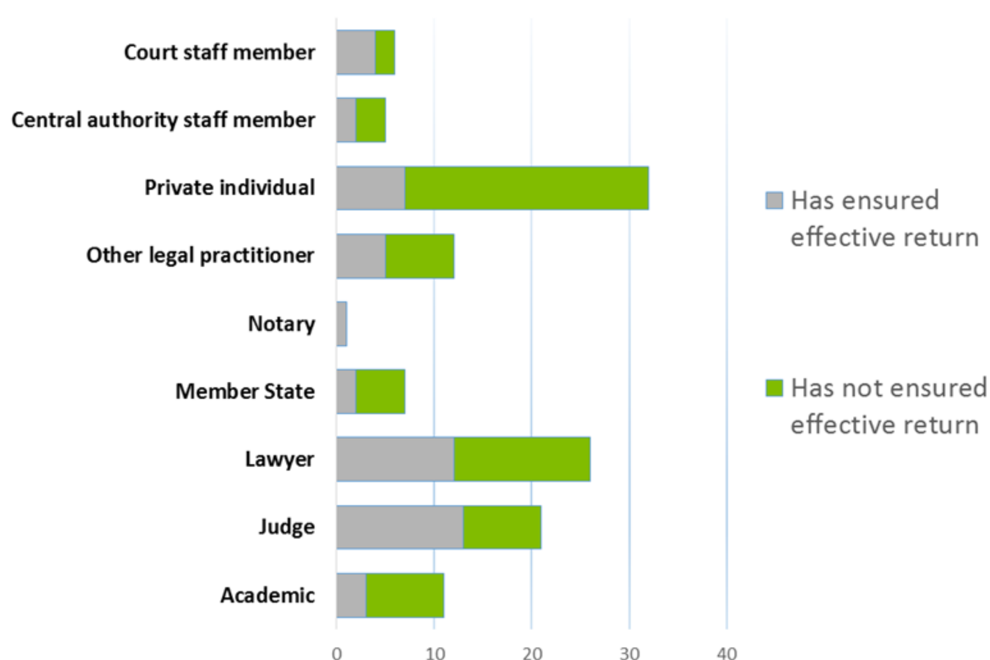
Respondents were asked to suggest ways of improving the procedure. The main suggestion among the responses arose in the area of enforcement. Many respondents believed that the best way to improve the return procedure is by **automatic enforcement of judgments**, **stricter time-frame compliance** and **sanctions for non-compliance**. Some respondents indicated that the issue should be dealt with under criminal law and a number believe that the police (national and international) should intervene and cooperate in the proceedings. Training and information was also pointed out as an area for improvement.

Addressing the problem of delays featured in the contributions from all Member State representatives who contributed to the public consultation (BE, CZ, DE, FR, NL, PT, UK).[392] As pointed out by the Netherlands, the time limit specified in Article 11 is not always adhered to in practice and

[392] PL did not respond.

the immediate and effective execution of return is not always achieved (FR). Belgium suggests that it may be appropriate to regulate the return procedures more strictly by limiting the number of hearings, opportunities for appeal, and setting common minimum standards for enforcement procedures. The United Kingdom, however, notes the difficulties, in practice, with adhering to the six-week time limit, but concludes that it is unlikely that a different period of time would make a significant difference to the operation of the procedure and that priority should be given to improving the operation of the existing provisions. Furthermore, the United Kingdom considers that dividing the process into segments, each bound by a time period, would actually run the risk of extending the duration of the process, against the best interests of the child. France does not suggest any ways of improving the procedure in relation to delays but instead notes that the mechanism for refusal of return on the basis of Article 13 of the Hague Convention provisions of Article 11.6.

Figure 15: Perception of whether the Regulation has ensured the immediate return of the child within the EU (Q19)



Total number of respondents excluding "other": 121

4.5 Abolition of exequatur

This section provides the results of responses to the questions relating to respondent opinions on the full abolition of exequatur in matters of parental responsibility and whether safeguards should be established if the abolition of exequatur is expanded.

Expansion of exequatur abolition (Q 20)

Overall findings

There were 165 responses to this question. Of these respondents, 68% (i.e. 113 of 165 responses) believe that all judgments, authentic instruments and agreements concerning parental responsibility should circulate freely between EU countries with exequatur. Of those who did not agree, 14% (i.e. 7 of 50 responses) think that exequatur should just be abolished in terms of judgments concerning the placement of a child in institutional care or with a foster family in another EU Member State.

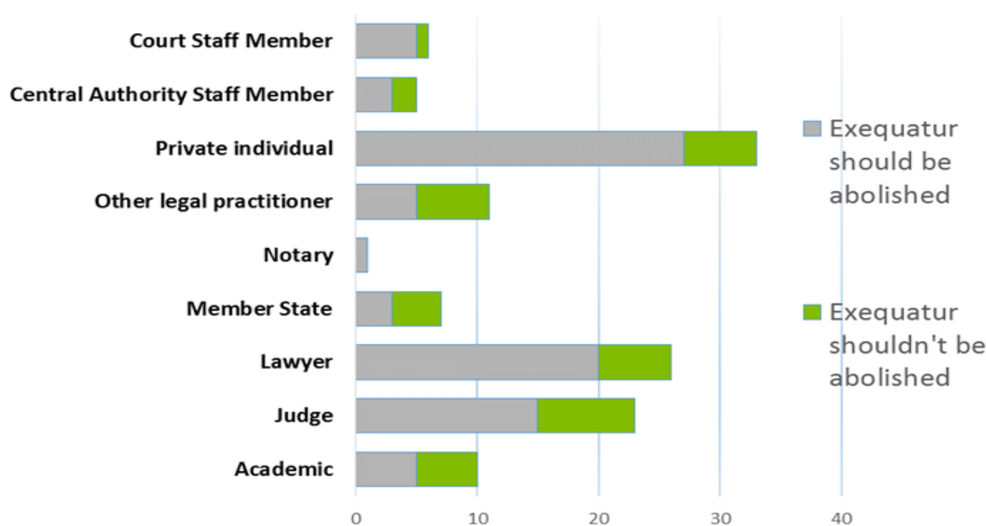
Segmentation analysis

Private individuals are the most prominent group who sought to expand the abolition of exequatur (82%, i.e. 27 of 33 responses), followed by judges and lawyers (71% collectively i.e. 35 of 49 responses). Academics had mixed views, with an equal share of responses (50%, i.e. 5 of 10 responses).

Those with practical experience of the Regulation are mostly in favour of full abolition of exequatur, with 66% (i.e. 80 of 121 responses) of positive votes coming from respondents who had indicated that they have practical experience.

Finally, five of the eight responding Member States (BE, DE, FR, PL, UK) indicate that exequatur should not be fully abolished. The United Kingdom in particular states that it would be inappropriate to completely abolish exequatur and that safeguards in all the areas mentioned should be maintained.

Figure 16: Attitudes towards complete abolition of exequatur in the EU for all judgments, authentic instruments and agreements concerning parental responsibility (Q20)



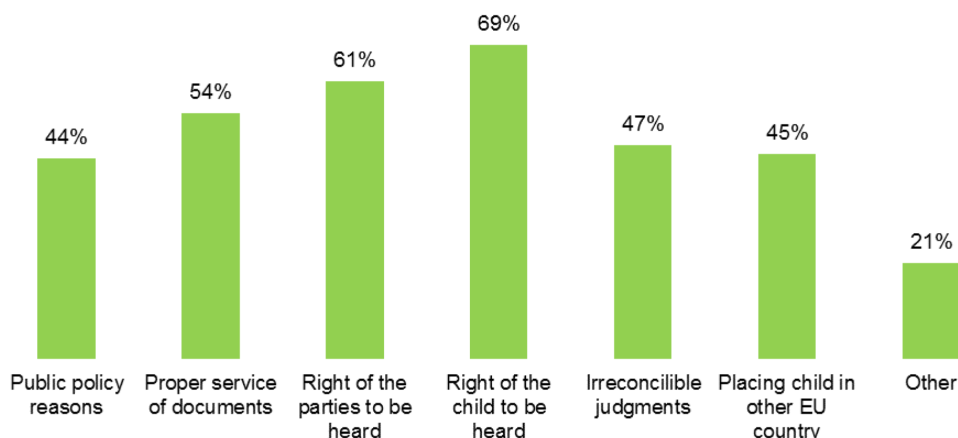
Total number of respondents excluding "other": 122

Safeguards required in the abolition of exequatur (Q 21)

Overall findings

In the complete abolition of exequatur, it was recommended that a number of safeguards be put in place in relation to areas such as the rights of parties to be heard and the rights of the child to be heard. The results are shown in the figure below.

Figure 17: Safeguards in the abolition of exequatur (Q21)



Total number of respondents: 153
**Respondents could choose multiple options*

4.6 Hearing of the child

This section covers questions aimed at avoiding refusal of recognition, enforceability and/or enforcement of a judgment from another Member State because of divergences between EU countries on the hearing of the child.

Common minimum standards (Q 22)

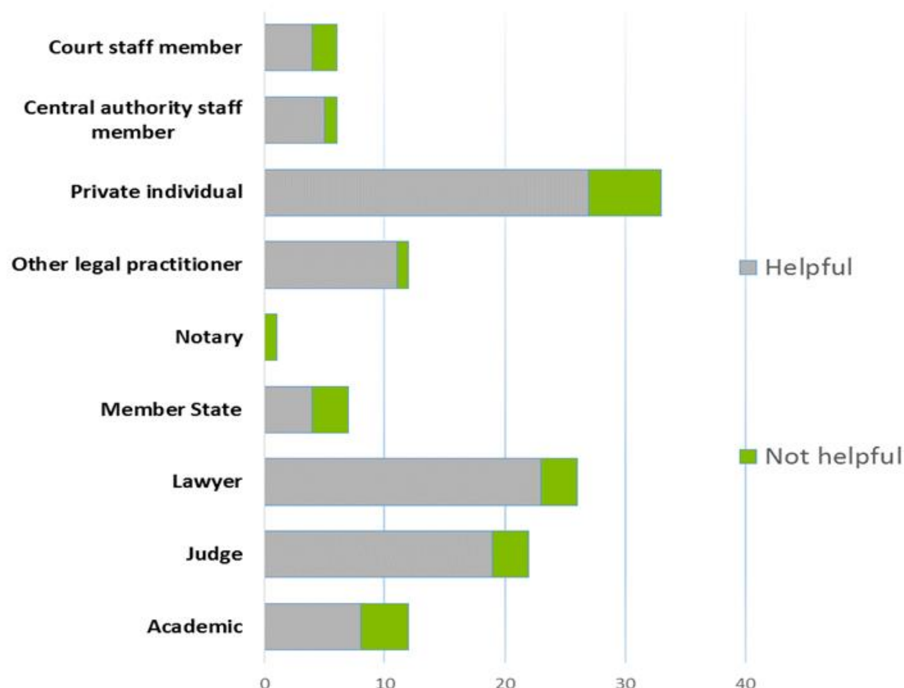
Overall findings

There were 170 responses to this question. Of these respondents, 78% (i.e. 134 out of 171 responses) think that common minimum standards for the hearing of a child could help in avoiding the refusal of recognition, enforceability and/or enforcement of a judgment from another Member State whereas just 22% do not (i.e. 37 out of 171 responses).

Segmentation analysis

All of the segments reflect the overall findings. Legal practitioners were the strongest group in favour of developing common minimum standards. In particular, 88% (i.e. 53 of 60 responses) of legal practitioners think that common minimum standards for the hearing of the child could help in avoiding the refusal of recognition or enforcement of judgments. Similarly, private individuals are 82% (i.e. 27 of 33 responses) in favour and those with practical experience of the Regulation are 81% (i.e. 104 of 128 responses) in favour. Academics, however, are slightly more divided with 67% (i.e. 8 of 12 responses) indicating that common minimum standards would help. Lastly, Member States are equally divided, with four (FR, NL, PT, UK) opposing the introduction of common minimum standards and four (BE, CZ, DE, PL) supporting their introduction.

Figure 18: The helpfulness of common minimum standards for the hearing of a child in avoiding the refusal of recognition of a judgment from another Member State (Q22)



Total number of respondents excluding "other": 125

Qualitative findings

In general, the main divergences found to give rise to problems that could be addressed by setting common minimum standards are related to the **definition of the term 'child'**. Most respondents made reference to the different standards across Member States for determining the **suitable age or capacity** of the child to be heard. In particular, the definition of "*age or degree of maturity*" found in Art. 42 (2)(a) was highlighted as being in need of a greater degree of certainty.

Other divergences noted are the **modes of the hearing** i.e. *who* should hear the child and *where*. In some countries the judge must directly hear the child, in others an independent party such as a child psychologist hears the child. Apparently, among Member States there are diverging practices and views about whether or not the parents should be present at the hearing.

Poland is the only Member state which offers some recommendation for improvement which included establishing minimum standards relating to the child's age, persons present at the hearing, and the place of hearing, while taking into account the health, degree of maturity and mental development of the child.

4.7 Enforcement

This section addresses the hurdles which remain in connection with the actual enforcement of parental responsibility decisions. Respondents were asked about the importance of improving the actual enforcement of decisions involving parental responsibility and return orders and the measures that could be taken to do so.

Decisions concerning Parental Responsibility (Q23)

Overall findings

There were 166 responses to this question. Of these, 83% (i.e. 137 out of 166 responses) of respondents to this question regard the enforcement of decisions concerning parental responsibility given in another Member State as an important area for improvement.

Segmentation analysis

Respondents with practical experience of the Regulation were mostly in favour of improving the enforcement of decisions concerning parental responsibility given in another Member State with 80% (i.e. 99 of 123 responses) answering this question positively. Among the legal practitioners, 77% (i.e. 43 of 56 responses) think that enforcement needs to be improved. Of these practitioners, lawyers were those who were most in agreement, with positive answers significantly outnumbering negative answers. Judges were more conflicting, with only a slight difference between positive and negative answers (see figure below).

Qualitative findings

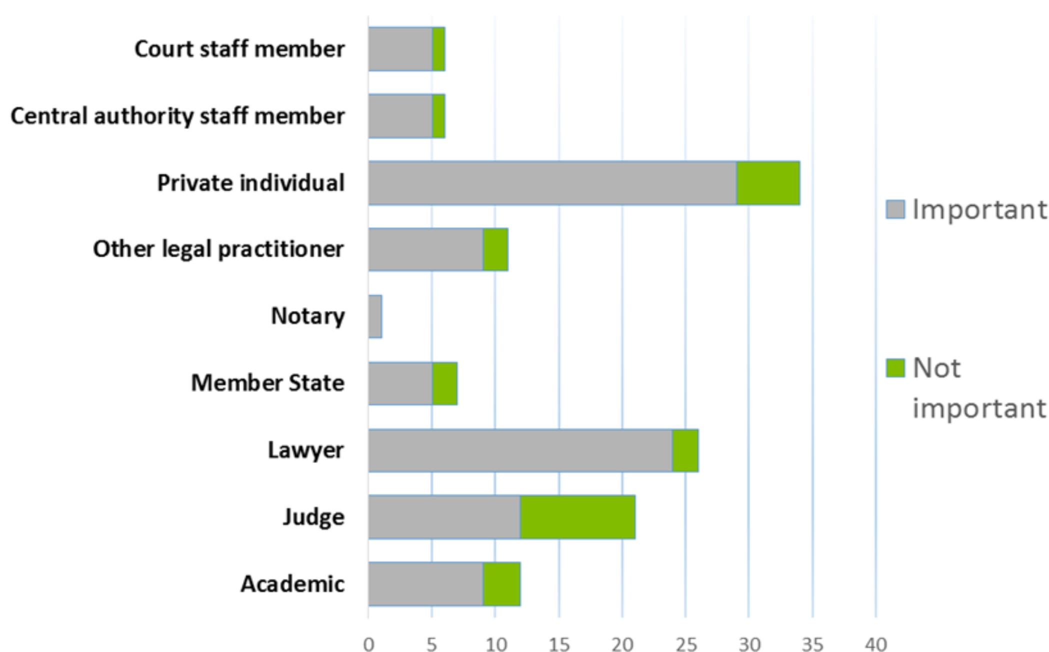
Respondents were asked to propose ways in which enforcement of decisions can be improved. The main suggestion here involved the **adoption of common minimum standards** including **uniform enforcement procedures.** One respondent went as far as suggesting a completely new EU Regulation on the enforcement of decisions taken in another Member State. Other suggestions include **harmonisation of national laws**, **increased communication**, and a **specialised body/instrument** dealing with decision enforcement to increase efficiency.

The contributions from Belgium, Poland and Portugal specifically note the prospect of establishing common minimum standards for improving the procedures. Belgium states that it should at least be possible to determine whether an appeal is possible in the relevant case and to centralise relevant information on the enforcement procedures in the Member States. Poland also notes the possibility of encouraging national law improvement and implementing good practices and Portugal advocates rules that could allow for a quicker procedure for implementing decisions of parental responsibility.

The contribution from France is not supportive of common minimum standards at the European level and states that the enforcement of procedures should be improved but that it can only be achieved at national level by the Member States. The United Kingdom agrees with this stance and notes that an appropriate way to address enforcement issues is to improve the operation of existing provisions of the Regulation.

The Czech Republic and Germany answered negatively to the question of improving the enforcement of decisions concerning parental responsibility and the Netherlands indicated that it should be improved but did not express in which way.

Figure 19: Improving the actual enforcement of decision (Q23)



Total number of respondents excluding "other": 124

Return Orders (Q24)

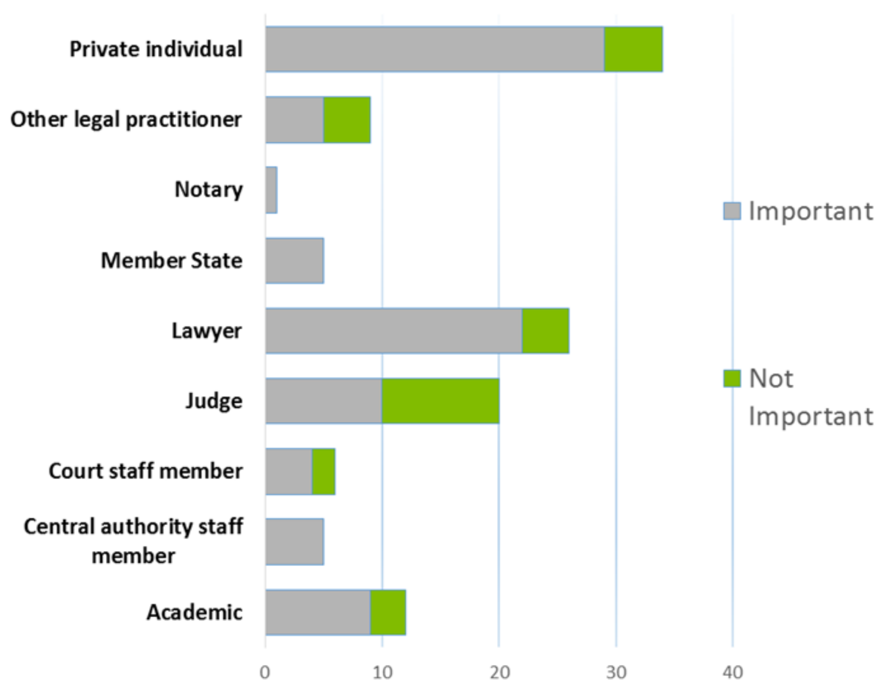
Overall findings

There were 160 responses to this question. Of these respondents, 79% (i.e. 127 out of 160 responses) think that it is important to improve the actual enforcement of return orders and just 21% do not (i.e. 33 out of 160 responses).

Segmentation analysis

Among practitioners, there was a majority of 67% (i.e. 37 of 55 responses) in favour of improving the enforcement of return orders. Of the practitioners, judges were the most undecided with an equal amount of positive answers and negative answers (i.e. 10 of 20 responses). Lawyers, however, were mostly in agreement, with just 15% (i.e. 4 of 25 responses) dissenting. Also, those with practical experience of the regulation are mostly in agreement (79%, i.e. 94 of 119 responses) that enforcement should be improved.

Figure 20: Improving the actual enforcement of return orders (Q24)



Total number of respondents excluding "other": 118

Qualitative findings

Respondents proposed a number of ways in which the enforcement of decisions can be improved, including suggestions similar to those made in Q23. There was, however, a bigger emphasis on **sanctions for non-compliance** with return orders. Suggested sanctions included monetary penalties, damages paid to an injured party, and criminal liabilities.

Overall, the main suggestions for improvement included **increased cooperation**, **common standards and procedures** and **improved communication methods**. Some respondents considered that a **specialised tool/instrument for enforcement of decisions** would be useful in the form of an official body or separate regulation.

All Member States that contributed to the public consultation note the importance of improving the actual enforcement of return orders (BE, CZ, DE, FR, NL, PL, PT, UK). However, the United Kingdom states that the matter is one of national law and the Netherlands notes that improvement requires no modification of the Regulation. Belgium suggests that means of constraint should exist in each Member State, provided that they are not used as a last resort. The representative of the Czech Republic mentions that it would be useful to address the recognition of any "mirror orders" that may be issued after the return decision and Portugal seeks a more expeditious process by promoting more and better cooperation between the central and judicial authorities, training and information. Lastly, France suggests that the effectiveness of return orders can be strengthened by the adoption of a new dedicated certificate for the enforcement of return orders, especially in the case where the child has subsequently moved to another Member State.

4.8 Cooperation between authorities

This section provides the results of responses to questions surrounding cooperation between Central Authorities in general, in connection with the placement of a child in another country, between local child welfare systems and measures which could be taken to improve any problems identified.

Functionality (Q25)

Overall findings

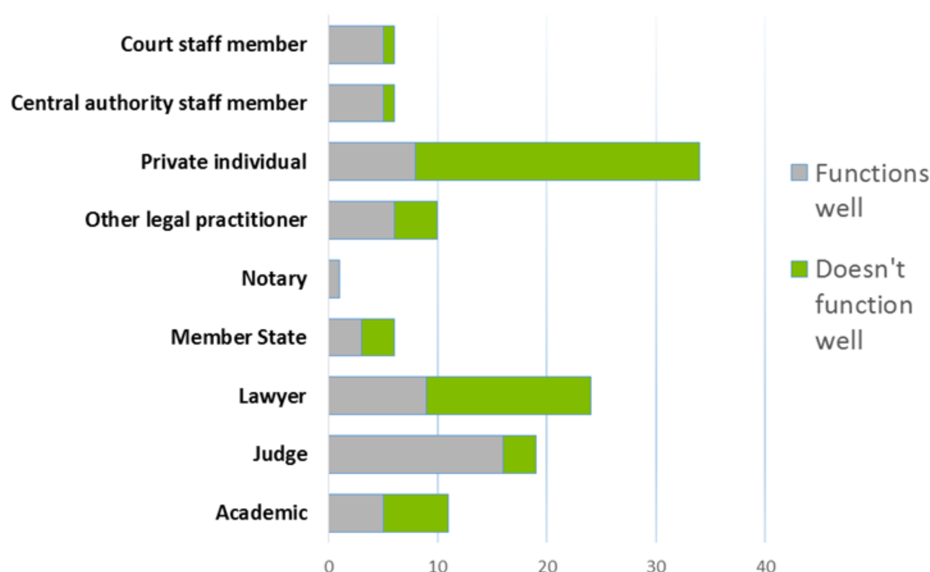
There were mixed responses from respondents when asked if the cooperation between the Central Authorities functions well. Of the respondents to this question, 53% (i.e. 86 of 161 responses) do not think that the cooperation between the Central Authorities functions well while 47% (i.e. 75 of 161 responses) do think that it functions well.

Segmentation Analysis

Of the Central Authority staff members who responded to this question, 83% (i.e. 5 of 6 responses) believe that cooperation between the Central Authorities functions well. However, the majority (76% i.e. 26 of 34 responses) of private individuals do not believe that cooperation functions well.

Academics were almost evenly divided on the matter, with 45% (i.e. 5 of 11 responses) indicating that cooperation functions well and 55% (i.e. 6 of 11 responses) indicating that it does not. A slightly higher number of legal practitioners were of the opinion that cooperation functions well, with 58% (i.e. 31 of 53 responses) indicating this.

Figure 21: Functionality of cooperation between Central Authorities (Q25)



Total number of respondents excluding "other": 117

Qualitative findings

Respondents who did not think that cooperation between Central Authorities is functioning well were asked to identify the main problems they had encountered. **Lack of cooperation and communication** was a main feature of most of the respondents' answers. In general, it was explained that authorities do not cooperate well for reasons relating to **excessive procedural formalities** (delaying tactics, according to some), **distrust** and **slow transfers of information.**

Respondents who gave answers relating more specifically to the substance of the regulation commented that **the Regulation does not always receive consideration by the authorities in a case falling within its application**. In other words they are either unaware of its existence or are so unfamiliar with the rules that they avoid it.

Moreover, a number of respondents pointed out that procedural differences cause the most confusion and delay. A judge noted that direct contact between the authorities rather than use of

the Regulation has resulted in a more effective outcome in some cases. To resolve this, the respondent recommends agreeing on a schedule of information which can be provided under Article 55, without further administrative action. An academic also highlighted this issue and suggested that a common set of statistical data should be compiled by Member States, as well as a minimum standard set for databases which also use mutually compatible software.

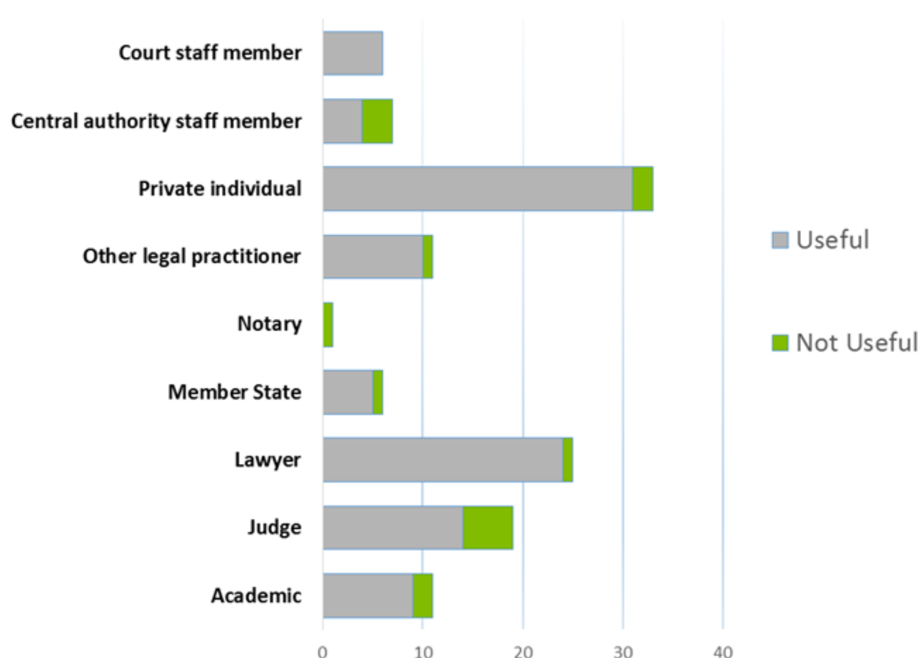
Use of Forms (Q26)

Overall findings

There were 165 responses to this question. We note that 85% (i.e. 140 of 165 responses) believe that cooperation between al Authorities could be improved through the mandatory use of forms translated into all EU languages to facilitate the exchange of information. This is consistent with qualitative findings from other questions which point to issues with translation and language differences between Member States.

Five (BE, CZ, DE, FR, NL) out of the eight Member State representatives that responded to the public consultation agree that the use of translated forms would help improve Central Authority communication. Poland does not agree and Portugal did not respond to this question. The United Kingdom does not agree and states that the introduction of multilingual forms would generate more bureaucracy which consequently delays the process more and could add additional costs.

Figure 22: Usefulness of mandatory use of forms in improving cooperation between Central Authorities (Q26)



Total number of respondents excluding "other": 119

Enhancement of mediation (Q27)

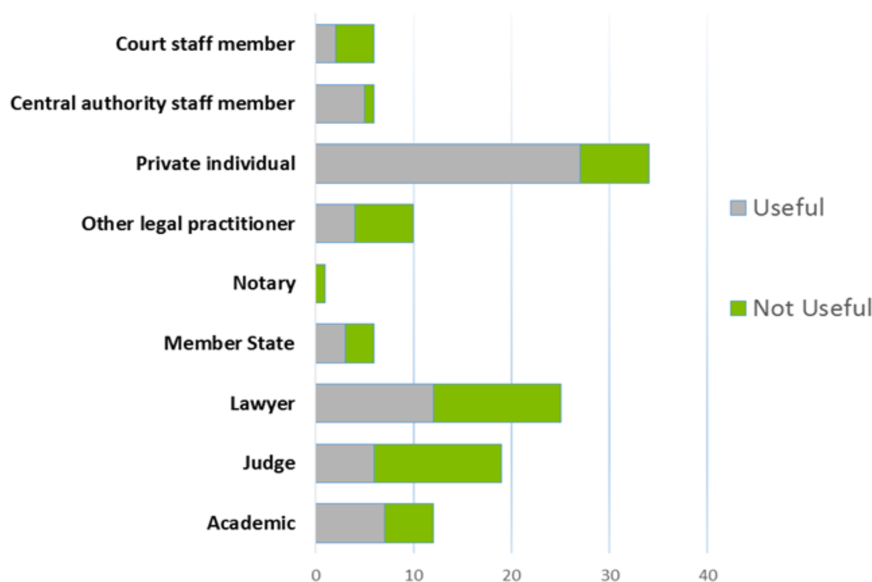
Overall findings

Regarding the addition of provisions to enhance the use of mediation, 164 responses were received. A slight majority of 61% (i.e. 100 of 164 responses) indicated that it would be useful for the Regulation to provide for additional provisions so as to enhance the use of mediation.

Segmentation analysis

The overall findings are not replicated in the segmentation of practitioners. In general, a slight majority of practitioners (59% i.e. 32 of 54 responses) felt that it would **not** be useful for the Regulation to provide for additional provisions so as to enhance the use of mediation. In contrast, a large majority (79% i.e. 27 of 34 responses) of private individuals felt that it would be useful.

Figure 23: Usefulness of providing additional provisions so as to enhance the use of mediation (Q27)



Total number of respondents excluding "other": 119

Qualitative findings

Respondents who thought that it would be useful to provide additional provisions to enhance mediation were asked to explain further.

We note here that there may have been a degree of confusion due to the structure of the question. It is not clear whether the questionnaire was seeking suggestions as to how the use of mediation could be enhanced or in which way it would be useful to enhance. The variety in the answers seems to illustrate this confusion.

Many suggestions for the enhancement of mediation in the provisions included making it **mandatory before court proceedings**[393] or at least making information and recommendation to the parties mandatory before proceedings. Other suggestions included making the process free or financially aided, conducting it through a **special institution** (ombudsman was suggested), **more information,** and **encouragement by authorities**.

In the latter understanding of the question, respondents found that enhancement of mediation would lead to **cost reduction** and **lessen the stress on children** caused by the court procedure.

[393] Proposed by the Member State contribution from Belgium (as well as other stakeholders).

Placement of a child in another Member State (Q28)

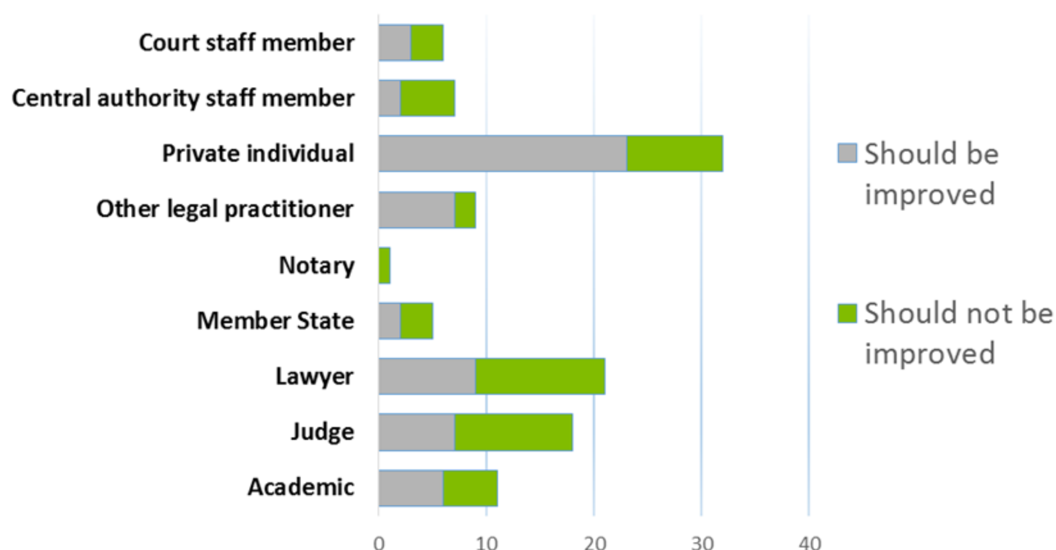
Overall findings

We observe that 56% (i.e. 83 of 147 responses) of respondents believed that the provision relating to the obligation for Central Authorities to provide information and assistance as needed by courts in connection with the placement of a child in another Member State should be improved.

