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| From:            | Secretary-General of the European Commission,<br>signed by Mr Jordi AYET PUIGARNAU, Director   |
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EUROPEAN  
COMMISSION

Brussels, 30.6.2016  
SWD(2016) 207 final

**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**Proposal for a Council Regulation**

**on jurisdiction, the recognition and enforcement of decisions in matrimonial matters  
and the matters of parental responsibility, and on international child abduction (recast)**

{COM(2016) 411 final}  
{SWD(2016) 208 final}

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## I. Introduction

### 1. BACKGROUND

Regulation No 1347/2000 laying down rules on jurisdiction, recognition and enforcement of judgments on divorce, separation and marriage annulment as well as judgments on parental responsibility for the children of both spouses<sup>1</sup> was the first Union instrument adopted in the area of judicial cooperation in family law matters. It was replaced by Regulation No 2201/2003<sup>2</sup> (commonly known as the Brussels IIa Regulation, hereafter "the Regulation"). The Regulation is the cornerstone of Union judicial cooperation in matrimonial matters and matters of parental responsibility. It applies since 1 March 2005 to all Member States<sup>3</sup> except Denmark<sup>4</sup>. Courts in all Member States have to apply it in all proceedings for divorce, separation or marriage annulment and in all proceedings on parental responsibility matters with a cross-border element. The term "international couple" is therefore used in this report to refer to situations where spouses are habitually residing in different Member States, have different nationalities or have the common nationality of one Member State, but are habitually residing in another Member State. It is estimated that, on average, one in twelve couples in Europe is an "international couple".

The Regulation establishes uniform jurisdiction rules for divorce, separation and the annulment of marriage<sup>5</sup> as well as for disputes about parental responsibility with an international element. It facilitates the free circulation of judgments, authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in other Member States.

### 2. THE INTERPLAY WITH OTHER FAMILY LAW INSTRUMENTS

The assessment of the operation of the Regulation has to be made against the background of other instruments, in particular other EU Regulations in the area of family law and international instruments such as the 1980<sup>6</sup> and 1996<sup>7</sup> Hague Conventions.

There are no direct overlaps in terms of scope of the Brussels IIa Regulation and other EU Regulations in the area of family law. However, in the area of parental responsibility, the carefully negotiated interaction between the Regulation and the two Hague Conventions of 1980 and 1996 needs to be preserved while in the area of matrimonial matters, an indirect link with some other EU instruments needs to be taken into account.

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<sup>1</sup> Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30.6.2000, p. 19.

<sup>2</sup> Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, OJ L 367, 14.12.2004, p. 1.

<sup>3</sup> To those Member States which joined the Union after this date, the Regulation applies from the beginning of their membership (Bulgaria and Romania: 1 January 2007, Croatia: 1 July 2013).

<sup>4</sup> Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, does not participate in the Regulation and is therefore neither bound by it nor subject to its application. For the purpose of this report (as for the Regulation; see Article 2 No 3), the term "Member States" does not include Denmark. As the outcome of the referendum held in Denmark on 3 December 2015 with regard to Denmark's future participation in this area was negative, this situation will remain unchanged for the time being.

<sup>5</sup> While the Regulation covers divorce, legal separation and annulment, in this report, for the sake of simplicity, reference is made only to "divorce".

<sup>6</sup> Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter "the 1980 Hague Convention").

<sup>7</sup> Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter "the 1996 Hague Convention").

## 2.1. Parental responsibility matters

With respect to the **parental responsibility matters** (custody, access, child protection) the courts of the Member States are bound by the **jurisdiction** rules of the Regulation. There are no other EU instruments dealing with this aspect. Generally speaking, only one Member State at a time has jurisdiction in order to avoid parallel proceedings and conflicting judgments. The jurisdiction rules are child-centred and based on proximity to the child (habitual residence as the main rule).<sup>8</sup>

The aim of the 1980 Hague Convention is to **protect the jurisdiction** of the State of habitual residence of the child, thereby **protecting the child** itself. The Contracting States to the 1980 Convention, including all Member States, have agreed that a child who is habitually resident in one Contracting State, and who has been removed to or retained in another Contracting State in violation of the left-behind parent's rights of custody, shall be promptly returned to the country of his/her habitual residence. Within the European Union, the 1980 Hague Convention continues to apply as supplemented by the Regulation which aims at creating even more ambitious rules fighting and deterring child abduction by imposing stricter obligations to ensure the prompt return of a child. This report addresses the respective provisions of the return procedure as set out by the Regulation, while it leaves the rules of the Convention untouched. The Hague Conference on Private International Law under whose auspices the 1980 Hague Convention was negotiated, holds regular meetings of Contracting States (delegations including legislators, judges and Central Authority staff) to monitor the operation of the Convention. At the meetings in 2006 and 2011/12, in which also the Commission participated, a Swiss proposal for an amending protocol was discussed but the meeting adopted the conclusion that there was no sufficient support.<sup>9</sup> It was perceived that the Convention in general worked well and could and should be enhanced by soft law and implementation measures at national and regional or supranational levels, as this was done, for instance, by the Brussels IIa Regulation. This was also the position of the EU and its Member States, as explained in 2011 in a letter to the Hague Conference which further stated that the carefully balanced consensus among the Contracting States in the area of parental child abduction, which also forms the basis of the Brussels IIa Regulation, the key Union instrument in this area, should not be undermined.<sup>10</sup> The present REFIT proposal pursues the same aim which is still valid. Moreover, its aim is to make the link with the United Nations Convention on the Rights of the Child<sup>11</sup> and the European Charter of Fundamental Rights<sup>12</sup> more obvious as these instruments provide binding guidelines for the implementation and application of the Regulation.

Both in intra-EU cases and cases in relation to third States, the **law applicable to parental responsibility matters** is determined by the 1996 Hague Convention. As there is only one set of uniform conflict-of-laws rules on the law applicable to parental responsibility matters which works well at EU and global levels, this issue is not discussed in this Impact Assessment as there is no need for substantial changes.

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<sup>8</sup> In relation to non-Member States which are parties to the 1996 Hague Convention which was ratified by all Member States, judges in EU Member States have to apply the jurisdiction rules of that Convention; they follow largely the same logic as the Regulation. In intra-EU cases the Regulation's jurisdiction rules take precedence over those of the 1996 Hague Convention. The Regulation applies: (i) where the child has his or her habitual residence in a Member State and (ii) with regard to the recognition and enforcement of a judgment given in a Member State, even if the child has his or her habitual residence in a third State which is Party to the Convention; Article 61. See also Council Decision of 5 June 2008 authorising some Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law, OJ L 151/36, 11.06.2008, p. 1.

<sup>9</sup> See the Report of the 2011/12 Special Commission at [https://assets.hcch.net/upload/wop/concl28-34sc6\\_en.pdf](https://assets.hcch.net/upload/wop/concl28-34sc6_en.pdf), paras 3, 4 and 41.

<sup>10</sup> See the letter at <https://assets.hcch.net/upload/abduct2011eu2.pdf>.

<sup>11</sup> UNCRC of 20 November 1989 which is in force for all Member States.

<sup>12</sup> Charter of Fundamental Rights of the European Union, OJ 26.10.2012, C 326 p: 391.

**Recognition and enforcement of judgments** given in another Member State on parental responsibility matters is governed by the Brussels IIa Regulation.<sup>13</sup> The Brussels I Regulation is not **directly** relevant to the Brussels IIa Regulation as it explicitly excludes family matters from its scope. Nevertheless, the solution found during the latest Brussels I recast on the abolition of *exequatur* inspires to a certain extent the amendments proposed for the Brussels IIa Regulation in this respect. Like the proposed clarifications and changes to the cooperation provisions, they are based on, and aiming at an even stronger implementation of, mutual trust.

## 2.2. Matrimonial matters

In **matrimonial matters**, the Brussels IIa Regulation regulates the **jurisdiction** of the courts of the Member States for divorce, legal separation and the annulment of marriages. It does not contain rules to determine which law applies to these questions. In 2006, the Commission proposed amendments to the Regulation introducing rules concerning **applicable law** in matrimonial matters as well as some modifications concerning jurisdiction (hereafter "the 2006 Commission proposal to amend the Regulation").<sup>14</sup> No unanimity could be reached within the Council with regard to the rules on applicable law. As a result, based on the Commission's proposals, 14 Member States<sup>15</sup> initially established enhanced cooperation among themselves and adopted Regulation (EU) No 1259/2010 laying down rules determining the law applicable to divorce and legal separation<sup>16</sup> (hereafter "the Rome III Regulation"); they were later joined by two more States<sup>17</sup>. The Rome III Regulation therefore plays a role only as far as a possible "rush to court" is concerned (see detailed explanation in chapter 1 of the matrimonial matters).

There is no **direct** link between the issues discussed in this Impact Assessment and the Maintenance Regulation; the scope of the latter relates to maintenance obligations arising from a family relationship while maintenance is excluded from the scope of the Brussels IIa Regulation. However, there is an indirect link: when divorce is pronounced, frequently also issues like custody and access (i.e. parental responsibility matters) and maintenance (for a spouse and/or the child(ren)) need to be resolved.<sup>18</sup> These latter matters follow their own jurisdiction rules, based on different considerations (proximity in parental responsibility matters, protection of the maintenance debtor in need in maintenance matters) while the aim of the jurisdiction rules for matrimonial matters was to provide as much choice as possible for the spouses to make sure that they can easily obtain their divorce somewhere. It can happen that jurisdiction for divorce, parental responsibility and maintenance lies in different Member States. The Maintenance Regulation and to some extent also the current chapter of the Brussels IIa Regulation on parental responsibility<sup>19</sup> strengthen party autonomy and encourage parties to plan for future litigation while they are still on good terms.

Finally, the Commission proposed in 2011 two Regulations<sup>20</sup> concerning property rights for international couples (spouses and registered partners). The purpose of the proposals was to establish a clear legal framework for determining jurisdiction and the law applicable to matrimonial property regimes and property regimes of registered partnerships and to facilitate the movement of decisions among the Member States. After four years of negotiations, the JHA Council voted on 3 December

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<sup>13</sup> Judgments from other States parties to the 1996 Hague Convention to whom the Regulation does not apply are recognised in Member States under the 1996 Hague Convention.

<sup>14</sup> 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).

<sup>15</sup> Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

<sup>16</sup> OJ 29.12.2010, L 343 p. 10.

<sup>17</sup> Lithuania and Greece.

<sup>18</sup> The same is true for the division of the matrimonial property (see *infra* note 20 and the adjoining text).

<sup>19</sup> The same is true for the proposals on the property regimes of international couples (*infra* note 20).

<sup>20</sup> COM(2011) 126 final and COM(2011) 127 final.

2015 on the package of the two proposals. Unanimity which is required by the Treaty<sup>21</sup> for measures in the area of family law with cross-border implications could not be reached.<sup>22</sup> Member States opposing the adoption of the Regulations explained that "*any initiative of the Union in that area should not interfere, even indirectly, with the fundamental principles of the family laws of its Member States*".<sup>23</sup>

The difficulties encountered with the matrimonial property matters have been taken into account while assessing the political feasibility of any possible measures on matrimonial matters falling within the scope of the Regulation as the same adoption procedure (unanimity) is also required for the Brussels IIa Regulation. In this context, the even more ambitious proposal to consolidate all relevant EU family law instrument in one single instrument is not an option at the moment. Moreover, as suggested in the Note<sup>24</sup> on "Current Gaps and Future Perspectives in European Private International Law: Towards a Code on Private International Law?" commissioned by the European Parliament's Committee on Legal Affairs in 2012, such consolidation in one instrument should be addressed only **after** individual instruments have been adopted for all relevant areas of family law.

### 3. LEGAL AND POLITICAL MANDATE

The present evaluation of the Regulation and its timing are based on a legal obligation established by the Regulation itself which was recently endorsed by a political mandate.

According to the Regulation, by 1 January 2012, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Regulation on the basis of information supplied by Member States. The report shall be accompanied if need be by proposals for adaptations<sup>25</sup>.

Like the Regulation itself, these adaptations are subject to the special legislative procedure defined in Article 81 para. 3 TFEU: For measures concerning family law, unanimity in the Council is required, and the Parliament will be consulted.

The Juncker Commission's Political Guidelines<sup>26</sup> indicate that judicial cooperation among EU Member States must be improved step by step keeping up with the reality of increasingly mobile citizens across the Union getting married and having children; by building bridges between the different justice systems and by mutual recognition of judgments, so that citizens can more easily exercise their rights across the Union.

At their Informal Council in July 2015, the Justice Ministers exchanged views on the part of the Brussels IIa Regulation concerning parental responsibility, on the basis of a description of some shortcomings identified by the Commission in the evaluation process. All speakers welcomed the review and agreed on the need to further improve the Regulation in matters of parental responsibility given the particular sensitivity of the subject matter.

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<sup>21</sup> Article 81(3) TFEU.

<sup>22</sup> The proposals will most probably be dealt with under the enhanced cooperation procedure in 2016.

<sup>23</sup> Public debate in the JHA Council on 3 December 2015: <http://www.consilium.europa.eu/en/meetings/jha/2015/12/03-04/>.

<sup>24</sup> By Xandra Kramer, available at [http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462476/IPOL-JURI\\_NT\(2012\)462476\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462476/IPOL-JURI_NT(2012)462476_EN.pdf).

<sup>25</sup> Article 65.

<sup>26</sup> A new start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission, Jean-Claude Juncker, Strasbourg, 15 July 2014.

The European Parliament which follows closely the application of the Regulation called upon the Commission<sup>27</sup> to address some specific shortcomings in the Regulation, so as to better take into account in particular the best interests of the child.

#### 4. REFIT

The Regulation is listed as one of the 2016 Work Programme initiatives<sup>28</sup>. The evaluation of the Regulation was carried out in light of the objectives of the Regulatory Fitness and Performance Programme (REFIT)<sup>29</sup>. This is the Commission's programme to ensure that EU legislation is fit for purpose and delivers the results intended by EU law makers, in other words: regulating better. This evaluation found that the Regulation is a positive asset which generally works well but identified a number of shortcomings which would need to be tackled in order to ensure that the Regulation delivers even better the results intended for it. In large measure, the objectives set for the assessment below are therefore the same as those pursued by the existing Regulation and its predecessor. Given the concerns expressed by stakeholders about the number and complexity of EU family law instruments, it is suggested to propose a recast rather than an amendment in order to enhance transparency and legal certainty, readability by the subjects and hence applicability of the instrument. This will also make it easier to follow and to evaluate in the future as some more specific reporting obligations will be proposed, thus making simpler to provide more factual evidence about its application and whether it works instead of resorting to more abstract legal analysis.

The evaluation of the Regulation is based on a qualitative and quantitative analysis. To this end, the following steps were undertaken: an application report was adopted by the Commission in April 2014<sup>30</sup> and a 3-month public consultation was carried out on the functioning of the Regulation and its possible amendments (its outcome is summarised in Annex 2). Empirical data was collected through an external study<sup>31</sup> to evaluate the *relevance, coherence, effectiveness, efficiency*, as well as *EU added value and utility* of the Regulation (see Annex 3). In addition, two surveys – one with the Central Authorities established under the Regulation and another one with Member States – were launched in 2015 to collect specific data concerning parental responsibility decisions. The evaluation took also account of the rights embedded in the Charter of Fundamental Rights and the United Nation Charter on the Rights of a Child. Finally, the European Court of Justice (CJEU) has so far rendered 24 judgments concerning the interpretation of the Regulation which were taken into account.

From the evaluation study, which relies on the opinion of the national experts and the interviews with legal practitioners and the representatives of the Central Authorities, several conclusions were drawn:

The evaluation study highlighted the useful role played by the Regulation with respect to cross-border litigation in matrimonial and parental responsibility matters. According to the statistics, each year in the EU there are about 100,000 international divorces, and the Regulation applies to all of them. It has also helped in settling cross-border cases relating to the attribution, exercise, restriction or termination of parental responsibility which arise independently of a marital link between the parents. An estimated 150,000 to 245,000 individuals were annually involved in such proceedings.

The study found that, given that the overall number of international divorces and families affected by the Brussels IIa Regulation, both the existence and further improvement of the Regulation are relevant to the needs of citizens. It also appears that between the two major areas covered by the Regulation, the

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<sup>27</sup> A Civil Justice Forum was organised on 26 February 2015 by the JURI Committee to discuss the Regulation. See [https://polcms.secure.europarl.europa.eu/cmsdata/upload/a4a36d3d-5a3e-4e67-98ff-399c5728bd92/IPOL\\_STU\(2015\)510003\\_EN.pdf](https://polcms.secure.europarl.europa.eu/cmsdata/upload/a4a36d3d-5a3e-4e67-98ff-399c5728bd92/IPOL_STU(2015)510003_EN.pdf) for the proceedings.

<sup>28</sup> Commission Work Programme 2016 – No time for business as usual, COM(2015) 610 final, Annex II.

<sup>29</sup> Better regulation for better results - An EU agenda, COM(2015) 215 final.

<sup>30</sup> *Supra* note 25.

<sup>31</sup> Study on the assessment of Regulation (EC) 2201/2003 and the policy options for its amendment; see at [http://ec.europa.eu/justice/civil/files/bxl\\_iaa\\_final\\_report\\_evaluation.pdf](http://ec.europa.eu/justice/civil/files/bxl_iaa_final_report_evaluation.pdf) and [http://ec.europa.eu/justice/civil/files/bxl\\_iaa\\_final\\_report\\_analtical\\_annexes.pdf](http://ec.europa.eu/justice/civil/files/bxl_iaa_final_report_analtical_annexes.pdf).

matrimonial and parental responsibility matters, the latter were identified to have caused more acute problems (see below on the effectiveness and efficiency).

The objectives of the Regulation are still relevant to the situation as it has evolved since its adoption. With regard to registered partnerships (whose dissolution is not covered by the scope of the instrument), the study did not identify any specific problems<sup>32</sup> requiring to be addressed during the review.

Looking at EU added value and utility, the study concludes that there is nothing to indicate that the Member States could have achieved the same results without EU intervention. The Regulation serves well the legitimate interests of EU citizens who have certain expectations of an effective common judicial area.

The Regulation is *coherent* with, and fosters, the free movement of persons within the EU. However, it appears that the multitude and complexity of Union instruments in family law have led to practical difficulties, such as a lack of understanding on the part of citizens and practitioners. In particular, it may be difficult in some cases to consolidate proceedings for divorce, maintenance and child custody.

The *effectiveness* of the Regulation was looked at in extensive detail and the study found that the Regulation has contributed to building a European area of justice in the domains of matrimonial matters and parental responsibility. It has facilitated the settlement of cross-border litigation in both areas through a comprehensive system of jurisdiction rules, a system of cooperation between Member States' Central Authorities (on parental responsibility matters only), the prevention of parallel proceedings, and ensured the mutual recognition of judgments. Furthermore, the Regulation appears to build on the right measures – i.e. uniform European rules to settle conflicts of jurisdiction between Member States and rules to facilitate the recognition and enforcement of judgments in another Member State – in order to achieve its general and specific objectives.

While the Regulation is considered to be functioning well overall and to be delivering value to EU citizens, the operational functioning of the instrument is at times hampered by a series of legal issues; the current legal text is insufficiently clear or there are omissions. This is considered in particular the case for the child return procedure and for the cooperation between the Central Authorities on parental responsibility matters.

With regard to parental responsibility matters, the overall *efficiency* of certain aspects of the child-related proceedings has been called into question. In matters concerning parental child abduction, cross-border placement of children, recognition and enforcement of judgments and cooperation between (central and other) national authorities there are excessive and undue delays arising from the way the existing procedures are formulated or applied. This has had a negative impact on parent-child relationships and the best interests of children. In addition, the requirement of *exequatur* generated delays per case of several months and costs reaching up to 4,000 Euro for citizens. The vague description of the cooperation between Central Authorities has often led to delays of several months or even to the non-fulfilment of requests – which is detrimental to children's welfare. The enforcement of judgments given in another Member State was identified as problematic; judgments are often not enforced or only with significant delays. For the Member States themselves, on the other hand, the Regulation itself has generated very limited costs; these mainly relate to the operation of the Central Authorities.

The evaluation study stressed that the identified delays and deficiencies have a negative impact on the fundamental rights of the child and a corrosive effect on the mutual trust between the Member States on which the smooth operation of the Regulation depends.

The evaluation study considered a wide range of issues in both areas; matrimonial and parental responsibility matters. These were compared with the outcome of the public consultation, discussed

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<sup>32</sup> In the course of the consultation process the Commission did not receive any request to include the dissolution of a registered partnership in the scope of the Regulation. Given the substantial differences between the two types of union, the matter of dissolution of registered partnerships should be considered in a separate instrument if necessary.

with experts, Central Authorities and Member States. In addition, the available data (as described in the section below) was taken into account to draw the overall conclusion from the REFIT exercise. As a result, the range of issues was narrowed down so as to enable the Commission to propose changes which would enhance the operation of the Regulation<sup>33</sup>. In particular, parental responsibility matters were identified as an area which would need to be tackled urgently.

This Impact Assessment presents how the above-mentioned burdens could be addressed and what possible savings could be achieved. However, the burden reduction can only be estimated to a limited extent, based on concrete examples. For instance, establishing an autonomous consent procedure and a time limit for the requested Member State to respond to the request (as proposed in the options section) would shorten the time for obtaining consent in the placement procedures to max. eight weeks instead of the current six months or more. With the proposed abolition of *exequatur*, delays (taking up to several months) and costs (up to € 4,000) relating to obtaining it would be eliminated. The proposed amended procedure for the return of the child in case of abduction would reduce the costs of specialised legal advice for parents (between € 1,000 and 4,000).

## 5. AVAILABLE DATA

The availability and completeness of the statistics on the application of the Regulation is limited and differs widely across Member States. For instance, there is no reliable record of all cases heard or their outcome.<sup>34</sup> A large share of the decisions relating to the application of the Regulation are not published or not easily accessible.<sup>35</sup> This is in particular true for matrimonial matters and, to some extent, for child-related proceedings brought without the involvement of Central Authorities (i.e. all custody cases, part of the access cases and a minor part of the child abduction cases).

Similarly, the Central Authorities do not hold any official statistics on the application of the Regulation by national courts in general. Several Central Authorities do however compile statistics on their own activity related to the application of the Regulation – for instance on the number of applications for a return of a child under the 1980 Hague Convention in conjunction with the Regulation – and the outcome of the respective court proceedings. The lack of data is therefore particularly acute for the matrimonial matters which are not monitored by the Central Authorities. Thus, for these matters no comprehensive nor specific, aspect by aspect, overview of possible difficulties exists. Nevertheless, two separate requests for specific data were made to Member States<sup>36</sup> and their Central Authorities<sup>37</sup> to feed this Impact Assessment which relies upon this data where it was made available.

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 for the assessment of the magnitude of issues related to the Brussels IIa Regulation.

## 6. METHODOLOGY

Apart from dividing the assessment into two core subjects (matrimonial and parental responsibility matters), in the following sections, the problems, objectives, policy options and their impact assessment

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<sup>33</sup> For example, most of the matters already clarified by the Court of Justice (such as the definition of the term "habitual residence") were dropped from this analysis.

<sup>34</sup> In many countries only decisions of superior courts and decisions with an element of novelty in the jurisprudence are published. Furthermore, the way in which case law and statistics are made available differ; while some Member States have set up central online repositories, in others the data is only available in the specific courts.

<sup>35</sup> The statistical gap was recorded in the Evaluation study on the Regulation completed in July 2015; only some examples could be collected. [http://ec.europa.eu/justice/civil/files/bxl\\_ia\\_final\\_report\\_evaluation.pdf](http://ec.europa.eu/justice/civil/files/bxl_ia_final_report_evaluation.pdf).

<sup>36</sup> In July 2015 Member States were asked for the overall number of refusals of recognition or enforcement of judgments from another Member State concerning matrimonial or parental responsibility matters in their respective jurisdiction, the grounds for refusal invoked and the reasons for this. Half of the Member States replied; all stated that no data is collected.

<sup>37</sup> In total, 19 Central Authorities submitted data related to the number of cases concerning child abduction and placement decisions.

will be dealt with separately for each of the issues identified in the evaluation of the Regulation as problematic. This approach was chosen because each issue has a specific problem definition, specific policy objectives, distinct policy options and a specific group of stakeholders affected. Moreover, the issues are not interconnected in the sense that the choice of a policy option on one issue would have an impact on the other issues.

Finally, the assessment of the policy options considers clarifying the current legal text (by codifying case law of the Court of Justice of the European Union, by rendering explicit what is implicit and by integrating available guidelines and good practice). With regard to the reduction of costs, it will be estimated whenever possible on case examples given the absence of data.

## II. MATRIMONIAL MATTERS

Matrimonial matters in the Regulation relate to the proceedings concerning divorce of an "international couple" whereas issues relating to maintenance<sup>38</sup> and/or property<sup>39</sup> of an international couple are dealt with separately in other EU instruments (see chapter 2.2.). It may often be advantageous and most efficient for both parties for all their matters to be dealt with by the same court; usually this is the court where divorce proceedings were initiated. It is therefore worthwhile considering the possibility for spouses to combine the different matrimonial proceedings before one court consistently with other existing Regulations.

### 1. PARTY AUTONOMY AND "RUSH TO COURT" IN MATRIMONIAL MATTERS

#### 1.1. Problem definition

##### *Limited party autonomy*

Spouses in an international marriage do not have a possibility to agree on the competent court which would settle their divorce or separation<sup>40</sup>. This causes some drawbacks as it has been reported in the evaluation study. First of all, it may lead to a **lack of predictability** for the spouses in that they do not know in advance where potential litigation will take place in the event of a divorce. The current rules offer seven possible fora to bring the divorce case based on, for example, one or both spouses' habitual residence or nationality.

In addition, spouses are not able to make arrangements in advance, for example, for instance at the time of the conclusion of a marriage agreement, on the question which court shall deal with any future divorce. Such arrangements made in advance may **reduce litigation** on where the divorce should be handled once the couple may be on bad terms in the context of the divorce.

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<sup>38</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1 (hereafter: the Maintenance Regulation).

<sup>39</sup> At a Council meeting on 3 December 2015, Poland and Hungary pronounced themselves against the 2011 Commission's proposal concerning the jurisdiction, applicable law, recognition and enforcement of judgments relating to matrimonial property regimes. The negotiations have therefore failed because the required unanimity could not be reached. On 3 March 2016, the Commission presented to the Council a Proposal for a Council Decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships and submitted two implementing regulations.

<sup>40</sup> Although marriage annulment is also covered by the scope of the Regulation the absence of a legal framework for advance planning of their possible future litigation by the spouses does not affect it. The nullity declaration is a reaction to defects in the contracting of a marriage. Member States' annulment arrangements primarily pursue public-order objectives (e.g. preventing bigamy). The validity of a marriage should therefore be determined according to the conditions of the law which provided for the prerequisites of entering into the marriage, or by the national law of the spouse concerned. Stakeholders have emphasised that issues related to the validity of marriage do not belong to the autonomy of the spouses, since they are related to the protection of the public interest. Therefore, as it is already the case for the choice of law applicable to marriage annulment, parties shall not have the possibility to choose a court in such a case either.

85% of the respondents to the public consultation identified that the Regulation does not sufficiently promote a common agreement between spouses. It has to be admitted, however, that this problem was perceived on a theoretical level (as giving more room to party autonomy in dispute settlement is a trend of the time) while no problematic cases or actual evidence to underpin the existence of tangible problems caused by the absence of a possibility to choose a court were produced.

Furthermore, when a couple divorces or separates, they usually have several matters to settle at the same time. Besides the divorce, solutions must be found for the parental responsibility over the children, for the maintenance of the spouse and children, for the property consequences of the divorce. At present, it is not excluded that courts in different Member States have jurisdiction over these closely related matters. This can be inefficient as the Regulation does not explicitly offer the flexibility to **consolidate the different family proceedings in advance by choosing a court** (see Annex 6 explaining choice of court in other EU family law instruments). Consolidation can already be achieved under the current rules, however, if the other matters (parental responsibility and maintenance for spouse and children) are also brought in one of the divorce fora offered by the Regulation at present, provided that some other conditions are fulfilled (e.g. for parental responsibility matters: that the jurisdiction is in the best interests of the child).

This situation is due to the fact that the Brussels II Regulation was the first Union instrument in the area of family law, and its conversion into the Brussels IIa Regulation only enlarged its scope with regard to parental responsibility without touching the part on matrimonial matters. Party autonomy assumed importance only in the instruments which were adopted subsequently.

#### *"Rush to court"*

The legislator decided not to establish a single forum but to provide a list with a variety of connecting factors to make sure spouses can find a forum to obtain their divorce and ensure flexibility which is often needed in a cross-border marriage breakdown as the situation constantly changes at short notice.<sup>41</sup> However, the result, namely seven alternative (as opposed to hierarchical) grounds of jurisdiction set out in the Regulation in conjunction with the absence of uniform conflict-of-laws rules in the entire Union may in some instances induce a spouse to "rush to court", that is, to apply for divorce before the other spouse does to ensure that the law applied in the divorce proceedings will safeguard his or her own interests. A Member State might then consider that its courts are receiving too many cases which are not connected closely enough to the forum, and where it might also be inappropriate to apply that forum's substantive law as foreseen by that State's conflict-of-laws rules.

"Rush to court" was already addressed by the harmonisation of the rules on the law applicable to divorce (Rome III Regulation)<sup>42</sup>. As a result of such harmonisation, any court seised within the EU would have to apply the same substantive law as determined by the common rules. Therefore, it would not matter anymore which court in the EU is seised of the matter. However, as the Regulation does not yet apply in all Member States (today it applies in 16 Member States while one more – Estonia – has announced to join soon), there may still be an incentive for spouses to act first by choosing a convenient court from the list of available jurisdictions. There is no evident trend towards convergence of Member States' substantive divorce laws, and there are no indications that the remaining Member States will join the Rome III Regulation in a foreseeable future. When last consulted by the Commission about their intentions<sup>43</sup>, the United Kingdom and Ireland declared that they had no intention to join Rome III while the other Member States where Rome III does not yet apply remained silent on the issue.

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<sup>41</sup> See the explanatory report by Prof. Alegría Borrás on the Brussels II Convention, OJ C 221, 16.7.1998, p. 27, paras 28-32.

<sup>42</sup> A further significant factor that may influence a spouse's choice of forum is the lack of harmonised conflict rules on the devolution of the matrimonial property, currently the subject of proposal COM (2011) 125.

<sup>43</sup> At the informal meeting held on 12 October 2015 with Member States' representatives on the forthcoming review of the Regulation.

Specialised legal advice may be required to take full advantage of the alternative grounds of jurisdiction in matrimonial matters.<sup>44</sup> 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 experts in the evaluation study noted that citizens may require **several lawyers from different legal systems** for cases where a possibility for rush to court / forum shopping exists. Therefore, legal advice and representation in two Member States could be necessary. As presented in the study<sup>45</sup>, in a typical case concerning rush to court, the costs doubled, both of the lawyer and court's fees, reaching almost € 15,000.

## 1.2. Scale of the problem

The overall number of international divorces has, with slight fluctuations, remained stable over the years, at around 100,000 per year. The institution of legal separation only exists in 12 Member States<sup>46</sup>, the total number amounting to 2,500 per year. The above-mentioned problem of limited party autonomy potentially affects those among all international couples seeking divorce who would like to choose a court and would be able to agree. The number of persons actually wishing and able to do so is unknown, though. Practicing lawyers including members of the Expert Group which advised the Commission reported that such planning concerns mainly a small number of very wealthy spouses. There is, however, no quantified evidence on this matter.

The problem of "rush to court", on the other hand, potentially affects only those international couples with connections to Member States not applying the Rome III Regulation as in the States where Rome III applies, the same substantive divorce law would be applied in every possible forum.

## 1.3. Subsidiarity

Under Article 81 para. 1 TFEU, the Union has shared competence to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. Article 81 para. 2 TFEU specifies that in order to reach the aim stated in paragraph 1, the Union shall adopt measures aimed at ensuring (c) the compatibility of the rules applicable in the Member States concerning jurisdiction, and (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. The possible creation of a new jurisdiction rule based on party autonomy is covered by Article 81 para. 2 (c), a possible transfer rule limiting "rush to court" and the possible introduction of a hierarchy for jurisdiction grounds are based on Article 81 para. 2 (c) and (f), promoting compatibility of rules on jurisdiction and civil procedure applicable in the Member States.

Shortcomings, where identified, can only be addressed through Union intervention by changing the existing EU law and cannot be addressed by the Member States acting individually.

As the Regulation's jurisdiction rules are exhaustive (with the exception of the rule allowing the use of national residual jurisdiction), the lack of party autonomy could not be addressed by the introduction of a jurisdiction rule based on party autonomy into the law of individual Member States.

The "rush to court" problem cannot be dealt with by individual Member States under their own national law because the underlying reason for the rush to court lies in the fact that the substantive divorce laws in Member States are different, and depending on where divorce is pronounced, the consequences for each spouse may be different. The Rome III Regulation, by creating uniform rules on applicable law,

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<sup>44</sup> 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*, 2011, p. 154.

<sup>45</sup> *Supra* note 31, at p. 54.

<sup>46</sup> Belgium, France, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Spain, and the United Kingdom.

solves this problem to a large extent for those 16 Member States in which this Regulation adopted under enhanced cooperation applies and could be sufficient to solve the "rush to court" problem in all Member States if the remaining 9<sup>47</sup> would decide to join the Rome III Regulation. However, only Estonia has announced to do so while the other Member States remained silent or explicitly declared that they did not intend to join Rome III.<sup>48</sup>

Therefore, a hierarchy of jurisdiction grounds or the possibility for a court to transfer jurisdiction to another Member State would be the only solutions available at this stage. As the Court of Justice has ruled that Member States are not allowed to use any discretion which may exist under their national law to transfer jurisdiction established by EU Regulations<sup>49</sup>, the transfer mechanism could only be created by including it into the Regulation. The same would be true for a hierarchy of the jurisdiction grounds already offered by the Regulation.