Segmentation analysis

The segmentation of those with practical experience corresponds with the overall findings with 59% (i.e. 63 out of 107 responses) of experienced respondents[394] indicating that the provision to provide information and assistance should be improved. Practitioners are similarly divided with 48% (i.e. 23 out of 48 responses) indicating that they think the provision should be improved. Conversely, the majority of private individuals (72%, i.e. 23 out of 32 responses) think that the provision should be improved.

Figure 24: Perception that the provision for providing information and assistance to courts in the placement of a child in another Member State should be improved (Q28)



Total number of respondents excluding "other": 110

Qualitative findings

Respondents who thought that the provision should be improved were asked for suggestions in the way that it could be improved. The majority of answers here did not directly answer the question but included practical methods of improvement such as **improved communication between authorities** and making the process faster and more efficient through the use of **IT tools**. The contribution from Germany did suggest improving the *chapeau* in Article 55 because its relationship with the ensuing sub-provisions is unclear. The contribution from Belgium specifically calls for a more detailed, harmonised procedure through the Regulation.

[394] Respondents indicating that they have 'practical experience' with the Regulation

Cooperation between Central Authorities and local child welfare system (Q29)

Respondents were asked if the cooperation between central authorities and child welfare systems in cross-border situations works as well as it should in order to ensure the smooth operation of the Regulation.

Overall findings

It was believed by 38% (i.e. 58 of 152 responses) of respondents that the cooperation between authorities and child welfare systems works as well as it should in order to ensure the smooth operation of the regulation but 62% (i.e. 94 of 152 responses) believed that it does not.

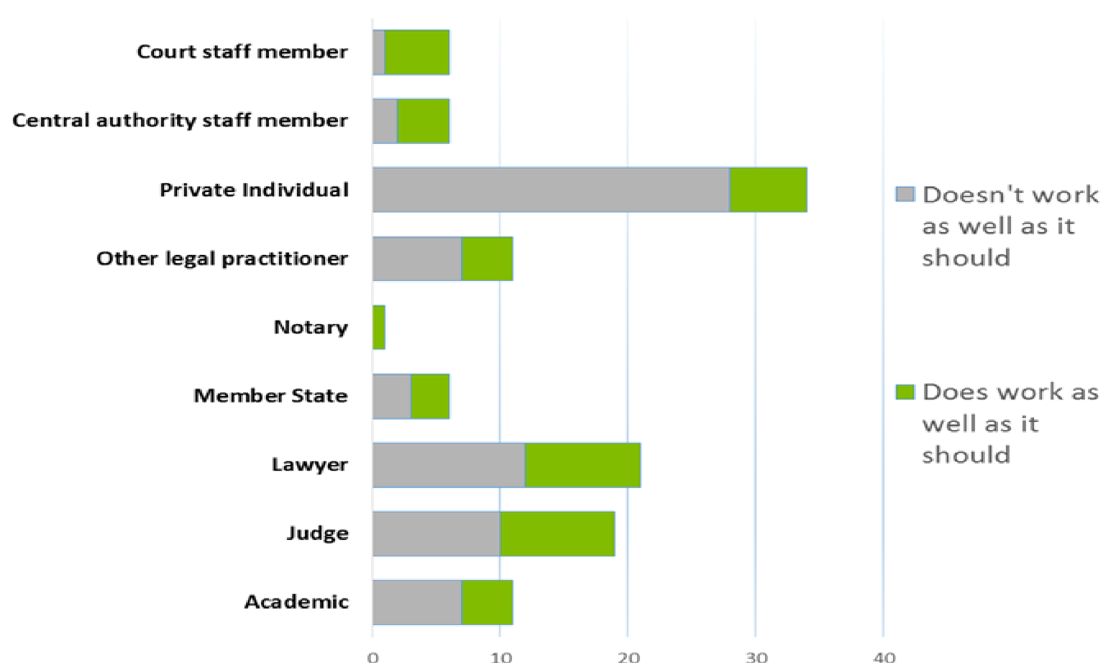
Segmentation analysis

Practitioners were relatively divided in this area, with 43% (i.e. 22 of 51 responses) regarding the cooperation between Central Authorities and the local child welfare system as satisfactory. On the other hand, a large majority (82% i.e. 28 of 34 responses) of private individuals think that cooperation does not function as well as it should.

From the few responses from Central Authority staff, it was found that 67% (i.e. 4 of 6 responses) consider that the cooperation works well.

Regarding Member state contributions, three (BE, CZ, PL) believe that the cooperation between Central Authorities and the local child welfare system functions as well as it should to ensure the smooth operation of the Regulation. Also the United Kingdom notes that the cooperation "*between Central Authorities and the local child welfare systems in the UK jurisdictions when dealing with cross-border cases works effectively*"[395].

Figure 25: Perception of the functionality of the cooperation between Central Authorities and child welfare systems in cross-border situations (Q29)



[395] NB this statement was not considered in the quantitative results as it is specific to UK jurisdiction and the questionnaire was not specific in this sense.

Total number of respondents excluding "other": 126

Qualitative findings

Respondents were asked to explain why they thought the standard of cooperation does not function well. The responses followed a similar trend as those to other questions. Respondents mainly pointed to the **lack of cooperation** in their specific Member State and the **lack of knowledge** on behalf of the authorities in charge. The Netherlands in particular noted that the responsibility for certain tasks is often unclear and delays occur in communication and information exchange. It was suggested that **training**[396] or **citizen-oriented information** would be useful for the local authorities. Germany specifically mentions the potential of an IT standardised procedure to accelerate requests for consent under Article 56.

Additionally, the United Kingdom representative notes the importance for the procedures for consultation and consent in Article 56 cases to be governed by the same policies and procedures which apply to comparable internal placements of a child, to make sure that children placed under Article 56 benefit from the same protections as other children placed.

Adapting the cooperation between a Central Authority and local child welfare authorities to take better account of cross-border cases (Q30)

Respondents were asked if there was a need to adapt cooperation between Central Authorities and local child welfare authorities in order to take better account of cross-border cases.

Overall findings

It was found by 71% (i.e. 113 of 160 responses) that there is a need to adapt the cooperation between the Central Authority and the local child welfare authorities to take better account of cross-border cases and just 29% (i.e. 47 of 160 responses) think that there is not.

Segmentation analysis

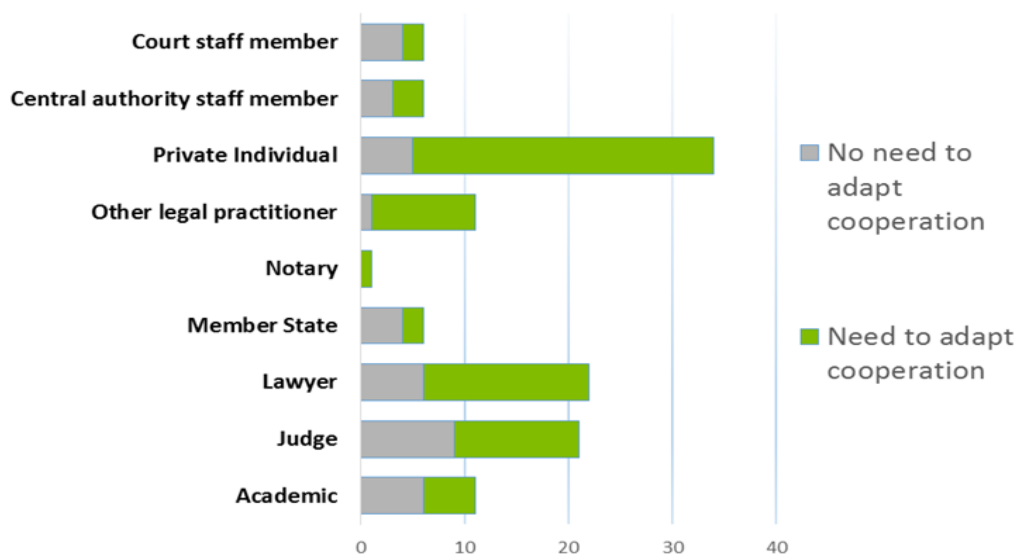
Although practitioners were relatively divided on the overall functionality of cooperation (Q29), it was indicated by 75% (i.e. 45 of 60 responses) of them that there is a need to adapt the cooperation practices to take better account of cross border cases. Even more private individuals believe that it should be adapted to take better account of cross border cases (85%, i.e. 29 of 34 responses).

Interestingly, from the few responses from Central Authority staff it was found that 50% (i.e. 3 of 6 responses) considered that there was **no need** to adapt the cooperation to take better account of cross-border cases.

However, when Member States were asked whether there is a need to adapt the cooperation between Central Authorities and the local child welfare authorities, just two (DE, FR) consider that there is a need and five (BE, CZ, NL, PL, UK) consider that there is no need.

[396] The contribution from Germany explicitly mentioned training as a suggestion for improvement.

Figure 26: Perception of the need to adapt the cooperation between Central Authorities and child welfare authorities to take better account of cross-border situations (Q30)



Total number of respondents excluding "other": 129

Qualitative findings

Methods suggested for the adaptation of cooperation between the authorities also focused on **increased communication, training and knowledge**. A number of respondents recommended the use of a **single information system**[397] and **mandatory reporting** for each case. It was also suggested that local welfare authorities should have a **designated coordinator for cross-border issues**.

4.9 Placement of a child in another Member State

This section provides the results of responses to questions which relate to the rules governing the placement of a child in another Member State. In particular, respondents were asked to evaluate the procedure applied where the court contemplates the placement of a child in a foster family in another EU country and public authority intervention is not required (by national law) and the court must inform the responsible authority in the host country.

Functionality (Q31)

Overall findings

In response to this question, 60% (i.e. 85 of 141 responses) of respondents believe that the rules in the Regulation governing the placement of a child in another Member State **do not** function in a satisfactory manner and 40% (i.e. 56 of 141 responses) believe that they do.

Segmentation analysis

Segmenting the practitioners who answered the question, it is found that a slightly greater percentage (57%, i.e. 25 of 44 responses) regarded the rules as functioning satisfactorily. This contrasts with private individuals, of whom just 25% (i.e. 8 of 32 responses) regarded the rules as

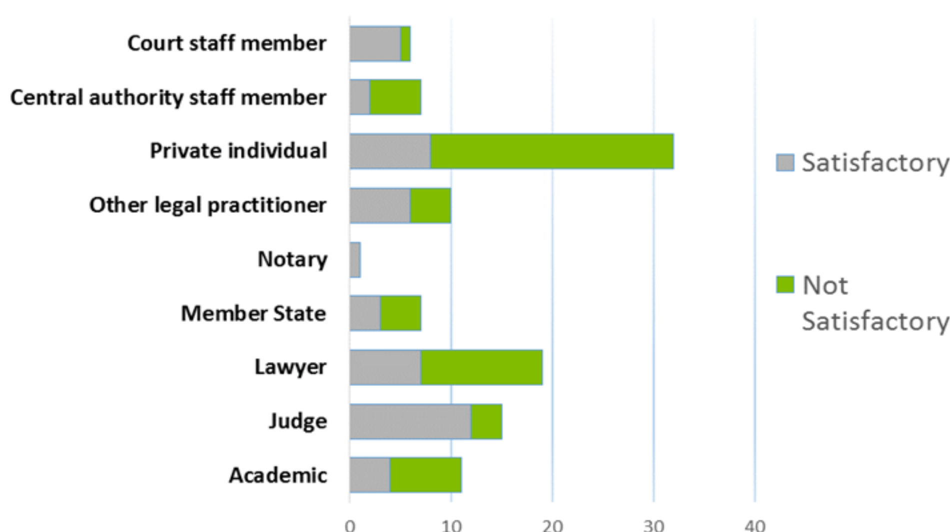
[397] The contribution from Germany specifically mentioned this sort of mechanism.

functioning satisfactorily. On a similar vein, those indicating practical experience of the Regulation also found that the rules governing the placement of a child in another Member State do not function satisfactorily (61%, i.e. 61 of 100 responses).

Qualitative findings

Respondents who thought that the rules were not satisfactory were asked to suggest solutions. There was no clear trend here and respondents offered a variety of different solutions and opinions. Firstly, it was mentioned by a number of respondents that the rule under Art 56 should simply not exist and that **cross-border placement of the child should be discouraged**. More specifically some respondents think the provision should be improved by **clarifying its scope and application**. For example, responses claim that the article is misapplied, consent is sometimes not taken before placement and courts are sometimes unfamiliar with the provision. **Uniform information standards**[398] between Central Authorities was also suggested as a method of improvement, as it was pointed out that the difference of powers between authorities in Member States sometimes leads to delays and confusion. Again, enforcement was mentioned as an area for improvement with sanctions for non-compliance.

Figure 27: Functionality of the rules governing the placement of a child in another Member State (Q31)



Total number of respondents excluding "other": 132

4.10 Certificates

This section assesses the usefulness of the certificates annexed to the Regulation. The Regulation includes four different certificates to facilitate the circulation of judgments, authentic instruments and agreements within the EU.

Functionality of certificates (Q32)

Overall findings

Of the respondents who answered this question, 61% (i.e. 91 of 148 responses) think that these certificates function in a satisfactory manner while 39% (i.e. 57 of 148 responses) think they do not.

398 In particular, the contributions from the representatives of Germany and Belgium noted the possibility of introducing a clear set of rules describing which documents are needed and time limits for action.

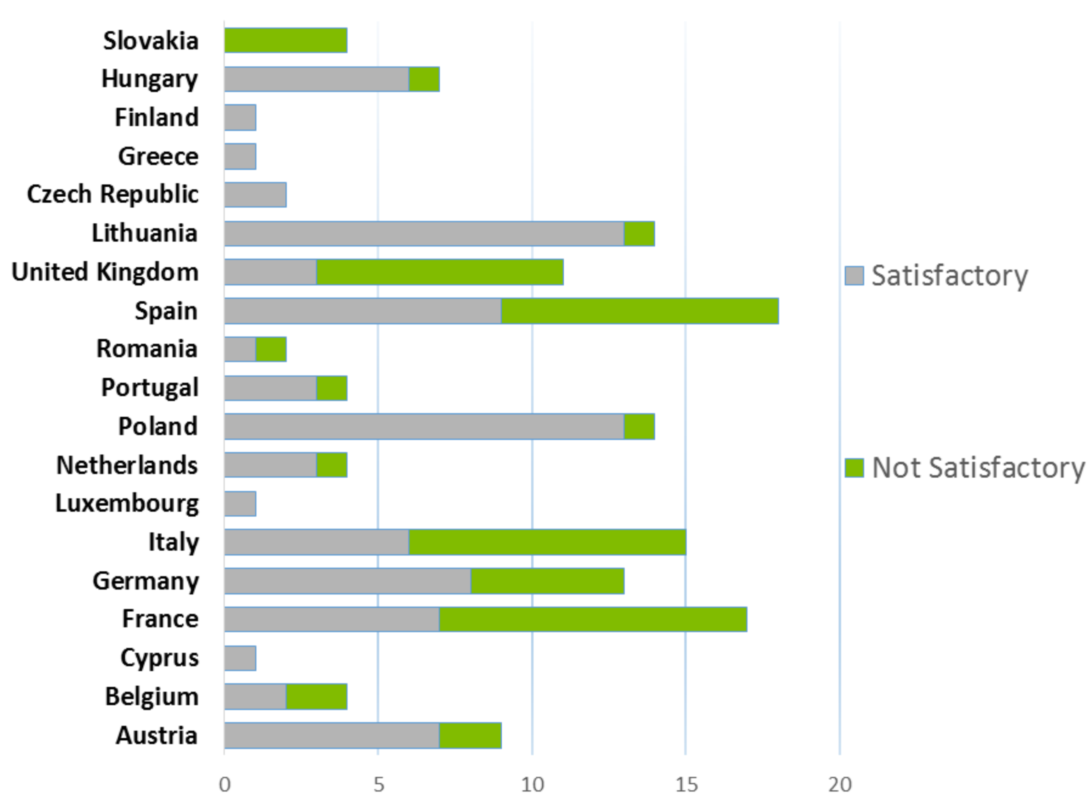
Segmentation analysis

Regarding practitioners who responded to this question, 72% (i.e. 38 of 53 responses) think that these certificates function satisfactorily. Among the private individuals there was a greater division, with 56% (i.e. 15 of 27 responses) who think that the certificates are satisfactory. Similarly, those with practical experience of the regulation have mixed views but it is found by 57% (i.e. 65 of 115 responses) that the annexed certificates function well. Segmentation by country is demonstrated in the figure below.

Qualitative findings

Respondents who answered negatively were asked to suggest solutions. Solutions included **increasing information and providing training to professionals** to enhance knowledge of the mechanism but also to ensure clear and accurate completion of the certificates. One respondent suggested **decreasing the amount of administration** involved and more respondents sought more **efficient translation methods**.

Figure 28: Functionality of the certificates annexed to the Regulation (Q32)



Total number of respondents excluding "other": 142

4.11 Relation with other instruments

This section assesses the interrelation of the Regulation with the Hague Conventions 1980 and 1996. Questions were aimed at gaining an overview of the general functioning of the instruments together and how this could be improved.

Hague Conventions (Q33 & Q34)

Overall findings

Regarding the rules governing the relationship of the Regulation with the Hague Convention 1980, 47% (i.e. 74 of 156 responses) of respondents find that they work satisfactorily. The rules governing

the relations between the Regulation and the Hague Convention 1996, gain a slightly better level of satisfaction but with fewer responses - 53% (i.e. 79 149 responses) answered positively.

Segmentation analysis

Private individuals were the only group with a significant majority expressing dissatisfaction with the operation of the Regulation with the Hague Conventions. Specifically, 83% (i.e. 29 of 35 responses) thought that the Regulation does not work well with the 1980 Convention and 81% (i.e. 26 of 32 responses) did not think that it works well with the 1996 Convention.

Legal practitioners were slightly more satisfied with the cooperation between the instruments - 50% (i.e. 25 of 50 responses) indicated that the Regulation operates well with the 1980 Convention and 60% (i.e. 28 of 47 responses) thought that it works well with the 1996 Convention.

Academics are the most positive group, with 55% (i.e. 6 of 11 responses) finding that the rules governing the relationship between the Regulation and the 1980 Convention work well and 82% (i.e. 9 of 11 responses) finding that it works well with the 1996 Convention.

Qualitative findings

Those who regarded the rules as not satisfactory were asked to suggest other solutions. Some respondents suggested amending the current rules or creating new rules within the Regulation. One respondent said that the Regulation should be **amended to clearly supersede the Convention in all situations**. Others mentioned that **simplification of the matters within the regulation** would suffice. Some other respondents maintained that only one document should exist in relation to these matters and the other should be disregarded.

4.12 Other issues

This section provides results from two open questions at the end of the questionnaire which sought information or suggestions for improvement on provisions which were not included in the main questions. Respondents also had the choice of leaving any additional comments. The responses from these questions were analysed and presented through trends which were common to a number of respondents or single opinions that were of particular interest.

Other provisions to be improved (Q35)

This question specifically sought provisions for improvement but in some cases respondents provided more general areas for improvement or issues which need attention. Not all responses can be listed here but some of the most complete and comprehensive contributions follow:

Introduction of new rules

- *"Introduce new rules in relation to the free movement of juveniles in order to prevent the possibility of child abduction. The parent maintains that to tackle the problems at their origin, specific measures could be put in place which prohibit a child from leaving borders without full compliance with the formalities. These formalities could include an official document to be signed by both parents to signify permission for the child to leave or in the absence of agreement, a court order. These certificates of agreement could be supplemented by a database accessible by the authorities to avoid fraud. It is also important that the certificates have an expiration date."*
- *"In theory the Regulation is fine but it does not have the sufficient tools to effectively enforce return orders."*

Improvement of EU law

- *"The competences of obligations of courts should be more explicitly defined"*

- *"The competences of the European Court should be more explicitly defined"*
- *"Child custody rights for unmarried fathers should be abolished in all EU countries"*

Improvement of the Regulation

- *"Enhance mediation"*
- *"Reduce procedural costs"*
- *"Improve procedure in child abduction cases i.e. reduction of complexity"*
- *"The Regulation should apply to EU citizens resident outside the EU"*
- *"A mechanism should be set up to deal with urgent child issues if the Member State takes too long to handle the case."*

Other comments (Q36)

This question allowed respondents to draw attention to any other issues or make general comments about the regulation or questionnaire. The majority of answers were reflective of the responses given throughout the questionnaire, with many respondents reiterating points they felt were important. The main findings from analysing these comments can be summed up as follows:

- Improved communication between Member States – use of IT methods for example
- Mandatory mediation
- Uniform procedures
- Increase regulation awareness among judges and practitioners
- Increased cooperation
- Assistance from a task force in the EU (within control of Central authorities or independent)

Annex 5. Assessment of the impacts of options proposed for non-priority legal issues

This annex includes the assessment of the sub-options proposed for all legal issues that have not been attributed high priority.[399] For the purpose of the assessment of sub-options, these are treated separately using a purely qualitative approach, as the impacts are likely to be only minor or can be attributed to the legal rules already established at EU level (e.g. ECJ case law).

With a view to structuring the assessment, the **types of measures we suggest** are structured according to the following broad groups:

1. Small legal modification; and
2. Clarifications to be added to the Regulation, where relevant on the basis of existing case law.

For **point 1**, a qualitative assessment of the effectiveness and economic impacts is conducted for each sub-option.

Based on our assessment, the impacts of the suggested measures under **point 2** are rather similar and can be assessed (in a qualitative way) in a bundle. As part of the cumulative assessment, due screening of the individual legal issues will be carried out in order to identify any additional specific impacts and to come to a conclusion about each of the measures suggested.

In the following, the assessment is structured according to the following headings:

- Jurisdiction rules;
- Recognition and Enforcement;
- Provisions specific to child abduction cases; and
- Clarifications to be added to the Regulation.

5.1. Jurisdiction rules

5.1.1 Matrimonial matters

Article 3(1)(a), 5th and 6th indent unilaterally favour nationals of the forum state and disadvantage the moving spouse

This legal issue is addressed by the sub-options proposed for the legal issue "Potential for rush to court/forum shopping on the basis of the alternative grounds for jurisdiction", which is dealt with in the main body of the impact assessment report, section on *Potential for 'rush to court'/'forum shopping' on the basis of the alternative grounds for jurisdiction*. For this reason, it is not treated here again.

[399] The approach used for deciding on the priority for legal issues is explained in the Methodological Annexes.

Differing interpretations of Article 6 on exclusive jurisdiction and questions related to its effect and utility

This legal issue is addressed by the sub-options proposed for the legal issue "Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court", which is dealt with in the main body of the impact assessment report, section 5.1.3.1. For this reason, it is not treated here again.

5.1.2 Parental responsibility

The principle of perpetuatio fori is not consistent with the 1996 Hague Convention and may be detrimental to ensuring the well-being of the child

According to Article 8(1) of the Regulation, jurisdiction in matters concerning parental responsibility lies with the courts of the Member State of the child's habitual residence. Whereas habitual residence as a connecting factor is widely accepted, Article 8(1) has been criticised because it refers to the **habitual residence of the child at the time the court is seised** and thus follows the principle of *perpetuatio fori*. This means that the court seised under Article 8(1) continues to have jurisdiction although the child has established its habitual residence in another Member State during the proceedings. The application of the principle has led to practical difficulties, for example because proceedings had to be held in a Member State where the child no longer lived. In addition, the principle is considered inconsistent with the 1996 Hague Convention on the protection of children, because the Convention has adopted the opposite approach. If a child moves during proceedings that are covered by the Hague Convention, jurisdiction will change as well. In addition to these practical difficulties, the provision was in some cases difficult to apply by courts in the Member States, because it was difficult to establish the timing of the application (which determines the court that would retain jurisdiction).

The following sub-options have are proposed to address this issue:

- **Sub-option 1**: Replacement of the principle of *perpetuatio fori* by a rule parallel to Article 5(2) of the 1996 Hague Convention on the protection of children (i.e. jurisdiction ends if the child has established its habitual residence in another Member State); and
- **Sub-option 2:** Restriction of the *perpetuatio fori* principle in Article 8(1) and/or of the particular jurisdiction rule in Article 9 if not in the best interests of the child.

According to our analysis,[400] the identified sub-options do not have any substantial impact on some specific objectives[401] that, consequently, have not been analysed in Table 4.

In assessing the economic impacts of the proposed options, no costs or cost savings were identified with respect to the points Compliance and awareness-raising costs (including the points on *Central Authorities*, *Providers of awareness-raising (public authorities or others), Training providers (public authorities or others)*), and *Administrative burden*. Therefore, these points are not mentioned in the table.

[400] This is in line with Table 2 (Links between specific objectives, operational objectives and identified issues) of Annex 1.

[401] To ensure that citizens in international families with a close connection to the EU are guaranteed access to court in a suitable Member State; To ensure that citizens do not have to provide additional administrative documents and/or follow additional proceedings to have judgments, authentic instruments and agreements recognised or enforced; To ensure the protection of the economically weaker spouse.

Table 4: Practical difficulties in relation to the principle of perpetuatio fori

Assessment criterion	**Sub-option 1:** ***Change of Article 8 so that jurisdiction ends if the child has established its habitual residence in another Member State***	**Sub-option 2:** ***Restriction of the perpetuatio fori principle***
Effectiveness		
To increase **predictability, clarity, and reliability** for citizens involved in cross-border cases	This sub-option would generate a **positive impact** on this specific objective, as it would lead to consistency with the 1996 Hague Convention.[402]	This sub-option would generate a **small negative impact** on this specific objective. It could lead to situations in which it is not clear which court will accept jurisdiction: it would in principle be possible that two courts[403] could have jurisdiction. This would depend on the argumentation of what is in the best interests of the child, which may be open to interpretation.
To safeguard the **well-being of the child** and the parent-child relationship	This sub-option would have a **small positive impact** on the well-being of the child. On the one hand, it is assumed that, if a child moves during the proceedings, the court of the new habitual residence would be better placed to hear a case. Proceedings would take place where the child lives and the court may have a better understanding of the situation in the country of the child's habitual residence. On the other hand, a change of jurisdiction could lead to delays, which might have a negative influence on the well-being of the child. Delays could, however, also occur if the case is handled in a country where the child no longer lives, because the child would then need to travel during the proceedings.	This sub-option would generate a **small positive impact** on the well-being of the child, as the well-being of the child could be taken into account on a case-by-case basis. However, as noted above, there could be delays due to ambiguity about the court that should exercise jurisdiction.

[402] We note here that the application of this rule depends on the concept of habitual residence. There may be difficulties in this respect. These are covered under a separate legal issue (*Different interpretations of the term 'habitual residence'*).
[403] The court of the child's former habitual residence and the court of the child's new habitual residence.

Assessment criterion	Sub-option 1: *Change of Article 8 so that jurisdiction ends if the child has established its habitual residence in another Member State*	Sub-option 2: *Restriction of the perpetuatio fori principle*
To reduce **delays** associated with cross-border cases	This sub-option would have **neutral impacts** on delays: there could be delays due to the transfer of a case. However, delays that would arise because proceedings are held in a Member State where the child does not live could be avoided.	This sub-option would have **neutral or negative impacts** on delays. In cases when the restriction is not made use of, there would not be an impact on delays. However, additional delays could arise due to ambiguity about the court that should exercise jurisdiction (cf. the point made under the specific objective on predictability).
To reduce undue **stress** associated with cross-border cases	This sub-option would have **small positive impacts** on stress. See the analysis of the impact of this sub-option on the specific objective: "To safeguard the well-being of the child and the parent-child relationship".	This sub-option would have a **small positive impact** on stress. See the analysis of the impact of this sub-option on the specific objective: "*To safeguard the well-being of the child and the parent-child relationship*".
To ensure the protection of **fundamental rights**	This sub-option would have **small positive impacts** on the rights of the child. See the analysis of the impact of this sub-option on the specific objective: "To safeguard the well-being of the child and the parent-child relationship".	This sub-option would have a **small positive impact** on the rights of the child. See the analysis of the impact of this sub-option on the specific objective: "*To safeguard the well-being of the child and the parent-child relationship*".
Stakeholders' input	While several stakeholders found this rule to be problematic, only a few commented on possible policy options. It was suggested by two experts and one interviewee that aligning the Regulation with the 1996 Hague Convention be considered to ensure consistency and because the court where the child lives is as a rule better placed to hear a case. On the other hand, a few interviewees argued that the rules should be kept.	One interviewee stated that, if the child moves during the proceedings, jurisdiction should be decided on a case-by-case basis, always taking into account the well-being of the child.
Overall assessment of effectiveness	The increase of effectiveness on the basis of this sub-option would be **medium**. There would be (small) positive impacts for most of the specific objectives and neutral impacts on delays.	The increase of effectiveness on the basis of this sub-option would be **low**, in particular because not all the impacts are positive. While there would be positive impacts for some of the specific objectives, there could be small negative impacts in

Assessment criterion	Sub-option 1: *Change of Article 8 so that jurisdiction ends if the child has established its habitual residence in another Member State*	Sub-option 2: *Restriction of the perpetuatio fori principle*
		terms of clarity, predictability and delays.
Economic impacts		
Costs for citizens	This sub-option would have **positive or neutral impacts** on costs, depending on the individual case. **Costs** Additional costs could occur if the change of jurisdiction leads to delays in the proceedings because of the new court first needing to get acquainted with the case. **Cost savings** Cost savings could occur because the court responsible for hearing a case would be the court in the Member State of the child's new habitual residence. Therefore, travel costs could potentially be avoided.	This sub-option would have **positive or neutral impacts** on costs, depending on the individual case. **Costs** Additional costs could occur if it is not clear which court has jurisdiction due to ambiguities relating to what is in the best interests of the child. **Cost savings** Cost savings could occur, because this option allows for flexibility. Therefore, proceedings could be held in a Member State that is most appropriate for the parties involved, which may lead, for instance, to a reduction of travel costs.

Source: Deloitte

Conclusions

Legislative modification is preferred over the status quo, mainly to ensure that jurisdiction is with the court that is closest to the child, to increase consistency with the 1996 Hague Convention, and to eliminate the uncertainties relating to the application of the current provision. **Sub-option 1 is the preferred option**, because it would increase effectiveness with respect to most of the specific objectives and would not involve significant costs. The impacts of sub-option 2 would be lower overall and some negative impacts could be expected.

Limited actual use of the possibility to transfer a case and lack of detail as concerns the procedural rules

Article 15 offers the court that has jurisdiction as to the substance of the matter of parental responsibility the option of transferring the case to the court of another Member State better placed to hear the case. The possibility of transferring a case was considered useful by the majority of stakeholders in order to make sure that jurisdiction lies with the court that has the closest connection to a child in order to ensure the well-being of the child. However, many interviewees, national experts, and most of the respondents to the public consultation confirmed that the current use of the article remains limited in the Member States and that Article 15 lacks sufficient clarity. It was pointed out by an Association responding to the public consultation that the flexibility contained in Article 15 is, in principle, a positive feature but is underused and misunderstood in practice.[404] In some cases, ambiguities have led to practical difficulties.[405] Table 5 outlines the expected impacts of the sub-option identified in relation to this issue in comparison to the status quo:

- **Sub-option 1**: The following changes are made with a view to enhancing the use of this provision:
  - Extension of the scope of Article 15 to all decisions on parental responsibility (no restriction to 'exceptional cases') and simplification of the procedures for the reference of a case to a court of another Member State under Article 15 (for instance abolition of the procedure according to Article 15(1)(a) which is burdensome for the parties and therefore seldom used).
  - Improvement of the direct communication between courts of different Member States (without intermediation of the respective Central Authorities).
    - This sub-option aims at making the procedures more efficient. As concerns the second part, including a statement in a recital and/or guidelines on the Regulation could be envisaged in order to encourage direct communication between courts. In addition, it would be necessary to ensure that courts know whom to contact. This could be done by promoting the network of liaison judges for this purpose or by publishing a list of courts responsible in the Member States or other relevant contacts.