#### 1.4. Objectives

General objective:

- (a) .....to  
enhance access to court
- (b) .....to ensure  
sound administration of justice

Specific objectives:

- (a) to increase party autonomy and thereby enhance predictability for international divorce proceedings
- (b) to facilitate the consolidation of different family proceedings
- (c) to limit "rush to court" and thereby reduce related costs

#### 1.5. Description of Policy Options

##### *Option 1: Baseline scenario*

This policy option assumes that no new initiatives would take place at EU level. Parties wishing to consolidate their matrimonial proceedings can do so already now under the existing rules: The Brussels IIa Regulation allows parental responsibility proceedings to be brought in a court having jurisdiction for divorce under the Regulation, provided that this corresponds to the child's best interests. The Maintenance Regulation also allows proceedings for child maintenance to be brought in the court where parental responsibility matters may be brought, and proceedings for spousal maintenance in the court where divorce proceedings may be brought. Therefore, by bringing also parental responsibility and maintenance issues before one of the courts having jurisdiction for their divorce under the Regulation, the spouses can consolidate all these proceedings in one forum. Only a choice in advance, which might be desired by a limited number of spouses, is not possible.

The perceived problem of rush to court would continue to exist with regard to those Member States which have not yet joined Rome III.

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<sup>47</sup> It is recalled that the Brussels IIa Regulation only applies to EU 27 (except Denmark), and 16 Member States already apply Rome III (*supra* notes 15 and 17).

<sup>48</sup> *Supra* note 43 and the adjoining text.

<sup>49</sup> See CJEU 1 March 2005, Case C-281/02 – *Andrew Owusu v N. B. Jackson*. This judgment concerned the Brussels I Convention, but the overwhelming majority of courts and academics applies this statement also to other EU instruments such as the Brussels I Regulation and the Brussels IIa Regulation, at far as matrimonial matters are concerned (e.g. Magnus/Mankowski, Brussels I Regulation, Introduction No 4, Brussels IIbis Regulation, Introduction No 5, 115).

*Option 2: Introduction of a possibility for the spouses to choose the competent court in a Member State with which they have a close link*

In addition to what is already possible under Option 1, this policy option would allow the spouses to choose the competent court by common agreement in advance of any litigation. The choice would be limited to jurisdictions with which the spouses have a close link by virtue of habitual residence or nationality. Formal requirements would have to be included to ensure that the spouses are aware of the consequences of their choice and reduce the risk for a weaker spouse of being forced into an agreement on a forum which may be detrimental.

In order to strengthen the choice of the parties, a provision would ensure that the chosen court can proceed even if a court in another Member State was seised in violation of a choice of court agreement in order to prevent the other spouse from seising the chosen court. Such solution was recently adopted in civil and commercial matters (recast of the Brussels I Regulation<sup>50</sup>).

*Option 3: Introduction of a possibility for the spouses to choose the competent court in a Member State with which they have a close link combined with a possibility, for spouses who cannot agree, for the court to transfer jurisdiction to the courts of another Member State*

In addition to Option 2, this option would entail a possibility for a court to transfer jurisdiction for a divorce case to a court of another Member State.

Such a transfer could be envisaged in exceptional circumstances and under strict conditions, in particular if a spouse, in the absence of a choice of court, applies for divorce in a Member State, but the defendant spouse requests that the case be heard by a court of another Member State on the basis that the marriage was manifestly more closely connected with that State. The possibility to transfer jurisdiction would provide a remedy to the problems that may arise when one spouse has unilaterally applied for divorce in a certain forum against the will of the other spouse. In the interest of legal certainty, the “centre of gravity” of a marriage should be established on the basis of a closed list of connecting factors which must apply in the specific case, for example the last common habitual residence of the spouses, if one spouse still lives there. Jurisdiction based on the choice of the parties would be excluded from the possibility to transfer to another Member State. Moreover, the transfer system would be modelled on the system already in place for parental responsibility matters, requiring agreement between the two courts within a time frame specified by the Regulation. If there is no answer within this period, or the answer of the requested court is negative, jurisdiction remains with the court initially seised, so as to prevent a denial of justice or parallel proceedings.

*Option 4: Introduction of a possibility for the spouses to choose the competent court in a Member State with which they have a close link combined with a hierarchy of grounds of jurisdiction*

In addition to Option 2, this option would imply the introduction of a hierarchy of jurisdiction grounds. For example, jurisdiction would lie in first place with the courts of the Member State of the spouses' common habitual residence. Failing that, the second court to hear the divorce case would be that of the spouses' last common habitual residence, if one of them still resides there. In cases where a current or previous common habitual residence of the spouses could not be established, the court of the defendant spouse's habitual residence could be seised. Finally, there would be a possibility to seise the court of the nationality of both spouses (in the case of the United Kingdom and Ireland, of their common 'domicile').

In summary, this option would mean that the requesting spouse would need to file an application for divorce with the first court from the list of available jurisdictions and only where no court of a Member

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<sup>50</sup> Article 31(2) and (3) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1.

State has jurisdiction under the first rule representing the closest connection, courts in other Member States could be seised, in hierarchical order as established by the Regulation.

## 1.6. Analysis of impact of Policy Options

### 1.6.1. Option 1: Baseline scenario

Since this option would entail no change, the situation described above would continue to exist. Parties wishing to consolidate their matrimonial proceedings would continue to be able to do this under the existing rules by bringing also parental responsibility and maintenance issues before one of the courts having jurisdiction for the divorce under the Regulation even if the Regulation does not offer them the possibility to agree in advance on the divorce court itself.

A possible problem of rush to court would continue to exist with regard to those Member States which have not yet joined Rome III. Infringement proceedings are not an appropriate tool with a view to improving the operation of the Regulation in the area discussed here as there is currently no rule in this Regulation addressing the problems described above.

### 1.6.2. Option 2: Introduction of a possibility for the spouses to choose the competent court in a Member State with which they have a close link

**Effectiveness to achieve objectives:** The introduction of a limited possibility for the spouses to choose the competent court would have some positive impact for the limited number of (in particular wealthy) spouses who consider this kind of estate planning useful and are able to agree on a forum because it would enhance predictability of the divorce forum. The assessment of the effectiveness to achieve this objective is however hampered by the lack of data and the fact that the actual scale of the problem is currently unknown.

As regards the possibility to consolidate various family proceedings related to the divorce which can be achieved already under the current rules, this option would add the possibility for spouses to determine **in advance** which court shall deal with the consolidated proceedings.

Moreover, for the limited number of spouses described above, this option could reduce the "rush to court" as both spouses would be bound by their common choice. Provided that the situation develops as described in the problem description, with this option there would still be an incentive for Member States to join Rome III. Where spouses did not choose a court jointly – which according to anecdotal reports from practising attorneys is indeed the case for most couples – the problem of “rush to court” continues to exist as long as the conflict-of-laws rules are not uniform.

**Fundamental rights:** This option would have a positive impact on fundamental rights, since it would give effect to the will of the parties and thereby improve their situation in terms of easing the right to access to judicial review as embedded in Article 47 of the Charter.

**Stakeholders' views:** Because this is standard in more recent EU instruments, the vast majority of stakeholders (85%), including Member States, are in favour of introducing a possibility of choice of court. It was however highlighted that this choice should be limited to courts to which the spouses have a substantial connection<sup>51</sup> and that the formal requirements of the choice should be defined following

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<sup>51</sup> During the public consultation, 97% (i.e. 140 out of 145 responses to this question) indicated that the choice should be limited by the requirement of a 'substantial connection' between the spouse(s) or the case, and the chosen forum. In particular, of 140 respondents, 65% (i.e. 85 out of 140 responses) think that the spouses' habitual residence provides a valid connecting factor, 33% (i.e. 47 out of 140 responses) think that the nationality of at least one of the spouses does and 36% (i.e. 48 out of 140 responses) consider any court having jurisdiction to hear the case under the main jurisdiction provisions of the Regulation as being sufficiently closely connected with the case and therefore eligible to be chosen by the parties.

the example provided by other EU instruments<sup>52</sup> in order to prevent a weaker spouse from being forced into a detrimental agreement.

**Costs savings:** For spouses who can agree on a court, the rush to court and thereby, the doubling of costs could be avoided. This option would however not reduce costs for spouses who cannot agree on a court. Taking the example from the problem definition (p.15), an amount of up to € 7,500 could be saved<sup>53</sup>.

**Political feasibility:** This option would be difficult to accept by some Member States given the varying definition of marriage in their national laws and their resulting difficulty to apply the instrument to the divorce of other forms of marriage, e.g. same-sex marriages. See chapter 2.2. concerning matrimonial matters.

1.6.3. *Option 3: Introduction of a possibility for the spouses to choose the competent court in a Member State with which they have a close link combined with a possibility for the court to transfer jurisdiction to the courts of another Member State*

**Effectiveness to achieve objectives:** In addition to the impacts achieved by Option 2, this option would further reduce the incentive to "rush to court". This would be in particular the case for spouses who cannot agree on a choice of court. It would give a possibility to the court seised with the divorce application, upon application by one party, to consider whether a court of another Member State is better placed to hear the case. Nonetheless, the introduction of a possibility to transfer jurisdiction would create some legal uncertainty for the spouses as to whether a court seised will actually hear their case. There is also a risk that this option will generate litigation on whether the case should actually be transferred or not. A list of specific criteria should guide the judge making use of the transfer to ensure that only in limited and exceptional situations such transfer would be possible, but as there is no overarching principle like the protection of the best interest of the child (which governs the transfer in parental responsibility matters<sup>54</sup>), it may be expected to be difficult to reach unanimity on the appropriate criteria defining in which circumstances a transfer should be permitted.

Provided that the situation develops as described in the problem description, like Option 2 this option would not have any negative impact on wider adherence to Rome III. The additional possibility for the court seised in the absence of a choice of court agreement to transfer jurisdiction to another Member State would offer a remedy if the court seised clearly does not seem to be the most appropriate forum (e.g. because of the substantive law that would be applied there under the forum's own conflict-of-laws rules). This transfer, inspired by the common law principle of *forum non conveniens*, however, is depending on the circumstances and is nothing a spouse could count on in advance as a general rule. The incentive for Member States who are generally open to applying foreign law to join Rome III would therefore still exist because uniform conflict-of-laws rules would offer greater predictability to the spouses with regard to the applicable law and thus the outcome of the case. In the unlikely case that all Member States join Rome III, a transfer under this option would no longer have an impact on the applicable substantive law; however, it is conceivable that courts would envisage a transfer even if Rome III applies. This shows that this option would move quite far away from the initial concept of the

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<sup>52</sup> See, for example, Article 4(2) 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 obligation (hereafter: the Maintenance Regulation) and Article 25(1) and (2) of the Brussels I recast (*supra* note 50).

<sup>53</sup> *Supra* note 45.

<sup>54</sup> In parental responsibility matters, a transfer rule was included into the Regulation in 2003 because for these matters, in principle only one Member State at a time has jurisdiction under the Regulation. This child-centred jurisdiction avoids parallel proceedings, but as a consequence it was felt that an escape clause was needed for cases where due to exceptional circumstances, this only forum turned out not to be the most appropriate one. For matrimonial matters, on the other hand, the legislator offered them as wide a list of fora as possible to choose from in order to enable them to find a forum where they could obtain a divorce according to their wishes.

legislator that a wide range of possible fora should be offered to the mobile citizens to choose from at the moment they need to seise a court.

**Fundamental rights:** This option would have some positive impact on fundamental rights, since it would give full effect to the common will of the spouses and thereby improve their situation in terms of easing the right to access to judicial review as embedded in Article 47 of the Charter. Moreover, in the absence of a choice of court it can potentially protect a potentially weaker spouse from being compelled to face court proceedings in a jurisdiction where the applicable law is detrimental to this spouse only because the other spouse was quicker in rushing to court. The discretion to transfer jurisdiction to a Member State more closely connected with the case, depending on the circumstances, which this option confers upon the judge could enhance the sound administration of justice and the access of both spouses to the appropriate forum. However, the price to pay is a decrease in predictability because spouses can no longer be certain that a court having under the Regulation will actually hear the case if seised – an idea which runs counter to the original will of the legislator.

**Costs savings:** This option would eliminate extra costs related to rush to court for spouses who can agree on a court. For spouses who cannot agree on a court, it may reduce costs only in situations when a spouse refrains from rushing to court because he or she is aware of the transfer provision.

**Political feasibility:** This option would be difficult to accept for some Member States given the varying definition of marriage in their national laws and their resulting difficulty in applying the instrument to the divorce of other forms of marriage, e.g. same-sex marriages. See chapter 2.2. concerning the matrimonial matters.

**Stakeholders' views:** For the creation of a possibility to choose a court, see the comments on Option 2. The UK, in particular pleaded in favour of introducing the possibility to transfer jurisdiction for matrimonial matters.

*1.6.4. Option 4: Introduction of a possibility for the spouses to choose the competent court in a Member State with which they have a close link combined with a hierarchy of grounds of jurisdiction*

**Effectiveness to achieve objectives:** This option would completely eliminate the "rush to court" also in the absence of a choice of the parties because in those cases it would suppress the current flexibility of the applicant to choose a court from the available list of fora and direct a couple to one court only. This would be the first court from the hierarchical list and only if there is no Member State meeting the criteria of proximity defined in the list, the one next in hierarchy could be seised. Spouses would not have any reasons to "strike first" to secure that a court of a specific Member State should hear the case; each would need to address the court of the same Member State in case they want to apply for divorce.

However, this option would depart fundamentally from flexible rules to deal with mobility and to meet individuals' needs to obtain a divorce as easily as possible without sacrificing legal certainty. Precisely because the conflict-of-laws rules are not uniform yet (nor are the substantive divorce laws of the Member States), the forum still has in certain cases an impact on the outcome of the proceedings. This is why parties were given the possibility to seize a broad range of possible courts in the current text of the Regulation. This option would run counter to this idea and impose a certain forum and thus a certain applicable law<sup>55</sup> – and therefore a certain outcome of their proceedings – on the spouses without any flexibility. Moreover, the grounds adopted are based on the principle of a genuine connection between the person and a Member State. Their acceptance by all Member States was the effort to find points of agreement acceptable to all. This stance seems to be reflected also in the public consultations (see below).<sup>56</sup>

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<sup>55</sup> As stated above (see *supra* note 43 and the adjoining text), Rome III is unlikely to be joined by all Member States in the near or mid-term future.

<sup>56</sup> See the explanatory report by Prof. Alegria Borrás on the Brussels II Convention, OJ C 221, 16.7.1998, paras 28-30.

This option could also have a negative impact on the future participation of additional Member States in the Rome III Regulation. If it is perceived as a problem that the outcome of the same divorce case will be different if brought in one or the other of a number of available fora (due to non-uniform conflict-of-laws rules), one solution can be to unify the conflict rules while another solution would be to limit the number of fora to one. The Union legislator has already decided that the first solution (uniform conflict-of-laws rules) is a good one; it is questionable whether the success of this solution should be diminished by the adoption of other solutions which, while to some extent achieving the objective sought, would at the same time entail negative consequences as well.

**Costs savings:** This option would fully eliminate the extra costs related to rush to court for all spouses regardless of whether they made a choice of court because there would always only be one forum available (thus no incentive for a "rush to court").

**Stakeholders' views:** The respondents to the public consultation were asked to identify the remedy for rush to court situations. The majority (69%) thought that the risk of a 'rush to court' might be reduced by establishing an order of priority of the several alternative grounds for jurisdiction so as to prevent spouses from beating each other in filing a claim. However, Member States (BE, CZ, FR, PL, NL) stated 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 the Regulation mostly correspond to specific factual situations that occur when the habitual residence criterion cannot be applied, and the current alternative grounds should therefore be maintained.

**Political feasibility:** This option would be difficult to accept for some Member States given the varying definition of marriage in their national laws and their resulting difficulty in applying the instrument to the divorce of other forms of marriage, e.g. same-sex marriages. See chapter 2.2. concerning matrimonial matters.