According to our analysis,[406] the identified sub-options do not have any substantial impact on some specific objectives[407] that, consequently, have not been analysed in **Table 5**.

In assessing the economic impacts of the proposed options, no costs or cost savings were identified with respect to the points Compliance and awareness-raising costs (including the points on *Central Authorities*, *Providers of awareness-raising (public authorities or others), Training providers (public authorities or others)*), and *Administrative burden*. Therefore, these points are not mentioned in the table.

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[404] CCBE responding to the public consultation Q6. See also T v T (Brussels IIa: Art 15) 2010 EWHC 3928.

[405] Further information on this issue can be found in Annex 1, section *Jurisdiction rules* (Parental responsibility), sub-section *"Limited actual use of the possibility to transfer a case"*.

[406] This is in line with Table 2 (Links between specific objectives, operational objectives and identified issues) of Annex 1 – Analysis of the effectiveness of the Brussels IIa Regulation at the level of the operational objectives.

[407] To ensure that citizens do not have to provide additional administrative documents and/or follow additional proceedings to have judgments, authentic instruments and agreements recognised or enforced; To ensure the protection of the economically weaker spouse.

Table 5: Limited actual use of the possibility of transferring a case and lack of detail as concerns the procedural rules

Assessment criterion	Sub-option 1: *Extension of scope, clarification of procedure and improvement of communication between courts*
Effectiveness	
To ensure that citizens in international families with a close connection to the EU are guaranteed **access to court** in a suitable Member State	This sub-option would have a **positive impact** on ensuring access to a suitable court, as it is expected that the use of Article 15 could be increased. In situations where the standard rules of jurisdiction (i.e. habitual residence of the child) are not suitable to a specific case, it would thus be more likely that a transfer to suitable court is initiated and followed through. In addition, this sub-option would contribute to an increased and more efficient use of the Article, as more direct communication may encourage judges to be more open to suggesting or facilitating a transfer. It might also make procedures for transfer more efficient.
To increase **predictability, clarity, and reliability** for citizens involved in cross-border cases	This sub-option would have a **positive impact** on this specific objective, as the current ambiguities around the procedures to be used for a transfer would be reduced.
To safeguard the **well-being of the child** and the parent-child relationship	This sub-option would have a **positive impact** on this specific objective, as it is expected that the use of Article 15 could be increased. As noted above, it would thus be more likely that cases are dealt with in the most suitable court. In addition, enhanced communication would contribute to an increased and more efficient use of the Article.
To reduce **delays** associated with cross-border cases	This sub-option would have a **positive impact** on delays. First, delays could be reduced because the clarified provision is expected to be easier to apply by courts. Second, the expected increased use of Article 15 would help to ensure that proceedings are always carried out in the court that is best placed to hear the case and thereby avoid delays e.g. due to necessary travel. In addition, enhanced communication would contribute to an increased and more efficient use of the Article.
To reduce undue **stress** associated with cross-border cases	This sub-option would have a **positive impact** on stress, because there would be increased clarity and because the expected increased use of Article 15 would help ensuring that proceedings are always carried out in the court that is best placed to hear the case. In addition, enhanced communication would contribute to an increased and more efficient use of the Article.

Assessment criterion	Sub-option 1: *Extension of scope, clarification of procedure and improvement of communication between courts*
To ensure the protection of **fundamental rights**	There would be a **positive impact** on the rights of the child.[408]
Stakeholders' input	The majority of stakeholders, including 78% of the respondents to the public consultation (i.e. 127 out of 163 responses), national experts and interviewees, as well as an academic commentator[409] indicated that the cooperation mechanism for the transfer to the court better placed to hear the case could be improved). For example, a judge from the United Kingdom responding to the public consultation states that the means by which a transfer is effected should be clearly identified to ensure the process is completed expeditiously. According to him, this relates both to the structure of Article 15 and to the manner in which it is implemented in practice.[410] Some stakeholders specifically suggested that the words 'By way of exception' in Art 15(1) should be removed. Some stakeholders specifically suggest making the communication faster by using e-documents and English as an official language to exchange information.
Overall assessment of effectiveness	The effectiveness of this policy option is expected to be high, as there are positive impacts with respect to all of the specific objectives.
Economic impacts	
Costs for citizens	**Costs** None.

[408] See the analysis of the impact of this sub-option on the specific objective: "To safeguard the well-being of the child and the parent-child relationship".
[409] "An effective security of the aims of Regulation can be reached firstly if courts cooperate directly. In practice it should proceed in the most expeditious ways: via telephone, or email." Pranevičienė, K. (2014), *Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges applying Regulation Brussels II bis* (http://www.degruyter.com/view/j/bjlp.2014.7.issue-1/bjlp-2014-0007/bjlp-2014-0007.xml)
[410] With regard to its structure, the judge stresses that, because of differences between Member States' legislations, the means by which the courts of the requested State are seised ("of their seizure") and "accept jurisdiction" within Article 15(5), are not clear. Greater clarity would be achieved if Article 15 prescribed the required documents (and timeframes for their transmissions) and made clear on whom responsibility for action lies. This stakeholder also asks for clarification regarding whether the six week-time limit is absolute or not.

Assessment criterion	Sub-option 1: *Extension of scope, clarification of procedure and improvement of communication between courts*
	Cost savings There may be a **small positive impact** on costs for citizens. Costs for legal advice could be decreased thanks to the clarification. In addition, travel costs could be reduced if proceedings are held in a more suitable court.

Source: Deloitte

Conclusions

Sub-option 1 is preferred to the status quo, as it would increase effectiveness at low costs.

5.1.3 Horizontal issues

Unspecific rules on the application of the provisions on the seising of a court and on lis pendens causing practical problems

Article 16 of the Brussels IIa Regulation determines when a court is deemed to be seised and thus responsible to hear a case: a court is deemed to be seised at the time when the document instituting the proceedings or an equivalent document is lodged with the court. This rule is of central relevance to citizens, as the court first seised will have jurisdiction subject to Article 19 of the Brussels IIa Regulation (*lis pendens*). These rules aim to prevent parallel proceedings on the same case in courts of different Member States. While most experts and stakeholders acknowledged the contribution of the rules on jurisdiction in the Brussels IIa Regulation in preventing parallel proceedings, a series of practical problems resulting from the application of the provisions on the seizing of a court have been identified. The problems identified mainly relate to the determination of the moment when a court was seised, the potential non-identification of parallel proceedings and a misleading wording in the rules on seising the court in cases of matrimonial matters. [411] The following legislative modification has been identified to address this issue:

- **Sub-option 1**: Adaptation of the general rule in Article 16 (taken unchanged from the Brussels I Regulation) to the special requirements of matrimonial proceedings and proceedings on parental responsibility.
  - This modification would take into account the varying ways in which a court is deemed to be seised in all Member States and craft general guidelines for the application of Article 16.
  - An example of how this could be achieved is by specifying what constitutes a 'document instituting the proceedings or an equivalent document' in proceedings of parental responsibility and matrimonial matters.

Table 6 outlines **the expected impacts of the legislative modification** identified in relation to the issue. The specific objectives that are not impacted substantially by the modification are not analysed in the table[412].

In assessing the economic impacts of the proposed options, no costs or cost savings were identified with respect to the points Compliance and awareness-raising costs (including the points on *Central Authorities*, *Providers of awareness-raising (public authorities or others), Training providers (public authorities or others)*), and *Administrative burden*. Therefore, these points are not mentioned in the table.

[411] For more information on these practical problems, see Annex I: Analysis of the effectiveness of the Brussels IIa Regulation at the level of the operational objectives, section 1.2.3 *Horizontal Issues.*

[412] This is in line with Table 2 (Links between specific objectives, operational objectives and identified issues) of Annex 1 – Analysis of the effectiveness of the Brussels IIa Regulation at the level of the operational objectives. The excluded specific objectives are: To ensure access to court for citizens in international families with a close connection to the EU; To ensure the smooth recognition and enforcement of judgments, authentic instruments and agreements; To ensure the protection of the economically weaker spouse.

Table 6: Unspecific rules on the application of the provisions on the seising of a court and on lis pendens causing practical problems

Assessment criterion	Sub-option 1: *Adaptation of Article 16 to take into account the special requirements of matrimonial proceedings and proceedings on parental responsibility*
To increase **predictability, clarity, and reliability for citizens** involved in cross-border cases.	This modification would **increase the predictability, clarity, and reliability for citizens** involved in cross-border cases because of the guidance given to the article. Citizens involved in parental responsibility proceedings or matrimonial proceedings would have a clear set of requirements of when a court is deemed to be seised thus strengthening the clarity of Art. 16.
To **safeguard the well-being** of the child and parent-child relationship	This modification would have **a positive impact on safeguarding the well-being of the child and parent-child relationship.** Confusion over whether a court has been seised is often a source for delays and stress to the parties involved. More comprehensive guidance on the seizing of a court is likely to reduce these problems thus avoiding undue stress to the family unit and avoiding potential situations where the child is separated from one of the parents for an unnecessarily period of time.
To **reduce delays** associated with cross-border cases	This modification is expected to **reduce delays** associated with confusion caused when two courts are seised in the same time period.
To **reduce undue stress** associated with cross-border cases	This modification is expected to **reduce undue stress** caused when there is confusion over which court has been seised.
To **ensure the protection of fundamental rights**	The **fundamental rights of the child** are protected with this modification as it can reduce undue stress and delays which may be caused through assessment of whether a court has been seised. Furthermore, the **right of access to justice** is properly upheld as potential disadvantages to citizens in the confusion over whether a court has been seised or not can be avoided.
Stakeholders' input	A number of national experts pointed to the need for clarification on the seizing of the court based on issues encountered in their country.
Overall assessment of effectiveness	This modification is expected to **generate positive impacts** in relation to all relevant specific objectives. Overall, it offers a positive solution to the identified problem i.e. *difficulties in relation to the application of provisions on the seizing of the court.*
Economic impact	

Assessment criterion	**Sub-option 1: *Adaptation of Article 16 to take into account the special requirements of matrimonial proceedings and proceedings on parental responsibility***
Costs for citizens	Costs for citizens may be reduced with less litigation for determining whether a court has been seised.
Efficiency	
Combination of effectiveness and economic impacts	The efficiency of this option is expected to be **high.** The effectiveness of the Regulation can be improved in relation to seizing of the court and there are no major costs involved.

Source: Deloitte

Conclusions

The legal modification is preferred to the Status Quo. By adapting Article 16 to take into account special requirements of matrimonial proceedings and proceedings on parental responsibility, the effectiveness of the Regulation can be improved while reducing costs for citizens.

Non-application of the provisions on lis pendens if third countries are involved

The rules on *lis pendens* of the Brussels IIa Regulation are currently restricted to conflicting proceedings before the courts of different Member States i.e. third countries are not covered by the *lis pendens* rules of the Regulation. In cases where an action is first filed by one spouse in a third country and afterwards by the other spouse in a Member State, national rules apply in determining whether to decline jurisdiction or not. As a consequence of the limitation of the scope of the Brussels IIa *lis pendens* rules to EU Member States, some commentators have considered that legal certainty and predictability are currently not ensured. Also, concerns were voiced regarding the need to secure reciprocity and the respect of fundamental rights by third countries. The following legislative modification has been identified to address this issue:

- **Sub-option 1**: Introduction of harmonised European rules respecting matrimonial proceedings or proceedings on parental responsibility pending before a third country court (by analogy to Articles 33 and 34 recast of the Brussels I Regulation).
  - This would involve the ability to stay/continue proceedings by having regard to:
    - the judgment being given in a reasonable time;
    - the capability of the judgment to be recognised and where applicable, enforced in that Member State;
    - the proper administration of justice.
  - Where actions are related, the court gives consideration to:
    - the risk of irreconcilable judgments;
    - the capability of the judgment to be recognised and where applicable, enforced in that Member State;
    - proper administration of justice.

Table 7 outlines **the expected impacts of the legislative modification** identified in relation to the issue. The specific objectives that are not impacted substantially by the modification are not analysed in the table[413].

In assessing the economic impacts of the proposed options, no costs or cost savings were identified with respect to the points *Costs for citizens*, *Compliance and awareness-raising costs* (including the points on *Central Authorities*, *Providers of awareness-raising (public authorities or others), Training providers (public authorities or others)*), and *Administrative burden*. Therefore, these points are not mentioned in the table.

[413] This is in line with Table 2 (Links between specific objectives, operational objectives and identified issues) of Annex 1 – Analysis of the effectiveness of the Brussels IIa Regulation at the level of the operational objectives. The excluded specific objectives are: To ensure access to court for citizens in international families with a close connection to the EU; To ensure the smooth recognition and enforcement of judgments, authentic instruments and agreements; To ensure the protection of the economically weaker spouse. In addition, this modification has no impact on the reduction of delays associated with cross-border proceedings.

Table 7: Non-application of the provisions on lis pendens if third countries are involved

Assessment criterion	Sub-option 1: *Introduction of harmonised European rules respecting proceedings pending before a third country court*
Effectiveness	
To increase **predictability, clarity, and reliability for citizens** involved in cross-border cases.	This modification would **increase the predictability, clarity, and reliability for citizens** involved in cross-border cases. By introducing harmonised rules on *lis pendens*, legal certainty and predictability can be ensured at a European level for citizens who issue proceedings in a Member State after or at the same time as a spouse/partner in a third country.
To **safeguard the well-being** of the child and parent-child relationship	This modification would have **a positive impact on safeguarding the well-being of the child and parent-child relationship.** As this modification obliges Member State courts to have regard to the proper administration of justice and other relevant factors, the well-being of the child and parent-child relationship can be taken into account in decisions to stay proceedings.
To **reduce undue stress** associated with cross-border cases	This modification is **expected to reduce undue stress** by adding legal certainty to the *lis pendens* rules for third countries.
To **ensure the protection of fundamental rights**	This modification would have a **strong positive impact on ensuring the protection of fundamental rights** by obliging Member State courts to assess the proper administration of justice and potential recognition and enforcement issues in deciding whether or not to stay proceedings.
Stakeholders' input	Several experts noted that an extension of *lis pendens* rules to third countries always needs to be bound to certain conditions, such as reciprocity, in view of ensuring legal certainty and predictability for EU citizens.
Overall assessment of effectiveness	This modification is expected to generate positive impacts in relation to all relevant specific objectives. Overall, problems encountered when Member States who do not have a *lis pendens* rule for proceedings issued in a third country can be avoided.

Efficiency	
Combination of effectiveness and economic impacts	The efficiency of this option is expected to be **high.** The effectiveness of the Regulation can be improved in relation to parallel proceedings and there are no costs involved.

Source: Deloitte

Conclusions

The legal modification is preferred to the Status Quo. Although this modification would have small/neutral impacts on Member states that already have a *lis pendens* rule in relation to third countries, legal certainty and clarity can be increased with a general European rule. Furthermore, any negative effects on the well-being of the family unit, stress and fundamental rights currently encountered in Member states with no rule on *lis pendens* for third countries can be avoided.

5.2 Recognition and Enforcement

5.2.1 Horizontal issues

Incorrect application of the system of certificates laid down in Articles 39, 41(2) and 42(2)

Practical difficulties were highlighted by some stakeholders with regard to the system of certificates laid down in Articles 39, 41(2) and 42(2). While the system of certificates is broadly well-functioning and considered useful for the recognition and enforcement of judgments, there is some room for improvement in the system's practical functioning. The system is not always correctly applied due to insufficient awareness and training of legal professionals[414] or to the absence of clear explanations on the certificates of the rights linked thereto[415]. In addition, language and translation issues have also been detrimental to the effectiveness of the certificates in practice.[416] The following legislative modification has been identified to address these issues:

- **Sub-option 1:** Improving the content of the existing certificates based on the experience in practice and developing new certificates for decisions on parental responsibility if exequatur proceedings are abolished. These improvements could include:
  - A clear explanation on the certificates regarding the rights linked thereto
  - A space for the issuing court to specify which part of the judgment is relevant

Table 8 outlines the expected impacts of the policy options that have been identified in relation to the practical difficulties with regard to the system of certificates. The specific objectives that are not substantially impacted by the sub-option are not analysed in the table[417]. In addition, no significant compliance or awareness-raising costs and no additional administrative burden were identified with respect to the sub-option. They are therefore not mentioned in the table either.

[414] For instance, several interviewed lawyers and respondents to the European Commission's public consultation noted that it is often required for the parties to explicitly ask the judge to produce the certificate and to refer him/her to the forms included in the annex of the Brussels IIa Regulation. They stated that judges are often not fully aware of the functioning of the system of certificates. In addition, the national expert for Belgium reported that a core difficulty with certificates issued under Articles 41 and 42 is that bailiffs ("*huissiers de justice*"/"*gerechtsdeurwaarders*") appear to erroneously believe that such certified judgments may only be enforced in Belgium after having been subject to a declaration of enforceability. Finally, the national expert for Ireland reported that certificates issued by Irish courts were not always recognised or enforced by courts in other countries.

[415] Several participants in the expert panel noted that practical difficulties and misunderstandings have occurred because the certificates issued that are based on the Brussels IIa Regulation do not include clear explanations of the rights linked to the certificates. In addition, it is not always clear, on the basis of the certificate, whether the whole ruling, or only parts of it, should be enforced.

[416] The main difficulties are the absence in Article 39 of rules on the language that has to be used to complete the certificate, and the absence of rules on which cases require translations to be provided.

[417] As specified in the Methodological Note, the non-prioritised legal issues were not attributed high priority because one or more of the following points are applicable:

- No substantial modifications of the Regulation are needed to address the specific legal issue. Rather, a clarification of the relevant Articles would be sufficient (e.g. based on ECJ case law);
- The specific legal issue does not impact on fundamental rights of citizens, e.g. access to court, child protection; or
- The specific legal issue does not affect a large number of citizens and/or a large number of cases.

For the assessment of this specific non-prioritised legal issue, the excluded specific objectives are: To ensure that citizens in international families with a close connection to the EU are guaranteed access to court in a suitable Member State; To ensure the protection of the economically weaker spouse.

Table 8: Incorrect application of the system of certificates laid down in Articles 39, 41(2) and 42(2)

Assessment criterion	**Sub-option 1:** ***Improving the content of the existing certificates based on the experience in practice and developing new certificates for decisions on parental responsibility if exequatur proceedings are being abolished***[418]
Effectiveness	
To increase **predictability, clarity,** and **reliability** for citizens involved in cross-border cases	The legislative modification would have a **positive impact** on predictability, clarity, and reliability for citizens involved in cross-border cases. The improvement of the content of the certificates would contribute to a better understanding of their rights linked to the certificates.
To ensure that citizens do not have to provide additional administrative documents and/or follow additional proceedings to have **judgments, authentic instruments and agreements** recognised or enforced	The legislative modification would have a **positive impact** on this specific objective. In particular, situations such as those in which bailiffs turn down requests to proceed to enforcement of judgments certified in accordance with Articles 41(2) and 42(2) would be avoided by clarifying, on the certificates referred to in Articles 41(2) and 42(2), that the certified judgment shall be recognised and enforceable without the need for a declaration of enforceability and without any possibility of opposing its recognition,.
To safeguard the **well-being of the child and the parent-child relationship**	The legislative modification would have a **positive impact** on safeguarding the well-being of the child and parent-child relationship, as it would eliminate confusion about the recognition and enforceability of certified judgments concerning rights of access or the return of a child. This confusion is a source of undue stress to the family unit and can cause situations where the child is separated from one of the parents for an unnecessarily long period of time.
To **reduce delays** associated with cross-border cases	This legislative modification is expected to **reduce delays** caused by misunderstandings regarding the rights linked to the certificates.
To **reduce undue stress** associated with cross-border cases	This legislative modification is expected to **reduce undue stress** caused by misunderstandings regarding the rights linked to the certificates.

[418] In this table the impact of improving the content of the existing certificates is assessed. If it is decided to abolish exequatur proceedings for decisions on parental responsibility, the impact of the modifications would be similar for the new certificates for decisions on parental responsibility.

Assessment criterion	Sub-option 1: *Improving the content of the existing certificates based on the experience in practice and developing new certificates for decisions on parental responsibility if exequatur proceedings are being abolished*[418]
To **ensure the protection of fundamental rights**	The **fundamental rights of the child** are protected with this modification as it can reduce undue stress and delays which may be caused by misunderstandings regarding the rights linked to the certificates. Furthermore, the **right of access to justice** is also protected as potential barriers to the recognition and enforcement of judgments are removed with this modification.
Stakeholders' input	Regarding **insufficient training and awareness of legal professionals**, several interviewed lawyers and respondents to the European Commission's public consultation noted that it is often required for the parties to explicitly ask the judge to produce the certificate and to refer him/her to the forms included in the annex of the Brussels IIa Regulation. They stated that judges are often not fully aware of the functioning of the system of certificates. In addition, the national expert for Belgium reported that a core difficulty with certificates issued under Articles 41 and 42 is that bailiffs ("*huissiers de justice*"/"*gerechtsdeurwaarders*") appear to erroneously believe that such certified judgments may only be enforced in Belgium after having been the subject of a declaration of enforceability. Finally, the national expert for Ireland reported that certificates issued by Irish courts were not always recognised or enforced by courts in other countries. Regarding the **absence of clear explanations on the certificates of the rights linked thereto**, several participants in the expert panel noted that practical difficulties and misunderstandings have occurred because the certificates issued based on the Brussels IIa Regulation do not include clear explanations of the rights linked to those certificates. In addition, a German judge noted that it is sometimes not clear on the basis of the certificate whether the whole ruling or only parts of it should be enforced. Regarding **language and translation issues**, numerous respondents to the European Commission's public consultation noted that language and translation issues are, in practice, often detrimental to the effectiveness of certificates. Finally, a German lawyer considered it problematic that there is no **possibility of appeal** against a certificate in the Member State where recognition and enforcement are sought.
Overall assessment of effectiveness	This sub-option is expected to generate **positive impacts** in relation to all the relevant specific objectives.
Economic impacts	
Costs for citizens	**<u>Costs</u>** No costs to citizens are expected.

Assessment criterion	Sub-option 1: *Improving the content of the existing certificates based on the experience in practice and developing new certificates for decisions on parental responsibility if exequatur proceedings are being abolished*[418]
	Cost savings This sub-option is expected to reduce costs for citizens, as it would reduce the costs caused by lengthy or unnecessary proceedings.

Source: Deloitte

Conclusions

The legislative modification is preferred to the *status quo* because a higher effectiveness could be achieved at low costs.

Uncertainty as to which types of authentic instruments and agreements are recognised under the Regulation

Article 46 of the Brussels IIa Regulation provides that documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments. Some interviewees and national experts have raised issues relating to the applicability of the Regulation to authentic instruments and agreements. In particular, it was reported that the concepts of authentic instruments and agreements are not sufficiently clear.[419] In addition, there are certain types of agreements that are not currently within the scope of the Regulation, although they are relevant in the framework of parental responsibility cases[420]. The following legislative modification has been identified to address these issues:

- **Sub-option 1:** Extension of Article 46 to informal agreements made between the parents and registered by a court to agreements on parental responsibility reached through mediation, and to undertakings ordered in parental responsibility proceedings.

Table 9 outlines the expected impacts of the legislative modification identified in relation to the uncertainty as to which types of authentic instruments and agreements are recognised under the Regulation. The specific objectives that are not substantially impacted by the sub-option are not analysed in the table[421]. In addition, no significant compliance or awareness-raising costs and no additional administrative burden related to the sub-options were identified. They are therefore not mentioned in the table either.

[419] It should be noted, however, that no specific cases could be identified due to the limited availability of case law.

[420] Reference was made to the following agreements: informal agreements between the parents registered by a court, undertakings under common law, agreements on parental responsibility reached through mediation, private agreements made under German law.

[421] As specified in the Methodological Note, the non-prioritised legal issues were not attributed high priority because one or more of the following points are applicable:

- No substantial modifications of the Regulation are needed to address the specific legal issue. Rather, a clarification of the relevant Articles would be sufficient (e.g. based on ECJ case law);
- The specific legal issue does not impact on fundamental rights of citizens, e.g. access to court, child protection; or
- The specific legal issue does not affect a large number of citizens and/or a large number of cases.

For the assessment of this specific non-prioritised legal issue, the excluded specific objectives are: To ensure that citizens in international families with a close connection to the EU are guaranteed access to court in a suitable Member State; To ensure the protection of the economically weaker spouse.

Table 9: Uncertainty as to which types of authentic instruments and agreements are recognised under the Regulation

Assessment criterion	Sub-option 1: ***Extension of Article 46 to informal agreements made between the parents and registered by a court, to agreements on parental responsibility reached through mediation and to undertakings ordered in parental responsibility proceedings.***
Effectiveness	
To increase **predictability, clarity,** and **reliability** for citizens involved in cross-border cases	The legislative modification would have a **positive impact on the predictability, clarity, and reliability for citizens** as it would, for specific agreements, remove the uncertainty regarding their recognition and enforceability. However, as the definitions of “authentic instrument” and “agreements” will remain absent from the Regulation, confusion regarding the meaning of these concepts may persist.
To ensure that citizens do not have to provide additional administrative documents and/or follow additional proceedings to have **judgments, authentic instruments and agreements** recognised or enforced	The legislative modification would have a **positive impact** on this specific objective, as it would extend the scope of Article 46 to some specific agreements which, under the *status quo*, do not benefit from recognition and enforcement under the same conditions as judgments under the Regulation.
To safeguard the **well-being of the child and the parent-child relationship**	The legislative modification would have a **positive impact on safeguarding the well-being of the child and parent-child relationship**, as it would extend the scope of article 46 to specific agreements reached between the parents on parental responsibility. This would eliminate confusion about the recognition and enforceability of these agreements, which is a source of undue stress to the family unit and may cause situations in which the child is separated from one of the parents for an unnecessarily long period of time.
To **reduce delays** associated with cross-border cases	This legislative modification is expected to **reduce delays** to the extent that it would eliminate confusion about the recognition and enforceability of some specific agreements. However, as the definitions of “authentic instrument” and “agreements” would remain absent from the Regulation, confusion regarding the meaning of these concepts and the delays linked thereto may persist.
To **reduce undue stress** associated with cross-border cases	This legislative modification is expected to **reduce undue stress** to the extent that it would eliminate confusion about the recognition and enforceability of some specific agreements. However, as the definitions of “authentic instrument” and “agreements” would remain absent from the Regulation, confusion regarding the meaning of these concepts and the undue

Assessment criterion	Sub-option 1: ***Extension of Article 46 to informal agreements made between the parents and registered by a court, to agreements on parental responsibility reached through mediation and to undertakings ordered in parental responsibility proceedings.***
	stress linked thereto may persist.
To **ensure the protection of fundamental rights**	The **fundamental rights of the child** are protected with this modification as it can reduce undue stress and delays which may be caused by confusion about the recognition and enforceability of some specific agreements. Furthermore, the **right of access to justice** is is also protected as potential barriers to the recognition and enforcement of some specific agreements are removed with this modification.
Stakeholders' input	As regards **ambiguities relating to the concept of authentic instruments and agreements**, issues were raised by some national experts, as well as some of the interviewees. The Lithuanian national expert, for example, indicated that the concept of “authentic instruments” and “agreements” are not sufficiently clear. A number of stakeholders also pointed to types of **agreements that may currently not be recognised under the Regulation**. - A German interviewee indicated that parents sometimes reach agreements before a court which are part of the protocol but not of a decision. It is not currently clear how far such agreements, which are informal but concluded before a court, may be recognised under the Regulation. In addition, the German expert noted that Article 46 of the Regulation includes agreements between the parties which have not been integrated in an authentic instrument or have not been approved by a court. The only prerequisite is that the agreement is enforceable in the Member State of origin. According to German law, such agreements would not be enforceable in Germany; therefore private agreements made under German law are not recognisable in other Member States under Article 46. - Somewhat similarly, undertakings (i.e. essentially a formal promise to the court) are very frequently used under common law. It is not clear whether they are covered by the Regulation or not, i.e. whether foreign courts will enforce an undertaking. - A further potential problem was raised by the expert for the United Kingdom, who indicated that problems could arise in cases where parents agree arrangements for children and these are not recorded in a court order. - An Irish mediator indicated that there are difficulties regarding the recognition of agreements established through mediation. This is believed to be due to the differences in the mediation laws of the Member States. - The French national expert indicated that the recognition of parental agreements that are possible under French law might pose difficulties in other Member States.

Assessment criterion	Sub-option 1: ***Extension of Article 46 to informal agreements made between the parents and registered by a court, to agreements on parental responsibility reached through mediation and to undertakings ordered in parental responsibility proceedings.***
Overall assessment of effectiveness	This sub-option is expected to generate **positive impacts** in relation to all the relevant specific objectives.
Economic impacts	
Costs for citizens	**Costs** **No costs** in relation to the citizens are expected. **Cost savings** Cost savings for citizens are expected as a result of the reduction of delays.

Source: Deloitte

Conclusions

The legislative modification is preferred to the *status quo* because a higher effectiveness could be achieved at low costs.

Legal aid systems do not sufficiently take into account the specific needs and costs related to proceedings under the Brussels IIa Regulation

Persons involved in proceedings to which the Brussels IIa Regulation applies benefit from a minimum standard of legal aid established by Council Directive 2002/8/EC[422]. In addition, for proceedings concerning the recognition or enforcement of judgments, Article 50 of the Brussels IIa Regulation provides that an applicant who has benefited from complete or partial legal aid or exemption from costs or expenses in the Member State of origin shall be entitled, in recognition or enforcement procedures in another Member State, to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of that Member State.

No major practical difficulties related to the guarantee of legal aid were identified. However, there are some concerns regarding whether the legal aid systems are taking sufficient account of the specific needs and costs related to complex international proceedings[423]. One legislative modification and one non-legislative measure have been identified to address this issue:

- **Sub-option 1:** Introduction of more detailed rules on legal aid based on Articles 44, 45 and 47 of the Maintenance Regulation[424], for instance in a separate Chapter of the Brussels IIa Regulation.
- **Sub-option 2:** Creation of an EU wide fund specifically aimed at providing financial support for practical measures not falling under legal aid (e.g. travel costs related to the return of the child).

Table 10 outlines the expected impacts of the measures that were identified in relation to the practical difficulties related to the guarantee of legal aid. The specific objectives that are not impacted substantially by the measures are not analysed in the table[425]. In addition, no significant compliance and awareness-raising costs and no additional administrative burden related to the sub-options were identified. They are therefore not mentioned in the table either.

[422] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, *OJ* 31.01.2003, L 26/41.

[423] Such specific costs are, for example, the applicant's travel costs or the costs related to the return of a child. In addition, it has been noted that state-aid lawyers may not have the required language skills and subject matter expertise to deal with complex international cases of matrimonial matters and parental responsibility.

[424] Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* 10.1.2009, L 7/1. Article 44 of the Maintenance Regulation provides that parties involved in a dispute covered by the Maintenance Regulation are entitled to legal aid. Article 45 specifies the content of legal aid. Article 47 provides that Member States can ask parties that are sufficiently wealthy to pay back the legal aid granted.

[425] As specified in the Methodological Note, the non-prioritised legal issues were not attributed high priority because one or more of the following points are applicable:

- No substantial modifications of the Regulation are needed to address the specific legal issue. Rather, a clarification of the relevant Articles would be sufficient (e.g. based on ECJ case law);
- The specific legal issue does not impact on fundamental rights of citizens, e.g. access to court, child protection; or
- The specific legal issue does not affect a large number of citizens and/or a large number of cases.

For the assessment of this specific non-prioritised legal issue, the excluded specific objectives are: To ensure that citizens in international families with a close connection to the EU are guaranteed access to court in a suitable Member State; To ensure smooth recognition and enforcement of judgments, authentic instruments and agreements; To ensure the protection of the economically weaker spouse.

Table 10: Legal aid systems do not sufficiently take into account the specific needs and costs related to proceedings under the Brussels IIa Regulation

Assessment criterion	Sub-option 1: *Introduction of more detailed rules on legal aid based on Articles 44, 45 and 47 of the Maintenance Regulation.*	Sub-option 2: *Creation of an EU wide fund specifically aimed at providing financial support for practical measures not falling under legal aid (e.g. travel costs related to the return of the child)*
Effectiveness		
To increase **predictability, clarity,** and **reliability** for citizens involved in cross-border cases	The legislative modification will have a **positive impact on predictability, clarity, and reliability** for citizens involved in cross-border cases as it will, by introducing more detailed rules on legal aid, clarify the right to legal aid as well as the content of legal aid.	The non-legislative measure will have **no impact on predictability, clarity, and reliability** for citizens involved in cross-border cases.
To safeguard the **well-being of the child and the parent-child relationship**	The legislative modification will have a **positive impact on safeguarding the well-being of the child and parent-child relationship** as it will, by introducing more detailed rules on legal aid, eliminate confusion about the right to legal aid as well as the content of legal aid, which is a source of undue stress to the family unit. However, the legislative modification will not eliminate the identified practical difficulty that some costs related to proceedings under the Brussels IIa Regulation (e.g. travel costs related to the return of the child) are not covered by legal aid. This may cause situations where the child is separated from one of the parents for an unnecessarily long period of time.	The non-legislative measure will have a **positive impact on safeguarding the well-being of the child and parent-child relationship** as it will eliminate the identified practical difficulty that some costs related to proceedings under the Brussels IIa Regulation (e.g. travel costs related to the return of the child) are not covered by legal aid, causing situations where the child is separated from one of the parents for an unnecessarily long period of time.
To **reduce delays** associated with cross-border cases	This legislative modification will not have an impact on **delays** associated with cross-border cases.	The non-legislative measure will not have an impact on **delays** associated with cross-border cases.
To **reduce undue stress** associated with cross-	The legislative modification will **reduce undue stress** as it will, by introducing more detailed rules on legal aid, eliminate	The non-legislative measure will **reduce undue stress** to the extent that it will ensure that an EU wide fund will cover some

Assessment criterion	Sub-option 1: *Introduction of more detailed rules on legal aid based on Articles 44, 45 and 47 of the Maintenance Regulation.*	Sub-option 2: *Creation of an EU wide fund specifically aimed at providing financial support for practical measures not falling under legal aid (e.g. travel costs related to the return of the child)*
border cases	confusion about the right to legal aid as well as the content of legal aid, which is a source of undue stress to the family unit.	costs related to proceedings under the Brussels IIa Regulation which are currently not covered.
To **ensure the protection of fundamental rights**	The legislative modification ensures the protection of the **right of access to justice** by clarifying the right to legal aid as well as the content of legal aid.	The non-legislative measure ensures the protection of the **right of access to justice** by ensuring that there are no financial obstacles to the practical execution of a judgment concerning the return of a child.
Stakeholders' input	None of the national experts have identified any significant difficulties with regard to the guarantee of legal aid. Most stakeholders interviewed similarly concluded that the legal aid systems are well-functioning. Yet, there are some concerns: - In view of specific additional costs of international procedures (such as costs for interpretation and translation), some interviewees considered the existing legal aid systems to be insufficient in ensuring an equal access to justice. - Some interviewees voiced doubts over whether state-aid lawyers necessarily have the required language skills and subject matter expertise to deal with complex international cases of matrimonial matters and parental responsibility. - According to the national expert for France, the cost related to the return of the child to a foreign country can be a problem for the "victim" parent, as these costs are not covered by legal aid.	None of the national experts have identified any significant difficulties with regard to the guarantee of legal aid. Most stakeholders interviewed similarly concluded that the legal aid systems are well-functioning. Yet, there are some concerns: - In view of specific additional costs of international procedures (such as costs for interpretation and translation), some interviewees considered the existing legal aid systems to be insufficient in ensuring an equal access to justice. - Some interviewees voiced doubts over whether state-aid lawyers necessarily have the required language skills and subject matter expertise to deal with complex international cases of matrimonial matters and parental responsibility. According to the national expert for France, the cost related to the return of the child to a foreign country can be a problem for the "victim" parent, as these costs are not covered by legal aid.

Assessment criterion	Sub-option 1: *Introduction of more detailed rules on legal aid based on Articles 44, 45 and 47 of the Maintenance Regulation.*	Sub-option 2: *Creation of an EU wide fund specifically aimed at providing financial support for practical measures not falling under legal aid (e.g. travel costs related to the return of the child)*
Overall assessment of effectiveness	This legislative modification is expected to generate **positive impacts** in relation to most of the specific objectives. However, the legislative modification will not eliminate the identified practical difficulty that some costs related to proceedings under the Brussels IIa Regulation (e.g. travel costs related to the return of the child) are not covered by legal aid.	This non-legislative measure is expected to generate **positive impacts** in relation to most of the specific objectives. However, questions can be raised regarding the feasibility of creating an EU wide fund.
Economic impacts		
Costs for citizens	**Costs** **No costs** in relation to the citizens are expected. **Cost savings** None.	**Costs** **No costs** in relation to the citizens are expected. **Cost savings** A reduction of costs for citizens is expected, as the EU wide fund would cover part of the costs currently incurred by citizens.

Source: Deloitte

Conclusions

Sub-option 1 is preferred to the *status quo* because a higher effectiveness could be achieved at low costs. It is also preferred to sub-option 2 – the creation of an EU wide fund – due to the questions relating to the feasibility of this measure.

5.2.2 Parental responsibility

Difficulties related to the possibility of specifying decisions on access rights under Article 48, arising from the different levels of specification in the Member States and the risk that the court of enforcement can substantially modify the original judgment

Practical difficulties have been highlighted by some stakeholders with regard to Article 48, which allows the courts of the Member State of enforcement to substantiate the decision on access rights by making practical arrangements for organising the exercise of access rights, if the necessary arrangements have not or not sufficiently been made in the judgment delivered by the courts of the Member State that has jurisdiction as to the substance of the matter. These difficulties arise from the different levels of specification of the decision for each Member State,[426] as well as from the risk that the judge of the court of enforcement can substantially modify the original judgment.[427] The following sub-option has been identified to address these issues:

- **Sub-option 1**: Provision of minimum standards of specification for decisions on access rights.
  - This option aims at reducing delays and uncertainties currently caused by the lack of limitations in the Regulation on the practical aspects that the judge of the court of enforcement can specify in the decision on access rights.

Table 11 outlines the expected impacts of the policy option that were identified in relation to the difficulties relating to the possibility of specifying decisions on access rights under Article 48. The specific objectives that are not substantially impacted by the sub-option are not analysed in the table[428]. In addition, no significant compliance or awareness-raising costs and no additional administrative burden related to the sub-options were identified. They are therefore not mentioned in the table either.

[426] For example, the application of Article 48 could be difficult for German judges, because the requirements concerning the level of details of a decision are usually higher than in other Member States. For instance, an Italian decision on access rights usually refers only to a general period in which a parent can meet his/her child (e.g. during the summer holidays). In Germany, the exact weekends and times need to be specified, otherwise the judgments are not enforceable. Therefore, the German judge needs to substantiate the decision, adding specifications and preferences of the parties.

[427] For instance, it could happen that the judge of the court of enforcement goes too far in the specification, substantially modifying the original judgment on access rights. In this case, a retrial can be filed, causing further delays. This was the case of a Maltese decision: 396/2012 Id-*Direttur tad-Dipartiment Għal Standards fil-Ħarsien Soċjali vs Lara Maria Merlevede neè Borg St. John.*

[428] As specified in the Methodological Note, the non-prioritised legal issues were not attributed high priority because one or more of the following points are applicable:

- No substantial modifications of the Regulation are needed to address the specific legal issue. Rather, a clarification of the relevant Articles would be sufficient (e.g. based on ECJ case law);
- The specific legal issue does not impact on fundamental rights of citizens, e.g. access to court, child protection; or
- The specific legal issue does not affect a large number of citizens and/or a large number of cases.

For the assessment of this specific non-prioritised legal issue, the excluded specific objectives are: To ensure that citizens in international families with a close connection to the EU are guaranteed access to court in a suitable Member State; To ensure the protection of the economically weaker spouse.

Table 11: Difficulties relating to the possibility to specify decisions on access rights under Article 48

Assessment criterion	Sub-option 1: *Providing for minimum standards of specification for decisions on access rights*
Effectiveness	
To increase **predictability, clarity,** and **reliability** for citizens involved in cross-border cases	This option would generate a **positive impact** on this specific objective. By providing for common minimum standards pointing out the practical aspects that the judge of the court of enforcement can specify in the decision on access rights, this option would reduce the uncertainties that are currently caused by the different levels of specification of the decision for each Member State. Furthermore, it would increase reliability for citizens by reducing the risk that the judge of the court of enforcement goes too far in the specification, substantially modifying the original decision on access rights.
To ensure that citizens do not have to provide additional administrative documents and/or follow additional proceedings to have **judgments, authentic instruments and agreements** recognised or enforced	This option is likely to have **positive impacts** on this specific objective. For instance, it would reduce the risk that a retrial is filed against the decision of the court of enforcement in case the judge went too far in the specification, substantially modifying the original judgment on access rights.
To safeguard the **well-being of the child and the parent-child relationship**	This option would generate a **positive impact** on the **well-being of the child and the parent-child relationship**. It would reduce the risk of the uncertain situation in which the enforcement of access rights is still pending being prolonged and the contact to one of the parents being prevented due to delays caused by: - the time necessary for the court of enforcement to specify the practical arrangements for the exercise of access rights; or - an eventual retrial filed because the judge of enforcement substantially modified the original judgment on access rights.
To **reduce delays** associated with cross-border cases	This sub-option would have a **positive impact:** It would reduce delays that are currently caused by: - the time needed for the court of enforcement to specify the practical arrangements for the exercise of access rights; or - an eventual retrial filed due to the judge of enforcement substantially modifying the original judgment on access rights.
To **reduce undue stress** associated with cross-border cases	A **reduction of stress** can be expected. This option is likely to reduce the stress associated to: - Delays in the enforcement of the decision on access rights;

Assessment criterion	**Sub-option 1:** ***Providing for minimum standards of specification for decisions on access rights***
	- The risk that the judge of the enforcement, by specifying the practical arrangements for the exercise of access rights, can eventually modify the original judgment substantially; - Delays caused by an eventual retrial filed in case the judge of enforcement has substantially modified the original judgment; - The uncertain situation in which the enforcement of access rights is still pending being prolonged and the contact to one of the parents being prevented.
To **ensure the protection of fundamental rights**	This sub-option would have a **positive impact** on the fundamental rights of the child and on respect for private and family life.429
Stakeholders' input	Difficulties in relation to Article 48 were only mentioned by two stakeholders (an interviewee and a national expert). The national expert from Germany explained that Article 48 does facilitate the enforcement of judgments that are not sufficiently detailed in the context of the relevant Member State (which would not be possible if there was no possibility of specification), although practical solutions may need to be found to apply the article in the interest of the parties. Nevertheless, the introduction of common minimum standards of specification for decisions on access rights was not explicitly recommended.
Overall assessment of effectiveness	This sub-option is expected to generate **positive impacts** in relation to all the relevant specific objectives.

[429] See the analysis of the impact of this sub-option on the specific objective "To safeguard the well-being of the child and the parent-child relationship".

Economic impacts	
Costs for citizens	**Costs** **No costs** to citizens are expected. **Cost savings** Costs for citizens caused by delays are expected to be reduced.

Source: Deloitte

Conclusions

Sub-option 1 is preferred to the *status quo* because a higher effectiveness could be achieved at low costs.

5.3 Provisions specific to child abduction cases

5.3.1 Parental responsibility

Disadvantages for the abducting parent in subsequent custody hearings

Article 11(6)-(8) lays down the procedure to be followed after a non-return order under Article 13 of the Hague Convention has been ordered. This includes the possibility for a new decision on custody, which has to be taken by the Member State of origin and which might imply the return of the child despite a return having previously been refused. The interplay of the return procedure and the subsequent hearings on custody might generate indirect disadvantages for the abducting parent. Some stakeholders pointed out that the child may be automatically put in the custody of the parent who had been left-behind parent without any further investigation or the abducting parent may be criminally prosecuted. As a consequence, the defence rights of the abducting parent are endangered and the impartiality of the court of origin may be doubted. The following legislative modification has been identified to help mitigate this issue as far as possible within the scope of the Regulation:

- **Sub-option 1**: introduction of rules on the possibility for the court seised in the Member State to which the child was abducted to include 'adequate urgent protective measures' aiming at the protection of the parent to be enforced without exequatur in the Member State of origin after the child's return. Such measures will lapse as soon as the courts in the Member State of origin take the necessary protection measures required by the situation[430].
    - This sub-option could be integrated under Article 11(4). It is suggested that Article 11(4) be amended by allowing for the court to order "adequate urgent protective measures" aiming to protect the child (cf. the main body of the impact assessment report, section 5.4.1.2). These two matters are interlinked, as they both aim at facilitating the return of the child by giving the handling court the possibility of ordering the measures that are deemed necessary to ensure that the return does not endanger the parties involved.

Table 12 outlines **the expected impacts of the legislative modification** identified in relation to the issue. The specific objectives that are not substantially impacted by the modification are not analysed in the table[431].

In assessing the economic impacts of the proposed options, no costs or cost savings were identified with respect to the points *Costs for citizens*, *Providers of awareness-raising (public authorities or others), Training providers (public authorities or others)*, and *Administrative burden*. Therefore, these points are not mentioned in the table.

[430] See Article 11 of 1996 Hague Convention and the Practical handbook of the 1996 Hague Convention, Example 6(G) on p. 75: .

[431] This is in line with Table 2 (Links between specific objectives, operational objectives and identified issues) of Annex 1 – Analysis of the effectiveness of the Brussels IIa Regulation at the level of the operational objectives. The excluded specific objectives are: To ensure access to court for citizens in international families with a close connection to the EU; To increase predictability, clarity, and reliability for citizens involved in cross-border cases ; To ensure that citizens do not have to provide additional administrative documents and/or follow additional proceedings to have judgments recognised or enforced. In addition, this modification has no impact on the reduction of delays associated with cross-border proceedings.

Table 12: Disadvantages for the abducting parent in subsequent custody hearings

Assessment criterion	**Sub-option 1:** ***Clear statement in a recital to the Regulation that the welfare of the child is the guideline in return proceedings***
Effectiveness	
To ensure the **protection of the economically weaker spouse.**	This legal modification would have a **positive impact** on the protection of the economically weaker spouse by ensuring that no disadvantage is caused to either parent in the determination of custody.[432]
To **safeguard the well-being** of the child and parent-child relationship	This legal modification would have a **positive impact** on safeguarding the well-being of the child and parent-child relationship. In some cases, there may be reservations regarding a return because it might put the abducting parent in danger, for instance if he or she could face criminal charges or if the other parent has been violent. Such reservations could be minimised and a return that is safe for both the parent and the child could be ensured.
To **reduce undue stress** associated with cross-border cases	This legal modification **can reduce undue stress** associated with return cases. The abducting parent can be assured that he/she will not experience any disadvantages because of his/her actions.
To **ensure the protection of fundamental rights**	This legal modification ensures the **protection of the fundamental rights of the child** by giving the child's welfare priority in return cases.
Stakeholders' input	Several stakeholders, including interviewees, national experts and respondents to the public consultation, raised this difficulty. However, only a few of these recommended specific policy action. The possibility for the court that delays the return to order protective measures aimed at ensuring the safety of the parent was specifically suggested by an academic responding to the public consultation. A national expert referred to a statement by the Slovakian Ministry of Justice, indicating that it is regrettable that the Regulation does not clearly state that the abducting parent should not be disadvantaged in subsequent custody proceedings simply on the basis that he or she abducted the child.

[432] It cannot be presumed that the abducting parent is also economically weaker than the other parent but this modification ensures that there are no disadvantages caused to either.

Assessment criterion		Sub-option 1: *Clear statement in a recital to the Regulation that the welfare of the child is the guideline in return proceedings*
Overall assessment of effectiveness		This modification is expected to generate **positive impacts** in relation to all relevant specific objectives, the reduction of stress and the protection of fundamental rights.
Economic impacts		
Compliance and awareness-raising costs[433]	*Central Authorities*	**Costs** There might be additional costs for CAs, if they play a role in enforcing the proposed measures. **Cost savings** None.

Source: Deloitte

Conclusions

The legal modification is preferred to the status quo. It would enhance the protection of the parent and the child during return cases and would flow well with the proposed option for amending Article 11(4).

[433] As concerns awareness raising and training, updates of existing information portals and training materials are necessary for every amendment of the Regulation. While these activities are mentioned in this table, the related costs are not considered significant in relation to the individual sub-options as specified in the methodological section.

5.4 Clarifications to be added to the Regulation

5.4.1 Horizontal issues

The evaluation found that a number of clarifications could be added to the Regulation in order to enhance its effectiveness in cross-border cases. In particular, interpretations of the Regulation through the case law of the European Court of Justice (ECJ) are sometimes unknown or misapplied by the courts of Member States. Consulted stakeholders have identified a number of issues which could be effectively avoided through additional clarifications in the Regulation. The table below (***Table 13***) outlines the expected impacts of the clarifications that were identified in relation to specific legal issues. Unlike the impact assessment for legal modifications, the assessment is made against bundled specific objectives in a qualitative way[434].

Based on our assessment, the impacts of the suggested measures are rather similar: by adding clarifications to existing provisions, the legal text becomes clearer in all cases and judicial interpretation becomes more consistent across the Member States. Therefore each assessed clarification invariably increases the **clarity, predictability and reliability for citizens involved in cross-border cases.**

With increased clarity comes **a reduction of delays and undue stress**, as there is less confusion over the interpretation of provisions. Subsequently, **costs for legal advice may be reduced**.

Likewise, in proceedings of parental responsibility, **the well-being of the child will be positively impacted** because of the reduction of delays and stress.

For these reasons we have not repeated that the clarification would have positive impacts in each case. The assessment includes a short rationale of these impacts and any *additional* impacts the clarifications may have in relation to other specific objectives or costs.

[434] This is consistent with the approach for non-prioritised legal issues for which we suggest clarifications of the relevant legal provision, where relevant on the basis of existing case law, as described in the annex on the methodological approach to the Impact Assessment

Table 13: Clarifications in the Regulation

1. Jurisdiction		
1.2 Parental responsibility		
Issue	**Clarification**	**Expected Impacts**
Unspecific rules on prorogation of jurisdiction (Article 12)	Modification of Article 12 in accordance with the latest ECJ judgments on Article 12: C-436/13, C-656/13	Case C-436/13 clarifies the uncertainties around the time for which the agreement is valid, by stating that an agreement on prorogation of jurisdiction under Article 12(3) "ceases following a final judgment in those proceedings". Case C-656/13 clarifies the uncertainties around the requirements for a prorogation agreement. The Court rules that jurisdiction under Article 12(3) can also be established in a Member State which is not that of the child's habitual residence "even where no other proceedings are pending before the court chosen". In addition, the Court clarified that Article 12(3)(b) of the Regulation "*must be interpreted as meaning that it cannot be considered that the jurisdiction of the court seised by one party of proceedings in matters of parental responsibility has been 'accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings' within the meaning of that provision where the defendant in those first proceedings subsequently brings a second set of proceedings before the same court and, on taking the first step required of him in the first proceedings, pleads the lack of jurisdiction of that court.*" By clarifying these points, the delays caused by the courts' difficulties in interpreting these provisions could be avoided. **The clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs.**
Ambiguity with regard to the scope of the rules on	Definition of provisional (including protective) measures which can be ordered under Article 20 in matrimonial matters.	By clarifying which provisional measures can be adopted under Article 20, the risk of diverging interpretations across Member States would be reduced, positively affecting legal clarity, undue stress, delays and the well-being of the child. Clarifying the provisional measures in parental responsibility cases also has a positive impact on fundamental rights of the child. **The**

provisional measures[435].	Clarification of provisional measures to be adopted under Article 20 in matters of parental responsibility in light of the ECJ case law[436].	**clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs.**
2. Recognition and enforcement		
2.1 Horizontal issues		
Issue	**Clarification**	**Expected Impacts**
Uncertainties relating to applications for non-recognition[437].	Clarification on which persons/authorities are entitled to apply for recognition/non-recognition of foreign judgments under the Regulation.	This clarification would increase legal certainty and reduce delays and stress for citizens while reducing the risk that persons or authorities considered "interested parties" are excluded from applying for recognition/non-recognition of foreign judgments under the Regulation. Furthermore, this clarification would have positive impacts on ensuring that citizens do not have to provide additional administrative documents and/or follow additional proceedings to have judgments, authentic instruments and agreements recognised or enforced. **The clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs.**
2.2 Parental responsibility		
Issue	**Clarification**	**Expected Impacts**
Difficulties relating to the enforcement of provisional measures.	Definition of the prerequisites for the enforceability of provisional measures on parental responsibility in other Member States under the Regulation in conformity	This clarification would increase legal certainty and reduce delays and stress that are due to the fact that specific guidelines regarding the conditions that must be met for provisional measures to be recognisable and enforceable in other Member States are currently missing in the Regulation.[439] Therefore, this clarification would also have **positive impacts** on ensuring that citizens do not have to provide **additional administrative documents** and/or follow additional proceedings to have judgments,

[435] Experts and stakeholders have identified several issues hampering the well-functioning of the provisions on provisional measures, including a lack of clarity on the definition and scope of provisional measures as well as the impossibility to apply provisional matters in matrimonial matters. Many interviewees and respondents to the European Commission's public consultation stated that the provisions of Article 20 are not sufficiently clear, including what actually qualifies as a provisional measure and under which precise criteria a court can use it. As a result of this lack of clarity, several aspects of Article 20 have given rise to different interpretations by the courts of the Member States (AT, CZ, DE, ES, FI, FR, HR, HU, SK).

[436] See cases: ECJ 02.04.2009 – C-523/07 – A; ECJ 23.12.2009 – C.-403/09 PPU Deticek./.Sgueglia; ECJ 15.07.2010 – C-256/09 – Purrucker/Vallés Pérez.

[437] For example, the national expert for Latvia reported cases where the Citizenship and Migration Office of Latvia – in order to proceed with the child's citizenship or passport matters – requested to obtain judgments from Latvian courts on the recognition of judgments by the courts of other Member States in relation to the child's custodial rights. That means that the Citizenship and Migration Office of Latvia considered itself as an "interested party". The Central Authority of Latvia intervened and clarified that "any interested party" is a party that took part in proceedings.

[439] It was noted by some interviewees and national experts that there is currently a lack of guidelines in this regard. Furthermore, the ECJ (Case C-256/09 – *Purrucker/Valléz Pérez*) ruled that the provisions laid down in Article 21 et seq. of the Regulation do not apply to provisional measures, relating to rights of custody, which have been ordered under Article 20 of the Regulation.

	with the ECJ decision C-256/09 (*Purrucker/Valléz*)[438] (by analogy to Article 2(a) subpar. (2), recast Brussels I Regulation).	authentic instruments and agreements recognised or enforced. The well-being of the child and child-parent relationship can be ensured because this clarification would guarantee a smoother adoption of provisional measures under Article 20, so as to respond more quickly to the situation of urgency which endangers the well-being of the child. **The clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs.**
3. The cooperation between and support by Central Authorities		
Issue	**Clarification**	**Expected Impacts**
The scope of responsibilities is not defined clearly enough, leading to different interpretations and misuse.	More detailed definition of the responsibilities of Central Authorities following the example of the 1996 Hague Convention on the protection of children.	If Central Authority duties are properly defined then we can expect some reduction in delays and stress for parties involved. Overall, this clarification would increase clarity, reliability and predictability and ensure protection of the well-being of the child and the child-parent relationship. This can be achieved at relatively low costs.[440] **The clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs.**
5. Interaction with other instruments		
5.1 Horizontal issues		
Issue	**Clarification**	**Expected Impacts**
Difficulties relating to the delineation of scope between the Brussels IIa Regulation and Regulation (EU) No 606/2013 on the recognition of protective measures in civil matters.[441]	As Article 20 has priority over protection measures adopted under the Regulation No 606/2013 on protection measures in civil matters, some clarification should be given with regard to the type of measures that could be ordered provisionally under Article 20 in matrimonial matters.	This clarification would increase legal certainty and predictability in cross-border cases by including guidelines as to what constitutes a "provisional measure" in matrimonial cases. Indeed, many stakeholders argued that provisional measures could not be applicable in matrimonial cases. This clarification would also have a positive impact on the protection of fundamental rights. **The clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs.**
5.2 Parental responsibility		
Issue	**Clarification**	**Expected Impacts**
Uncertainty relating to the 1961 Hague Convention on the	Clarification in Article 60 that the Regulation does not interfere with the international obligations of Member States	This clarification would have positive impacts on predictability, clarity and reliability for citizens by reducing the uncertainties that could be caused by the misinterpretations of the interplay between the obligations Member States incur under the Regulation and under other international conventions (within their scope of application). This would also reduce delays and

[438] The clarification of the specific guidelines regarding the conditions that must be met for provisional measures to be recognisable and enforceable in other Member States could take inspiration from the decision BGH 09.02.2011, FamRZ 2011, 542 = unalex DE-2038 of the German Federal Court that, on the basis of the ECJ case law, has defined these specific guidelines which are still missing in the Regulation.

[440] See assessment of sub-option 1 for high priority issue '*Difficulties relating to the obligation to collect and exchange information on the situation of the child*'

[441] The provisions on provisional measures have been considered as insufficiently clear by numerous stakeholders and experts, notably with regard to their scope. Their interpretation has been left to the ECJ and courts of the Member States, leading to a risk of diverging interpretations and implementations

protection of minors.	incurred versus third States.	associated stress - positively affecting all the relevant specific objectives. **The clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs.**
Inconsistencies with regard to the 1996 Hague Convention. In cases in which the child moves during a case, different rules will be applied as regards the effects on jurisdiction, depending on whether the child moves to a state that applies the Brussels IIa Regulation or not.	Clarification of the rule in Article 61(a) with regard to the relevant time in which the child should have its habitual residence in a Member State. In order to avoid a conflict with the obligations of the Member States incurred under the Hague Convention, the relevant time should be the moment when the decision is made by the court.	This clarification would have positive impacts on ensuring access to court, as well as enhancing predictability, clarity and reliability for citizens by reducing the uncertainties that are currently caused by the interpretation of Article 61(a). Consequently, delays and stress would be reduced, positively affecting the well-being of the child and the parent-child relationship. **The clarification is preferred to the status quo as the effectiveness of the Regulation can be improved with minimal costs.**

Conclusions

The assessment has found that all additions containing clarifications are preferred to the Status Quo. It appears that all suggested clarifications bring about positive impacts on the relevant specific objectives while reducing delays and undue stress caused to citizens. Furthermore there are little or no costs involved in adding clarifications. For this reason it is suggested that all clarifications be included in a future amendment of the Regulation.

Annex 6. Quantitative analysis

This section contains the quantitative analysis of the available data concerning the number of persons involved in cases covered by the Brussels IIa Regulation, the estimates of the number of persons affected by the prioritised legal issues under the Regulation, as well as costs for citizens associated with hypothetical cases in which these prioritised issues occur.

6.1 Introduction

As part of the findings of the evaluation of the Brussels IIa Regulation, in total 51 legal issues, stemming from the application of the provisions of the Regulation, have been identified to potentially cause problems for citizens.[442]

The purpose of this section is to answer the following questions:

- What are the issues relating to the application of the Regulation that cause problems for citizens?
- How many citizens are affected by the problems?
- What is the scale of the problems, e.g. what are the costs and delays?[443]

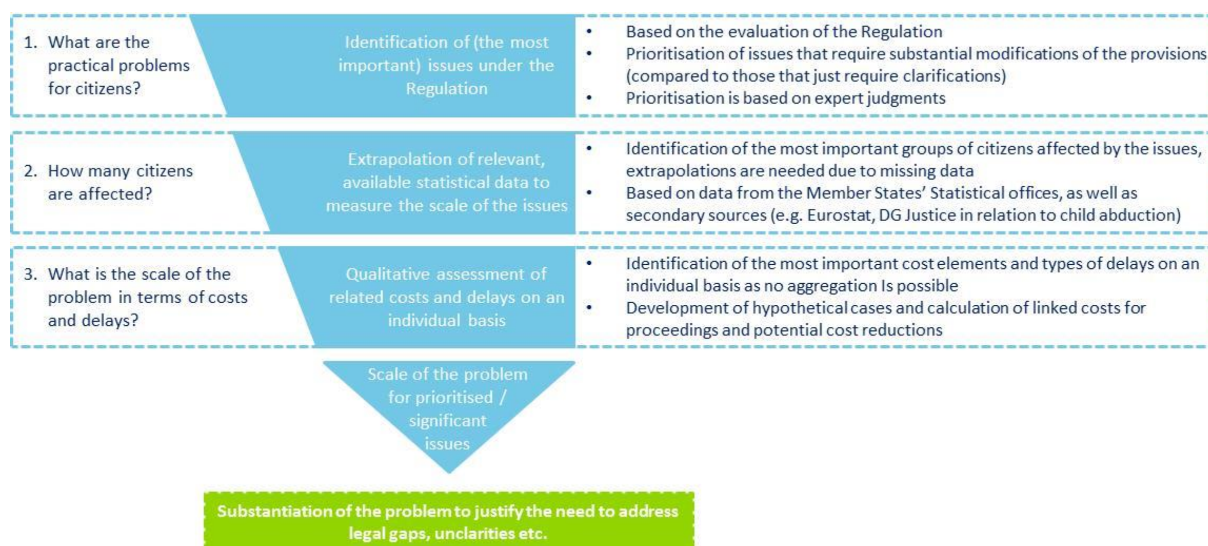
The above listed aspects can thus be considered as the **key indicators** concerning the types of problems that result for citizens in relation to the implementation of the Regulation.

The logic of our methodological approach is visualised in the figure below.

[442] These issues were identified at the stage of the draft interim report and are subject to further validation and elaboration as part of the ongoing research activities.

[443] In addition, the duration of stress was identified as a quantitative indicator by the European Commission. In view of the fact that stress is heavily linked to the individual circumstances of the cases and people affected, it is advised to not consider this indicator in quantitative terms.

Figure 25: Logic of the methodological approach



Source: Deloitte

In line with this approach, **section 6.2 presents a list of identified legal issues** pertaining to the implementation of the Regulation, as well as the prioritisation of issues upon which focus was placed.

Section 6.3 outlines the methodological approach applied in order to estimate the number of citizens affected by the problems that stem from the key legal issues identified. This also comprises an assessment of data needs, data availability and limitations, as well as concrete methodological steps to be taken.

Sections 6.4 and 6.5 present the relevant data on the **number of persons involved in cases covered by the Brussels IIa Regulation** and the **number of persons affected by each prioritised issue under the Regulation.**

Finally, **section 6.6 presents our approach to assessing the most important costs elements and eventual procedural delays** for the key issues. In addition, relevant data is presented as well.

6.2 What are the legal issues under the Regulation?

This section discusses the availability of data concerning the legal issues that result in problems for citizens. It also identifies our approach to prioritise key legal issues upon which focus was placed for the purpose of the ongoing data collection activities and assessments.

6.2.1 The availability of data concerning the legal issues and the need for prioritisation

As part of the evaluation of the Brussels IIa Regulation, **51 legal issues that occur in relation to the implementation of the Regulation** have been identified.

Various sources have been used to validate and substantiate these issues and the resulting problems for citizens, including interviews with legal professionals and other stakeholders, case law analysis by

the network of legal experts, desk research, the responses to the public consultation launched by the European Commission and the outcomes of the expert panel that was held on 2 July 2014.

Comprehensive data to assess each of the legal issues and the resulting effects/problems for citizens is not readily available. In view of this challenge and the high number of issues identified, it has been agreed with the European Commission that **focus should be placed on a more limited list of prioritised legal issues, i.e. those issues that are expected to result in the most significant problems for individuals**. The purpose of this prioritisation is to focus the efforts in relation to the quantitative estimates.