### 1.7. Comparing the Options and preferred Policy Option

| Objectives/Impacts  | Option 1<br>Baseline scenario | Option 2<br>Choice of court  | Option 3<br>Choice of court + possibility for court seised to transfer jurisdiction to another Member State   | Option 4<br>Choice of court + hierarchy of grounds for jurisdiction   |
|---|-------------------------------|--|---|---|
| Provide for party autonomy and thereby enhance predictability for spouses | 0                             | This option would provide for party autonomy and enhance predictability. However, this would only be the case for the limited number of spouses who wish to and are able to agree on one forum from the list of possible fora offered by the Regulation already today. | This option would enhance predictability <b>for spouses who can agree on a court.</b> For those who cannot agree; it introduces legal uncertainty as the decision to transfer would depend on the discretion of the judges in the two Member States concerned in the individual case. | This option would enhance legal predictability <b>for all couples</b> (notwithstanding the existence of an agreement). However, a hierarchy of jurisdiction grounds would reduce the possibility for the plaintiff to choose from a broad range of fora, and hence the broad access to court which currently exists and is considered important, as long as Rome III does not apply in all Member States. |

|  |   |   |   |  |
|--|---|---|---|--|
| <p>Enhance access to court by consolidating different family proceedings</p> | <p>Consolidation could be achieved by bringing all family proceedings in one of the divorce fora offered by the Regulation.</p>                   | <p>Same effect on consolidation as Option 1 but the limited number of spouses wishing to and able to do so could agree in advance <b>which</b> of the available fora this shall be. The number of spouses who may be in such a situation may be expected to be limited.</p> | <p>This option would further help to consolidate for those who can agree on a court by making the possibility to choose a court jointly more visible. If no choice was made, consolidation may be achieved by bringing all family proceedings in one of the divorce fora offered by the Regulation; if the spouses prefer another forum, it could be obtained through transfer decided by a judge but this depends on judicial discretion in the two Member States concerned.</p> | <p>This option would further help to consolidate for those who can agree on a court by making the possibility to choose a court jointly more visible. If no choice was made, consolidation may be achieved by bringing all family proceedings in the single divorce forum offered by the Regulation.</p>   |
| <p>Limit rush to court</p>   | <p>0</p>  | <p>Rush to court would be eliminated for spouses <b>who can agree on a court</b> but this option would not have any positive impact for those spouses who did not or could not choose a forum jointly.</p>  | <p>Rush to court would be eliminated for those spouses who can agree on a court. It might be reduced for those spouses who cannot agree on a court as they know that the court seised would have exceptionally the powers to transfer jurisdiction to a more appropriate forum.</p>   | <p>Rush to court would be eliminated for all couples as only one court at a time could be seised by either spouse to hear the divorce case.</p>  |
| <p>Ensure sound administration of justice</p>                                | <p>The objective is already partially achieved as different proceedings can be combined in one of the divorce fora offered by the Regulation.</p> | <p>The objective would be better achieved as in Option 1 because different proceedings could be combined in either the chosen court for spouses who agree on a court or in one of the divorce fora offered by the Regulation for others.</p>                                | <p>The objective would be achieved <b>to a similar extent</b> (same as Option 2) but for those spouses who cannot agree the judge could transfer jurisdiction to another Member State where other proceedings are pending. However, the transfer possibility may bring in an <b>important element of uncertainty</b> at the beginning of the</p>  | <p>This option would have <b>mixed impacts</b>. It would have a positive impact on the administration of justice for spouses who can agree on a court and combine their proceedings; it may have <b>negative impact</b> on couples who cannot agree as no flexibility would be granted even to the applicant to choose a court unilaterally.</p> |

|                       |  |   |  |   |
|-----------------------|--|---|--|---|
|                       |  |   | proceedings and trigger litigation on the jurisdiction question.   |   |
| Costs savings         | 0  | Would reduce costs only for those spouses who agree on a court.   | Would reduce costs for spouses who can agree on a court and could in some instances reduce them for those who cannot do so while increasing costs in other cases.  | Would fully eliminate the extra costs relating to rush to court regardless of the existence of a choice of court agreement.   |
| Political feasibility | In the light of the requirement of unanimity and the probable varying views regarding jurisdiction in matrimonial matters, the baseline scenario seems at this stage the best possible option. | In the light of the requirement of unanimity and the probable varying views regarding jurisdiction in matrimonial matters, including choice of court, this option does not seem politically feasible. | In the light of the requirement of unanimity and the probable varying views regarding jurisdiction in matrimonial matters, including choice of court and transfer of jurisdiction, this option does not seem politically feasible. | In the light of the requirement of unanimity and the probable varying views regarding jurisdiction in matrimonial matters, including choice of court, this option does not seem politically feasible. In addition, the possible introduction of a hierarchy of jurisdiction grounds is very controversial among stakeholders. Finally, the broad access to court was one of the crucial elements of the final agreement on the existing Regulation. |

At this time, Option 1 is the preferred policy given the fact that in line with currently available data, the existing rules have proven to work to a large extent satisfactorily, and the drawbacks of the other options make them currently not feasible or desirable. While Option 2 would strengthen party autonomy and in particular meet the operational objective to introduce the possibility for spouses to choose a court by agreement, this only concerns a limited number of spouses. In addition, the benefits brought by this option would not outweigh the risks inherent in opening discussions on matrimonial matters at this moment in time. Option 3 would reach that same objective and encounter the same risk; the possibility for a court to transfer jurisdiction to another Member State, while having certain advantages in good administration of justice, would entail legal uncertainty and may trigger litigation at the beginning of the proceedings. It is questionable whether the problem of rush to court, which is limited to certain Member States, would justify introducing these elements of uncertainty and risk of litigation for all Member States. Option 4 would reach the same objective as Option 2; however, a hierarchy of jurisdiction rules would reduce the broad access to court which currently exists. As long as Rome III does not apply in all Member States, it is important that spouses continue to have a number of fora available as the outcome of proceedings can be different, depending where proceedings are brought. Therefore, it appears that at this stage, because of the limited data to underpin the identification of workable solutions there is limited added value in proposing changes on these matters. Furthermore, in the light of the requirement of unanimity any change to the current jurisdictional regime on matrimonial matters seems highly difficult, taking into account the divergences between Member States' national family laws and their respective views on how to deal with matters of jurisdiction. Options 2 through 4 therefore do not seem politically feasible at this stage. As the negotiations in the Council on the matrimonial property regimes showed, there is currently no possibility to unanimously agree on a

proposal which concerns divorce of a marriage or any related aspects. Given the potential benefits of improvements to the Regulation on this matter, the matter may be re-considered in the future on the basis of further evidence gathered, at a time when the national laws of the Member States may have evolved such that a consensus is more likely to be achieved.

## **2. THE OPERATION OF THE REGULATION IN THE INTERNATIONAL LEGAL ORDER**

### **2.1. Problem definition**

*Risk of difficulties in finding a suitable court to settle divorce for EU citizens living in a third State*

A specific study<sup>57</sup> analysing the situation of EU citizens who live in a third State but retain strong links with a certain Member State and want to get divorced highlighted several problems: citizens either cannot get access to a court at all, to a court in the EU or they cannot have their judgment (obtained in a third country) recognised in the EU.

In situations where the spouses are not habitually resident in the territory of a Member State and do not have a common EU nationality, the Regulation does not provide any basis of jurisdiction. International jurisdiction is established on the basis of the national rules of the Member States (so-called "residual jurisdiction"). In practical terms this means that in about half of the Member States the EU nationality of a plaintiff spouse alone is sufficient to bring proceedings in his/her Member State of nationality. In the other half, it is not possible for residents of third countries to bring proceedings in their Member State of nationality alone, but only in conjunction with other connecting factors. In the end, 24 Member States do provide residual jurisdiction for the case described above. In the remaining 4 Member States, this may lead to situations where no court at all in the EU has jurisdiction to deal with an application for divorce because of the different criteria being used to establish it; this forces spouses to file their divorce proceedings in a third State if that State has jurisdiction under its own law.

Since a decision issued in a third State cannot be recognised in a Member State pursuant to the Brussels IIa Regulation, but only pursuant to national rules or applicable international treaties, divorcing spouses could face problems to have their divorce recognised in their respective countries, and it can even happen that their divorce will be recognised in the home Member State of one of the spouses but not in the home Member State of the other. This difference in civil status has a negative impact on the freedom of movement and the right to respect for a person's private and family life. A person wishing to remarry in a Member State cannot do so if the divorce pronounced in a third State is not recognised under that Member State's national law while at the same time that Member State did not provide a forum for the divorce to be pronounced there. In other words, Union law regulates only the larger part of the international jurisdiction of the Member States' courts, leaving a remaining small part to national law.

The national experts in the framework of the evaluation study and practitioners in the public consultation both criticised the Regulation for its too complex and impractical solution in cases where the defendant spouse is not habitually resident in a Member State and the spouses are not nationals of the same Member State. Some guidance on this matter was given by the CJEU<sup>58</sup> but the situation is still perceived as unsatisfactory.

In terms of costs, spouses need to seek advice of a specialised lawyer to investigate foreign law systems or, as the case may involve investigation in several Member States, the costs can be multiplied. The costs for specialised legal advice vary considerably across the EU. In the evaluation study, the

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<sup>57</sup> 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.

<sup>58</sup> CJEU 29 November 2007, Case C-68/07 – *Kerstin Sundelind-Lopez v. Miguel Enrique Lopez Lizazo*.

additional costs for international cases have been estimated to range from € 500 (in Hungary) to € 12,500 (in the UK) per case.<sup>59</sup>

#### **Example: the German/Dutch couple living in a third State**

A German/Dutch couple have lived for some years in a third State. As their relationship deteriorates, the German wife would like to divorce, preferably before a German court. However, she cannot apply for divorce in Germany or in any other Member State. None of the grounds of jurisdiction of the Brussels IIa Regulation is applicable since the couple are not habitually resident in a Member State and are not of common nationality. In such circumstances, the courts of the Member States may avail themselves of their national rules of jurisdiction. Under national law, the German courts have international jurisdiction if one of the spouses is German. However, while the Dutch husband could bring divorce proceedings in Germany based on these rules, the German wife cannot apply for divorce in Germany under the German rules of jurisdiction, since the Dutch husband may not be sued in Germany under national law according to the Regulation. Nor can the wife apply for divorce in the Netherlands, since Dutch law does not provide for jurisdiction in these circumstances. Consequently, the German wife is unable to apply for divorce in any Member State. Even if the courts of the third State of the couple's residence happen to have jurisdiction to deal with the matter, it may be difficult to have a divorce pronounced in the third State recognised in Germany. It is also possible that the divorce will be recognised in Germany but not in the Netherlands, with the effect that the spouses are considered to be still married in the Netherlands while they are considered divorced in Germany.

*Parallel litigation and risk of irreconcilable judgments when the same matter is pending before a court in a Member State and a court in a third country*

In some cases, proceedings between the same parties on the same subject matter are pending in parallel (*lis pendens*) before the courts of an EU Member State and the courts of a non-EU country. The expert group pointed out that in this situation, a court of a Member State does not have any discretion under the Regulation, according to the current rules, to take into account the proceedings pending in a third State. This can eventually lead to two irreconcilable judgments.

## **2.2. Scale of the problem**

There is little indication about the scale of the problem. The number of potentially affected people can be based on the numbers of EU citizens who live in third countries. There is no reliable single source of data for this group, but rather disparate sources which cover the main destination countries<sup>60</sup>. It is estimated that more than 20 million European citizens live permanently in a non-EU country. This number has to be narrowed down to those persons who are married, and the rate of marriage breakdown.

Within the EU<sup>61</sup>, every year around 10% of the total number of divorces relate to international couples. One may assume that EU citizens living in third States would largely behave in the same way as those within the EU.

## **2.3. Subsidiarity**

The creation of a new rule on unified residual jurisdiction and/or *forum necessitatis* is based on Article 81 para. 2 (c) TFEU which establishes shared EU competence for common jurisdiction rules which has already been exercised. Currently, for spouses living outside the EU, the Regulation only

<sup>59</sup> Analytical Annexes to the Evaluation Study, p. 262, see *supra* note 31.

<sup>60</sup> [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474441/IPOL-AFCO\\_ET\(2013\)474441\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET(2013)474441_EN.pdf).

<sup>61</sup> Eurostat, Statistics explained: Marriage and divorce statistics, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage\\_and\\_divorce\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics), data extracted in June 2015.

contains a uniform jurisdiction rule if they have a **common** EU nationality. In all other cases, jurisdiction for their divorce is left to the national law of their respective States. Member States have diverse policies as regards this issue and cannot alone remedy the situation. As the problem affects solely couples with two different EU nationalities and couples involving third-State nationals, the solution goes beyond the powers of a single Member State. The need for EU action is therefore even stronger for these couples than it is for spouses having the same EU nationality (and for whom the Regulation already provides uniform jurisdiction).

The introduction of a discretionary rule dealing with parallel proceedings pending in a Member State and in a third State (*lis pendens*) can be based on Article 81 para. 2 (c) TFEU (common jurisdiction rules) together with Article 81 (f) TFEU (elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States). Some Member States already have such a rule in their national law and exercise it; others have it but are uncertain whether they may decline jurisdiction attributed to them by the Regulation in favour of a third State. Others do not have a rule on *lis pendens* vis-à-vis third States and have no intention to create one. This leads to an unequal application of the jurisdiction rules of the Regulation in the different Member States which can only be remedied by EU action.

## 2.4. Objectives

General objectives:

- (a) to ensure equal access to justice in the Union for both spouses
- (b) to enhance sound and efficient administration of justice

Specific objectives:

- (a) to simplify the regulatory framework on international jurisdiction in divorce cases in the EU and its Member States
- (b) to introduce flexibility for courts to take into account proceedings pending in third States.

## 2.5. Description of Policy Options

*Option 1: Baseline scenario*

This policy option assumes that no legislative initiatives bringing about substantive changes would take place at EU level. This does not exclude, however, a clarification of the Regulation's rules determining in which cases and under which conditions Member States may apply their rules on residual jurisdiction, accompanied by further explanations in a revised version of the Practice Guide on the Regulation which was published, and which is updated as necessary, by the Commission.

*Option 2: Creation of a uniform and autonomous rule on forum necessitatis for spouses not having a common EU nationality and living in a third State combined with the deletion of the reference to residual jurisdiction under national law, and introduction of a discretionary lis pendens rule vis-à-vis third countries*

This option would introduce a rule creating a *forum necessitatis* while deleting the current reference to residual jurisdiction under national law. Where no court of a Member State has jurisdiction under the Regulation, the courts of a Member State would be allowed, on an exceptional basis provided for in the Regulation, to hear the case if proceedings cannot be brought in a third State with which the case is closely connected (because divorce cannot be granted at all there) or would be practically impossible (e.g. because of war), provided that the case has a sufficient connection with the Member State of the court seised. This rule would ensure that each spouse of a couple not having the same EU nationality and living in a third country has a forum to obtain a divorce, **but it would only provide a forum within**

**the EU if the spouses cannot obtain a divorce in a third country.** If the spouses could, e.g., obtain a divorce in the third State of their common habitual residence, the *forum necessitatis* would not apply.

Furthermore, this option would entail the introduction of a possibility for the courts in a Member State to take into account proceedings pending in third States by granting a discretionary stay of proceedings if there is an action involving the same parties and the same subject matter (divorce, legal separation or marriage annulment) pending in a non-Member State, provided that there is a reasonable prospect that the resulting judgment will be recognised in the Member State(s) concerned.

*Option 3: Creation of a uniform and autonomous rule on residual jurisdiction for spouses not having a common EU nationality and living in a third State, combined with the deletion of the reference to residual jurisdiction under national law, and introduction of a discretionary lis pendens rule vis-à-vis third countries*

This option would introduce a uniform and exhaustive rule on residual jurisdiction for cases where the spouses do not have a common EU nationality and live in a third State. This rule would replace the national rules on residual jurisdiction existing in most Member States and close a gap for nationals of those Member States who do not provide jurisdiction for such cases. It ensures access to a court in the EU for spouses who live in a third State but retain links with a certain Member State of which they are nationals or in which they have resided for a certain period, **even if the spouses could find a forum in a third State**. The scope of this rule would correspond to the general rule of jurisdiction (Article 3) and would apply to divorce, legal separation and marriage annulment. The rule of the Regulation which currently protects citizens of EU Member States and persons habitually resident in a Member State from some of the exorbitant jurisdiction grounds of national law which has given rise to confusion could be deleted because the courts of the Member States would no longer be allowed to use those national rules in international divorce cases.

Furthermore, this option would introduce a discretionary *lis pendens* rule vis-à-vis third countries like Option 2.

*Option 4: No harmonisation of residual jurisdiction, but deletion of Article 6 which protects a defendant having EU nationality or domicile from being sued in another Member State under residual jurisdiction rules of national law and introduction of a discretionary lis pendens rule vis-à-vis third countries*

This option would not add a rule on *forum necessitatis* or residual jurisdiction, and it would leave the residual jurisdiction rules provided by the national law of the Member States intact. The only change would be the deletion of the protective rule in Article 6 which limits the exercise of these national jurisdiction rules and protects defendants having an EU nationality or domicile from being sued in another Member State under the jurisdiction rules of national law (while they could still bring proceedings themselves there). As in Options 2 and 3, a discretionary *lis pendens* rule vis-à-vis third States would be added.

## 2.6. Analysis of impact of Policy Options

### 2.6.1. Option 1: Baseline scenario

For the impacts of this option see problem definition. There are no other legislative initiatives at global or Union levels forthcoming on these issues. As the mobility of people in general is increasing, it may be assumed that also the number of spouses living outside the EU but having a connection with a Member State and wishing to file for divorce there will increase. Infringement proceedings are not an appropriate tool with a view to improving the operation of the Regulation in the area discussed here as there is currently no rule in this Regulation offering jurisdiction for spouses not having a common EU nationality and living in a third State. As for the operation of the Articles allowing the use of national

jurisdiction rules and protecting the defendant and their interaction, infringement proceedings, which need to be based on a perceived structural deficit in the implementation of the Regulation, would promise little success as the provisions are admittedly unclear.

2.6.2. *Option 2: Creation of a uniform and autonomous rule on forum necessitatis for spouses not having a common EU nationality and living in a third State, combined with the deletion of the reference to residual jurisdiction under national law, and introduction of a discretionary lis pendens rule vis-à-vis third countries*

**Effectiveness to achieve objectives:** The deletion of the reference to national residual jurisdiction combined with the creation of a *forum necessitatis* rule would have a positive impact on ensuring **access to a court** for spouses not having a common EU nationality who are living in a third country but have a sufficient connection to the EU by way of their previous common habitual residence or by way of the nationality (or, in the case of the UK and Ireland, the ‘domicile’) of one of the spouses or in situations where a risk of denial of access to justice would exist outside the EU. It would no longer allow the use of national rules on residual jurisdiction but ensure that spouses not having a common EU nationality living in a third State have access to a court at all, albeit perhaps in the third State, and only if that is not the case, to an EU court in order to obtain a divorce, legal separation or the annulment of their marriage.

Moreover, the option would end the existing general inequality illustrated by the example and created by the current text of the Regulation, namely that only one spouse has access to the courts of a Member State under residual jurisdiction provided by national law while the other spouse doesn't. The risk that the judgment rendered in the EU will not be recognised by the third State of which one or both of the spouses are nationals or where the spouses were habitually resident if that State also has jurisdiction under its own law is minimised because the *forum necessitatis* will by definition only apply if proceedings could not be brought in that third State. This option does not solve the problem that a divorce pronounced in a third State might be recognised in one EU Member State but not in the other if the spouses are nationals of different EU Member States.

The objective of **simplification would be reached** at the jurisdiction level because the varying national residual jurisdiction rules would be replaced by a single and uniform rule offering access to the EU courts to all citizens under the same conditions and ensuring that no denial of justice occurs. As a corollary of this harmonisation, the Regulation's current rule protecting nationals of EU Member States and persons habitually resident in a Member State from the exorbitant bases of jurisdiction contained in the national law of the Member States can be deleted. The court seised, however, would still need to examine whether proceedings could be brought in a third State before being allowed to base its jurisdiction on the *forum necessitatis* rule.

In cases where the divorce judgment pronounced in a third State is likely to be recognised in the Member States concerned, the proposed rule on *lis pendens* vis-à-vis third States would enhance the efficiency of justice by allowing the courts of a Member State having jurisdiction under the Regulation to give priority to the proceedings brought earlier in that third State.

**Fundamental rights:** Access to justice would be improved for spouses with a sufficient connection to the EU. If a divorce is obtained in a third State, though, the problem described above will persist, namely that the divorcees' civil status may vary from one Member State to another, thereby hampering their right to free movement and to respect for private and family life.

**Costs savings:** This option would not result in cost savings related to specialised legal advice as it would be necessary to assess whether the spouses cannot bring their divorce proceedings in a third State.

**Stakeholders' views:** The majority of respondents (78% i.e. 132 of 170 responses) believe that in the cases outlined above, the Regulation should allow an EU court to exercise its jurisdiction. Among practitioners, 80% think that the Regulation should offer a *forum necessitatis* instead of leaving jurisdiction to the diverse rules of the Member States on residual jurisdiction. This resembles responses from private individuals (78%) and from academics (67%). Moreover, the majority of those with practical experience agree that the Regulation should ensure access to justice through a *forum necessitatis* while no longer allowing the use of national rules on residual jurisdiction. A harmonisation through deletion of the permission to use national jurisdiction rules combined with a *forum necessitatis* was also the proposal favoured by the expert group which advised the Commission as the best way forward. Of those Member States that responded, five (CZ, DE, NL, PL, PT) were in favour of creating a *forum necessitatis* and two against (FR and BE who both denied the need for it because their national law already provides for a *forum necessitatis* based on nationality).

**Political feasibility:** This option would be difficult to accept for some Member States given that there are widely divided views on the need for unification and little evidence. In addition, given the varying definition of marriage in the national laws of Member States and their resulting difficulty in applying the instrument to the divorce of other forms of marriage, e.g. same-sex marriages, work towards a consensus on any jurisdiction rule in matrimonial matters is difficult at this time. See chapter 2.2. concerning matrimonial matters.

2.6.3. *Option 3: Creation of a uniform and autonomous rule on residual jurisdiction for spouses not having a common EU nationality and living in a third State, combined with the deletion of the reference to residual jurisdiction under national law, and introduction of a discretionary lis pendens rule vis-à-vis third countries*

**Effectiveness to achieve objectives:** The creation of an autonomous rule on residual jurisdiction would have a **strong positive impact on ensuring access to a suitable court in the EU** for spouses not having a common EU nationality who are living in a third country but have a close connection to the EU by way of their previous common habitual residence or by way of the nationality (or, in the case of the UK and Ireland, the 'domicile') of one of the spouses. It would ensure that they both have access to an EU court in order to obtain a divorce of their marriage, even if the national jurisdiction rules of the relevant Member State do not allow residents of third countries to bring proceedings in that Member State. The option would end the existing general inequality illustrated by the example and created by the current text of the Regulation, namely that only one spouse might have access to the courts of a Member State under the residual jurisdiction rules of national law while the other spouse doesn't.

Like the previous option, this option would have a strong positive impact on **simplifying the regulatory framework** on international jurisdiction for divorce for spouses not having a common EU nationality who are living in a third country by establishing clear harmonised rules on residual jurisdiction for all Member States. As a corollary of this harmonisation, the Regulation's current rule protecting nationals of EU Member States and persons habitually resident in a Member State from the exorbitant bases of jurisdiction contained in the national law of the Member States can be deleted. The existence of a uniform jurisdiction rule makes the forum even more predictable than under the previous option only providing a *forum necessitatis*, and the article protecting respondents from being sued "by surprise" in a forum with which they have only weak or no connections is thus no longer necessary. These measures would decrease the amount of investigation or possible confusion caused by consulting the law of each Member State. This option does increase the risk, however, that parties who thus have access to a court in the EU obtain a judgment which may not be recognised by the third State of which one or both of the spouses are nationals or where the spouses were habitually resident if that State also has jurisdiction under its own law. This option also does not solve the problem that a divorce pronounced in a third State might be recognised in one EU Member State but not in the other.

In cases where the divorce judgment pronounced in a third State is likely to be recognised in the Member States concerned, the proposed rule on *lis pendens* vis-à-vis third States would enhance the efficiency of justice by allowing the courts of a Member State having jurisdiction under the Regulation to give priority to the proceedings brought earlier in that third State.

**Fundamental rights:** Access to justice would be improved for spouses not having a common EU nationality with a close connection to the EU. It would be ensured that they can obtain a divorce within the EU which is then automatically recognised by operation of law in all other EU Member States. There is a risk, however, that the judgment rendered in the EU will not be recognised by the third State of which one or both of the spouses are nationals or where the spouses were habitually resident if that State claims jurisdiction under its own law.

**Costs savings:** For all spouses living abroad but retaining a sufficient connection with the EU this option would decrease the amount of investigation into the law of each Member State and thereby it would reduce costs estimated to range from € 500 to € 12,500 per case.

**Stakeholders' views:** A significant majority (77%) of respondents maintain that it would be useful to address the lack of a uniform rule on residual jurisdiction for all cases. In particular, stakeholders with practical experience of the Regulation answered positively to this question. Of those Member States that responded, three (NL, PL, PT) were in favour of creating a uniform rule on residual jurisdiction if no court in a Member State has jurisdiction under the Regulation and three against: FR and BE both denied the need for it because their national law already provides for residual jurisdiction based on nationality, CZ gave no reasons, and DE stated that a redraft of Articles 6 and 7 would be sufficient and could leave the national rules on residual jurisdiction intact. The UK also expressed hesitations.

**Political feasibility:** This option would be difficult to accept for some Member States given that there are widely divided views on the need for unification and little evidence of the scale of the problem. In addition, given the varying definition of marriage in the national laws of Member States and the diverging views of Member States in how to deal with matters of jurisdiction as a result thereof it seems difficult to work towards a unanimous agreement on any jurisdiction rule in matrimonial matters at this time. See chapter 2.2. concerning matrimonial matters.

2.6.4. *Option 4: No harmonisation of residual jurisdiction but deletion of Article 6 which protects a defendant having an EU nationality or domicile from being sued in another Member State under residual jurisdiction rules of national law and introduction of a discretionary lis pendens rule vis-à-vis third countries*

**Effectiveness to achieve objectives:** The deletion of Article 6 which protects a defendant having EU nationality or domicile from being sued in another Member State under residual jurisdiction rules of national law would have a positive impact on ensuring **equal access to a court** in the EU for spouses not having a common EU nationality who are living in a third country but have a sufficient connection to the EU by way of their previous common habitual residence or by way of the nationality (or, in the case of the UK and Ireland, the ‘domicile’) of one of the spouses. In the example given above, this option would allow not only the Dutch husband but also the German wife to bring divorce proceedings in Germany.

This option would leave the national rules on residual jurisdiction intact and open them to both spouses by removing the protective limitation. The option would not solve the problem, however, that currently only half of the Member States have rules on residual jurisdiction which offers their nationals living in a third State a forum without any further conditions. So while access to justice would be equal for both spouses of a couple, there would still be couples having, and others not having access to a residual forum in the EU.

The regulatory framework would be simplified by this deletion because the relationship between that protective article and the article allowing the use of national jurisdiction rules was interpreted in different ways, thus giving rise to confusion and therefore delays. Legal clarification was requested by many.

However, this option would not deal with the current situation that some spouses who are nationals of different EU Member States are **forced to file for divorce in a third State** because there is no jurisdiction in any EU Member State under the Regulation and under national law. Moreover, like the other options, it would not solve the problem that a divorce pronounced in a third State might be recognised in one EU Member State but not in the other.

In cases where there **is** jurisdiction in the EU under the Regulation and a divorce judgment pronounced in a third State is likely to be recognised in the Member States concerned, however, the proposed rule on *lis pendens* vis-à-vis third States would enhance the efficiency of justice by allowing the courts of a Member State having jurisdiction under the Regulation to give priority to the proceedings brought earlier in that third State.

**Fundamental rights:** The protection of the fundamental right of access to justice would be somewhat improved for citizens with a close connection to the EU (through nationality/'domicile' or previous habitual residence). It would be ensured that they can both obtain a divorce within the EU (albeit perhaps not in their own Member State of nationality) which is then automatically recognised by operation of law in all other EU Member States. Inequality between the spouses in one single couple in this respect would be eliminated. However, there would still remain unequal access to court in the EU for spouses in general. In addition, spouses in particular in couples formed of EU nationals from two different Member States would in the future be exposed to being sued in a "surprise jurisdiction" provided by the national law of the Member State of the other spouse.

**Costs savings:** For the **applicant** spouse living outside the EU but retaining a strong connection with the EU, this option would decrease the amount of investigation into the law of each Member State in order to find jurisdiction and thereby it would reduce costs estimated to range from € 500 to € 12,500 per case. For the **defendant** spouse, however, who has to face proceedings in a "surprise" jurisdiction provided for by the national law of a Member State, additional costs for specialised legal advice are likely to arise.

**Stakeholders' views:** During the public consultation, this option of deleting the protective article was not proposed by anyone. Only one Member State (DE) mentioned – without providing further details – that a mere redraft of the Articles allowing the use of Member States' rules on residual jurisdiction and protecting defendants with EU nationality or residence/domicile<sup>62</sup> could solve the problems while leaving the rules on residual jurisdiction of the Member States in their national law intact.

**Political feasibility:** This option is likely to be difficult to accept for some Member States given that there are widely divided views on the need for unification and little evidence on the scale of the problem. Moreover, as the so-called exorbitant grounds of jurisdiction of a single State under its national law are often considered politically undesirable by other States, there will be little incentive for them to agree to the abolition of a rule protecting their own nationals against the exorbitant jurisdiction rules of other States. In addition, given the varying definition of marriage in the national laws of Member States and diverging views of Member States in how to deal with matters of jurisdiction as a result thereof it seems difficult to work towards a unanimous agreement on any jurisdiction rule in matrimonial matters at this time. See chapter 2.2. concerning matrimonial matters.

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<sup>62</sup> Articles 6 and 7.

## 2.7 Comparing the Options and preferred Policy Option

| Objectives/Impacts                            | Option 1   | Option 2  | Option 3  | Option 4   |
|---|--|---|---|--|
| Ensure equal access to court for both spouses | <p>Baseline scenario</p> <p>As three Member States do not provide a forum for their nationals living abroad, <b>there will still be couples who would not have access to an EU court (which would depend on the diverging national rules).</b></p> | <p>Creation of a uniform and autonomous rule on <i>forum necessitatis</i> for spouses not having a common EU nationality and living in a third State, combined with the deletion of the reference to residual jurisdiction under national law, and introduction of a discretionary <i>lis pendens</i> rule vis-à-vis third countries</p> <p>This option would have a positive impact on ensuring access to a court for spouses not having a common EU nationality who are living in a third country but have a sufficient connection to the EU, but <b>only if they cannot bring their proceedings in the third State (i.e., because divorce is legally impossible there or because of war).</b></p> <p>On the other hand, this option would <b>ensure equal access</b> to a court in the EU to spouses of all EU nationalities throughout the EU, provided that the "necessity" for this forum is given...</p> | <p>Creation of a uniform and autonomous rule on residual jurisdiction for spouses not having a common EU nationality and living in a third State, combined with the deletion of the reference to residual jurisdiction under national law, and introduction of a discretionary <i>lis pendens</i> rule vis-à-vis third countries</p> <p>This option would <b>ensure equal access to a court</b> in the EU for spouses not having a common EU nationality who are living in a third country but have a close connection to the EU.</p> | <p>No harmonisation of residual jurisdiction but deletion of Article 6 which protects a defendant having an EU nationality or domicile from being sued in another Member State under residual jurisdiction rules of national law and introduction of a discretionary <i>lis pendens</i> rule vis-à-vis third countries</p> <p>This option would enhance equal access (and thereby improve the <i>status quo</i>) to a court in the EU for spouses not having a common EU nationality who are living in a third country but have a close connection to the EU. Both spouses of a couple would have the same forum available, but <b>still there would be couples who would not have access to an EU court (which would depend on the diverging national rules).</b></p> |
| Enhance the sound administration of justice   | 0  | <p>The <i>lis pendens</i> rule would help avoiding parallel proceedings on the same matter and thereby allow for a better coordination of pending proceedings.</p>  | Same impact as Option 2   | Same impact as Option 2.   |
| Simplify the                                  | A redraft of   | This option would   | This option would   | This option would  |

|   |   |   |   |  |
|---|---|---|---|--|
| regulatory framework on international jurisdiction in divorce cases | the two Articles allowing the use of national residual jurisdiction and protecting EU defendants from being sued in a "surprise jurisdiction" under national law could clarify their relationship, thereby simplifying and enhancing their application. | have a <b>positive impact</b> as it provides for a uniform rule throughout the EU. In order to use the <i>forum necessitatis</i> , however, the court needs to examine first whether it is impossible to bring proceedings in a third State.  | have a <b>strong positive impact</b> as it provides for a uniform residual jurisdiction rule throughout the EU.   | have <b>some positive impact</b> : Compared to the <i>status quo</i> it would only delete the Article protecting EU defendants from being sued in a "surprise jurisdiction" under national law but not simplify the identification of the national jurisdiction rules.   |
| Protect fundamental rights  | 0   | This option would have a positive impact since it would enhance access to court in a situation where there is a risk of denial of justice. On the other hand, it would reduce access to court under national law in those Member States where nationality currently is a ground for jurisdiction in third-State related cases. Addressing only jurisdictional matters, it would not address the current negative impact on the freedom of movement and the right to respect for private and family life which is created by unequal recognition of third State divorces throughout the Union. | This option would have a strong positive impact on fundamental rights, since it would ensure access to court. There is a risk, however, that the judgment rendered in the EU will not be recognised by the third State of which one or both of the spouses are nationals or where the spouses were habitually resident if that State claims jurisdiction under its own law. Addressing only jurisdictional matters, this option would not address the current negative impact on the freedom of movement and the right to respect for private and family life which is created by unequal recognition of third State divorces throughout the Union. | This option would have a positive impact on fundamental rights, since it would enhance equal access to court. Both spouses of a couple would have the same forum available, but still there would be couples who would not have access to an EU court. Moreover, addressing only jurisdictional matters, this option would not address the current negative impact on the freedom of movement and the right to respect for private and family life which is created by unequal recognition of third State divorces throughout the Union. |
| Costs savings   | 0   | No cost savings related to specialised legal advice as it   | For all spouses living outside the EU and retaining strong links  | Mainly for the applicant spouse but not for the defendant  |

|                       |  |  |  |   |
|-----------------------|--|--|--|---|
|                       |  | would be necessary to assess whether the spouses cannot bring their divorce proceedings in a third State.  | with an EU Member State.   | who may be sued in a "surprise jurisdiction".   |
| Political feasibility | In the light of the requirement of unanimity and the probable varying views regarding jurisdiction in matrimonial matters, the baseline scenario seems at this stage the best possible option. | Difficult to accept for some Member States because of <ul style="list-style-type: none"> <li>widely divided views on the need for unification and little evidence</li> <li>differing definitions of marriage in the national laws of Member States and diverging views of Member States in how to deal with matters of jurisdiction as a result thereof</li> </ul> | Difficult to accept for some Member States because of <ul style="list-style-type: none"> <li>widely divided views on the need for unification and little evidence</li> <li>differing definitions of marriage in the national laws of Member States and diverging views of Member States in how to deal with matters of jurisdiction as a result thereof</li> </ul> | Unlikely to be acceptable to Member States because other Member States' exorbitant grounds of jurisdiction are generally perceived as undesirable, and a need to protect the own citizens from those foreign rules is retained. |

The preferred option is Option 1. Options 2, 3 and 4 would be difficult to accept for some Member States given that there are widely divided views on the need for unification and little evidence on the scale of the problem. Moreover, as the so-called exorbitant grounds of jurisdiction of a single State under its national law may be considered politically undesirable by other States, there may be little incentive for them to agree to Option 4 proposing the abolition of a rule protecting their own nationals against the exorbitant jurisdiction rules of other States. In addition, given the varying definition of marriage in the national laws of Member States and diverging views of Member States in how to deal with matters of jurisdiction as a result thereof, it seems unlikely that a unanimous agreement on these matters could be achieved at this time. Given the potential benefits of improvements to the Regulation on this matter, the matter may be re-considered in the future on the basis of further evidence gathered, at a time when the national laws of the Member States may have evolved such that a consensus is more likely to be achieved. See chapter 2.2. concerning matrimonial matters.