Indeed, whilst all 51 identified legal issues may cause problems in individual cases, the interviewees consulted as part of the present assignment have indicated that **not all issues impose similar barriers or problems for citizens** and that **some of the issues are more important (to address) than others** from a practical perspective. It was, however, not possible during the interviews to conclude on a clear hierarchy of relative importance of the specific issues.

Several different indicators and information sources may be used to prioritise the issues identified, as further described below.

One relevant indicator is, for example, the **number of persons that is affected by each of the legal issues**. This information is not readily available; such information is not systematically recorded in the Member States. One approach to calculate this number would be to estimate the number of people based on the number of judgements and decisions that are taken with reference to each of the legal issues. However, a **comprehensive set of data covering all judgments and decisions under the Regulation in the Member States and statistics concerning the number of individuals involved in these cases is not available**. No exhaustive statistics on the number of cases / judgements / decisions relating to a specific practical or legal issue in the application of the Brussels IIa Regulation are collected throughout the Member States. By contrast, the data is very scarce and fragmented.[444] In view of these limitations, we have identified an alternative approach to identify the number of persons affected, which is described in section 8.1.3.

Another indicator is the **relative importance of the issues for citizens in terms of the costs and delays caused**. Again, the available evidence is typically <u>not</u> of comprehensive, comparable and quantitative nature. Generally, the available information is non-representative or qualitative based on individual, fragmented experience.

[444] The Annex discusses in more detail the availability and use of national case law from different databases to substantiate and confirm the relevance of the issues identified, as well as the use of data on judgments and decisions to prioritise the identified issues according to their relevance in judicial and administrative practice (see section **Error! Reference source not found.**).

In order to mitigate this challenge, it has been agreed with the European Commission to focus the research activities and assessments on those issues that are expected to require **substantial modifications of specific Articles** of the Regulation (and are thus expected to have **significant impacts on citizens**, e.g. in terms of costs and delays). Issues that would only require legal clarifications e.g. based on ECJ case law are thus not prioritised. Moreover, issues that impact on the **fundamental rights of citizens** (e.g. access to court, child protection) are considered to be of priority, as well as issues that affect a **large number of citizens**. [445] The study team has **prioritised the identified issues primarily based on available qualitative information** (e.g. retrieved from the interviews, the expert panel, and the national reports) concerning these aspects, as well as relevant quantitative information, in so far as such is available[446].

To sum up, the criteria for selecting the prioritised issues are as follows:

- **Substantial modifications:** Are substantial modifications of the Regulation needed to address the specific legal issue (opposed to issues for which legal clarifications of the relevant Articles would be sufficient, e.g. based on ECJ case law)?
- **Fundamental rights**: Does the specific legal issue impact on fundamental rights of citizens, e.g. access to court, child protection?
- **Number of citizens affected**: Do the specific legal issues affect a large number of citizens and/or a large number of cases?

For each of these criteria, each of the identified issues has been rated on a three steps scale: low, medium and high importance of the issue to be addressed. The full three steps scale was used for the criteria concerning the extent of the modifications and number of citizens affected. For fundamental rights, only “high” or “low” was used, as an issue either relates to a fundamental right or not. An overall rating was also devised.

While this overall rating formed the basis for the prioritisation, an additional check was carried out of the remaining non-prioritised issues in order to ensure that no key legal – or other – issues are missed from the prioritised list[447]. For example, an additional aspect that is influencing the need to address a specific (legal) issue is the **gravity / burden on citizens of a specific issue compared to others** (e.g. the enforcement of judgments is more important than automatic updating of civil status documents); this was also considered in the prioritisation exercise. This assessment was primarily

[445] An approach to estimate the number of citizens affected by the most important problems and the magnitude of their practical problems is outlined in sections 6.3 and 6.6.

[446] This prioritisation and focus of the assessment is a means to at least try to assess the scale of the most important issues pertaining the implementation of the Regulation.

[447] This is also imperative in view of the impact assessment that will be carried out; the solution (in this case a modification of the Regulation) should not be pre-empted.

based on qualitative information. Cases for which the above questions (or part of it) cannot be answered in positive fashion are not considered of high-priority for this study.

6.2.2 List of prioritised issues

A list of legal issues that are prioritised based on the findings from the evaluation is provided in the table below. All of these issues have been given the rating "high-priority" in the initial assessment of the priority of the issues identified.

Table 14: Identified high-priority legal issues under the Regulation

#	Title of issue
Matrimonial matters: Number of spouses affected	
1	Potential for 'rush to court'/'forum shopping' on the basis of the alternative grounds of jurisdiction
2	The current jurisdiction rules do not sufficiently promote a common agreement between spouses
Matters of parental responsibility: Number of citizens in international families affected	
3	Different interpretations of the term 'habitual residence'
4	Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments)
5	Different practices related to the representation of the child in court
6	Different interpretations of the term 'recognition' leading to differing practices as to which judgments require a declaration of enforceability
7	Exequatur proceedings are still in place for some types of judgments
8	Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement
9	Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplications of the Regulation and reservations against the content of decisions
10	Difficulties relating to the time limit for return (i.e. not clear and not effective)
11	Questions on the practical application of Article 11(4) and ambiguity as regards the concept of 'adequate arrangements' under that provision
12	The system stipulated in Article 11(6) to (8) may endanger the well-being of the child if a child is returned in spite of a risk that has been established in the return proceedings and possibly after a long time has passed
13	Unspecific rules relating to the obligation of Central Authorities to collect and exchange information on the situation of the child causing practical problems
14	Not sufficiently specific provisions on the procedure for the placement of a child in another Member State
15	Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children

#	Title of issue
Horizontal issues: Number of citizens in international families affected	
16	Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court
17	The use of mediation is currently not promoted to a sufficient extent
18	**Practitioners** are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions of the Brussels IIa Regulation
19	**Citizens** are not sufficiently aware of the content of the Regulation and its implication for international proceedings on matrimonial matters, matters of parental responsibility or child abduction

Source: Deloitte

6.3 Methodological approach to estimate the number of citizens affected by the key legal issues stemming from the Brussels IIa Regulation

As highlighted above, the number of citizens affected by the most important issues under the Regulation is not available. Therefore, estimates need to be made based on available statistical data. This section presents the methodological approach that was used to estimate the number of citizens affected by the most important issues.

The **approach is based on two steps**:

- First, the necessary statistical data on international marriages and divorces was estimated for those Member States for which data was not made available by the statistical offices (UK and Ireland). The estimate was based on the share of foreign citizens in these Member States the respective overall number of marriages and divorces; and
- As a second step, the proportion of citizens of the total population that are expected to be affected by the most important issues under the Regulation is estimated based on an expert judgment by the study team. Efforts were made to confirm the relevance of the estimates with a limited number of external stakeholders.

By linking the expert judgments and the extrapolations methodologically it was possible to break down the available information on the overall number of citizens affected by the prioritised issues.

The following sub-sections explain the approach in more detail.

Step 1: Extrapolation of the overall number of citizens that are involved in cases falling under the Regulation

Data on international marriages, divorces, and legal separations was obtained from the statistical offices of 25 Member States (except for the United Kingdom and Ireland). Thus, the data for these two Member State has to be estimated to establish the EU27 number.

The extrapolation for specific Member States depends on the three factors: (1) The number of citizens with a foreign citizenship in the Member State; (2) The overall number of citizens in the Member States; and (3) The total number of marriages, divorces, and legal separations in the Member State. All three elements are necessary to use the formula to extrapolate to the EU27 level based on the formula below.

Formula to extrapolate the available data on international marriages, divorces, legal separations, and marriages to Member States for which no data was supplied in order to establish the EU27 number:

*[Number of international divorces in particular Member States for which no data was available] = [Number of citizens with foreign citizenship in a Member State] / [Overall number of citizens in a Member State] * [Overall number of marriages, divorces, and legal separations in a Member State]*

Numeric example to illustrate the above formula: Number of international divorces in EU27 in 2012

*[Number of international divorces in particular Member States for which no data was available] = 467,858 / 3,592,798 * 19,133 = 2,492*

The EU27 number is the sum of the individual numbers of all Member States.

The same formula was applied for the number of divorces and legal separations.

For the extrapolation of the number of EU citizens in relation to matrimonial matters, the population aged 15 years and older has been taken into account. The reason for this is that Eurostat only provides demographical statistics either by particular years of age (15, 16, 17, 18 years old etc.) or by broad age group (number of citizens less than 15 years old, between 15 and 64 years old, over 64 years old). The data taken into account is the sum of the number of citizens in the EU27 aged between 15 and 64 and over 64 years.

General remark on the use of extrapolated statistical data.

Statistical information that has been extrapolated to fill data gaps needs to be treated and used with great caution as the methodologies used often times depends on assumptions that impact the outcome of the extrapolations.

Therefore, extrapolated data cannot necessarily be considered as portraying the real picture of a certain issue, but rather needs to be viewed as the 'best data available'. This is particularly valid in the context of this assignment as data is very scarce and mostly qualitative.

As a particularly vulnerable group, the number of children affected by the Regulation was also estimated based. The calculation is based on the following types of statistics:

- Number of children affected by international divorces and legal separations;
- Number of children born to international parents outside marriage;

In addition, the number of abducted children is also a relevant variable that, however, was not included in the calculation in order to avoid double counting.

For the calculation of the total number of children affected, the following formula has been used:

Formula to estimate the number of children affected by the Regulation:

*[Number of children affected by the Regulation] = ([Number of international divorces and legal separations] * [Fertility rate]) + ([Total number of live births outside marriage] * [% of international couples] * (1 – [Assumed share of children born outside marriage that will be raised in marriages, legal partnerships, and de facto unions]) * [Assumed share for children born outside marriage in which problems occur])*

Numeric example to illustrate the above formula: Number of children affected by the Regulation in 2012

*[Number of children affected by the Regulation] = (125,520 + 838) * 2.01 + 1,917,012 * 38.1% **

*16.3% * (1 – 30%) * 35% = 332,692*

International families are the core of **matters of parental responsibility**. Data on the number of international families is, however, not readily available.

Therefore, the following approach and formula was used to estimate the number of citizens in international families affected by the Regulation, as well as the number of international families as such.

The statistical findings presented concerning matrimonial matters and the number of children affected, as well as parental matters outside of marriage can, however, be combined to estimate the number of citizens that live in **international families** and are affected by the Regulation, which is the core of matters of parental responsibility. This is calculated based on the number of:

- Spouses in international divorces and their children;
- Spouses in international legal separations and their children; and
- Parents who have children outside marriage and children born outside marriage.

The number of abducted children has not been introduced in this calculation, as this group of citizens is already covered in the above family constellations and would thus be subject to double-counting.

The following formula has been used to calculate the **number of citizens in international families**:

Formula to calculate the number of citizens in international families affected by the Regulation:

*([Number of spouses in international divorces] + [Number of spouses in international legal separations] + [Number of children of spouses in international divorces] + [Number of children affected by international legal separations] + [Number of children born outside marriage] + ([Number of children born outside marriage * 2 / [Fertility rate]) * [Estimated proportion in which a specific prioritised issue occurs]*

Numerical example for the year 2008 (thousands of citizens):

*(261.0 + 2.0 + 167.0 + 1.3 + 20.1 + 20.1 * 2 / 2.01) * 10% = 47.3*

From a theoretical point of view, the **number of households** should have a strong correlation with the number of (international) families and can thus be considered as a proxy for the number of international families.[448]

[448] It has to be noted, however, that couples that file for divorce or legal separation often are likely to account for two households. Therefore, this proxy can be expected to be subject to underreporting.

In order to calculate the number of international households, data concerning the average household size is necessary.[449] According to Eurostat[450], the mean household size was 2.4 persons (mean over households) to 3.1 persons (mean over individuals) in 2010.[451]

Step 2: Estimate of the number of citizens affected by the most important issues

For each of the most important issues, a proportion of cases, expressed as a range (e.g. 10% to 20%)[452], in which the issue is expected to occur in judicial practice was estimated. This estimate is based on an 'expert judgment' by the study team, relying on knowledge gathered from interviews, the expert panel, and the legal expert that forms part of the core team. As noted above, attempts to validate the estimates were made with a limited number of external stakeholders.

In order to estimate the number of citizens affected by the most important issues, first, a mapping of the groups of citizens that are involved in cases to which each of the problematic provisions (legal issues) apply was (e.g. provision XY applies to international divorcing couples only, and not to international families / children).

In general, the following groups of citizens were identified to be affected by different issues:

- For issues in the area of matrimonial matters: Only the spouses in international divorce and legal separation proceedings (at least strictly speaking);
- For issues in matters of parental responsibility and in relation to horizontal issues: Citizens in international families, i.e. spouses and their children, as well as international children born outside marriage and their parents; and
- For issues related to child abduction: Abducted children and their parents.

As a second step, the number of citizens that form part of the group is identified based on the population estimates made.

The second step involved making an expert assessment of the proportion of cases (expressed as a range) that are affected by problems stemming from the relevant provision / legal issue, as described above.

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[449] The number of citizens in international families divided through number of citizens per household equals the number of international households.

[450] See household composition statistics 2010: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-10-024/EN/KS-RA-10-024-EN.PDF

[451] The number of international families can thus be estimated by dividing the number of citizens in international families by the average number of citizens per household.

[452] Generally such estimates are always provided in the form of ranges in order to estimate a corridor in which the actual real value can be found, rather than to estimate concrete figures.

Finally, the proportion of expected problematic cases was multiplied with the population figures in order to identify the number of citizens that are expected to be affected by the issue.

In relation to matrimonial matters, the following formulas were applied:

Formula to estimate the number of citizens affected by a specific prioritised issue in the area of matrimonial matters:

[Number of citizens affected by a prioritised issue in matrimonial matters] = (([Number of international divorces] + [Number of international legal separations])[453] ** [Estimated proportion in which a specific prioritised issue occurs])*[454] ** 2*[455]

Numeric example to illustrate the above formula: Number of citizens affected by the most important issues in the area of matrimonial matters in 2012[456]

*[Number of citizens affected by a prioritised issue in matrimonial matters] = (125,520 + 838) * 15% * 2 = 37,907*

The same formula was applied for each specific priority issue.

In relation to issues in matters of parental responsibility and horizontal issue, the number of citizens in international families was taken as a base number for the calculation.

6.4 The number of persons involved in cases covered by the Brussels IIa Regulation

6.4.1 Overview of sources used

Data on the number of citizens affected by the Regulation as such is not readily available. Therefore, general population statistics were used to estimate the number of citizens affected.[457] The key data sources are identified in Table 15.

Table 15: Types of data used to estimate the number of affected citizens

Type of issue	Type of statistics	Key data sources
Matrimonial	• Number of international divorces	Deloitte survey with the national statistics

[453] This data is not readily available but extrapolated based on the approach outlined above, as well as based on the formulas provided in this Annex.

[454] Generally, this proportion would be applied as a range, e.g. from 10% to 20%. For the illustrative purpose, however, no minimum and maximum values need to be calculated.

[455] The factor 2 is used in this formula because a divorce / marriage / legal separation affects (at least) two citizens.

[456] The figures are based on the preliminary results of extrapolations and refer to the situation in the year 2012.

[457] A detailed presentation of the methodology used is provided in the methodological Annex.

Type of issue	Type of statistics	Key data sources
matters	• Number of international legal separations	offices[458]
Matters of parental responsibility, incl. child abduction	• Number of spouses in international divorces and legal separations	Deloitte survey with the national statistics offices
	• Number of children affected by international divorces	Estimated based on the data from national statistics offices on international divorces and international legal separations and Eurostat data on the fertility rate per Member State[459]
	• Number of children affected by international legal separations	
	• Number of children born to international couples outside marriage	Estimated based on Eurostat data on the fertility rate per Member State and live births outside marriage per Member State
	• Number of abducted children	DG Justice study on "Missing children"[460]; Missing data was estimated based on: • Number of applications of the Hague Convention per year and Member State • Average share of applications under the Hague Convention of total cases

Source: Deloitte

In addition to the above data sets, the number of foreign citizens in particular Member States[461] was taken into account to carry out the relevant calculations, as well as the overall numbers of marriages and divorces.[462] This data was used to estimate missing data for the two Member States (Ireland and United Kingdom) for which the requested data concerning the number of international divorces and international legal separations were not made available.

Why household composition statistics were not used to estimate the number of children affected:

The use of Eurostat's household composition statistics for the purpose of estimating the number of affected citizens was carefully reflected upon. The idea was to mitigate methodological and theoretical challenges that arise when using the total fertility rate as a basis to estimate the number of children affected.

Overall, the study team has come to the conclusion that Eurostat's household composition statistics cannot be

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[458] As not all Member States provided the requested statistical information or provided it only partially, the missing pieces of data were estimated based on the approach outlined in the methodological Annex in order to estimate the number of international marriages, divorces, and legal separations at EU27 level, as well as the number of spouses and children (at risk to be) affected by the Regulation.

[459] The number of children affected has been estimated at Member State level. The EU27 number is the sum of the individual number per Member State.

[460] http://ec.europa.eu/justice/fundamental-rights/files/missing_children_study_2013_en.pdf

[461] Broadly grouped in categories of citizens aged under 15, 15-64 years old and older than 64 years.

[462] This type of data was, however, not added in the above table as it is only taken into account as a means to estimate the necessary core data presented above.

used to estimate the number of children affected but to estimate the number of international families/households affected by the Regulation (i.e. by simply dividing the total number of affected citizens in international families by the average household size in the EU Member States).

This can be explained as follows:

The assumption for the use of household composition statistics would have been that at some time, each international couple would have fallen into one of the following categories of households: 1 person with children, 2 adults without children, 2 adults with 1, 2, 3+ children. Ideally, the average number of children in such households would be a plausible estimate of the average number of children per international couple.

However, Eurostat does not (publicly[463]) provide the average number of children per household. Eurostat only provides relative shares in this regard, e.g. the share of children living in one of the different types of categories of households. For instance, Eurostat has published the percentage of households where children are present, differentiated by the number of children (1, 2, 3, 4 etc.)[464]

Based on this information, however, a conclusion on the absolute/average number of (international) children living in EU households is, however, not possible as the provided data is relative and not absolute.

Furthermore, the number of international households in the EU-27[465] is not available at Eurostat and thus needs to be estimated. This estimate is based on the number of spouses and the number of children – which is estimated based on women's total fertility rate. Hence, the number of households is more of a result of the calculation than a means to calculate the number of children affected. To make it explicit: the estimate of the number of international households is based on the estimated number of children which is the reason why the estimate of the number of children cannot be based on the number of households. This would be tautological.

6.4.2 Matrimonial matters

Cases in which spouses in 'international marriages'[466] wish to break their marriage through a divorce or legal separation falling under the Brussels IIa Regulation.[467]

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[463] The number of children per household is likely to be only available at micro-data level. Eurostat, however, does grant access to micro-data for scientific purposes only. To apply for access to Eurostat's micro-data, an organisation must first be recognised by Eurostat as a research entity, i.e. a university, research institution or research department in public administration, statistical institute etc. Hence, the respective data has not been gathered from Eurostat.

[464] See: Eurostat (2010): Household structure in the EU. http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-10-024/EN/KS-RA-10-024-EN.PDF

[465] For the purpose of this study, EU-27 means the EU-28 except for Denmark.

[466] For a definition of an international marriage, see section 4.

[467] Although marriage annulment is in the scope of the Regulation, it was not possible to gather any statistical data on marriage annulment as part of this study. The children of international couples are of course also affected by matrimonial matters, but only in indirect fashion and are thus not the primary group to be considered in this section.

Table 16 presents the total **number of international divorces** and the **number of spouses in international divorces** in the EU-27, as well as the proportion of international divorces of all divorces in the EU-27.

Table 16: The number of cases and citizens involved in international divorces (EU27, 2008-2012, in thousands)

Year	2008	2009	2010	2011	2012
Number of international divorces	101.5	96.6	98.7	100.2	98.9
Number of spouses in international divorces	203.0	193.2	197.4	200.3	196.7

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States[468]

Every year from 2008 to 2012, approximately 200,000 citizens in international marriages divorced, corresponding to around 10% (or one in ten divorces) of the total number of divorces.

From 2008 to 2012, the overall number of international divorces remained stable with slight fluctuations between the years.

The specific numbers per Member State are provided in section 6.5.3.

Legal separation is only possible in 12 Member States.[469] This is at least part of the explanation why the number of international legal separations is lower than the number of international divorces. This can be seen from Table 17, which presents the data for the 12 Member States concerned.[470].

Table 17: The number of citizens affected by international legal separations (12 Member States, 2008-2012, in thousands)

Year	2008	2009	2010	2011	2012
Number of international legal separations	1.7	2.0	1.8	1.9	2.5
Number of spouses in international legal separations	3.3	4.0	3.7	3.8	5.1

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States[471]

[468] Data concerning the number of international divorces was made available by statistical offices of 25 Member States (except Ireland and the United Kingdom). For the other two Member States, missing data was estimated based on the number of foreign citizens in each of the Member States and the overall numbers of marriages and divorces.

[469] Belgium, France, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Spain, United Kingdom.

[470] The figures are based on the data received from the National Statistics Offices, as well as estimates for Member States that have not provided the relevant data. Due to a lack of data, it has been assumed for the purpose of the calculation that the proportion of international legal separations of all legal separations in the 12 Member States in which this instrument is possible is the same as for international divorces.

On average, from 2008 to 2012 approximately 4,000 citizens in international marriages legally separated each year in the 12 Member States where this is possible.

Overall, on an annual basis from 2008 to 2012, **an average number of 202,000 persons in the EU-27 were involved in an international divorce or legal separation**.

The specific numbers per Member State are provided further below in section 6.5.3.

6.4.3 Matters of parental responsibility, incl. child abductions

While in the area of matrimonial matters, the nucleus of the statistical analysis is the international married couple (consisting of two adults) **international *families*** are at the core of matters in parental responsibility cases. Hence, while divorce and legal separation procedures under the Regulation primarily affect the spouses (at least strictly speaking), proceedings concerning matters of parental responsibility relate to both children and their parents, including married and unmarried couples that have children, as well as citizens that have a child together but are not in a relationship with each other.[472] Cases of child abductions also fall under this heading.

The number of children affected by cases covered by the Regulation and the number of parents of affected children born outside marriage

Table 18 presents estimates of the number of children affected by international divorces and legal separations[473], as well as the number of children born outside marriage who are affected[474]. The number of abducted children is also estimated.[475]

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[471] Data concerning international legal separations was only made available by statistical offices in Italy, Poland, Portugal, and Spain. For the other eight Member States in which legal separation is possible, data has been estimated.

[472] The relevant estimate for the latter group of citizens is included in the overall number of births outside marriage.

[473] Although the use of Eurostat's household composition statistics has been carefully reflected upon for these estimates, this type of data cannot be used for the estimate of the number of affected citizens. Due to this lack of data, the lower range estimate is based on a simple reduction of the upper estimate by one third. Due to a lack of relevant data, no better estimate can be provided to estimate a range. Such ranges are, however, necessary as the number of children affected is not available and it cannot simply be assumed that the estimate of one particular figure corresponds to the *actual* number of children affected. Hence, ranges are a means to reduce uncertainty by introducing a correction factor.

[474] For the purpose of this study, only the number of children born outside marriage in relation to problems that would fall under the Regulation is considered. This number of children has been calculated based on an assumed share of children born outside marriage that will be raised in marriages, legal partnerships, and de facto unions, as well as an assumed share

Formula to estimate the number of children affected by the Regulation:

[Number of children affected by the Regulation in EU27] = $\sum^{\text{(over all 27 Member States)}}$*([Number of international divorces and legal separations in a particular Member State] * [Fertility rate in a particular Member State]) + ([Total number of live births outside marriage in a particular Member State] * [% of international couples in a particular Member State] * (1 – [Assumed share of children born outside marriage that will be raised in marriages, legal partnerships, and de facto unions]) * [Assumed share for children born outside marriage in which problems occur])*[476]

Numeric example to illustrate the above formula: Number of children affected by the Regulation in 2012 in Germany:

*[Number of children affected by the Regulation in Germany] = (28,164 + 0) * 1.38 + 232,383 *13.6% * (1 – 30%) * 35% = 48,814*

Such estimates were carried out for each Member State and totalled in order to receive the EU-27 figures displayed in the table below.

Table 18: The number of children affected (EU-27, 2008-2012, in thousands)

Year	Number of children affected by international:								Total number of children affected	
	Divorces		Legal separations		Births outside marriage		Child abduction			
	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
2008	108.9	162.5	1.8	2.6	38.5	74.9	1.5	1.8	150.7	241.9
2009	103.0	153.7	2.1	3.1	39.5	80.1	1.5	1.8	146.0	238.8
2010	106.5	158.9	1.9	2.9	40.9	79.5	1.4	1.8	150.7	243.0
2011	105.5	157.4	2.0	2.9	42.0	80.4	1.5	1.9	151.0	242.6
2012	104.4	155.9	2.6	3.9	42.5	82.0	1.5	1.9	151.1	243.6

Source: Estimated by Deloitte based on Eurostat data and the DG Justice Study on Missing Children[477]

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for children born outside marriage in which problems occur, and a sensitivity factor to take account of eventual over- or underreporting. A more detailed explanation can be found in the methodological Annex of this report.

[475] In order to avoid double counting, the number of abducted children has been excluded from the total number of children affected.

[476] The "share of children born outside marriage that will be raised in marriages, legal partnerships, and de facto unions" and the "share for children born outside marriage in which problems occur" are based on expert judgment by the study team as specific statistical evidence is not available. These estimates are only based on assumptions.

[477] http://ec.europa.eu/justice/fundamental-rights/files/missing_children_study_2013_en.pdf

Based on the above estimates, on an annual basis between 150,000 and 245,000 children are affected by international matters of parental responsibility.

The vast majority of these children are affected by international divorces and legal separations (between 66% and 73% depending on the year and estimate), followed by parental responsibility matters concerning children born outside marriage (between 26% and 34% depending on the year and estimate). Hence, together these cases account for 99% of all cases involving children. In turn, this means that around 1% of the children are affected by abduction.

While the number of children affected by international divorces decreased slightly from 2008 to 2012 (-4.1%), the number of children born outside marriage that are affected by parental responsibility proceedings under the Regulation increased by 10.8%.

Specifically concerning children born outside marriage, the table below presents the corresponding number of parents affected by the Regulation.

Table 19: The number of parents of affected children born outside marriage (EU27, 2008-2012, in thousands)

2008		2009		2010		2011		2012	
Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
46.6	88.8	48.0	96.1	49.3	94.7	51.8	97.3	52.4	99.0

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States[478]

Formula to estimate the number of parents of children affected by the Regulation:

[Number of parents of children born outside marriage affected by the Regulation in EU27] = $\sum^{\text{(over all 27 Member States)}}$ *([Number of children born outside marriage]/[Fertility per Member State and year] * 2)*

Numeric example to illustrate the above formula: Number of children affected by the Regulation in 2012 in Germany:

*[Number of children affected by the Regulation in Germany] = 9,948/1.38 * 2 = 14,417*

Such estimates were carried out for each Member State and totalled in order to receive the EU27 figures displayed in the table below.

The specific numbers per Member State are provided in further below in this annex.

[478] Data concerning international legal separations was only made available by statistical offices in Italy, Poland, Portugal, and Spain. For the other eight Member States in which legal separation is possible, data has been estimated.

The number of international families affected by cases covered by the Regulation

Data on the **number of international families affected by the Regulation** is not readily available.

However, the statistical findings presented concerning matrimonial matters and the number of children affected, as well as parental matters outside of marriage, can be combined to estimate the number of citizens that live in **international families** and are affected by the Regulation. This is calculated based on the number of:

- Spouses in international divorces and their children;
- Spouses in international legal separations and their children; and
- Children born outside marriage and their parents.

The number of abducted children has not been introduced in this calculation, as this group of citizens is already covered in the above family constellations and would thus be subject to double-counting.[479]

From a theoretical point of view, the **number of households** should have a strong correlation with the number of (international) families and can thus be considered as a proxy for the number of international families.[480] In order to calculate the number of international households, data concerning the average household size per Member State is necessary.[481] The number of international families was estimated at Member State level by dividing the number of citizens in international families affected by the Regulation by the average household size per Member State from 2008 to 2012. The relevant statistical data is provided below.

The following table presents estimates of the number of individuals involved in international families, as well as estimates of the number of international families.[482]

[479] The formula to calculate the number of citizens in international families affected by the Regulation is provided in the methodological Annex.

[480] It has to be noted, however, that couples that file for divorce or legal separation often are likely to account for two households. Therefore, this proxy can be expected to be subject to underreporting.

[481] The number of citizens in international families divided by the number of citizens per household equals the number of international households.

[482] As indicated above, the number of abducted children is excluded from these figures in order to avoid double counting.

Table 20: The number of citizens in international families affected by the Regulation (EU27, 2008–2012, in thousands)

Year	Citizens in international families affected by the Regulation		Number of international households/families affected by the Regulation[483]	
	Minimum	Maximum	Minimum	Maximum
2008	402.1	535.2	174.0	229.9
2009	389.8	530.2	173.1	233.6
2010	402.5	537.0	179.3	237.9
2011	405.4	542.1	180.5	240.1
2012	403.8	542.5	180.1	240.8

Source: Estimates by Deloitte based on Eurostat

Based on these estimates, on an annual average basis, between **400,000 and 540,000 citizens in international families** were affected by the Regulation from 2008 to 2012, either through a divorce, a legal separation, proceedings in matters of parental responsibility, or child abductions.

This corresponds to an annual estimated number of approximately **between 175,000 and 240,000 international families**.

The specific numbers per Member State are provided in below in this annex.

6.5 The number of persons affected by each prioritised issue under the Regulation

Based on the estimates of the number of citizens affected by the Regulation presented in the previous section, this section provides estimates of the number of individuals that are affected by the problems that are caused by the legal issues under the Regulation that have been identified as being of high priority to address.[484]

[483] As a brief reminder, while in the area of matrimonial matters, the nucleus of the statistical analysis is the international married couple (consisting of two adults), **international *families*** are at the core of matters in parental responsibility cases. Hence, the number of international families is relevant for the statistical assessment of the number of citizens affected in matters of parental responsibility.

[484] The approach for the identification and prioritisation of the individual issues is outlined in the methodological Annex.

6.5.1 General approach

As a starting point, the **groups of citizens affected by each legal issue** were identified, i.e.:

- Matrimonial matters: Spouses in international divorces and legal separations; and
- Parental responsibility matters: Individuals in international families, including abducted children.

Some of the legal issues are of a 'horizontal' character and thus affect both of the above groups.

Second, the **proportion of cases in which a specific legal issue is expected to occur in judicial practice** was estimated. This proportion was estimated as a range, due to a lack of data concerning the actual number of cases in relation to each of the legal issues.[485]

Third, the estimates of the **number of citizens** belonging to the above groups of people were **multiplied** by the **proportion of cases** in which a specific issue is expected to occur in judicial practice.

The following sub-sections provide the statistical findings in relation to the number of citizens affected by the prioritised issues.

General remark on the aggregation of the number of persons affected by the prioritised issues

The estimates provided for each individual issue and year ***cannot be added up***, as this would imply double-counting. The reason for this is twofold:

- First, in judicial practice, citizens are not only confronted with single issues under the Regulation, but rather with different combinations of issues as cases are all of a different nature depending, for example, on the individual, private background of the citizens and the Member State in which the proceedings take place.
- Second, data is very scarce and although extensive efforts were made to obtain relevant information from academics, practitioners and the national experts in the Member States, it was generally not possible to obtain data, or even estimates of the number of people affected.[486]

Moreover, the findings presented below are expressed as ranges of the number of citizens that could potentially be affected by an individual issue. It is not possible to determine the exact number of citizens affected by an individual issue or to add these up.

6.5.2 Number of citizens affected by the prioritised issues

Table 20: Potential number of directly affected citizens in the area of matrimonial matters (EU-27, 2008-2012, in thousands) provides the estimated number of citizens that is affected by each prioritised issue under the Regulation. In relation to matrimonial matters, the number of affected

[485] The estimates have been checked by the legal expert in the study's core team.