### III. PARENTAL RESPONSIBILITY

The Regulation establishes harmonised jurisdiction rules for all disputes concerning parental responsibility (e.g. custody, access and child protection measures). The resulting judgments are automatically recognised in all Member States and can be enforced there under certain conditions. Moreover, the Regulation – in conjunction with the 1980 Hague Convention - sets up a procedure for returning children who have been moved wrongfully to another Member State by a parent. It also contains rules for the cross-border placement of children in other Member States and provides for the establishment of a Central Authority in every Member State. They shall cooperate with each other in the application of the Regulation and support parents and courts in cross-border parental responsibility cases. According to the opinion of the national experts collected in the evaluation study and the

feedback received in the public consultation<sup>63</sup> as well as in the discussion with the Member States' representatives the jurisdiction rules mostly work well by providing an efficient and clear system for identifying the responsible court to hear a case. Problems have been however reported in four areas: parental child abduction, cross-border placement of children, recognition and enforcement of judgments and cooperation between (central and other) national authorities. Linking these problems are common threads: the excessive and undue delays arising from the way the existing procedures are formulated or applied; the negative impact that these delays can have on the fundamental rights of the child; the corrosive effect that these deficiencies have on the mutual trust on which the smooth operation of the Regulation depends. Problems related in particular to child return in cases of parental abduction are reflected in the cases brought before the Court of Justice.

In relation to the important subject of mediation, the existing Regulation already encourages its use.<sup>64</sup> In general terms, this encouragement should be further embedded in relation to several of the parental responsibility matters discussed below.

Parental responsibility matters are perceived by Member States as highly important given their link to the rights of the child, and enjoy their support in terms of possible changes which would enhance the overall efficiency of the proceedings. Therefore, it seems politically feasible to address these matters in the revision.

### **3. THE RETURN PROCEDURE IN CASES OF PARENTAL CHILD ABDUCTION**

#### **3.1. Problem definition**

If an international couple splits up, the temptation for one of the spouses to return to his or her home country with the child(ren) can be high. If both parents – as is normally the case – have joint custody for the child, such unilateral removal of the child violates the rights of custody of the left-behind parent (parental child abduction) and puts the best interests of the child at risk. The 1980 Hague Convention, which is in force in all Member States, discourages unilateral removals of children across borders by establishing a mechanism for the prompt return of the child to the State where the child was habitually resident before the abduction.<sup>65</sup> The aim is a mere factual return; the 1980 Hague Convention does not establish jurisdiction rules nor deal with the proceedings for the attribution of custody after separation or divorce of the parents. The Convention is based on the assumption, though, that the courts of the State where the child was habitually resident before the abduction are best placed to resolve the custody dispute.

The Regulation builds on this and goes further. It harmonises jurisdiction for custody disputes throughout the Union (as a rule in the State of habitual residence of the child) and complements the return mechanism of the 1980 Hague Convention by some procedural safeguards and an additional procedure if the child is not returned to the State of habitual residence under the 1980 Hague Convention. To obtain the return of a child abducted from one Member State to another, the 1980 Hague Convention continues to apply in accordance with the terms of the Regulation. These return proceedings under the Convention take place in the State to which the child was abducted. If return is

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<sup>63</sup> The qualitative analysis of the replies to the question concerning helpfulness of the Regulation with respect to cross-border custody and access rights highlights the efficiency of the jurisdiction system of the Regulation.

<sup>64</sup> See Article 55. The 1980 Hague Convention and the 1996 Hague Convention on which the Regulation builds, also encourage the use of mediation, in particular in child abduction cases.

<sup>65</sup> The Commission is currently evaluating the performance of the operation and use of the second generation Schengen Information System (SIS II) (set up in SIS II Decision and SIS II Regulation), *supra* note 5. A specific section of the evaluation report will be dedicated to the use and limitations of SIS in case of parental child abduction. The SIS II Decision only allows the creation of an alert on an abducted child when the child is actually missing and its protection and/or whereabouts have to be ascertained. However, in many cases of parental abduction the whereabouts of the abducted child are known or the child is staying with a person holding parental responsibility and does not need to be placed under protection.

ordered and the child returns, the Convention's aim is achieved and the custody case, if the parents so wish, can be heard by the courts of the State of the child's habitual residence.

If return is refused by the State of refuge, an additional procedure comes into play which will be described below under "Functioning of the overriding mechanism".

### *Problems relating to the timing*

Parental child abduction causes harmful effects for children and great distress for their parents.

The objective of the Regulation, which supplements in this regard the objectives and provisions of the 1980 Hague Convention, is therefore to deter abductions and in any case to secure the prompt return of children wrongfully removed to or retained in another Member State. The *prompt* return of the child is crucial for three reasons. First, it is a reasonable assumption that it is generally better for the child if any disruption caused by abduction is rescinded as quickly as possible. A swift return means that the child can be returned to their normal routine and, if appropriate, maintain contact with the left-behind parent. Secondly, the longer the child is away from his or her State of habitual residence, the more likely they are to become settled in their new environment. This may mean that, even if initially it would have been in the best interest of the child to return to their State of habitual residence, by the time the return application is decided by a court this is no longer the case. Thirdly, as one of the aims of the Regulation is to deter abductions, knowing that abduction will be countered by an immediate return is more likely to deter potential abductors than proceedings that can take months to resolve<sup>66</sup>. Timing is thus key to the successful operation of the child return procedure<sup>67</sup>. The Regulation therefore provides that "the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged". On average, however, only 26% of applications between Member States were resolved within six weeks<sup>68</sup>. In the same vein, the majority (61%) of the respondents to the public consultation, including those who have practical experience with the Regulation and the Member States, identified timing as an issue by stating that the Regulation has not ensured the immediate return of the child.

Inefficiency of the return proceedings can be attributed to several aspects. Notwithstanding the benefits of having an express and short deadline, the current six-week time limit to issue a return order, whilst useful in setting a benchmark for what a "prompt return" should be, proved inadequate in practice since there are doubts among judges and practitioners whether the six weeks apply per instance, include appeals or even the enforcement of a return decision. In discussions with Member States' representatives and judges it became clear that in some Member States, the existing six-week time limit is considered as a mere political appeal to act quickly rather than a realistic time limit and has little impact on the handling of an individual case. In Member States which apply the six-week time limit to the first instance only (England and Wales) or to every court instance separately, however (e.g., Germany, the Netherlands), the first instance courts generally respect the time limit while appellate courts often take longer.

Another problem of the rule which was raised in particular by judges is that it sets no time limit for the processing of an application by the receiving Central Authority. As a result, some cases take very long

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<sup>66</sup> N. Lowe, V. Stephens, *The timing of 1980 Hague Abduction Convention applications*, p. 3.

<sup>67</sup> The need for speedy proceedings in child abduction cases also prompted the Court of Justice of the European Union to introduce, in March 2008, a fast-track procedure for preliminary rulings interpreting Union law in these cases. The Court made use of this procedure in nine cases so far, eight of which concerned child abduction, and issued its judgment within 60 about days in each case.

<sup>68</sup> Statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Part II — Regional Report, Prel. Doc. No 8 B — update of November 2011 for the attention of the Special Commission of June 2011, available at <https://assets.hcch.net/upload/wop/abduct2011pd08be.pdf>.

to be brought before the court, which can have a negative impact on the outcome of the return proceedings.

The evidence of the evaluation study and the analysis of the complaints received by the Commission<sup>69</sup> suggest that these delays are mainly based on certain inefficiencies in national procedures which hinder the respect of the time limit. Problems in meeting the deadline have been attributed in particular to the lack in national law of a limitation of the number of appeals that can be brought against a return order, combined with the fact that proceedings before higher courts usually take longer. In some Member States there are two levels of appeals (FR, AT, PL, SK) and often the appellate court only quashes the decision of the lower instance and refers the case back to it. The new decision by the lower instance court can then again be appealed. Statistics show<sup>70</sup> that in extreme cases it can take up to 324 days to conclude an application which was appealed; the average being 154 days (see Annex 7 on the number of appeals in return proceedings).

The second issue relates to the analysis conducted with respect to the time limit for filing an appeal which ranges from 5 days to three months<sup>71</sup> and which may have a suspensive effect on the enforceability of the return decision. This means that even in the absence of an actual appeal, the order is not enforceable until the time for filing an appeal has expired. In some States (AT, CZ, LT, EL, FR) the court has discretion to declare the return order (provisionally) enforceable before that moment, while such appeal can still be filed. If nothing else is ordered later to the contrary, this effect will subsist if an appeal is indeed filed. In other systems, it is not possible to declare the order (provisionally) enforceable where no appeal has been filed and the time for doing so has not yet expired, but if an appeal is then actually filed (possible only within a very short period of two weeks), the court of first instance or the Court of Appeal (DE) can at this stage declare the order enforceable in spite of the pending appeal.

In addition, the European Judicial Network in civil and commercial matters came to the conclusion that an inefficient handling of cases is caused by lack of specialisation and concentration of the courts dealing with return applications in several Member States<sup>72</sup>. These cross-border abduction cases are complex and sensitive but arise only infrequently for the individual judge when handled in individual local family courts. As a result judges are less familiar with the procedures and provisions involved and have less opportunity to engage in a routine way other EU jurisdictions in a manner favourable to the building of mutual trust. This calls for limiting the number of courts competent to deal with abduction cases as is the case already in several Member States.<sup>73</sup>

Return of the child under the 1980 Hague Convention may be refused if the return would be likely to cause a grave risk of physical or psychological harm for the child. Under the Regulation, this ground for refusal may not be used by judges hearing return applications under the 1980 Hague Convention "if it is

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<sup>69</sup> The complaints from citizens were received directly by the Commission (letters, formal complaints) or channelled through the European Parliament (petitions, parliamentary questions). Around half of the 60 cases per year relate to parental child abduction.

<sup>70</sup> *Supra* note 68.

<sup>71</sup> *Infra* note 100.

<sup>72</sup> Cyprus, Estonia, Greece, Italy, Poland, Portugal, Slovenia and Spain do not have concentration of jurisdiction. See the Best Practice Guide drawn up by the Article 11 Working Group within the EJM; [https://e-justice.europa.eu/content\\_parental\\_child\\_abduction-309-en.do?clang=en](https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en), several Good Practice Guides of the Hague Conference on Private International Law and recommendations of Special Commissions on the practical operation of the 1980 Hague Convention have regularly reiterated the desirability for States to introduce concentration of jurisdiction for return applications under the 1980 Hague Convention.

<sup>73</sup> Austria, Belgium, Bulgaria, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Romania, the Slovak Republic, Sweden and the United Kingdom (England & Wales, Northern Ireland) have concentrated jurisdiction for return cases under the 1980 Hague Convention in one or more specialised courts. In Luxembourg and Malta, there is no formal concentration but there are only two family courts (Malta) or two Juvenile Courts (Luxembourg), respectively, for the whole country.

established that adequate arrangements have been made to secure the protection of the child after his or her return". Further delays occurred in situations where it could not be established quickly whether 'adequate arrangements' were put in place in the Member State of origin so to decide on the return of the child. The lack of precision of this provision appears to allow still too much leeway to refuse the return of a child. It is not clear where the burden of proof lies with respect to establishing that 'adequate arrangements' are in place. 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. It is not clear either whether the judge hearing the return case under the 1980 Hague Convention is obliged to take the initiative and get in touch with the court of the State of habitual residence of the child with regard to these arrangements. In this context, there is also a gap as the Regulation does not provide itself a jurisdictional basis for any protective measures to be ordered by the court of refuge if considered necessary to allow return, and even if such measures are taken under national law they do not benefit from cross-border recognition and enforcement under the Regulation and can thus not protect the child during and after the return until the State of habitual residence takes its own measures.

The problems described relate to the application and implementation of the 1980 Hague Convention which the Brussels IIa Regulation set out to clarify in 2005. At a global level, as described under 1.1., the Hague Conference had to conclude in 2012 that there is currently no support for a protocol clarifying the 1980 Hague Convention and that the necessary clarifications would therefore have to be brought about by soft law and regional initiatives such as the Brussels IIa Regulation.

#### *Functioning of the "overriding mechanism"<sup>74</sup>*

The so-called "overriding mechanism" constitutes an addition to what has been provided for in the 1980 Hague Convention and is thought to have a stronger deterrent effect on the potential abducting parent. It lays down the procedure to be followed after a non-return order was issued in the State of refuge on the basis of Article 13 of the 1980 Hague Convention (no exercise of custody rights by the left-behind parent, consent, objection of the mature child, grave risk of harm likely to be caused by the return). This decision shall be sent to the courts of the State of the (former) habitual residence of the child which shall invite the parents to file applications with regard to custody. Thus, even though the child does not return, the State best placed until now to make a sound decision on custody is given one last chance to do this even though the child is currently not present in that Member State. If a decision given in those custody proceedings orders the return of the child to the Member State of the former habitual residence, this order "overrides" the non-return decision made earlier and is directly enforceable in all Member States if accompanied by a certificate provided for in the Regulation.

Although the Court of Justice has already clarified certain aspects of this procedure,<sup>75</sup> national courts have faced difficulties in understanding the connections between the different types of procedures (custody procedures and return procedures). As reported by the national experts in the evaluation study, it may be the case that parents are involved at the same time in custody proceedings pending before the court of origin, in return proceedings before the court of refuge and yet there might be protective, provisional measures ordered by the former or the latter court. In this respect, the Austrian Supreme Court argued that the enforcement of a return order before a judgment on custody is final could endanger the best interests of the child. If the final judgment on custody differs from the earlier return

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<sup>74</sup> Article 11 (6)-(8) of the Regulation.

<sup>75</sup> See in particular CJEU 11 July 2008, Case C-195/08 PPU – *Inga Rinau*; 1 July 2010, Case C-211/10 PPU – *Doris Povse v Mauro Alpago* and 22 December 2010, Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*.

order on the question whether or not the child should be returned, the child will have to move twice in order to comply with the contradictory decisions.<sup>76</sup>

The practical application of the “overriding mechanism” has proven difficult because the custody proceedings do not take place in the Member State where the child is present and because the abducting parent is often not cooperative. In particular, it is often difficult to hear the child.<sup>77</sup> In addition, Central Authorities whose principal role is to support parents in all kinds of proceedings are not involved in such custody proceedings although they could potentially assist in ensuring the proper application of these provisions.

In addition, a practical problem relates to the transmission of documents to the court of origin in case of a non-return order concerning an abducted child. Some concerns have been raised by judges and Central Authorities in the public consultation and annual meetings because the Regulation lacks a translation regime relating to these provisions, which gives rise to additional correspondence and delays.

Finally, the lack of clarity of the child return provisions or inefficient measures generate extra costs for the parents, Central Authorities and judges involved in the proceedings. International child abduction cases require an intense work load and a high level of commitment by legal professionals supporting parents to meet the deadline imposed by the Regulation. The same obligation rests with the Central Authorities and judges.

For the parents involved it is mainly additional legal advice and work of their lawyers which causes the costs. Depending on the problem encountered or procedural step which has to be taken, every additional 10 working hours of a lawyer may generate extras cost of € 1,000 – 4,000 (depending on an hourly rate which varies between the Member States; usually between € 100 and 400).

In the same vein, unnecessary costs are generated for the national authorities through a higher work load for judges and staff of the Central Authorities. This means that the human resources cannot adequately deal with their usual responsibility and more staff is needed to handle the cases. The estimates in this field are difficult as the remuneration and workload of public administration staff is not available. It is known, at least, that Central Authority staff throughout the Union varies in composition – in some Member States all cases are handled by staff which are qualified as judges or lawyers (attorneys), in others staff members may hold other university degrees, and yet in others the caseworkers are paralegals or other professionals which have undergone education at a college of applied sciences. Accordingly, remuneration in the public service varies widely, making it impossible to quantify the costs of additional working hours.

### 3.2. Scale of the problem

It is estimated that annually there are up to 1,800 cases of parental child abduction within the EU. The number of cases in which the overriding mechanism has been applied is relatively small, not exceeding 20 cases per year.

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<sup>76</sup> CJEU 1 July 2010, Case C-211/10 PPU – *Povse*. The CJEU held that “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”. Moreover, the return may even be necessary to facilitate an eventual decision on the custody of the child.

<sup>77</sup> An example on the hearing of the child is provided by the case *Aguirre Zarraga*, CJEU 22 December 2010, Case C-491/10 PPU, paras 63-68. The Court stressed that a child must be given a genuine and effective opportunity to make his/her views known. If necessary, the Evidence Regulation should be used which provides the opportunity to use technologies facilitating a hearing without the child having to be physically present before the court (e.g. video conferencing).