[486] Data concerning the number of citizens affected by the Regulation, in particular in relation to specific legal issues, are not centrally collected by Member States' authorities.

spouses was estimated while in relation to parental matters and horizontal issues, the estimates are based on the number of citizens in international families affected by the Regulation (i.e. spouses and their children, as well as parents and their children outside marriage).

The table shows that in the area of **matrimonial matters**, the lack of a possibility for spouses to choose the competent court by common agreement is expected to affect the highest number of citizens (roughly between 100,000 and 160,000 spouses per year; issue 2).

In the area of **parental responsibility**, difficulties in assessing the child's habitual residence in a State (issue 3) affect the highest number of citizens (approx. between 80,000 and 160,000 citizens per year).

Horizontal issues that affect the highest number of citizens concern the issue that practitioners are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions (issue 18), as well as citizens not being sufficiently aware of the content of the Regulation and its implication for international proceedings on matrimonial matters, matters of parental responsibility or child abduction (issue 19). Both issues affect approx. 120,000 to 270,000 citizens in international families per year.[487]

[487] Further below, this annex also contains an overview of the number of international families affected by each prioritised legal issue.

Table 21: Potential number of directly affected citizens in the area of matrimonial matters (EU-27, 2008-2012, in thousands)

No	Title of issue	Estimate of problematic cases in which this issue is of relevance (%)		Affected groups of citizens[488]	No									
					2008		2009		2010		2011		2012	
		Max.	Min.		Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
Matrimonial matters: Number of spouses affected[489]														
1	Potential for '*rush to court*'/'*forum shopping*' on the basis of the alternative grounds of jurisdiction	20%	30%	Total	41.3	61.9	39.4	59.2	40.2	60.3	40.8	61.2	40.4	60.5
				Spouses	41.3	61.9	39.4	59.2	40.2	60.3	40.8	61.2	40.4	60.5
				Children	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
2	The current jurisdiction rules do not sufficiently promote a common agreement between spouses	50%	80%	Total	103.2	165.0	98.6	157.8	100.5	160.8	102.1	163.3	100.9	161.4
				Spouses	103.2	165.0	98.6	157.8	100.5	160.8	102.1	163.3	100.9	161.4
				Children	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

[488] This group of citizens forms the basis to which the estimated percentage of problematic cases in which this issue is of relevance is applied and explains who the group constituting the basis is. It is only possible to provide these figures at an aggregate EU27 level, i.e. no figures per Member State can be given as such estimates are not viewed by the study team as being robust enough in order to draw conclusions on which Member States are mostly affected by the prioritised legal issues.

[489] In matrimonial matters, the high-priority legal issues identified are expected to always cover both spouses. Although in case of rush-to-the-court cases, in which one spouse may be better off than another due to the legal issue at stake, both spouses are however affected by the issue as such, e.g. by stress, delays and infringements of Fundamental Rights. Moreover, it is expected that in such a situation, costs for legal advice will be higher for both spouses than in *normal* cases. Therefore, it cannot be argued that there are legal issues that only affect one spouse.

No	Title of issue	Estimate of problematic cases in which this issue is of relevance (%)		Affected groups of citizens[488]	No									
					2008		2009		2010		2011		2012	
		Max.	Min.		Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
Matters of parental responsibility: Number of citizens in international families affected490														
3	Different interpretations of the term 'habitual residence'	20%	30%	Total	80.4	160.5	78.0	159.1	79.9	161.1	81.1	162.6	80.8	162.8
				Parents	50.6	88.5	49.1	88.0	50.1	88.7	51.2	90.4	50.8	90.2
				Children	29.8	72.0	28.9	71.1	29.8	72.4	29.9	72.2	29.9	72.5
4	Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments)	10%	30%	Total	40.2	160.5	39.0	159.1	40.0	161.1	40.5	162.6	40.4	162.8
				Parents	25.3	88.5	24.5	88.0	25.0	88.7	25.6	90.4	25.4	90.2
				Children	14.9	72.0	14.5	71.1	14.9	72.4	14.9	72.2	15.0	72.5
5	Different practices related to the representation of the child in court	20%	30%	Total	80.4	160.5	78.0	159.1	79.9	161.1	81.1	162.6	80.8	162.8
				Parents	50.6	88.5	49.1	88.0	50.1	88.7	51.2	90.4	50.8	90.2
				Children	29.8	72.0	28.9	71.1	29.8	72.4	29.9	72.2	29.9	72.5
6	Different interpretations of the term 'recognition' leading to differing practices as to which judgments require a declaration of enforceability	10%	20%	Total	40.2	107.0	39.0	106.0	40.0	107.4	40.5	108.4	40.4	108.5
				Parents	25.3	59.0	24.5	58.7	25.0	59.1	25.6	60.3	25.4	60.2
				Children	14.9	48.0	14.5	47.4	14.9	48.2	14.9	48.1	15.0	48.4

[490] This group of citizens contains: Spouses in international divorces & legal separations, the children whose parents are in international divorces & legal separations, as well as children born outside marriage in whose family parental responsibility issues occur. Abducted children have been excluded from non-child abduction related legal issues in order to avoid double counting. Prioritised legal issues that relate to child abduction only (highlighted in grey) concern only the number of parents and children affected by child abductions. It cannot be argued that child abduction cases only concern one parent (i.e. the one that has not abducted the child) as – disregarding the fact that child abduction is a criminal offence – the abducting parent also suffers from problems identified such as procedural delays, increased costs compared to normal custody procedures and legal uncertainty due to differences in enforcement procedures etc.

No	Title of issue	Estimate of problematic cases in which this issue is of relevance (%)		Affected groups of citizens[488]	No									
					2008		2009		2010		2011		2012	
		Max.	Min.		Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
7	Exequatur proceedings are still in place for some types of judgments	10%	30%	Total	40.2	160.5	39.0	159.1	40.0	161.1	40.5	162.6	40.4	162.8
				Parents	25.3	88.5	24.5	88.0	25.0	88.7	25.6	90.4	25.4	90.2
				Children	14.9	72.0	14.5	71.1	14.9	72.4	14.9	72.2	15.0	72.5
8	Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement	10%	20%	Total	40.2	107.0	39.0	106.0	40.0	107.4	40.5	108.4	40.4	108.5
				Parents	25.3	59.0	24.5	58.7	25.0	59.1	25.6	60.3	25.4	60.2
				Children	14.9	48.0	14.5	47.4	14.9	48.2	14.9	48.1	15.0	48.4
9	Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplication of the Regulation and reservations against the content of decisions	5%	10%	Total	0.23	0.55	0.22	0.54	0.22	0.53	0.23	0.57	0.23	0.56
				Parents	0.15	0.37	0.15	0.36	0.14	0.35	0.15	0.38	0.15	0.38
				Children	0.08	0.18	0.07	0.18	0.07	0.18	0.08	0.19	0.08	0.19
10	Difficulties relating to the time limit for return (i.e. not clear and not effective)	50%	80%	Total	2.26	4.42	2.23	4.36	2.17	4.24	2.32	4.54	2.30	4.50
				Parents	1.51	2.95	1.49	2.91	1.44	2.82	1.55	3.02	1.53	3.00
				Children	0.75	1.47	0.74	1.45	0.72	1.41	0.77	1.51	0.77	1.50
11	Questions on the practical application of Article 11(4) and ambiguity as regards the concept of 'adequate arrangements' under that provision	5%	10%	Total	0.23	0.55	0.22	0.54	0.22	0.53	0.23	0.57	0.23	0.56
				Parents	0.15	0.37	0.15	0.36	0.14	0.35	0.15	0.38	0.15	0.38
				Children	0.08	0.18	0.07	0.18	0.07	0.18	0.08	0.19	0.08	0.19
12	The system stipulated in Article 11(6) to (8) may endanger the well-being of the child if a child is returned in spite of a risk established in the return proceedings and possibly after a long time has passed	20%	40%	Total	0.05	0.28	0.04	0.27	0.04	0.26	0.05	0.28	0.05	0.28
				Parents	0.03	0.18	0.03	0.18	0.03	0.18	0.03	0.19	0.03	0.19
				Children	0.02	0.09	0.01	0.09	0.01	0.09	0.02	0.09	0.02	0.09
13	Rules relating to the obligation for Central Authorities to collect and exchange information on the situation of the child that are not specific enough, and thus cause practical problems	10%	50%	Total	40.2	107.0	39.0	106.0	40.0	107.4	40.5	108.4	40.4	108.5
				Parents	25.3	59.0	24.5	58.7	25.0	59.1	25.6	60.3	25.4	60.2
				Children	14.9	48.0	14.5	47.4	14.9	48.2	14.9	48.1	15.0	48.4

No	Title of issue	Estimate of problematic cases in which this issue is of relevance (%)		Affected groups of citizens[488]	No									
					2008		2009		2010		2011		2012	
		Max.	Min.		Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
14	Insufficiently specific provisions on the procedure for the placement of a child in another Member State	5%	10%	Total	20.1	53.5	19.5	53.0	20.0	53.7	20.3	54.2	20.2	54.3
				Parents	12.6	29.5	12.3	29.3	12.5	29.6	12.8	30.1	12.7	30.1
				Children	7.5	24.0	7.2	23.7	7.5	24.1	7.5	24.1	7.5	24.2
15	Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children	5%	10%	Total	20.1	53.5	19.5	53.0	20.0	53.7	20.3	54.2	20.2	54.3
				Parents	12.6	29.5	12.3	29.3	12.5	29.6	12.8	30.1	12.7	30.1
				Children	7.5	24.0	7.2	23.7	7.5	24.1	7.5	24.1	7.5	24.2
Horizontal issues: Number of citizens in international families affected[491]														
16	Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court	5%	10%	Total	20.1	53.5	19.5	53.0	20.0	53.7	20.3	54.2	20.2	54.3
				Parents	12.6	29.5	12.3	29.3	12.5	29.6	12.8	30.1	12.7	30.1
				Children	7.5	24.0	7.2	23.7	7.5	24.1	7.5	24.1	7.5	24.2
17	The use of mediation is currently not promoted to a sufficient extent	5%	10%	Total	20.1	53.5	19.5	53.0	20.0	53.7	20.3	54.2	20.2	54.3
				Parents	12.6	29.5	12.3	29.3	12.5	29.6	12.8	30.1	12.7	30.1
				Children	7.5	24.0	7.2	23.7	7.5	24.1	7.5	24.1	7.5	24.2
18	Practitioners are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions of the Brussels IIa Regulation	30%	50%	Total	120.6	267.6	116.9	265.1	119.9	268.5	121.6	271.0	121.1	271.3
				Parents	75.9	147.6	73.6	146.7	75.1	147.9	76.8	150.7	76.3	150.4
				Children	44.8	120.0	43.4	118.5	44.8	120.6	44.8	120.3	44.9	120.9
19	Citizens are not sufficiently aware of the content of the Regulation and its implication for	30%	50%	Total	120.6	267.6	116.9	265.1	119.9	268.5	121.6	271.0	121.1	271.3
				Parents	75.9	147.6	73.6	146.7	75.1	147.9	76.8	150.7	76.3	150.4

[491] This group of citizens contains: Spouses in international divorces & legal separations, the children whose parents are in international divorces & legal separations, as well as children born outside marriage in whose family parental responsibility issues occur. Abducted children have been excluded from these estimates in order to avoid double counting.

No	Title of issue	Estimate of problematic cases in which this issue is of relevance (%)		Affected groups of citizens[488]	No									
		Max.	Min.		2008		2009		2010		2011		2012	
					Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
	international proceedings on matrimonial matters, matters of parental responsibility or child abduction			Children	44.8	120.0	43.4	118.5	44.8	120.6	44.8	120.3	44.9	120.9

Source: Deloitte

6.5.3 Detailed results of the quantitative analysis at the Member State level

This section contains the results of the quantitative analysis at the Member State level. It provides the following detailed figures for the years 2008 to 2012 per Member State:

Table 22: Types of statistics provided at Member State level (2008-2012)

Area of interest	Type of statistics
International marriages	• Number of international marriages; • Number of spouses in international marriages; • Number of children affected by international marriages; • Share of international marriages of all marriages;
International divorces	• Number of international divorces; • Number of spouses in international divorces; • Number of children affected by international divorces; • Share of international divorces of all divorces;
International legal separations	• Number of international legal separations; • Number of spouses in international legal separations; • Number of children affected by international legal separations; • Share of international legal separations of all legal separations;
Further statistics concerning children	• Number of children born to international couples outside marriage; • Number of child abductions;
International families and households	• Number of citizens in international families; • Number of international households/families;
Auxiliary statistics	• Total fertility rate; and • Average household size.

Source: Deloitte

International marriages

Table 23: The number of international marriages per Member State (2008-2012, in thousands)

Member State	2008	2009	2010	2011	2012
EU	254.7	253.4	243.6	237.5	242.2
Austria	6.4	6.3	6.9	6.9	6.8
Belgium	9.9	9.1	7.3	6.5	7.3
Bulgaria	2.3	2.4	2.5	1.4	1.6
Croatia	1.1	1.0	1.0	1.0	1.0
Cyprus	3.3	3.1	2.2	2.3	2.2
Czech Republic	4.4	4.4	4.3	4.4	4.3
Estonia	2.1	1.7	1.6	1.8	1.8
Finland	2.7	2.8	2.9	2.7	2.9
France	40.5	39.5	37.2	37.5	39.9
Germany	48.7	51.7	51.3	51.3	52.5

Member State	2008	2009	2010	2011	2012
Greece	6.4	6.4	6.7	6.9	7.4
Hungary	1.7	1.7	1.5	1.3	1.1
Ireland	3.1	3.0	2.8	2.6	2.5
Italy	12.4	10.7	8.0	8.7	10.0
Latvia	0.0	0.0	0.0	0.0	0.0
Lithuania	3.2	3.3	3.1	3.0	3.0
Luxembourg	1.1	1.0	0.9	0.9	1.0
Malta	0.9	0.8	0.9	1.0	1.1
Netherlands	14.7	15.5	17.4	16.6	16.3
Poland	5.2	4.9	4.7	4.5	4.7
Portugal	5.8	4.8	4.5	4.3	4.4
Romania	9.5	6.9	5.6	5.0	4.7
Slovakia	3.8	4.0	3.7	4.0	3.6
Slovenia	0.2	1.3	1.3	1.5	1.4
Spain	36.3	37.1	35.1	31.7	29.5
Sweden	9.9	10.5	10.1	9.1	9.9
United Kingdom	19.0	19.5	20.2	20.7	21.4

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States[492]

Table 24: The number of spouses in international marriages per Member State (2008-2012, in thousands)

Member State	2008	2009	2010	2011	2012
EU	509.4	506.7	487.3	475.1	484.5
Austria	12.7	12.7	13.8	13.7	13.7
Belgium	19.8	18.1	14.6	13.1	14.5
Bulgaria	4.5	4.7	5.0	2.8	3.1
Croatia	2.3	2.1	2.1	2.1	1.9
Cyprus	6.7	6.2	4.4	4.5	4.5
Czech Republic	8.8	8.7	8.6	8.7	8.6
Estonia	4.2	3.5	3.2	3.6	3.7
Finland	5.3	5.5	5.8	5.5	5.9
France	81.1	78.9	74.5	75.0	79.9
Germany	97.5	103.3	102.6	102.7	104.9
Greece	12.9	12.9	13.4	13.7	14.8
Hungary	3.4	3.3	3.0	2.5	2.2
Ireland	6.1	6.1	5.6	5.3	5.0
Italy	24.8	21.5	15.9	17.3	20.0
Latvia	0.0	0.0	0.0	0.1	0.0
Lithuania	6.4	6.6	6.2	6.1	6.0

[492] Data concerning the number of international divorces was made available by statistical offices of all Member States with the exception of Ireland and UK. In addition, Slovenia did not provide any data for 2008. Missing data was extrapolated based on the number of citizens in each of the Member States and the overall number of international divorces in the 25 Member States for which data was available.

Member State	2008	2009	2010	2011	2012
Luxembourg	2.2	1.9	1.8	1.8	2.1
Malta	1.9	1.7	1.7	1.9	2.2
Netherlands	29.5	31.0	34.7	33.1	32.6
Poland	10.5	9.8	9.3	9.0	9.3
Portugal	11.6	9.6	9.0	8.7	8.7
Romania	19.0	13.8	11.3	10.0	9.5
Slovakia	7.6	8.0	7.3	8.0	7.1
Slovenia	0.5	2.6	2.7	2.9	2.9
Spain	72.6	74.2	70.2	63.4	59.0
Sweden	19.7	21.0	20.2	18.2	19.7
United Kingdom	37.9	39.1	40.4	41.5	42.7

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 25: The number of children affected by international marriages per Member State (2008-2012, in thousands)[493]

Member State	2008	2009	2010	2011	2012
EU	414.4	408.8	397.7	380.3	388.9
Austria	9.0	8.8	9.9	9.8	9.8
Belgium	18.3	16.7	13.6	11.8	13.0
Bulgaria	3.5	3.9	3.9	2.1	2.3
Croatia	1.8	1.6	1.6	1.5	1.5
Cyprus	4.9	4.5	3.9	3.7	3.8
Czech Republic	6.6	6.6	6.5	6.2	6.2
Estonia	3.6	2.9	2.8	2.9	2.8
Finland	4.9	5.1	5.4	5.0	5.3
France	81.5	78.9	75.6	75.4	80.3
Germany	67.3	70.3	71.3	69.8	72.4
Greece	9.5	9.6	10.1	9.6	9.9
Hungary	2.3	2.2	1.9	1.6	1.4
Ireland	6.3	6.2	5.8	5.4	5.0
Italy	18.0	15.6	11.6	12.5	14.3
Latvia	0.0	0.0	0.0	0.0	0.0
Lithuania	4.6	5.0	4.7	4.7	4.8
Luxembourg	1.8	1.5	1.5	1.4	1.6
Malta	1.3	1.2	1.2	1.4	1.6
Netherlands	26.1	27.8	31.1	29.2	28.1
Poland	7.3	6.9	6.4	5.9	6.1
Portugal	8.1	6.4	6.3	5.9	5.6
Romania	14.5	10.8	8.7	7.3	7.2
Slovakia	5.1	5.7	5.2	5.8	4.8
Slovenia	0.4	2.0	2.1	2.3	2.3

[493] The provided figures in this table are the maximum estimates calculated by the team. The actual figure is unknown and very likely to be lower than what is provided in the table.

Member State	2008	2009	2010	2011	2012
Spain	52.7	51.2	48.1	42.5	38.9
Sweden	18.8	20.3	20.0	17.3	18.8
United Kingdom	36.2	36.9	38.8	39.6	41.0

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 26: The share of international marriages per Member State (2008-2012, in %)

Member State	2008	2009	2010	2011	2012
EU	10.8%	11.3%	11.1%	11.3%	11.3%
Austria	18.0%	17.9%	18.3%	18.9%	17.7%
Belgium	21.7%	20.9%	17.3%	14.5%	18.0%
Bulgaria	8.2%	9.1%	10.3%	6.5%	7.3%
Croatia	4.9%	4.6%	4.8%	5.1%	5.0%
Cyprus	54.5%	48.7%	36.5%	36.4%	35.7%
Czech Republic	8.4%	9.1%	9.2%	9.7%	9.5%
Estonia	34.3%	32.2%	31.7%	32.7%	31.0%
Finland	8.6%	9.3%	9.6%	9.6%	10.2%
France	15.3%	15.7%	14.8%	15.8%	16.6%
Germany	12.9%	13.7%	13.4%	13.6%	13.6%
Greece	12.0%	10.9%	11.9%	12.5%	13.3%
Hungary	4.3%	4.5%	4.2%	3.6%	3.0%
Ireland	13.9%	14.0%	13.6%	13.3%	13.0%
Italy	5.0%	4.7%	3.7%	4.2%	4.8%
Latvia	0.2%	0.2%	0.2%	0.3%	0.2%
Lithuania	13.2%	16.1%	16.6%	15.9%	14.6%
Luxembourg	56.8%	55.5%	51.9%	52.9%	58.0%
Malta	37.4%	35.8%	33.1%	37.6%	42.7%
Netherlands	19.9%	21.5%	23.0%	23.1%	20.8%
Poland	2.0%	2.0%	2.0%	2.2%	2.3%
Portugal	13.4%	11.9%	11.3%	12.0%	12.7%
Romania	6.4%	5.1%	4.9%	4.7%	4.4%
Slovakia	13.4%	15.1%	14.4%	15.6%	13.7%
Slovenia	3.5%	19.7%	20.5%	21.8%	20.5%
Spain	18.9%	21.5%	21.2%	20.0%	18.1%
Sweden	19.6%	22.2%	20.2%	19.4%	19.5%
United Kingdom	6.9%	7.3%	7.3%	7.4%	7.6%

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

International divorces

Table 27: The number of international divorces per Member State (2008-2012, in thousands)

Member State	2008	2009	2010	2011	2012
EU	101.5	96.6	98.7	100.2	98.9
Austria	4.1	3.6	3.2	3.3	3.3
Belgium	6.7	6.6	5.2	5.0	4.5
Bulgaria	0.6	0.5	0.5	0.5	0.7

Member State	2008	2009	2010	2011	2012
Croatia	0.2	0.2	0.2	0.3	0.3
Cyprus	0.7	0.7	0.8	0.9	0.8
Czech Republic	2.2	2.0	2.2	1.9	1.9
Estonia	1.2	1.1	1.0	1.1	1.1
Finland	1.5	1.6	1.7	1.8	1.7
France	7.8	7.8	8.1	8.1	8.2
Germany	33.0	30.3	29.9	29.4	28.2
Greece	1.1	1.1	1.1	1.1	1.1
Hungary	0.6	0.5	0.5	0.5	0.5
Ireland	0.5	0.5	0.4	0.4	0.4
Italy	0.2	0.2	0.3	0.3	0.5
Latvia	1.3	1.0	0.9	1.5	1.3
Lithuania	0.8	0.8	0.8	0.8	0.9
Luxembourg	0.5	0.6	0.5	0.7	0.5
Malta	0.1	0.0	0.1	0.1	0.1
Netherlands	8.0	7.5	8.1	8.0	8.1
Poland	1.0	0.7	0.6	0.6	0.5
Portugal	1.2	1.1	1.3	1.3	0.5
Romania	0.5	0.5	0.4	0.5	0.5
Slovakia	0.2	0.2	0.2	0.3	0.3
Slovenia	0.1	0.2	0.3	0.3	0.4
Spain	13.2	12.8	14.5	15.9	16.5
Sweden	4.9	5.3	6.1	6.2	6.4
United Kingdom	9.5	9.1	9.7	9.7	9.7

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 28: The number of spouses in international divorces per Member State (2008-2012, in thousands)

Member State	2008	2009	2010	2011	2012
EU	203.0	193.2	197.4	200.3	197.7
Austria	8.2	7.3	6.4	6.5	6.7
Belgium	13.3	13.2	10.4	10.1	9.1
Bulgaria	1.2	1.1	1.0	0.9	1.4
Croatia	0.5	0.5	0.5	0.6	0.5
Cyprus	1.4	1.5	1.7	1.7	1.7
Czech Republic	4.4	4.0	4.4	3.7	3.8
Estonia	2.4	2.2	2.0	2.1	2.1
Finland	2.9	3.2	3.4	3.5	3.4
France	15.7	15.6	16.3	16.2	16.5
Germany	65.9	60.5	59.8	58.8	56.3
Greece	2.1	2.2	2.2	2.2	2.2
Hungary	1.1	1.1	1.0	1.1	1.0
Ireland	1.0	0.9	0.8	0.8	0.8
Italy	0.3	0.4	0.6	0.6	1.0
Latvia	2.6	2.0	1.9	3.1	2.6
Lithuania	1.6	1.6	1.7	1.7	1.7

Member State	2008	2009	2010	2011	2012
Luxembourg	1.0	1.1	1.1	1.4	1.0
Malta	0.1	0.1	0.1	0.1	0.1
Netherlands	16.0	15.1	16.2	15.9	16.3
Poland	2.0	1.4	1.1	1.2	0.9
Portugal	2.4	2.2	2.5	2.6	1.1
Romania	1.0	0.9	0.9	0.9	0.9
Slovakia	0.4	0.3	0.5	0.5	0.6
Slovenia	0.2	0.5	0.5	0.6	0.7
Spain	26.5	25.7	29.1	31.7	33.0
Sweden	9.7	10.5	12.2	12.4	12.8
United Kingdom	19.1	18.1	19.4	19.4	19.5

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 29: The number of children affected by international divorces per Member State (2008-2012, in thousands)[494]

Member State	2008	2009	2010	2011	2012
EU	162.5	153.7	158.9	157.4	155.9
Austria	5.8	5.1	4.6	4.6	4.8
Belgium	12.3	12.1	9.7	9.1	8.1
Bulgaria	0.9	0.9	0.8	0.7	1.0
Croatia	0.4	0.4	0.4	0.4	0.4
Cyprus	1.0	1.1	1.2	1.2	1.2
Czech Republic	3.3	3.0	3.3	2.7	2.8
Estonia	2.0	1.9	1.7	1.7	1.7
Finland	2.7	3.0	3.2	3.2	3.1
France	15.8	15.6	16.5	16.3	16.6
Germany	45.5	41.1	41.6	40.0	38.9
Greece	1.6	1.7	1.7	1.5	1.5
Hungary	0.8	0.7	0.6	0.7	0.7
Ireland	1.0	1.0	0.9	0.8	0.8
Italy	0.3	0.3	0.4	0.4	0.7
Latvia	2.0	1.5	1.3	2.1	1.9
Lithuania	1.2	1.2	1.3	1.3	1.4
Luxembourg	0.8	0.9	0.9	1.0	0.8
Malta	0.1	0.1	0.1	0.1	0.1
Netherlands	14.2	13.5	14.5	14.0	14.0
Poland	1.4	1.0	0.8	0.8	0.6
Portugal	1.7	1.5	1.7	1.8	0.7
Romania	0.7	0.7	0.7	0.7	0.7
Slovakia	0.3	0.2	0.3	0.4	0.4

[494] The figures provided in this table are the maximum estimates calculated by the team. The actual figure is unknown and very likely to be lower than what is provided in the table.

Member State	2008	2009	2010	2011	2012
Slovenia	0.1	0.4	0.4	0.5	0.6
Spain	19.2	17.7	19.9	21.2	21.8
Sweden	9.3	10.2	12.0	11.8	12.2
United Kingdom	18.2	17.1	18.6	18.5	18.7

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 30: The share of international divorces per Member State (2008-2012, in %)

Member State	2008	2009	2010	2011	2012
EU	10.1%	10.1%	10.2%	10.3%	10.3%
Austria	20.7%	19.4%	18.3%	18.8%	19.7%
Belgium	18.8%	20.2%	17.9%	19.3%	16.6%
Bulgaria	4.1%	4.6%	4.6%	4.4%	5.8%
Croatia	4.7%	4.6%	4.8%	5.2%	4.4%
Cyprus	41.9%	42.2%	43.3%	44.7%	41.5%
Czech Republic	7.1%	6.8%	7.1%	6.7%	7.2%
Estonia	33.6%	34.8%	32.9%	33.9%	33.8%
Finland	10.9%	11.8%	12.5%	13.0%	13.2%
France	5.9%	6.0%	6.1%	6.1%	6.2%
Germany	17.2%	16.3%	16.0%	15.7%	15.7%
Greece	8.1%	8.2%	8.2%	8.3%	8.3%
Hungary	2.3%	2.2%	2.0%	2.3%	2.3%
Ireland	13.9%	14.0%	13.6%	13.3%	13.0%
Italy	0.3%	0.4%	0.5%	0.6%	0.9%
Latvia	20.7%	19.8%	19.2%	18.6%	17.9%
Lithuania	7.7%	8.6%	8.4%	8.2%	8.3%
Luxembourg	51.0%	52.5%	49.6%	59.5%	39.6%
Malta	n/a	n/a	n/a	131.0%	12.0%
Netherlands	24.9%	24.4%	24.0%	23.6%	23.4%
Poland	1.5%	1.1%	0.9%	1.0%	0.7%
Portugal	4.6%	4.2%	4.5%	4.9%	2.1%
Romania	1.4%	1.4%	1.3%	1.3%	1.5%
Slovakia	1.7%	1.4%	1.9%	2.3%	2.7%
Slovenia	3.5%	10.1%	11.1%	12.6%	14.6%
Spain	12.0%	13.1%	14.1%	15.3%	15.8%
Sweden	22.8%	23.7%	25.8%	26.4%	27.3%
United Kingdom	7.0%	7.2%	7.3%	7.5%	7.6%

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

International legal separations

Table 31: The number of international legal separations per Member State (2008-2012, in thousands)

Member State	2008	2009	2010	2011	2012
EU	1.7	2.0	1.8	1.9	2.5
Austria	n/a	n/a	n/a	n/a	n/a

Member State	2008	2009	2010	2011	2012
Belgium	30	36	33	34	45
Bulgaria	n/a	n/a	n/a	n/a	n/a
Croatia	n/a	n/a	n/a	n/a	n/a
Cyprus	n/a	n/a	n/a	n/a	n/a
Czech Republic	n/a	n/a	n/a	n/a	n/a
Estonia	n/a	n/a	n/a	n/a	n/a
Finland	n/a	n/a	n/a	n/a	n/a
France	178	213	193	200	267
Germany	n/a	n/a	n/a	n/a	n/a
Greece	n/a	n/a	n/a	n/a	n/a
Hungary	n/a	n/a	n/a	n/a	n/a
Ireland	12	14	13	14	18
Italy	467	635	720	743	1,260
Latvia	n/a	n/a	n/a	n/a	n/a
Lithuania	9	11	10	10	14
Luxembourg	1	2	1	2	2
Malta	1	1	1	1	2
Netherlands	46	55	50	52	69
Poland	23	15	10	5	13
Portugal	16	13	16	16	6
Romania	n/a	n/a	n/a	n/a	n/a
Slovakia	n/a	n/a	n/a	n/a	n/a
Slovenia	n/a	n/a	n/a	n/a	n/a
Spain	708	806	595	633	586
Sweden	n/a	n/a	n/a	n/a	n/a
United Kingdom	173	206	188	194	260

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 32: The number of spouses in international legal separations per Member State (2008-2012, in thousands)

Member State	2008	2009	2010	2011	2012
EU	3.3	4.0	3.7	3.8	5.1
Austria	n/a	n/a	n/a	n/a	n/a
Belgium	0.1	0.1	0.1	0.1	0.1
Bulgaria	n/a	n/a	n/a	n/a	n/a
Croatia	n/a	n/a	n/a	n/a	n/a
Cyprus	n/a	n/a	n/a	n/a	n/a
Czech Republic	n/a	n/a	n/a	n/a	n/a
Estonia	n/a	n/a	n/a	n/a	n/a
Finland	n/a	n/a	n/a	n/a	n/a
France	0.4	0.4	0.4	0.4	0.5
Germany	n/a	n/a	n/a	n/a	n/a
Greece	n/a	n/a	n/a	n/a	n/a
Hungary	n/a	n/a	n/a	n/a	n/a
Ireland	0.024	0.029	0.026	0.027	0.036
Italy	0.9	1.3	1.4	1.5	2.5

Member State	2008	2009	2010	2011	2012
Latvia	n/a	n/a	n/a	n/a	n/a
Lithuania	0.019	0.022	0.020	0.021	0.028
Luxembourg	0.003	0.003	0.003	0.003	0.004
Malta	0.002	0.003	0.003	0.003	0.004
Netherlands	0.1	0.1	0.1	0.1	0.1
Poland	0.046	0.030	0.020	0.010	0.026
Portugal	0.032	0.026	0.032	0.032	0.012
Romania	n/a	n/a	n/a	n/a	n/a
Slovakia	n/a	n/a	n/a	n/a	n/a
Slovenia	n/a	n/a	n/a	n/a	n/a
Spain	1.4	1.6	1.2	1.3	1.2
Sweden	n/a	n/a	n/a	n/a	n/a
United Kingdom	0.3	0.4	0.4	0.4	0.5

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 33: The number of children affected by international legal separations per Member State (2008–2012, in thousands)[495]

Member State	2008	2009	2010	2011	2012
EU	2.6	3.1	2.9	2.9	3.9
Austria	n/a	n/a	n/a	n/a	n/a
Belgium	0.1	0.1	0.1	0.1	0.1
Bulgaria	n/a	n/a	n/a	n/a	n/a
Croatia	n/a	n/a	n/a	n/a	n/a
Cyprus	n/a	n/a	n/a	n/a	n/a
Czech Republic	n/a	n/a	n/a	n/a	n/a
Estonia	n/a	n/a	n/a	n/a	n/a
Finland	n/a	n/a	n/a	n/a	n/a
France	0.4	0.4	0.4	0.4	0.5
Germany	n/a	n/a	n/a	n/a	n/a
Greece	n/a	n/a	n/a	n/a	n/a
Hungary	n/a	n/a	n/a	n/a	n/a
Ireland	0.03	0.03	0.03	0.03	0.04
Italy	0.7	0.9	1.1	1.1	1.8
Latvia	n/a	n/a	n/a	n/a	n/a
Lithuania	0.01	0.02	0.02	0.02	0.02
Luxembourg	0.002	0.003	0.002	0.002	0.003
Malta	0.002	0.002	0.002	0.002	0.003
Netherlands	0.1	0.1	0.1	0.1	0.1
Poland	0.03	0.02	0.01	0.01	0.02
Portugal	0.02	0.02	0.02	0.02	0.01

[495] The provided figures in this table are the maximum estimates calculated by the team. The actual figure is unknown and very likely to be lower than what is provided in the table.