### 3.3. Subsidiarity

Shared competence of the Union for most of the measures discussed here is based on Article 81 para. 2 (f) TFEU which establishes EU competence for the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. The clarification of the time limit, the concentration of jurisdiction within a Member State, the limitation of the number of appeals, the rule on provisional enforceability of return orders and the obligation to hear the child all establish uniform rules on certain aspects of civil procedure in the context of return proceedings under the 1980 Hague Convention. The same method was already used in 2003 when an article<sup>78</sup> was included into the Regulation which establishes certain common procedural rules for courts of Member States when dealing with return proceedings under the 1980 Hague Convention. The shared EU competence for creating an autonomous jurisdiction rule for provisional and protective measures taken in the State of refuge flows from Article 81 para. 2 (c) TFEU which establishes shared EU competence for common jurisdiction rules. A revocation of the current system by concentrating jurisdiction in the State of origin could be based on Article 81 para. 2 (c), ensuring the compatibility of the rules applicable in the Member States concerning jurisdiction.

The return mechanism applies solely to cross-border child abduction cases. To work properly it is heavily dependent on both efficient decision making in all Member States involved and efficient cooperation between the courts and authorities of the respective Member States. Existing Union law has shortcomings in this respect. Improvements undertaken in one Member State have proven not to have an impact on the return procedure as a whole since smooth operation of the system presupposes efficiency, close cooperation and mutual trust between both Member States involved in a case. If cooperation in return cases between States A and B works like a one-way street because State A always returns abducted children quickly to State B while State B always takes very much time and, due to the time elapsed, sometimes does not return children at all to State A, this undermines mutual trust and develops negative spill-over effects. EU action is therefore required to address these obstacles in all Member States and ensure that there are no disparities which negatively impact on the overall efficiency of the procedure. While the changes require some, limited, further harmonisation of Member States' procedural law<sup>79</sup>, this is limited to the minimum necessary to ensure the objective of smooth and swift functioning of the system.

### 3.4. Objectives

General objectives:

- (a) to deter abductions, protect the parent-child relationship and thereby safeguard the best interests of the child

Specific objectives:

- (a) to ensure swift and safe return of the child to his or her State of habitual residence and thereby simplify the child return procedure

### 3.5. Description of Policy Options

*Option 1: Baseline scenario*

This option does not involve any legislative intervention. The application of "soft law measures" as already developed by the Commission in cooperation with the Member States would continue. Such

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<sup>78</sup> Article 11.

<sup>79</sup> The existing Regulation already establishes some harmonisation of Member States' procedural laws.

measures include a Practice Guide<sup>80</sup> elaborated by the European Judicial Network in Civil and Commercial Matters concerning handling of return requests and a Practice Guide drawn up by the Commission,<sup>81</sup> and the organisation of annual meetings of the Central Authorities of all Member States, enabling them to have an exchange of views on general matters relating to the application of the Regulation and bilateral meetings to discuss difficult individual cases.

*Option 2: Codification of the current interpretation based on available guidelines and the CJEU case law*

This option would only clarify the current understanding of the relevant article and its operation following the interpretation given in some of the available guidelines and the CJEU case law referred to in the problem description.

It would stipulate that the six-week time limit applies to the whole procedure for obtaining an enforceable return decision; including the first instance court proceedings and possible appeal proceedings.<sup>82</sup>

In specific cases where the court of origin takes the final decision on the return and overrides the decision of the court of refuge the specific role of Central Authorities would be explicitly mentioned.

The court of refuge, where it decides not to return the child, should be obliged to specify in its decision the grounds for refusal and thereby make it clearer whether the overriding mechanism is to be applied.

*Option 3: Introduction of measures increasing efficiency and improving the functioning of the "overriding mechanism"*

This option would start with the two mere clarifications set out at the end of Option 2 but go beyond. It adds a number of "new" measures to tackle the problem of inefficiency and the problems relating to the complexity of the "overriding mechanism".

First of all, it would clarify the time limit for issuing an enforceable return order in line with the view prevailing among those Member States which handle return cases under the 1980 Hague Convention most quickly. A separate six-week time limit would apply to the proceedings before the first instance court and the appellate court, respectively. In addition, this option would oblige Central Authorities to also work under a six-week time limit to receive and process the application; locate the respondent and the child; promote mediation while making sure that this does not delay the proceedings, and refer the applicant to a qualified lawyer. Currently, no time limit exists for Central Authorities. This new 6+6+6 deadline would therefore envisage a maximum period of 18 weeks for all possible stages. This would render the time limit for courts more realistic with a view to protecting the right of the defendant to a fair trial whilst limiting it to the shortest period realistically possible when respecting the rule of law.

Moreover, the measures proposed would include an obligation for Member States to concentrate jurisdiction for child abduction cases on a limited number of courts while respecting the structure of the legal system concerned. This would allow judges experienced with this very specific type of procedure to rule on the return proceedings.

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<sup>80</sup> The Best Practice Guide drawn up by the Article 11 Working Group within the EJN; [https://e-justice.europa.eu/content\\_parental\\_child\\_abduction-309-en.do?clang=en](https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en), several Good Practice Guides of the Hague Conference on Private International Law on the 1980 Hague Convention and Recommendations of Special Commissions on the practical operation of the Convention.

<sup>81</sup> Practice Guide for the application of the Brussels IIa Regulation, 3<sup>rd</sup> edition 2015, [http://ec.europa.eu/justice/civil/files/brussels\\_ii\\_practice\\_guide\\_en.pdf](http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf).

<sup>82</sup> This view, put forward by the Commission in the first edition of its Practice Guide on the Regulation, published in 2005, was not shared by the Member States, as their implementation of the six-week rule and the discussions within the European Judicial Network in Civil and Commercial Matters demonstrate.

This option would also limit the number of possibilities to appeal a decision on return to one and explicitly invite a judge to consider whether a judgment should be provisionally enforceable.

Also, there would be an obligation of the Member State of origin to conduct a thorough examination of the best interests of the child before a final custody decision, possibly implying return of the child, is issued. In this context, when conducting this examination of the best interests of the child, any child who is capable of forming his or her own views has the right to be heard, using alternative means where relevant, even if the child is not physically present.

The cooperation between the Central Authorities or a direct communication by a judge with the relevant court in the Member State of origin should be facilitated to assess measures ("adequate arrangements") put in place in the Member State to which the child should be returned.

Where the child might be at a grave risk of harm or might otherwise be placed in an intolerable situation if returned to the country of the child's habitual residence without any safeguards, it should also be possible for the court of the Member State of refuge to order urgent protective measures required there and which, if necessary, can also "travel with the child" to the State of habitual residence where a final decision of the substance has to be taken. These could include that the left-behind parent cannot see the child alone and perhaps only under the supervision of a public authority. Such an urgent measure would be recognised by operation of law in the State of origin but would lapse as soon as the court of origin has taken the measures required by the situation.

*Option 4: Revoking the current system by deleting the overriding mechanism and thereby returning to the 1980 Hague Convention system*

The system would move back to the system stipulated in the 1980 Hague Convention which was applied before the adoption of the Regulation. A refusal of return by the court in the Member State of refuge would be final and could not be overruled by the court in the Member State of origin which is currently permitted under the Regulation.

*Option 5: Revoking the current system of Article 11 by concentrating the jurisdiction for return proceedings in the Member State of origin and enforcing the return order in the Member State of refuge*

This option implies that no application for a return order under the 1980 Hague Convention would have to be brought in the State of refuge first. Solely the Member State of the habitual residence of the child prior to the unlawful removal or retention would decide on the return. The Member State of refuge would then enforce such an order. Assuming that such an opt-out would be permitted by the 1980 Hague Convention, this option would mean that a parallel system would be established for intra-EU cases.

### **3.6. Analysis of impacts of retained Policy Options**

#### *3.6.1. Option 1: Baseline scenario*

For the assessment of this option please see problem definition. At global or EU level, no other legislative projects are planned which would address international parental child abduction and the remaining implementing problems of the 1980 Hague Convention and the Regulation as described above. While some Member States have taken effective remedies to solve the problems, others have not – for various reasons: sometimes the political pressure from abroad is not big enough because the total number of cases is limited, and almost each of them concerns a different country, sometimes the domestic resistance by judges or other stakeholders against certain proposed measures is too strong, and sometimes there is no political majority. But even if all Member States were to take certain implementing measures in the near future, it is unlikely that these would be identical. Differences in

efficiency would thus remain, and with them the challenge to mutual trust caused by the unequal handling of return applications concerning abducted children.

### 3.6.2. *Option 2: Codification of the current interpretation based on available guidelines and the CJEU case law*

**Effectiveness to meet objectives:** This option would improve the deterrent effect by clarifying the “overriding mechanism”. However, it would **not simplify the procedure as it would not reduce delays nor would it make the six-week time limit achievable** as it would stipulate that the time frame applies to the proceedings as a whole, i.e. including proceedings before all court instances and would be unable to tackle the core underlying causes of the delays. The time limit of six weeks **for the overall proceedings (i.e. not just per instance)** is not achievable on a general scale without putting the rule of law at risk. A survey carried out between 2010 and 2013 by a Working Group of Central Authorities under the Regulation established in the framework of the European Judicial Network in civil and commercial matters showed that in many Member States, the application is filed with the court first, and the court then serves the document instituting the proceedings upon the defendant (in this case the abducting parent). The time for service would therefore already count as part of the six weeks. The right to a fair trial requires that the defendant, after having been served with the document instituting the proceedings, has sufficient time to prepare for his or her defence and find a lawyer before the court hearing takes place. In States which are currently quick, a judgment can be expected about five to six weeks after the first instance court was seised, and the time limit for appeal starts yet to run. This shows that if the six weeks applied to all instances together, this could only be achieved to the detriment of the right of the defendant to a fair trial.

Similarly, this option would not enhance a safe return; the protective measures would continue to have only effects in one Member State.

For the relationship of this option with any other possible legal developments at global, EU or national levels see 3.6.1.

**Fundamental rights:** The mere clarification of the current system would enhance its efficiency to a limited extent and therefore have only minimal impact on the protection of the right of the child to have contacts with both parents as the right of the parent to protect his/her family life. The obligation to carry out a deeper assessment of the best interest of the child before the final custody decision is issued positively impacts on the rights of the child(ren) involved in the proceedings.

**Costs savings:** This option would only have some positive impacts on costs savings for parents (as less intense legal advice would be required due to more clarity of the provisions). A positive effect on national authorities is doubtful as further intense work would be required. However the effects could be hardly achieved as the provisions causing a prolongation in particular of the return proceedings under the 1980 Hague Convention would still apply.

**Stakeholders' views:** There was some support from the respondents for clarifying the current system which is seen in overall as a complex one.

### 3.6.3. *Option 3: Introduction of measures increasing efficiency and improving the functioning of the "overriding mechanism"*

**Effectiveness to meet objectives:** This option, **in addition to improving the deterrent effect** of the “overriding mechanism”, would also meet the objective of **making the time limit for the return proceedings under the 1980 Hague Convention achievable** as the system would be designed with three six-week targets so that the final decision, including appeals (if any), is given at the latest within 18 weeks (instead of the excessive delays exceeding 25 weeks and more) of the application being received by the **Central Authority** of the State of refuge. More particularly, this option **would simplify**

and tackle the core underlying causes of the delays. Even though this may at first glance look like an extension of the current six-week time limit, the effect is likely to be the opposite, namely that this clarification would considerably reduce delays, as practice in certain Member States with quick case handling has shown:

The time limit for the **Central Authorities** would be a novelty as there is currently no time limit for them in the Regulation and Central Authorities often take longer to take a case to court or refer it to a lawyer (mostly because the case file is not yet complete and the requesting Central Authority or the applicant does not provide the necessary information). Setting a clear deadline for the requested Central Authority will increase pressure to take the case to court timely, and for the requesting Central Authority and the applicant to provide the missing information quickly. Concerning **court proceedings**, this option follows the good practice identified in some Member States already where the six-week time limit is interpreted as applying separately to each instance, and is largely complied with: In line with the considerations about fair trial mentioned above under Option 2, in some Member States (e.g. Germany) the first (and only) hearing is scheduled about four weeks after the court was seised with the case, and the decision is given shortly after the hearing. In other Member States, a first preparatory hearing takes place after two weeks (e.g. Netherlands) to discuss procedure and the possibility of mediation, followed by the final hearing after four weeks and the judgment shortly afterwards. The first instance judgment is generally issued after five to six weeks in these Member States, and the time limit for appeal starts to run. The appellate court then has its own six weeks. However, even in Member States with quick case handling, appellate courts currently often overstep the time limit. Therefore, the Commission sees a need for making this obligation clearer and addressing each instance separately with a view to speeding up in particular appeal proceedings.

The **concentration of jurisdiction** could significantly contribute to the **swift handling** of the cases by a pool of specialised and experienced judges and thereby reduce delays. Such a concentration has proved effective to speed up proceedings in the Member States which have introduced it. Those Member States would certainly welcome a concentration also in other Member States. An EU obligation can help those who have not yet done so to overcome internal obstacles. Member States would concentrate jurisdiction upon one or more courts, taking into account their internal structures for the administration of justice as appropriate. They are likely to accept the widely recognised advantage of concentrating jurisdiction as they would choose their own way to do so. Good practice in some Member States is, for example, the concentration of jurisdiction for child abduction cases in one single court for the whole country (e.g. Bulgaria, Finland, Hungary, the Netherlands, Romania, Sweden, the UK [for England and Wales, Gibraltar, Northern Ireland and Scotland, respectively]), while in other Member States, the point of departure for concentration has been the number of appellate courts and an ensuing concentration of jurisdiction for international child abduction cases upon one court of first instance within each district of a court of appeal (Austria, Belgium, Germany and France). The concentration would also maximise the effectiveness of networking with judges in other jurisdictions dealing with such cases and of training opportunities.

In the same vein, the limitation of appeals would considerably reduce delays, as experience in those Member States which have taken this step already has shown.

Provisional, protective measures with cross-border effect would enable the court of refuge to make itself, at least initially, an “adequate arrangement” to secure the protection of the child after his or her return”, without awaiting such measures to be taken by the court of origin and thereby enable the court to order return more quickly. Indeed, it would also encourage the court of origin to take such measures, and thus facilitate coordination and cooperation between the court of refuge and the court of origin, and, thereby, it would help reduce the need for an order refusing return and **further reduce delays**.

For the relationship of this option with any other possible legal developments at global, EU or national levels see 3.6.1.

**Fundamental rights:** Reducing delays in return proceedings under the 1980 Hague Convention would better protect the right of the child to have contacts with both parents as the right of the parent to protect his/her family life. Even if the number of appeals that can be brought against a return order would be limited, at least one appeal instance will be guaranteed, so that no issue would arise regarding the right to an effective remedy and to a fair trial (Charter Article 47).

The obligation to carry out a deeper assessment of the best interest of the child before the **final custody decision involving the return of the child** (after a refusal of another Member State to return the child under the 1980 Hague Convention) is issued positively impacts on the rights of the child(ren) involved in the proceedings: In the past it has happened that the court in the State of (former) habitual residence of the child, after having received a non-return order under the 1980 Hague Convention from another Member State, simply ordered the return of the child by a provisional measure with a view to having the child within the jurisdiction first, and then conducting full custody proceedings. Even though this is in line with the case law of the Court of Justice,<sup>83</sup> it bears risks for the child's best interests in several respects. First, the court in the State of refuge had legitimate reasons not to order the return of the child in the summary proceedings under the 1980 Hague Convention. The Convention permits non-return based on consent of the left-behind parent, on the objection of the child or on the fact that return bears a risk of harm to the physical or psychological wellbeing of the child. The court in the State of (former) habitual residence which still has jurisdiction over the substance of custody is further away from the child in his or her current situation. Overruling the non-return order should therefore be possible for this court only if based on a full in-depth examination of the custody question, thereby providing a long-term solution and not only a reversal to the abduction situation which may be overturned by the same court later following a more in-depth analysis. If the overriding return order under the Regulation is made in a similarly summary procedure without additional evidence, it may even contribute to materialising the risks perceived by the court which heard the return case under the 1980 Hague Convention. Moreover, cross-border removals are difficult, sometimes even traumatic for children, in particular if they occur in a "crisis environment" of hostility between both parents as compared to a joint relocation of a whole family in harmony.

**Costs:** This option implies that a number of specialist judges are available in the jurisdiction at all times. Additional training may need to be offered in some Member States to the judges who will be dealing with return cases. On the other hand, given the concentration of jurisdiction, training expenditure may actually decrease, as a limited number of judges would need to be trained.

In all Member States which have already concentrated jurisdiction for return cases under the 1980 Hague Convention, no new courts were created but the specialist courts were designated from among the courts already established in a Member State. In this case, the adoption of national rules to implement the principle of concentration would be the only cost factor. For Member States there might be costs related to the administration and running of the court but as the cases already exist now and are only heard by other, non-specialist courts, costs would only be shifted from one court to another and no new costs would be generated. Moreover, many Member States have already concentrated jurisdiction for return applications in a limited number of courts. For this reason the economic impact is not expected to be high at EU-level.