Member State	2008	2009	2010	2011	2012
Romania	n/a	n/a	n/a	n/a	n/a
Slovakia	n/a	n/a	n/a	n/a	n/a
Slovenia	n/a	n/a	n/a	n/a	n/a
Spain	1.0	1.1	0.8	0.8	0.8
Sweden	n/a	n/a	n/a	n/a	n/a
United Kingdom	0.3	0.4	0.4	0.4	0.5

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 34: The share of international legal separations per Member State (2008-2012, in %)

Member State	2008	2009	2010	2011	2012
EU	12.3%	12.6%	12.2%	24.2%	8.9%
Austria	n/a	n/a	n/a	n/a	n/a
Belgium	18.8%	20.2%	17.9%	19.3%	16.6%
Bulgaria	n/a	n/a	n/a	n/a	n/a
Croatia	n/a	n/a	n/a	n/a	n/a
Cyprus	n/a	n/a	n/a	n/a	n/a
Czech Republic	n/a	n/a	n/a	n/a	n/a
Estonia	n/a	n/a	n/a	n/a	n/a
Finland	n/a	n/a	n/a	n/a	n/a
France	5.9%	6.0%	6.1%	6.1%	6.2%
Germany	n/a	n/a	n/a	n/a	n/a
Greece	n/a	n/a	n/a	n/a	n/a
Hungary	n/a	n/a	n/a	n/a	n/a
Ireland	13.9%	14.0%	13.6%	13.3%	13.0%
Italy	0.3%	0.4%	0.5%	0.6%	0.9%
Latvia	n/a	n/a	n/a	n/a	n/a
Lithuania	7.7%	8.6%	8.4%	8.2%	8.3%
Luxembourg	51.0%	52.5%	49.6%	59.5%	0.0%
Malta	0.0%	0.0%	0.0%	131.0%	12.0%
Netherlands	24.9%	24.4%	24.0%	23.6%	23.4%
Poland	1.5%	1.1%	0.9%	1.0%	0.7%
Portugal	4.6%	4.2%	4.5%	4.9%	2.1%
Romania	n/a	n/a	n/a	n/a	n/a
Slovakia	n/a	n/a	n/a	n/a	n/a
Slovenia	n/a	n/a	n/a	n/a	n/a
Spain	12.0%	13.1%	14.1%	15.3%	15.8%
Sweden	n/a	n/a	n/a	n/a	n/a
United Kingdom	7.0%	7.2%	7.3%	7.5%	7.6%

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Further statistics concerning children

Table 35: The number of children born to international couples outside marriage per Member State (2008-2012, in thousands)

Member State	2008		2009		2010		2011		2012	
	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
EU	38.5	74.9	39.5	80.1	40.9	79.5	42.0	80.4	42.7	82.0
Austria	1.3	1.7	1.2	1.7	1.2	1.8	1.2	1.9	1.4	1.8
Belgium	2.2	3.9	2.5	3.8	2.2	3.2	2.6	2.9	2.3	3.8
Bulgaria	0.3	1.0	0.4	1.2	0.4	1.3	0.4	0.8	0.5	0.9
Croatia	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Cyprus	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Czech Republic	0.6	1.1	0.7	1.3	0.7	1.4	0.6	1.4	0.7	1.4
Estonia	0.7	1.0	0.7	0.9	0.6	0.9	0.6	0.9	0.6	0.8
Finland	0.6	0.7	0.6	0.7	0.7	0.8	0.7	0.7	0.7	0.8
France	5.4	21.0	5.6	21.9	5.8	21.4	5.9	22.9	6.1	24.3
Germany	7.9	8.9	7.4	9.4	7.6	9.5	7.4	9.6	7.7	9.9
Greece	0.1	0.3	0.1	0.3	0.1	0.3	0.1	0.3	0.1	0.3
Hungary	0.2	0.5	0.2	0.6	0.2	0.5	0.2	0.4	0.2	0.4
Ireland	0.7	1.1	0.7	1.1	0.7	1.1	0.7	1.1	0.7	1.0
Italy	0.1	1.9	0.1	1.8	0.1	1.4	0.2	1.7	0.3	2.0
Latvia	0.5	0.0	0.4	0.0	0.4	0.0	0.3	0.0	0.3	0.0
Lithuania	0.1	0.3	0.1	0.4	0.1	0.4	0.1	0.4	0.2	0.4
Luxembourg	0.2	0.3	0.2	0.3	0.2	0.3	0.2	0.3	0.0	0.4
Malta	0.0	0.1	0.0	0.1	0.0	0.1	0.3	0.1	0.0	0.1
Netherlands	4.0	4.8	4.1	5.4	4.1	5.9	4.0	6.0	4.0	5.4
Poland	0.3	0.5	0.2	0.5	0.2	0.5	0.2	0.6	0.1	0.6
Portugal	0.4	1.6	0.3	1.4	0.4	1.5	0.4	1.6	0.2	1.6
Romania	0.2	1.2	0.2	1.0	0.2	0.9	0.2	0.9	0.2	0.9
Slovakia	0.1	0.7	0.1	0.9	0.1	0.9	0.1	1.0	0.1	0.8
Slovenia	0.1	0.1	0.2	0.7	0.3	0.8	0.3	0.9	0.4	0.8
Spain	4.3	10.2	4.7	11.5	5.1	11.5	5.7	11.1	5.9	10.1
Sweden	2.9	3.7	3.0	4.3	3.4	4.0	3.4	3.7	3.5	3.8
United Kingdom	5.3	7.9	5.5	8.4	5.8	8.7	6.0	8.9	6.2	9.2

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 36: The number of child abductions per Member State (2008-2012, in thousands)

Member State	2008		2009		2010		2011		2012	
	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
EU	1.5	1.8	1.5	1.8	1.4	1.8	1.5	1.9	1.5	1.9
Austria	0.02	0.03	0.03	0.03	0.03	0.04	0.03	0.04	0.02	0.02
Belgium	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Bulgaria	0.02	0.03	0.02	0.03	0.02	0.03	0.02	0.02	0.02	0.03
Croatia	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Cyprus	0.03	0.03	0.03	0.03	0.03	0.04	0.03	0.03	0.02	0.03
Czech Republic	0.03	0.03	0.03	0.03	0.03	0.04	0.03	0.03	0.02	0.03

Member State	2008		2009		2010		2011		2012	
Estonia	0.01	0.01	0.01	0.01	0.01	0.02	0.01	0.01	0.02	0.02
Finland	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01
France	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Germany	0.3	0.4	0.3	0.3	0.3	0.3	0.3	0.4	0.3	0.3
Greece	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02	0.02
Hungary	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Ireland	0.04	0.05	0.04	0.05	0.05	0.06	0.05	0.06	0.05	0.07
Italy	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Latvia	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01
Lithuania	0.02	0.02	0.01	0.01	0.01	0.01	0.02	0.02	0.03	0.04
Luxembourg	0.01	0.02	0.01	0.02	0.01	0.01	0.01	0.02	0.02	0.02
Malta	0.002	0.002	0.005	0.006	0.003	0.003	0.005	0.006	0.007	0.009
Netherlands	0.06	0.07	0.07	0.09	0.07	0.08	0.07	0.09	0.07	0.08
Poland	0.1	0.1	0.1	0.2	0.1	0.1	0.1	0.1	0.1	0.1
Portugal	0.03	0.04	0.03	0.04	0.03	0.03	0.03	0.03	0.03	0.03
Romania	0.002	0.003	0.003	0.003	0.002	0.002	0.003	0.003	0.003	0.003
Slovakia	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Slovenia	0.001	0.001	0.001	0.001	0.001	0.001	0.001	0.001	0.001	0.001
Spain	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Sweden	0.03	0.03	0.03	0.03	0.03	0.03	0.03	0.03	0.03	0.04
United Kingdom	0.2	0.3	0.2	0.3	0.2	0.3	0.3	0.3	0.2	0.3

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

International families and households

Table 37: The number of citizens in international families per Member State (2008-2012, in thousands)

Member State	2008		2009		2010		2011		2012	
	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
EU	402.1	535.2	389.8	530.2	402.5	537.0	405.4	542.1	405.2	543.5
Austria	15.2	18.1	13.7	16.5	12.5	15.4	12.6	15.6	13.2	15.9
Belgium	26.4	33.8	26.5	33.4	21.3	26.9	21.8	25.5	19.6	25.4
Bulgaria	2.5	4.4	2.6	4.7	2.4	4.8	2.3	3.5	3.2	4.5
Croatia	0.8	1.0	0.8	1.0	1.0	1.1	1.0	1.2	0.9	1.1
Cyprus	2.2	2.7	2.4	3.0	2.9	3.3	2.9	3.4	2.9	3.4
Czech Republic	8.2	10.4	7.5	10.1	7.6	10.9	7.1	9.7	7.3	9.9
Estonia	5.2	6.6	5.0	6.2	4.6	5.7	4.6	5.8	4.6	5.6
Finland	5.9	7.0	6.4	7.6	7.0	8.2	7.1	8.3	7.0	8.2
France	37.6	74.0	38.0	75.9	39.5	75.9	39.5	79.0	40.5	82.6
Germany	115.8	133.3	106.5	124.8	105.1	124.6	103.8	122.5	101.2	119.6
Greece	3.5	4.3	3.6	4.5	3.7	4.6	3.6	4.5	3.6	4.5
Hungary	2.1	3.2	2.0	3.1	1.9	2.9	2.0	2.8	1.9	2.6
Ireland	3.2	4.3	3.1	4.2	2.8	3.9	2.7	3.7	2.7	3.7
Italy	2.1	6.7	2.8	7.2	3.3	6.9	3.5	7.7	5.8	10.8
Latvia	5.0	4.6	4.0	3.5	4.8	3.2	5.3	5.2	4.7	4.5
Lithuania	2.7	3.6	2.8	3.8	2.9	3.9	2.9	4.0	3.0	4.1
Luxembourg	1.9	2.5	2.1	2.7	2.4	2.7	2.6	3.1	2.0	2.7
Malta	0.2	0.5	0.1	0.4	0.2	0.4	0.8	0.5	0.2	0.5

Member State	2008		2009		2010		2011		2012	
	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
Netherlands	34.1	40.5	33.0	40.2	34.5	43.4	34.1	42.9	34.6	42.1
Poland	3.6	4.7	2.6	3.7	2.2	3.2	2.2	3.5	1.7	3.1
Portugal	4.5	8.1	4.1	7.3	4.8	7.9	5.0	8.4	2.0	6.0
Romania	1.9	4.5	1.8	3.9	1.7	3.6	1.8	3.7	1.8	3.6
Slovakia	0.8	2.5	0.6	2.8	0.9	3.0	1.0	3.3	1.1	3.1
Slovenia	0.4	0.6	1.3	2.5	1.5	2.8	1.6	3.0	2.0	3.2
Spain	51.8	72.5	51.4	74.4	59.4	79.3	61.9	82.7	64.1	82.1
Sweden	21.8	26.6	23.6	29.4	27.3	32.2	27.2	31.7	28.2	32.7
United Kingdom	42.7	54.1	41.6	53.4	44.4	56.5	44.6	56.8	45.5	58.0

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 38: The number of international households/families per Member State (2008-2012, in thousands)

Member State	2008		2009		2010		2011		2012	
	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
EU	174.0	229.9	173.1	233.6	179.3	237.9	180.5	240.1	180.7	241.2
Austria	6.6	7.9	5.9	7.2	5.4	6.7	5.5	6.8	5.7	6.9
Belgium	11.5	14.7	11.5	14.5	9.3	11.7	9.5	11.1	8.5	11.1
Bulgaria	0.9	1.5	0.9	1.6	0.8	1.7	0.8	1.2	1.1	1.6
Croatia	0.3	0.4	0.3	0.4	0.3	0.4	0.4	0.4	0.3	0.4
Cyprus	0.8	1.0	0.9	1.1	1.0	1.2	1.0	1.2	1.0	1.2
Czech Republic	3.3	4.2	3.0	4.0	3.0	4.3	2.8	3.9	3.1	4.1
Estonia	2.2	2.9	2.2	2.7	2.0	2.5	2.0	2.5	2.1	2.6
Finland	2.8	3.3	3.1	3.6	3.3	3.9	3.4	3.9	3.3	3.9
France	16.4	32.2	17.3	34.5	18.0	34.5	18.0	35.9	18.4	37.6
Germany	55.1	63.5	53.2	62.4	52.6	62.3	51.9	61.3	50.6	59.8
Greece	1.3	1.6	1.3	1.7	1.4	1.7	1.4	1.7	1.4	1.7
Hungary	0.8	1.2	0.8	1.2	0.7	1.1	0.8	1.1	0.7	1.0
Ireland	1.1	1.5	1.1	1.5	1.0	1.5	1.0	1.4	1.0	1.4
Italy	0.9	2.8	1.2	3.0	1.4	2.9	1.5	3.2	2.4	4.5
Latvia	1.9	1.8	1.6	1.4	1.9	1.3	2.2	2.1	2.0	1.9
Lithuania	1.0	1.4	1.1	1.5	1.2	1.6	1.2	1.7	1.3	1.8
Luxembourg	0.8	1.0	0.9	1.1	1.0	1.1	1.0	1.3	0.8	1.1
Malta	0.1	0.2	0.0	0.2	0.1	0.2	0.3	0.2	0.1	0.2
Netherlands	14.8	17.6	15.0	18.3	15.7	19.7	15.5	19.5	15.7	19.2
Poland	1.3	1.7	0.9	1.3	0.8	1.2	0.8	1.2	0.6	1.1
Portugal	1.7	3.0	1.5	2.7	1.8	2.9	1.9	3.2	0.8	2.3
Romania	0.6	1.6	0.6	1.4	0.6	1.2	0.6	1.3	0.6	1.2
Slovakia	0.3	0.9	0.2	1.0	0.3	1.1	0.4	1.2	0.4	1.1
Slovenia	0.2	0.2	0.5	0.9	0.6	1.1	0.6	1.1	0.8	1.3
Spain	19.2	26.8	19.0	27.6	22.8	30.5	23.8	31.8	24.7	31.6
Sweden	10.4	12.7	11.8	14.7	13.0	15.3	12.9	15.1	13.4	15.6
United Kingdom	17.8	22.5	17.3	22.2	19.3	24.5	19.4	24.7	19.8	25.2

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Table 39: The number of international households/families affected by the prioritised legal issues (2008-2012, in thousands)

#	Title of issue	2008		2009		2010		2011		2012	
		Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
Matrimonial matters: Number of spouses in international families affected											
1	Potential for 'rush to court'/'forum shopping' on the basis of the alternative grounds of jurisdiction	20.6	30.9	19.7	29.6	20.1	30.2	20.4	30.6	20.3	30.4
2	The current jurisdiction rules do not sufficiently promote a common agreement between spouses	51.6	82.5	49.3	78.9	50.3	80.4	51.0	81.7	50.7	81.1
Matters of parental responsibility: Number of citizens in international families affected											
3	Different interpretations of the term 'habitual residence'	31.5	62.8	30.9	63.0	31.9	64.2	32.5	65.1	32.8	65.9
4	Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments)	15.7	62.8	15.4	63.0	15.9	64.2	16.2	65.1	16.4	65.9
5	Different practices related to the representation of the child in court	31.5	62.8	30.9	63.0	31.9	64.2	32.5	65.1	32.8	65.9
6	Different interpretations of the term 'enforcement'	15.7	41.9	15.4	42.0	15.9	42.8	16.2	43.4	16.4	43.9
7	Exequatur proceedings are still in place for some types of judgments	15.7	62.8	15.4	63.0	15.9	64.2	16.2	65.1	16.4	65.9
8	Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement	15.7	41.9	15.4	42.0	15.9	42.8	16.2	43.4	16.4	43.9
9	Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplication of the Regulation and reservations against the content of decisions	0.1	0.2	0.1	0.2	0.1	0.2	0.1	0.2	0.1	0.2

#	Title of issue	2008		2009		2010		2011		2012	
		Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
10	Difficulties relating to the time limit for return (i.e. not clear, not effective).	0.9	1.7	0.9	1.7	0.9	1.7	0.9	1.8	0.9	1.8
11	Questions on the practical application of Article 11(4) and ambiguity as regards the concept of 'adequate arrangements' under that provision	0.1	0.2	0.1	0.2	0.1	0.2	0.1	0.2	0.1	0.2
12	The system stipulated in Article 11(6) to (8) may endanger the well-being of the child if a child is returned in spite of a risk that was established in the return proceedings and possibly after a long time has passed	0.0	0.1	0.0	0.1	0.0	0.1	0.0	0.1	0.0	0.1
13	Rules relating to the obligation for Central Authorities to collect and exchange information on the situation of the child that are not specific enough, and thus cause practical problems	15.7	41.9	15.4	42.0	15.9	42.8	16.2	43.4	16.4	43.9
14	Insufficiently specific provisions on the procedure for the placement of a child in another Member State	7.9	20.9	7.7	21.0	8.0	21.4	8.1	21.7	8.2	22.0
15	Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children	7.9	20.9	7.7	21.0	8.0	21.4	8.1	21.7	8.2	22.0
Horizontal issues: Number of citizens in international families affected											
16	Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court	7.9	20.9	7.7	21.0	8.0	21.4	8.1	21.7	8.2	22.0
17	The use of mediation is currently not promoted to a sufficient extent	7.9	20.9	7.7	21.0	8.0	21.4	8.1	21.7	8.2	22.0
18	Practitioners are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions of the Brussels IIa Regulation	47.2	104.7	46.3	105.0	47.8	107.1	48.7	108.6	49.1	109.8

#	Title of issue	2008		2009		2010		2011		2012	
		Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
19	Citizens are not sufficiently aware of the content of the Regulation and its implication for international proceedings on matrimonial matters, matters of parental responsibility or child abduction	47.2	104.7	46.3	105.0	47.8	107.1	48.7	108.6	49.1	109.8

Source: Estimated by Deloitte based on Eurostat data and data from the statistics offices of the Member States

Auxiliary statistics

Table 40: Total fertility rates per Member State (2008-2012)

Member State	2008	2009	2010	2011	2012
EU	1.59	1.59	1.59	1.55	1.55
Austria	1.42	1.39	1.44	1.43	1.44
Belgium	1.85	1.84	1.86	1.81	1.79
Bulgaria	1.56	1.66	1.57	1.51	1.50
Croatia	1.55	1.58	1.55	1.48	1.51
Cyprus	1.48	1.47	1.44	1.35	1.39
Czech Republic	1.51	1.51	1.51	1.43	1.45
Estonia	1.72	1.70	1.72	1.61	1.56
Finland	1.85	1.86	1.87	1.83	1.80
France	2.01	2.00	2.03	2.01	2.01
Germany	1.38	1.36	1.39	1.36	1.38
Greece	1.47	1.49	1.51	1.39	1.34
Hungary	1.35	1.32	1.25	1.26	1.34
Ireland	2.06	2.06	2.05	2.03	2.01
Italy	1.45	1.45	1.46	1.44	1.43
Latvia	1.58	1.46	1.36	1.33	1.44
Lithuania	1.45	1.50	1.50	1.55	1.60
Luxembourg	1.61	1.59	1.63	1.52	1.57
Malta	1.43	1.42	1.36	1.45	1.43
Netherlands	1.77	1.79	1.79	1.76	1.72
Poland	1.39	1.40	1.38	1.30	1.30
Portugal	1.39	1.34	1.39	1.35	1.28
Romania	1.53	1.57	1.54	1.46	1.53
Slovakia	1.34	1.44	1.43	1.45	1.34
Slovenia	1.53	1.53	1.57	1.56	1.58
Spain	1.45	1.38	1.37	1.34	1.32
Sweden	1.91	1.94	1.98	1.90	1.91
United Kingdom	1.91	1.89	1.92	1.91	1.92

Source: Eurostat

Table 41: Average household size per Member State (2008-2012)

Member State	2008	2009	2010	2011	2012
EU	2.6	2.5	2.5	2.5	2.5
Austria	2.3	2.3	2.3	2.3	2.3
Belgium	2.3	2.3	2.3	2.3	2.3
Bulgaria	2.9	2.9	2.9	2.9	2.8
Croatia	2.8	2.8	2.8	2.8	2.8
Cyprus	2.8	2.8	2.8	2.8	2.8
Czech Republic	2.5	2.5	2.5	2.5	2.4
Estonia	2.3	2.3	2.3	2.3	2.2
Finland	2.1	2.1	2.1	2.1	2.1
France	2.3	2.2	2.2	2.2	2.2
Germany	2.1	2.0	2.0	2.0	2.0
Greece	2.7	2.7	2.7	2.6	2.6
Hungary	2.6	2.6	2.6	2.6	2.6
Ireland	2.8	2.7	2.7	2.7	2.7
Italy	2.4	2.4	2.4	2.4	2.4
Latvia	2.6	2.5	2.5	2.4	2.4

Member State	2008	2009	2010	2011	2012
Lithuania	2.6	2.5	2.4	2.4	2.3
Luxembourg	2.5	2.5	2.5	2.5	2.4
Malta	2.8	2.8	2.7	2.7	2.7
Netherlands	2.3	2.2	2.2	2.2	2.2
Poland	2.8	2.8	2.8	2.8	2.8
Portugal	2.7	2.7	2.7	2.6	2.6
Romania	2.9	2.9	2.9	2.9	2.9
Slovakia	2.9	2.8	2.8	2.8	2.8
Slovenia	2.8	2.8	2.6	2.6	2.5
Spain	2.7	2.7	2.6	2.6	2.6
Sweden	2.1	2.0	2.1	2.1	2.1
United Kingdom	2.4	2.4	2.3	2.3	2.3

Source: Eurostat

6.6 Assessment of problems for citizens: costs and delays

This section presents the most important types of costs for citizens that result from the application of the Regulation, and our approach to assessing these costs. Furthermore, the section discusses other negative consequences for citizens in terms of delays and stress, as well as the approach to examining these issues.

6.6.1 Types of costs, cost reduction potential, and delays

The key indicator to be assessed is the **undue costs that result for citizens because of the identified legal issues** (see section 8.1.2) pertaining to the implementation of the Regulation. That is, costs that there is a potential to eliminate or reduce due to an amendment of the Regulation or by means of other policy measures (policy options).

Data concerning these costs is not readily available, i.e. no previous studies that assess the costs that relate to the application of various (problematic) provisions of the Brussels IIa Regulation have been identified. Efforts that are made to collect relevant data as part of the present study involve interviews with legal professionals and other relevant stakeholders in the Member States, as well as desk research. The desk research activities also cover the identification of data that can serve as proxies. Only limited relevant information has been identified at this stage.

Types of different cost elements

The starting point for estimating the costs, taking account of the above described data limitations, has been the **identification of different cost elements** that result from the application of the Regulation. The following main types of cost elements have been reported by experts and interviewed stakeholders in relation to **matrimonial matters and in undisputed cases of parental responsibility**:

- Hourly rates for lawyers;
- Number of hours provided by a lawyer in the country of residence of the citizen;
- Number of hours of additional lawyers in other jurisdictions;
- Court fees (usually 10% of the value at stake);
- Number of hearings;
- Translation & interpretation costs per hearing;
- Travel costs per hearing;
- Costs for the submission of a copy of a judgement; and
- Costs for the recognition of judgements.

According to the interviewees consulted as part of the present assignment, the **largest share of the costs for citizens relates to the hourly rates** for lawyers, on which the Regulation does not have an influence (as lawyers are free in determining their fees). Therefore, only limited overall impacts can be expected from an amendment of the Regulation in relation to the costs incurred.

What could, however, be impacted on through an amendment of the Regulation are **indirect costs incurred by citizens due to procedural delays**. Such costs relate, for example, to delays due to the following procedural steps:

Table 42: Mapping of procedural steps in national and international cases as causes of delay

Area of delay	Type of delays	International	National
Horizontal	Requirement for lawyers specialised in internat. family law	X	
	Requirement for different lawyers for different jurisdictions	X	

Area of delay	Type of delays	International	National
	Service of documents and evidence	X	X
	Translation & Interpretation	X	
	Travelling	X	X
	Judgment - submission of a copy	X	X
	Issuance of a certificate	X	X
	Recognition of judgements	X	
	Length of international procedures	X	
Matrimonial matters	Forum shopping	X	
	Stand still' delay	X	X
Matters of parental responsibility	Gathering of evidence from foreign authorities	X	
	Cooperation between central authorities	X	
	Obtaining a decision containing a declaration of enforceability of a judgment	X	
	Length of return procedures	X	
Child abductions	Time limits	X	X
	Length of return procedures	X	X
	Conflicting decisions by courts in different Member States	X	

Source: Deloitte

As can be seen from the table above, a number of identified procedural steps that may cause delays are only relevant in international cases while some are relevant for both national and international cases. In addition, it is expected that procedural steps cause higher costs due to delay in international cases than in national ones. A prime example is costs related to travelling abroad such as hotel fees or additional flight costs etc.

With an amendment of the Regulation, it could be possible to abolish certain unnecessary or iterative steps in the judicial procedures compared to national cases such as, for example, the costs incurred through the involvement of lawyers in other countries or the costs associated with the recognition of judgements from other Member States. There is also a potential to reduce costs.

The cost reduction potential at the level of the individual legal issues

Information on the costs for citizens linked to proceedings in international matrimonial matters and matters of parental responsibility, incl. child abductions, is very scarce. Despite significant efforts to obtain evidence of costs through desk based research and interviews with stakeholders working with cases under the Brussels IIa Regulation, besides some limited anecdotal evidence and cost estimates made in other studies, relevant data has generally not been obtained.

Therefore, it was not possible to carry out a quantitative assessment of the related costs at an aggregate level due to a lack of data. However, the **overall costs for a proceeding** and **potential cost reduction** of an amendment of the Regulation related to specific **hypothetical cases**, i.e. in the form of illustrative examples, were calculated broken down by the prioritised issues.

This approach serves to provide a picture of the costs faced by citizens in individual cases; it does not provide a sufficiently robust method to aggregate the costs to the EU27.

For this purpose, in total nine hypothetical cases have been developed, covering different combinations of the prioritised issues under the Regulation(these can be found in the Impact assessment report in the section *Hypothetical Cases*).

Most of the **legal issues** that have been identified are expected to primarily have an impact on the **number of hours spent by lawyers in different jurisdictions**. The identification of the degree to which the various legal issues impact on the time spent by lawyers on a case has proved very challenging; the legal professionals interviewed have not been able to provide estimates at this detailed level.[496]

Another challenge to estimating the undue costs for citizens is, as pointed out by numerous interviewees, that the costs of the proceedings depend on the **value at stake,** which in itself is a function of the combined monthly income of the spouses and a multiplicative factor (usually three) to determine the actual value at stake. Clearly, this further complicates the possibility to provide aggregate estimates of costs and the potential to achieve a reduction.

The approach towards these hypothetical cases is described in Annex 10.

Types of delays

Data on delays is scarce and was hard to obtain from the national experts as relevant data is not available. Therefore, the data on delays currently available is, at best, fragmented and anecdotal.

Hence, the first step of this exercise to examine the types of delays would again be a **mapping of any possible procedural delays under the Regulation**. At this stage, the following broad types of delays have been identified:

- Research time, e.g. time spent by lawyers to research the concept of domicile or time spent by lawyers to prepare their argumentation and present it to the court;
- Time for mandatory procedural steps, e.g. time until court that has jurisdiction has been identified in case ambiguities exist which court was seised first or time until applications and judgments are translated; and
- Travel time.

At this stage, it is necessary to distinguish two types of delays: Delays on which modifications and clarifications of the Regulation can and cannot impact on.

There are, however, also delays that any modifications and/or clarifications of the Regulation will have no impact on and would thus remain. Such delays, for example, relate to procedural steps and deadlines for courts and court hearings.

Moreover, **it was not be possible to assess the magnitude of delays under the Brussels IIa Regulation, neither at an aggregate level nor individual level other than in the form of illustrative examples**. Such an exercise is precluded due to the lack of data and the highly disputable assumptions such an approach would imply in order to come to a quantifiable conclusion. Therefore, evidence can, at best, be used as part of illustrative examples and hypothetical case scenarios.

However, data concerning the average lengths of first instance exequatur and appeal proceedings provided in the Impact Assessment concerning on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[497] (concerning the recast of the Brussels I Regulation) has additionally been taken into account for the assessment of the delays.

An overview of the average lengths of first instance exequatur and appeal procedures per Member State in relation to proceedings under the Brussels I Regulation is provided in the table below.

[496] The data / estimates that were provided by the interviewees are given below.
[497] http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2010/sec_2010_1547_en.pdf

Table 43: Average lengths of first instance exequatur and appeal procedures per Member State under the Brussels I Regulation

Member State	Average duration of first instance exequatur procedure	Average duration of appeal proceedings
Austria	1 week	n/a
Belgium	1-4 months	Liège: 1 year; Antwerp: 1 year; Brussels: up to 2 years
Cyprus	1-3 months	n/a
Czech Republic	n/a	n/a
Estonia	3-6 months	6 months to 1-2 years
Finland	2-3 months	6 months
France	10-15 days	n/a
Germany	3 weeks	1-6 months; applications which obviously have no chance of success are immediately closed within a period of 1-2 weeks
Greece	10 days – 7 monthsx	6-10 months
Hungary	1-2 hours	3 months (in more than 50% of the cases)
Ireland	1 week or more	n/a
Italy	Milan: 20-30 days; Bolzano: 7-20 days	About 2 years
Latvia	10 days	2-6 months
Lithuania	up to 5 months	up to 2 months
Luxembourg	1-7 days	10-12 months
Malta	Exemplary single cases with procedures concluded within days up to three months	First hearing after 2 years, decision 3-12 months later
Netherlands	n/a	n/a
Poland	1-4 months	1-3 months
Portugal	n/a	4-5 months
Slovakia	n/a	n/a
Slovenia	n/a	2-12 months
Spain	n/a	2-4 months
Sweden	2-3 weeks	n/a
United Kingdom	England & Wales: 1-3 weeks Scotland: n/a	England & Wales: 1-2 months Scotland: n/a

Source: European Commission; Commission Staff Working Paper SEC(2010) 1547 final[498]

As can be seen from the table above, the average duration of exequatur proceedings ranges from one week in Austria up to seven months in Greece.

In general, however, the majority of delays in legal procedures occur in case it is appealed by one of the parties. The average length of such appeal procedures ranges from one to two months in England and Wales up to three years in Malta (where a first hearing takes place after 2 years and a decision is made 3 to12 months later).

6.6.2 Magnitude of costs and delays

The main factors generating **costs and delays** in international cases of matrimonial affairs and parental responsibility relate to **travelling**, **translation** and **interpretation**, a need for **lawyers specialised in international family law**, a need for **specialised legal advice** to deal with the unfamiliarity and unpredictability of foreign law systems and potentially additional **administrative paperwork** (e.g. for the recognition of foreign judgements).

The court fees for the parties are typically not impacted by the international dimension of a case in matrimonial matters or parental responsibility.

In general, disputes and court proceedings in family law matters are **highly stressful** events for the parties involved, in particular children. This stress can have significant negative impact on the individuals' health, well-being and ability to work – potentially leading to high societal costs. In the framework of this study, it is however not feasible to quantify and monetise the costs of stress related to proceedings under the Brussels IIa Regulation. Indeed, such a quantification and monetisation is hampered by a lack of reliable data, the complexity of the phenomenon of stress as well as the fact that the severity and duration of stress in a similar situations differ strongly between individuals depending on psychological, physiological and contextual factors.[499]

Several **specific factors for costs and delays** were pointed out by the stakeholders consulted in relation to specific parts of the procedure[500]:

(a) Travel costs

International proceedings in matrimonial matters and parental responsibility may require the parties to travel to court hearings. Typically, **travel costs** are **higher for international destinations** than domestic destinations, but this may vary on a case-by-case basis. The typical average costs for intra-EU travelling have been estimated at 400-800 EUR per court hearing in the framework of the impact assessment study on the European Small Claims Regulations.[501] The use of distance communication means, such as videoconferencing, can significantly reduce the need for travelling and thus the related costs.

(b) Translation and interpretation

[498] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1547:FIN:EN:PDF

[499] Stress may, for example, depend on the following variables: Age, gender, individual propensity for stress, individual experiences (e.g. traumata), physical environment, relationship status (family, friends), fear (e.g. of loneliness), mental health, physical health (illness, injury), occupational situation, financial situation, self-confidence, (perceived) external and internal pressure, physical exhaustion, discrimination, harassment, ability to manage stressful situations, ability for conflict resolution.
Cf. also: UK Department of Health (2010): "Quantifying health impacts of government policies".
UK Department of Health (2010): "Health Impact Assessment: evidence on health".

[500] Please refer also to the quantitative estimates of the costs of proceedings under the Brussels IIa Regulation, which have been developed based on nine hypothetical cases in section 3.4 of the impact assessment report. These cases provide insights on the typical costs encountered by citizens in cases covered by the Regulation.

[501] European Commission (2014): Assessment of the socio-economic impacts of the policy options for the future of the European Small Claims Regulation, p. 60.

Court proceedings in international cases of matrimonial matters and parental responsibility often require the **translation** of documents (e.g. of official documents on the marriage, identity of the parties and children, previous court rulings, etc.) and/or the **interpretation** of hearings if the parties or the child do not speak the language of the court. These types of costs generally do not occur in purely domestic cases.

The costs for translation and interpretation vary significantly depending on the Member State and the amount of translations/interpretation required in each specific cases. Costs indicated by experts and stakeholders ranged from 0 EUR (costs covered by public authorities) to 3,200 EUR per case (in Slovenia). Typically, in international cases involving EU Member States the translation costs amount to **300-400 EUR**, but with a high variance depending e.g. on the amount of documents. In **Hungary**, the official translation of a mere passport costs about 100 EUR (25,000-30,000 HUF). In **Slovenia**, parties have to pay for such translations in advance. For some individuals such costs can be very significant and hamper their access to justice. The existing legal aid provisions were considered as insufficient in this regard to ensure equal access to justice.

In other countries, such as the **Czech Republic**, translation and interpretation are provided **free of charge**. Similarly, in **Sweden** the costs for interpretation at oral hearings do not have to be covered by the parties. Nevertheless, translations cause **delays** in the proceedings also in these countries. The stakeholders consulted indicated that typically the translation of documents takes from three days to three weeks.

(c) Service of documents and evidence

The national experts of all Member States reported that the **service of documents** is **largely well-functioning in cross-border cases**. Yet, some interviewed stakeholders pointed to **long delays** (of up to one year) as well as **high fees** for the service of documents in some jurisdictions (notably Scotland and Luxembourg). While the provision of documents and evidence may also be required in domestic cases, the processes are more complex, time-intensive and expensive at international level.

Some national experts concluded that difficulties arising from different provisions across the Member States concerning the service of documents have strongly diminished in cross-border cases due to the implementation of the **Service of Documents Regulation**[502]. Therefore, the different national provisions concerning the **service of documents** are **to a large extent harmonised in cross-border cases**.

Nevertheless, some problems have been reported. A significant issue and cost driver in international cases of matrimonial matters and parental responsibility relate to the **evidence procedure**, including expert opinions and witnesses. An important problem in this regard is also that the location of **spouses and/or children** is not always easy to identify and **searches by private detectives** may be required. This can be very expensive and even prohibitive for many individuals. Concrete cost estimates depend on the specific circumstances of each case and examples have not been possible to obtain.

Several interviewees noted that the arrangements laid down in the **Evidence Regulation**[503] are **very rarely used by judges** – due to a lack of awareness of this instrument or a rejection to make use of it. This leads to additional delays and costs.

(d) Legal advice and representation

While legal advice and representation is generally needed in both national and international cases, the complexity of international law, the use of different languages and need to deal with foreign law

[502] Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1409082725876&uri=CELEX:32007R1393
[503] Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in taking of evidence in civil or commercial matters, http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32001R1206

systems lead to a need for **highly qualified and specialised lawyers**, who may generate higher costs than in purely national cases. Indeed, typically more hours of legal advice and representation are required in international cases and the unit costs (per hour) for specialised legal advice in international family law are typically higher than for domestic cases.

The **additional costs for specialised legal advice** vary considerably across the EU, *inter alia* depending on national differences in salary levels. The additional costs for international cases have been estimated to fall within a range of 500 EUR to 15,000 EUR per case.

As to the reasons for these additional costs, with some exceptions, lawyers seem to charge higher fees for their services rendered in international cases compared to purely national ones. In Hungary, lawyers' hourly fees for international cases are 50-100 EUR + VAT (27%). Launching a case is at least 10 hours work. Lawyers' fees for a child abduction case can be 200,000-300,000 HUF (1,000 EUR). In **Belgium**, average costs for legal advice in international cases are 100 EUR/h + VAT (21%).

In the **United Kingdom**, lawyers' fees for a contested international divorce case are about 10,000 GBP (12,500 EUR) or above. For international cases of parental responsibility, prices are similar, although there are more possibilities for getting legal aid. Obtaining advice from specialist lawyers in another country about the likely financial outcome of a divorce for the parties can be fairly quick but expensive (up to 5,000 GBP (6,250 EUR) or more).

One interviewee from **Bulgaria**, however, stated that the costs for legal counselling are not different in international cases compared to national cases, because the general tariffs apply and the prices are fixed rates. For a divorce, parties have to pay about 12 EUR per hour at the beginning and about 25 EUR per hour at the end of the proceedings.

Some lawyers also noted that the **ineffective implementation of the Services Directive**[504] hinders them in freely exercising their mandate in other Member States within the Internal Market, thus leading to additional costs and delays. This can lead to situations, where lawyers do not want to practice in other countries (due to high administrative obstacles) and that the citizens are therefore forced to take on a new lawyer although the initial one could have handled the case.

Furthermore, it has been pointed out that judges are sometimes less familiar with the legal instruments applicable to international cases and therefore require explanations from lawyers, thus leading too lengthier – and more costly – procedures.

(e) Court proceedings

A problem, which can lead to significant additional costs (for travelling, lawyers, etc.), is that **sometimes parties do not show up before the court**. Typically, the costs related to the default of appearance of a party are significantly higher in international proceedings than in purely domestic ones because of longer and more expensive travel may be required to attend to additional hearings. Some interviewees regretted that often no continuation of court proceedings is possible in cases where parties do not show up with the objective to impede the proceedings (in cases where no judgment in default of appearance can be given).

A general problem relates to the fact that matrimonial matters and parental responsibility cases as well as related issues such as maintenance or succession are often not dealt with in the same court, notably where other Union instruments (such as the Maintenance Regulation) are used in addition to the Brussels IIa Regulation. This can lead to an **unnecessary duplication of procedures** and thus to additional costs and delays. Several stakeholders regretted the insufficient coordination and coherence between the different instruments of international family law that does not allow to

[504] Directive 2006/123/EC on services in the internal market, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF

prevent such parallel proceedings on related matters. This issue, however, goes beyond the scope of the Brussels IIa Regulation and of this study as it concerns several Union instruments on family law.

Costs and delays relating specifically to matrimonial matters

This section presents specific insights on costs and delays of international court proceedings in **matrimonial matters** associated with the Brussels IIa Regulation.[505]

(a) Costs of international proceedings in matrimonial matters

The interviewees consulted estimated that the **costs of international cases in matrimonial matters** are, on average, about **20%-40% higher than the costs of national cases**. As mentioned above, the main factors generating costs (and delays) in international cases relate to travelling, translation and interpretation, a need for lawyers specialised in international family law and a need for specialised legal advice to deal with the unfamiliarity and unpredictability of foreign law systems.

Costs of an international divorce vary according to whether the proceeding is launched by **mutual consent** or is **contested**. For instance, a Belgian interviewee highlighted that if nothing is contested by the divorcing spouses, an 'international divorce' only involves very limited additional work (reflected in lawyers' fees) compared to a purely national case.

A Romanian expert explained that typically the **additional costs** (for translation, specialised lawyers, etc.) of international divorce cases amount to **300 to 400 EUR per case** in **Romania**.

Rush to court / forum shopping is considered as a **cost driver** in many international cases of matrimonial matters. Indeed, **specialised legal advice** is generally required to take full advantage of the alternative grounds of jurisdiction in matrimonial matters of the Brussels IIa Regulation.[506] Furthermore, the risk that the other spouse will rush to court may encourage a spouse to rush to court herself/himself as quickly as possible or at least to consult a specialised lawyer in this regard – leading to additional costs. Several interviewed experts noted that citizens may require **several lawyers from different legal systems** for cases where a possibility for rush to court / forum shopping exists. Indeed, lawyers in the country of residence of the spouses may not necessary have the required expertise of the national substantive laws on divorce of all the Member States to which a rush to court would be possible. Therefore, legal advice and representation in two or three Member States could be necessary, causing additional costs. While the Rome III Regulation has contributed to reduce this issue, the problem still remains.[507]

(b) Delays of international proceedings in matrimonial matters

According to the stakeholders consulted, **international proceedings** in matrimonial matters typically take **between one and two years in total**. The reported length of proceedings ranged between six months and four years. The additional delays of international cases compared to domestic ones were estimated to fall within a range of two months to three years.

For instance, according to a Slovenian judge, an analysis of 567 cases in divorce and parental responsibility matters in **Slovenia** shows that **international cases with other EU Member States take on average two to three months longer than domestic cases**. International cases with third

[505] Please refer also to the quantitative estimates of the costs of proceedings under the Brussels IIa Regulation, which have been developed based on nine hypothetical cases in section 3.4 of the impact assessment report. These cases provide insights on the typical costs encountered by citizens in cases covered by the Regulation.

[506] A comprehensive analysis of this issue can be found in the section "Rush to court / forum shopping" in Annex 1. See also: N. A. Baarsma, The Europeanisation of International Family Law (Asser Press: 2011) 154

[507] A comprehensive analysis of this issue can be found in the section "Jurisdiction rules applicable to matrimonial matters" in Annex 1.

countries typically take six months longer than domestic cases. The analysis did not distinguish between cases of matrimonial matters and cases of parental responsibility matters.

According to an interviewee from **Bulgaria**, national cases can take **up to two years**, while **international cases** can take **up to four years**. The additional time needed for international cases can be explained by the geographical distances of the parties. It therefore takes longer to serve documents and to schedule hearings. Similar time frames were given by a Finnish interviewee, who indicated that national divorce cases in **Finland** take between six months[508] and one year. International cases can take much longer. A figure of **up to four years** was given by the stakeholder. A Romanian expert explained that international divorce cases take on average **20% more time** than domestic cases in **Romania**.

In some jurisdictions **additional 'stand-still' delays** (i.e. time periods after the seizing of the court and before the proceedings can officially start) are foreseen **for international divorce cases** (e.g. two months in France).

Generally, **no significant delays** are **associated with rush to court / forum shopping**, because applications have to be filed as quickly as possible so as to ensure that the interests of the clients are ensured.

Costs and delays relating specifically to parental responsibility cases

This section presents specific insights on costs and delays of international court proceedings in cases related to **parental responsibility** under the Brussels IIa Regulation.[509]

(a) Costs of international proceedings concerning matters of parental responsibility

For parental responsibility cases, more work is typically involved for international cases than domestic ones and, therefore, **additional costs** generally occur for citizens. The interviewees estimated that the **costs of international cases in parental responsibility** are, on average, **about 20%-40% higher than the costs of national cases**, i.e. similar to the additional costs quoted for international cases concerning matrimonial matters**.** As mentioned above, the main factors generating costs (and delays) in international cases relate to travelling, translation and interpretation, a need for lawyers specialised in international family law, a need for specialised legal advice to deal with the unfamiliarity and unpredictability of foreign law systems and potentially additional administrative paperwork (e.g. for the recognition of foreign judgements).

Numerous stakeholders stated that international family law **cases involving children** are generally perceived as **more difficult and time consuming** than other international cases. For instance, international child abduction cases require an intense work load and a high level of commitment by lawyers. Additional work for international cases on parental responsibility is associated with the preparation of the written documents that are necessary for the procedure under the Brussels IIa Regulation, which is more cumbersome when compared to domestic cases and thus leads to significant additional cost for legal advice and representation.

(b) Delays of international proceedings concerning parental responsibility

Numerous stakeholders stated that international family law **cases involving children** are generally perceived as **more difficult and time consuming** than other international cases. Judgments in international cases on parental responsibility may also be more difficult to enforce due to a general

[508] Six months is the minimum time (for national and international cases), as there is a 6 months consideration period for the spouses, which applies to the time between the application and the decision.

[509] Please refer also to the quantitative estimates of the costs of proceedings under the Brussels IIa Regulation, which have been developed based on nine hypothetical cases in section 3.4 in the impact assessment report. These cases provide insights on the typical costs encountered by citizens in cases covered by the Regulation.

lack of awareness of international procedures among judges, legal practitioners and public authorities. The consulted stakeholders estimated that international cases of parental responsibility under Brussels IIa typically take **between two months and three years**, while **most international cases** concerning parental responsibility under the Brussels IIa Regulation are **concluded within six months**.

As mentioned above, an analysis of 567 cases in divorce and parental responsibility matters in **Slovenia** shows that on average **international cases with other EU Member States take on average two to three months longer than domestic cases**. International cases with third countries take on average six months longer than domestic cases. The analysis did not distinguish between cases of matrimonial matters and cases of parental responsibility matters.

In **Germany**, there has been an improvement since 2009, because a new law has been introduced following an ECtHR judgment on the **maximum length of international parental responsibility proceedings**. According to the new law, the first hearing has to take place within one month after the application has been filed. For this appointment, all parties, lawyers, the youth welfare centre, and other relevant parties come together to find a solution. If this does not work out, proceedings are started. However, according to the new law, **procedures must be finalised after six to eight months**. According to a German expert, this works in practice.

Several specific issues and procedures related to international proceedings in parental responsibility matters lead to additional delays for citizens:

- The **establishment of habitual residence of the child**, which is determining the jurisdiction in cases of parental responsibility matters, is regularly disputed due to the vagueness of the concept.[510] In those cases, where the parties **appeal** against the decision on jurisdiction, delays of **three to twelve months** have been reported by stakeholders from different Member States (DE, SE, SK).
- Additional delays in **custody cases** can occur because **information about the situation of the child** needs to be collected by the **Central Authorities**. While the necessity to gather information applies to both national[511] and international cases, the provision of information generally takes longer in international cases (**up to six months** compared to about one month in domestic cases). While urgent national cases can typically be handled more quickly, the need for translations can slow down the provision of information in international cases. It was also noted that information is sometimes exchanged among Central Authorities through postal service (instead of digital communication channels), causing additional delays.
- The **recognition of judgments** in parental responsibility matters can take **several months** because the **courts request additional documents**, such as translations or *apostilles* (i.e. international certification comparable to a notarisation in domestic law). Moreover, the recognition of judgments in parental responsibility is often subject to **appeal**. It can take **up to two years** to have a judgment recognised.
- The duration of proceedings for **obtaining a decision containing a declaration of enforceability of a judgment** on the exercise of parental responsibility varies significantly. If all documents are available immediately, it can take **about one week** according to a Swedish judge. If the court has to ask for additional information, it can take a couple of **months**. These delays are the same for the recognition of judgments and for declarations of enforceability.
- The necessity to enforce certain judgements by **exequatur** causes significant delays. An Estonian judge noted that this generally takes between **one and two months**. If the case is simple, a declaration can be obtained in a written procedure, which takes about one month.

[510] A comprehensive analysis of this issue can be found in the section Difficulties due to the fact that the term 'habitual residence' is not clearly defined in Annex 1.

[511] In a domestic case, two authorities (e.g. from different cities) can be involved in the information gathering.

If any of the documents are incorrect or if there are questions, parties need to come to court. In such cases it can take two months or longer. In case of **appeal**, the procedure can take about **one year** according to a Romanian judge.

- With regard to **child abduction** cases, the **time limit of six weeks** has been heavily criticised by the stakeholders consulted[512]. The time limit is considered as not being realistic and is **only rarely respected**. Stakeholders from different Member States (BG, DE, IE) reported delays of two months till two years. However, it was noted by numerous interviewees that the **time limit in the Regulation contributes to fast decisions**, as international cases are treated with priority. As a consequence, international cases may even be concluded faster than national cases.

Effects of the Brussels IIa Regulation on the additional costs of international court proceedings compared to domestic proceedings

Many interviewees concluded that the **Brussels IIa Regulation** has typically **not augmented the additional costs of cross-border cases** (as compared to the costs of domestic cases), but has also **not significantly contributed to reducing them**. Some interviewees underlined that the costs and delays linked to international judicial cooperation (translations, provision of documents, etc.) should not be seen as a result of the Brussels IIa Regulation; on the contrary, the Regulation aims at facilitating this cooperation and reducing its costs.

It was also pointed out by several interviewees that the Brussels IIa Regulation is a rather **complex instrument** and that many practitioners do not fully understand it. In addition, there is a problem of a lack of awareness of citizens and legal practitioners. Therefore, the **potential positive effects** of the Regulation, such as reduced costs and delays, and increased legal certainty and predictability, are **not always fully realised in practice**.[513]

[513] For a discussion of issues related to the awareness and information of citizens and legal practitioner regarding the Brussels IIa Regulation, please refer to the section “Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States”.

Annex 7. Compliance costs and stress

7.1. Compliance costs

Compliance costs associated with the Regulation mainly relate to the operation of the Central Authorities as well as training of legal practitioners. These costs are generally **very limited**.

The **Central Authorities** of the Member States are generally operated by the national Ministries of Justice or related public bodies. Usually, the bodies designated as Central Authorities under the Brussels IIa Regulation are also in charge of international coordination tasks for similar international legal instruments in family law, such as the 1980 and 1996 Hague Conventions. The main costs related to the Central Authorities under the Brussels IIa Regulation refer to staff costs (generally between 2 FTEs and 4 FTEs per Member State), office space, outsourced translation services and supplies. No detailed cost data is available for the different Member States.[514]

Awareness raising and training on the Brussels IIa Regulation may be required for different types of legal practitioners affected by the Brussels IIa Regulation, such as judges (potentially, but not necessarily, in specialised courts dealing with family matters), lawyers (specialised in (international) family law), officials in Central Authorities, officials in public authorities responsible for children and mediators – and, potentially, citizens. While no detailed data could be collected on the costs of the Member States' awareness-raising and training activities, a large number of the stakeholders consulted pointed to insufficient efforts by the Member States in this regard.[515]

7.2. Stress as consequence of divorces and legal separations

Generally speaking, stress is an individual psychological phenomenon that depends on external factors and internal prerequisites that are different for each individual. Stress can, for example, be defined as a real or perceived imbalance between environmental demands required for survival and an individual's capacity to adapt to these requirements.[516] In one of its most basic conceptions[517], the effects of stress on an individual's health follow a causal link from external, environmental factors to individual appraisals of these (e.g. perceived level of stress) that result in distinct behavioural, physiological, and psychological responses. This could, for example, be illustrated as follows:

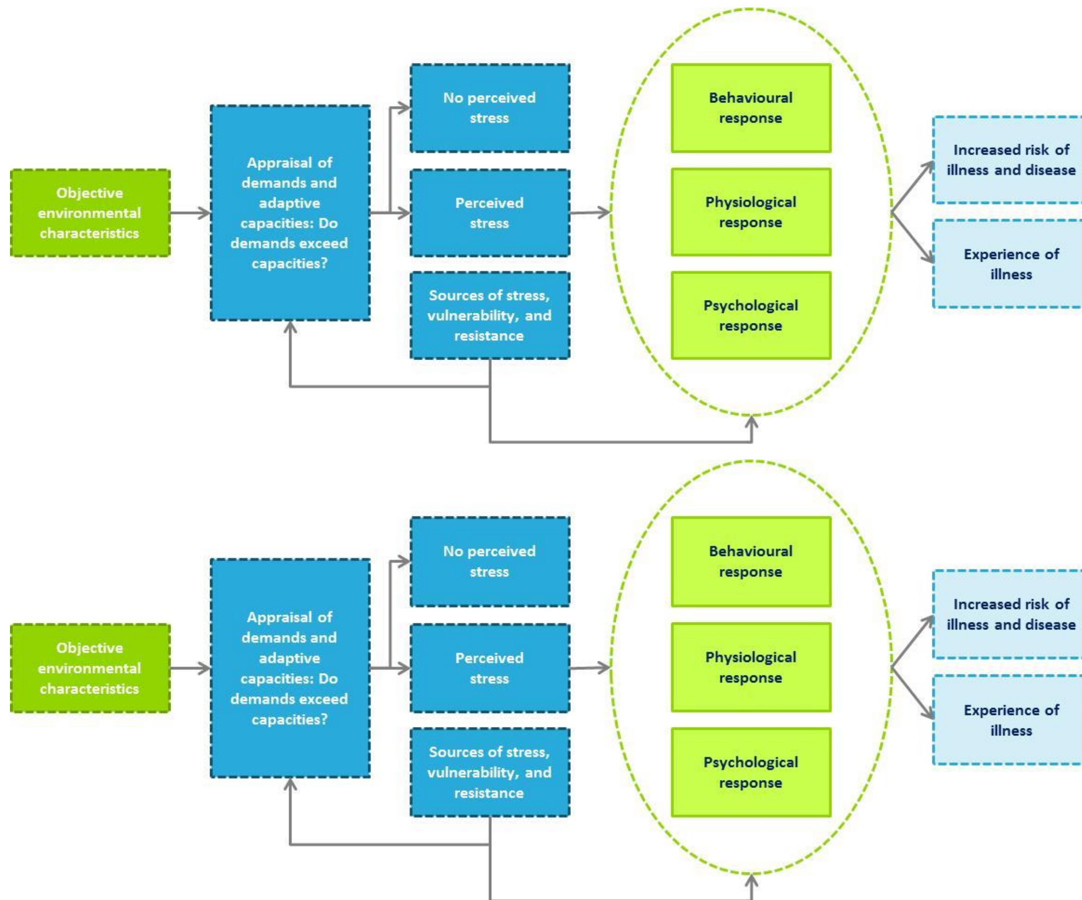
[514] The study team conducted a survey of the Central Authorities, but the responses received provided very limited insights on the costs and resources of Central Authorities. Please refer to Annex 5 for more information.

[515] For a discussion of issues related to the awareness and information of citizens and legal practitioners regarding the Brussels IIa Regulation, please refer to the section "*Challenges of the application of the Regulation in the Member States*".

[516] http://www.gulflink.osd.mil/library/randrep/stress/mr1018_4_chap2.html

[517] It is very important to note that different conceptions of stress exist in the scientific literature. It is, however, not possible to illustrate and reference these as part of this assignment as it is expected that none of these models can *fully* reflect stress as a psychological phenomenon as such and they are therefore considered to be in mutual competition with each other.

Figure 26: Basic conception of the causality of stress and health concerns



Source: Illustrated by Deloitte based on desk research

Applied to the types of issues this study is concerned with, the *objective environmental characteristics* could, for example, be the divorce of the parents which exceeds the *capacities* of the child (e.g. through insecurity, feeling of guilt, fear). This may lead to a *high perceived level of stress* for the child which triggers individual behavioural, physiological, and psychological responses to the relevant stimulus. The consequence could, for example, be that the child suffers from an illness or other deficits in his/her psychosocial development due to the stress associated with the divorce of the parents.

It is, however, important to note that this is not to be seen as a causality that applies in each and every case per se. Individuals are different and so are their capacities to deal with environmental characteristics, and their individual responses to stress. These depend on factors such as, for example, the issue at stake, how it is handled, the age of the child, or the individual propensity to stress. Hence, a divorce *could* cause stress – but it does not have to per se. Therefore, it is not clear a priori what types of effects specific proceedings may have on the concerned individuals, i.e. parents and children.

To be more precise, the National Scientific Council on the Developing Child has identified three different types of stress:[518]

[518] National Scientific Council on the Developing Child. Cambridge: The Council: 2005 [cited 2007 April 9]. Excessive stress disrupts the architecture of the developing brain. Working Paper No 3. Available from: http://www.developingchild.net/pubs/wp/Stress_Disrupts_Architecture_Developing_Brain.pdf.

- **Positive stress**: is considered an important part of the development process and it results from adverse experiences that are short-lived. With the support of caring adults, children can learn how to manage and overcome positive stress;
- **Tolerable stress**: refers to adverse experiences that are more intense but still relatively short-lived. It can be caused, for example, by the death of a loved one, a frightening accident, or parents' separation or divorce. If the child lacks adequate support, tolerable stress can become toxic and lead to long-term negative health effects. Otherwise, it can be overcome; and
- **Toxic stress**: results from intense adverse experiences that may be sustained over a long period of time. Examples of toxic stress are child maltreatment, abuse and neglect. Children who have experienced toxic stress need appropriate support and intervention to return to their normal baseline.

As regards tolerable stress, **parental divorce or legal separation** involves a series of stressful interactions between children and their environment as the family restructures following parental separation.[519] Many of these interactions, such as inter-parental quarrels, badmouthing, and missed visits by the non-custodial parent present serious adaptation challenges for children.[520] Several studies indicate that post-divorce stressors have a more important influence on children's mental health than does the occurrence of the divorce *per se*.[521]

Both family circumstances and parenting behaviours are aspects of a child's environment that deeply influence his/her early cognitive and emotional development. However, not every child is equally affected by post-divorce stressors. The strategies that children use to cope are one likely source of children's differential vulnerability to the effects of stress. Furthermore, even though differences in children's outcomes have been shown to emerge early in life and to be linked to family circumstances, it is not clear whether these early differences, and the factors associated with them, persist up to age 7.[522]

In order to understand which family circumstances are significant for child well-being at different ages, and how that varies across outcomes, a Study by the UK Department for Education[523] measured childhood stress, splitting the research sample into children up to age 7 and children between age 11 and age 13.[524] From the Study it was found that at age 7, the stressful event which the child suffered seemed to cause attainment and behavioural difficulties[525] as well as mainly to affect his/her verbal cognitive skills,[526] non-verbal cognitive skills[527] and maths skills.[528] For teenagers aged between 13 and 14, the principal observed outcomes were: attainment, emotional, behavioural and social issues, and

[519] Felner, Terre, & Rowlison, 1988, Life transition framework for understanding marital dissolution and family reorganization. In S. A. Wolchik & P. Karoly (Eds.), Children of Divorce: Empirical perspectives on adjustment.

[520] Sandleh, Irwin N; Tein, Jenn-Yun; and West, Stephen G. Coping, Stress, and the Psychological Symptoms of Children of Divorce: A Cross-sectional and Longitudinal Study. Child Development, 1994. The authors conducted a cross-sectional and prospective longitudinal study of stress, coping, and psychological symptoms in children of divorce. The sample consisted of 258 children (mean age = 10.1), of whom 196 were successfully followed 5.5 months later. A 4-dimensional model of coping was found using confirmatory factor analysis, with the factors being active coping, avoidance, distraction, and support.

[521] "Separation from a parent", Amato & Keith, 1991; Pillow, Sandier, Braver, Wolchik, & Gersten, 1991, Small theory and the strategic choices of prevention research. American Journal of Community Psychology.

[522] "Family stressors and children's outcomes", UK Department for Education, DFE-RB254 ISBN 978-1-78105-210-5, Published January 29, 2013

[523] See footnote above.

[524] A range of children's outcomes were examined using data from the Millennium Cohort Study (MCS) and the Avon Longitudinal Study of Parents and Children (ALSPAC).

[525] Behaviour has been measured using the Strengths and Difficulties Questionnaire, which comprises responses by the parent to a series of 25 questions and is used to evaluate emotional-behavioural difficulties.

[526] Verbal skills were measured through the BAS Word Reading assessment.

[527] Non-verbal cognitive skills were measured through the British Ability Scales (BAS) Pattern Construction measure.

[528] Maths skills were measured by the National Foundation for Educational Research Progress in Maths Assessment.

school unease.[529] The stressful life events measured up to age 7, between age 7 and age 11, and between age 11 and age 13 were individually coded and then grouped into 18 types of event. This list of events included parents' divorce or separation.[530] Stressful events which were associated with lower educational attainment or worse wellbeing, but only when the event occurred when the child was older than 7 years, included:

- **Parental divorce;**
- Parents arguing;
- Not seeing parents/siblings as much as usual; and
- Moving/attending a new school.

It is clear that stressful events can potentially disrupt teenagers' lives; and in some cases have enduring effects from early childhood. Nevertheless, in some cases parental divorce or separation may bring an end to stressful family experiences related to abuse and violence in the home. However, the analysis conducted by UK Department for Education highlights the diversity and extent of stressful events in childhood, and their negative consequences across a range of outcomes. The Study found that the most frequent stressful event experienced by children and adolescents was the death of a family member or friend. **The second most frequent stressful event was parental separation and divorce.** The third and fourth most common stressful events were injuries or illnesses of family members and the study child, respectively. Experiences of victimisation and domestic abuse were the fifth and sixth most common stressful events, respectively. The seventh most common stressful event was not seeing either parents or siblings as much as usual. **According to the Study, for 30 per cent of the children whose parents identified this as a stressful event, it was often the result of parental separation and divorce when one parent moved to another location, sometimes taking one or two siblings with them.** Parents fighting and arguing more than usual was the next most common stressful event, which co-occurred with parental separation or divorce in about 30 per cent of cases.

Overall, the study by the UK Department for Education found that stressful family events which created instability in children's and teenagers' lives, such as parental divorce, have significant associations with teenagers' outcomes, especially when these events occur after early childhood (age 7 and onwards). Parental separation/divorce had negative associations with achievement at age 16 as well as emotional, behavioural and social well-being at age 13. Furthermore, family separation, in terms of not seeing parents or siblings as much as usual (which is frequent in cases of separated or divorced international couples) was also related to lower emotional, behavioural, and social well-being in early adolescence. Interestingly, family separation or divorce in early childhood (before age 7) was not related to worse outcomes in adolescence. This suggests that younger children are less affected by family problems than older children, who might be more able to remember their parents and siblings together and understand the implications more fully.[531]

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[529] Emotional, behavioural, social and school well-being were measured analysing the responses the parents gave to a series of questions concerning their teenagers' separation anxiety, fears, anxiety, attention, friendships and social interactions, satisfaction and engagement in school.

[530] The events were reported by parents and were those that they considered to be "exceptionally stressful" and "that would really upset almost anyone". The majority of children experienced no stressful events. The full list of stressful life events included: 1. Death of parent 2. Death of family member or friend 3. Child was seriously ill or injured 4. Family member was seriously ill or injured 5. Friend was ill or injured 6. Saw crime or accident 7. Negative change in parent's financial situation 8. Domestic violence/abuse including alcohol and drugs 9. Victim of abuse, violence or bullying (not within immediate family) 10. Parents separated /divorced/ left 11. Moved/attended new school 12. Got a new (step) brother or sister 13. Pet died 14. Parents/family argued more than previously 15. Family member arrested 16. Homeless/Living in refuge/Foster care 17. Not seeing parents/siblings as much as usual 18. Problems in school or with friends.

[531] "Family stressors and children's outcomes", UK Department for Education, DFE-RB254 ISBN 978-1-78105-210-5, Published January 29, 2013

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