**Cost savings:** In the long term there would be cost savings due to efficiency gains. As only a limited number of courts and judges would deal with return cases, it would be possible to prepare tailor-made training for them and they would be able to develop a routine in dealing with return cases. Procedures would eventually become shorter which would mean that fewer resources would be needed per case. Central Authorities and judges from Member States which have already concentrated jurisdiction for return cases reported in the annual meetings of Central Authorities that concentration of jurisdiction also

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<sup>83</sup> *Supra* notes 75 and 76 (*Povse*).

fosters the development of a specialised bar at these courts. These expert attorneys handle the delicate cross-border child abduction cases more quickly and more efficiently. As a consequence, parents need fewer hours of specialised legal advice; such gain is estimated at € 1,000 to 4,000 per case.

**Stakeholders' views:** Addressing the problem of delays featured in the contributions from all Member States who responded to the public consultation. BE suggests that it may be appropriate to regulate the return procedures more strictly by limiting the number of hearings, opportunities for appeal, and by setting common minimum standards for enforcement procedures. The United Kingdom 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. A number of respondents to the public consultation recommended adopting a fast-track procedure for handling return cases which would be effectively achieved with concentration of jurisdiction.

#### *3.6.4. Option 4: Revoking the current system by deleting the overriding mechanism and thereby returning to the 1980 Hague Convention system*

**Effectiveness to meet objectives:** This option **would not have a deterrent effect** as strong as that of the current Regulation system which gives the court of origin the additional and final say on the return. It would have a **positive impact on delays** and thereby **simplify the procedure** as the overall court proceedings would be limited to the proceedings before the court of refuge. The main advantage of this solution is that it would ensure quicker decisions on return by narrowing the scope of the questions submitted for the analysis to the court of refuge (whether the applicant has custody rights, whether the habitual residence was in the Member State of origin, and whether there is a ground for refusal) as the overriding mechanism would not be applied. This option **would not make the time limit achievable**, and it **would not ensure a follow-up on the open custody issue**.

The return to the "lighter" 1980 Hague Convention system would be a radical reversal of what proved to be the key element of the political compromise allowing the existing Regulation to be concluded in 2003, and reopening the question may have a negative impact on the balance of the negotiations.

**Fundamental rights:** The return to the 1980 Hague Convention system would protect the rights of some children, as the overriding mechanism would be abolished, which would avoid a forced return in cases where the child has clearly refused to return and the judge in the State to which the child had been abducted had issued a non-return order on this basis. The judge when examining whether the child should be returned or not should bear in mind the effects of the fact that the child is in a foreign environment and feels very dependent on the abducting parent. Every child has the right to maintain on a regular basis a personal relationship and direct contact with both parents, thus also with the left-behind parent, unless it is contrary to his or her interests – a right protected by the UNCRC as well as the Charter. On the other hand, this option would leave the custody situation in limbo if the child is not returned, thereby also prolonging an unclear legal situation which, as research has shown, can have a negative impact on the child concerned and will often prevent contact between the child and the parent with whom the child is not living.

**Costs savings:** This option could involve savings for parents, estimated at € 1,000 to 4,000 per case, as the return proceedings would be shorter and thereby less legal advice would be required. On the other hand, the custody situation would not be resolved and the proceedings on this part would need to continue without being supported by the Regulation's system.

**Stakeholders' views:** Only few respondents suggested that the 1980 Hague Convention system would better address the inefficiency problem.

3.6.5. *Option 5: Revoking the current system of Article 11 by concentrating the jurisdiction for return proceedings in the Member State of origin and enforcing the return order in the Member State of refuge*

This policy option was discarded.

It implies a creation of a completely new system which may cause serious difficulties to practitioners who are used to the current "philosophy". This option would also lead to the creation of two different systems of handling intra- and extra-EU child abduction cases. In addition, this would weaken the position of the MS vis-à-vis third countries in the framework of the application of the 1980 Hague Convention. It would also create a disproportionate burden on Central Authorities which in all Member States are responsible for both intra- and extra-EU cases. The change would require adaptation of enforcement mechanisms which are currently a matter of national law: the current system requires and ensures close cooperation between the court of the Member State of refuge deciding on the return and the enforcement authorities of that State. Such cooperation may be more difficult if the deciding court and the enforcement authorities are in different Member States. In particular, the Member State of origin is likely to be unaware of the particular requirements of the enforcement law of the State of refuge so that the enforcement organs in that State might encounter problems when enforcing the order.

**Stakeholders' views:** None of the stakeholders suggested this solution.

### 3.7 Comparing the Options and preferred Policy Option

| Objectives/<br>Impacts  | Option 1<br>Baseline<br>scenario | Option 2<br>Clarification of the<br>current system  | Option 3<br>Introduction of new<br>measures to the<br>return mechanism   | Option 4<br>Return to the 1980<br>Hague Convention<br>system   |
|---|----------------------------------|---|--|--|
| To deter abductions   | 0                                | This option would improve deterrence of abduction by clarifying the "overriding mechanism".   | Same impact as Option 2.   | This option would have a negative impact on the deterrent effect compared to the <i>status quo</i> as the overriding mechanism would no longer be available and the last word would remain with the court of refuge.   |
| Simplification by ensuring swift and safe return of the child to his or her State of habitual residence | 0                                | This option <b>would minimally simplify the procedures</b> . It would reduce delays to a limited extent. The time limit would not be overall achievable.<br><br>Safe return could not be enhanced as the protective measures would not have cross-border effects. | This option would <b>strongly simplify</b> the return procedure. It would have a <b>positive impact</b> by reducing delays and making the time limit achievable.<br><br>Safe return would be ensured through protective measures with cross-border effect. | This option would <b>simplify the procedure</b> . It would have a <b>positive impact on delays but less than Option 3</b> as the custody situation will remain untouched.<br><br>Safe return could not be enhanced as the protective measures would not have cross-border effects. |
| Protection of fundamental rights  | 0                                | This option would have only a <b>limited positive impact</b> on fundamental rights, since some delays   | This option would have a <b>strong positive impact</b> on fundamental rights, since it would significantly enhance   | The option would have a <b>mixed impact</b> . Increased efficiency leads to a better protection of the rights of the child. If the overriding  |

|                     |   |  |   |   |
|---------------------|---|--|---|---|
|                     |   | could be reduced, and would therefore not fully protect the rights of the child. | the right of the child to be heard and the best interests of the child. It would also increase overall effectiveness of the system which in its turn positively impacts on the rights of the child.   | mechanism would be abolished, this would avoid a forced return in cases where the child has clearly refused to return. However, on a more general level, the removal of the "overriding mechanism" might decrease deterrence and thereby increase likelihood of abduction. And the custody situation left in limbo is likely to have a negative impact on the child and on contact with the left-behind parent. |
| Costs/costs savings | 0 | 0  | <p>For the Member States, this Option should be cost-neutral as a concentration of jurisdiction will not generate more cases but only allocate them to other courts.</p> <p>In the long term there would be savings in training for judges as only a small number of judges would require it (for example, only judges in one district court in each of the 45 circuit court districts instead of all judges in all 321 district courts in case of Poland<sup>84</sup>). In Germany, this type of concentration reduced the number of competent courts from 656 to 22, producing extremely positive effects. It also turned out that the handling by specialist courts and lawyers is quicker and more efficient, thus also saving court and lawyers' fees for the parties.</p> | 0   |

The preferred option is Option 3. Options 1 and 2 are not viable as they both would not address the underlying problems leading to excessive and undue delays. Similarly, Option 4 would not address the issue of efficiency and in addition it would weaken the deterrent effect of the Regulation.

<sup>84</sup> For the organisation and number of courts in Poland, see: <http://bip.ms.gov.pl/pl/rejstry-i-ewidencje/lista-sadow-powszechnych/>.

While the present overall philosophy of the Regulation concerning child return is kept, Option 3 meets best the operational objectives to clarify and strengthen the role of the court of origin, to introduce a clear and realistic time frame for issuing an enforceable return order, to concentrate the handling of the return cases upon experienced judges, to limit the number of appeals and ensure the provisional enforceability of judgments even if national law does not provide for it, to ensure that protective provisional measures can have cross-border effects and to ensure that the child's right to be heard is respected, even if the child is not physically present before the court, in accordance with the UNCRC and the Charter.

The preferred option is proportionate as it proposes only what is strictly necessary to achieve the deterrent objective of the Regulation, ensure swift handling of return cases and thereby positively impact on the rights of the child.

## **4. PLACEMENT OF THE CHILD IN ANOTHER MEMBER STATE**

### **4.1. Problem definition and scale of the problem**

Under the Regulation, a court or authority envisaging the placement of a child in a foster family or an institution in another Member State has to *consult* the authorities of that State before ordering the placement.<sup>85</sup> To define what kind of consultation is necessary, the Regulation refers to national law: If such a placement would require public authority intervention in the requested State if it were an internal case there, the *consent* of the authorities of the receiving State needs to be obtained for a comparable cross-border placement prior to ordering the placement. If no public authority intervention would be required in a similar domestic case in the requested State, its authorities only have to be *informed* of the placement.

Central Authorities have an obligation to assist courts and authorities in arranging cross-border placements but their involvement is not mandatory.<sup>86</sup>

There are two types of placement falling under this provision. One is a long-term placement of a child which needs a new family (either because it is an orphan or because the parents appear unfit to care for the child).<sup>87</sup>

Most cross-border placements, however, belong to the second type, namely measures of an educational character which are meant to be temporary, although they can last for several years. These measures concern children who do still have parents, the parents do have custody, and in general they are fit to care for the child, but there are educational problems. The child welfare authorities then offer assistance, and in a number of Member States, after everything else has failed, the most intensive kind of assistance would be either secure care for the child (i.e. in a locked institution) or an educational placement abroad in an environment providing similar isolation through the circumstances (foreign language, rural location). These children then follow an educational programme, and their carers are in most cases trained, paid and supervised by the child protection authorities of the sending Member State. Under national law, child welfare authorities are normally only allowed to use such placements abroad as a last resort when everything else has failed. In case of such failure, the child or juvenile often has to leave the current domestic placement immediately because the situation has escalated and become unbearable, putting this child and/or others at risk.

At their annual meetings held with the Commission since 2006, the Central Authorities of the Member States under the Regulation have regularly reported that sometimes it takes several months or even more

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<sup>85</sup> Article 56 of the Regulation.

<sup>86</sup> Article 55 (d) of the Regulation.

<sup>87</sup> In this respect, these placements are similar to adoption which is outside the scope of the Regulation.

than a year until it is even established whether consent is required in a particular case. If consent is required, the consultation procedure as such has to follow and is reported to be equally lengthy. Moreover, requesting Central Authorities repeatedly reported that they did not receive any answer at all from requested States.

In a statistical survey carried out by the European Commission during the first quarter of 2015, the Central Authorities of 20 EU Member States reported that for the years 2012 to 2014, they had registered a total of 314, 409 and 360 requests,<sup>88</sup> respectively, originating from courts and authorities within their own Member State for cross-border placement in other Member States. For the same years, only 162, 251 and 171 requests, respectively, for cross-border placement in their own Member State have been reported by requested Central Authorities.<sup>89</sup> The discrepancy between the numbers of outgoing and incoming placements is often caused by the fact that requests originating in the Central Authorities' own Member State for cross-border placement of a child in another Member State in the years 2012, 2013 and 2014 were still being processed by the requesting Central Authorities in early 2015 and had not even been forwarded to the requested State. The likely reason is the uncertainty described above.

*Requested* Central Authorities also reported problems with the application of the provision. Placement as an educational measure is only known in about five or six Member States which generate a considerable number of outgoing cross-border placements, e.g. Germany between 160 and 220 per year and Luxembourg around 100 per year through Central Authorities, plus an unknown number without Central Authority involvement. Most Member States not knowing these measures have not enacted any implementing provisions for such incoming placements. Consequently, the authorities of the requested State are unable to process incoming requests.

If consent is required for a certain placement, the latter may only be ordered by the sending State after consent was obtained from the receiving State.<sup>90</sup> Only then, the child may travel to the receiving State. In practice, however, many requesting authorities order placement and send the child to the receiving State while the consultation procedure is still pending or even at the moment it is initiated because they consider the placement as urgent and are aware of the length of proceedings. Receiving States therefore complained that children were often already placed before consent had been given.

Non-compliance with the consultation procedure is a ground for refusal of recognition of the placement order.<sup>91</sup> Therefore, the placement of the child abroad lacks a legal basis in these cases, and the legal situation of the child present in another Member State without his or her parents is unclear. The European Court of Justice has ruled that irregularities which give rise to doubts whether consent was *validly* given can be corrected, and some receiving States conclude from this judgment that no correction is possible if consent was not given *at all* prior to the placement of the child. Others do not grant consent for the period already passed but for the remaining future duration of the placement. In some cases receiving States insisted on the immediate repatriation of children placed without their prior consent, affecting children whose particularly vulnerable situation gave rise to the placement.

The length of the proceedings, as voiced by the national experts interviewed to evaluate the operation of the Regulation and by stakeholders contributing to the public consultation (60%), can easily be identified as the central problem. It leads to circumvention of the procedure, to illegal placements and to

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<sup>88</sup> Actual figures are even higher because the involvement of the Central Authorities is not mandatory, and in particular in areas close to the borders many cross-border placements are made through direct contact between the national authorities involved. In most Member States there are no centralised statistics for these placements.

<sup>89</sup> One Member State to which an important number of requests for placement in their State were sent did not respond to the statistical survey of the Commission so these requests have to be disregarded here.

<sup>90</sup> Article 56 (2) of the Regulation.

<sup>91</sup> Article 23 (g) of the Regulation.

non-placement of children in need of placement. This delay is not caused by a lack of use of information technology and electronic means of communication as the Central Authorities normally communicate by e-mail and fax in these cases. The main cause of delay is the fact that the Regulation refers to the national law of the requested State for defining whether consent is required, and for determining what must be submitted to obtain it.

The Regulation refers to national law for determining whether consent is required for a particular placement. This was intended to avoid creating new bureaucratic procedures for placements which did not require any procedure if occurring *within* a State. In reality, however, the additional step to find out whether consent is needed has generated far more bureaucracy and loss of time than a universal consent requirement. This has been widely recognised in the specific discussions among Central Authorities<sup>92</sup> as well as by national experts.

Moreover, the Regulation is silent on which authority is to give consent, the information to be provided in an application, the requirements for consent to be given, grounds for refusal and who is to bear the costs for the placement. All this is determined by national law and needs to be found out by the authority contemplating a cross-border placement.

In 2011, after several years of preparation a chart showing (1) whether consent for incoming educational placements was required in each Member State, (2) which authority was competent to give consent and (3) which documents should accompany the request was established in the framework of the European Judicial Network in civil and commercial matters. This initiative was taken in 2008 by the German Central Authority which asked the Central Authorities of all other Member States to provide information on these three aspects. The Commission welcomed and supported this initiative and annually circulated reminders to those Member States which had not yet responded. By 2011 responses had been received from about half of the Member States, and it was possible to draw up a table reflecting them. This chart was then circulated annually by the Commission with a request to Member States to insert updates where applicable. By 2013 the chart appeared nearly complete as almost all of the Member States have responded. Only one country (Poland) generally exempts educational placements from the consent procedure because Poland considers those placements organised upon request of, or in agreement with, the holders of parental responsibility as being outside the scope of the Regulation. For educational placements in Poland, it is therefore clear from the outset that no consultation or even information procedure needs to be started. In the other Member States, consent normally needs to be obtained, but there are varying exceptions (sometimes mandatory, sometimes discretionary) in many legal systems.

In spite of the chart, at the annual meetings of Central Authorities it is still regularly reported that in the handling of individual cases, the chart does not solve the problem. Since the consent procedure does not apply to all cases, and the exceptions are determined by the national law of the requested State, normally the competent authorities of the latter State have to assess the full application first in order to determine whether consent is necessary or one of the exceptions applies. Moreover, States sometimes require different documents and apply different procedures. The major problem, however, remains that many Member States do neither have implementing provisions on substance nor procedure to handle these requests, setting out requirements for the request and conditions as well as competencies for consent. Article 33 of the 1996 Hague Convention, which served as a model for the Regulation's rule, establishes minimum requirements for a request for consent which were not taken over into the Regulation: A report on the child and the reasons for the envisaged placement must be transmitted under the 1996 Hague Convention. Under the Regulation which is silent on this point, requesting authorities often send just a simple letter requesting consent without transmitting further personal information on the child and the foster family in order to avoid data protection issues. Only after the

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<sup>92</sup> The issue was discussed annually at the Central Authorities' annual meetings from 2008 to 2015.

authorities of the receiving State have informed them about the documents needed, they will transmit them because at that stage they have evidence that the documents are necessary for processing the request. This multi-step approach causes further delays.

Equal treatment for all children in need of placement throughout the Union and the best interests of the children concerned are currently seriously undermined by the fact that many Member States have not enacted legislation to implement the Regulation's consent procedure for cross-border placements. As a result, it is practically impossible to carry out a lawful placement of a child under the Regulation in these Member States. A few Member States, on the other hand, have established clear procedures for incoming requests, and the decision on consent is normally given about two months after receipt of the request. This time is required because in the receiving State, a number of public authorities need to be consulted before consent is given or refused to the requesting State (child welfare authorities, aliens authority, sometimes a court). They are normally consulted in parallel.

About half of the requests for consent to outgoing placements received in 2012-2014 have been reported to the Commission by the requesting Central Authority but not yet by the requested Central Authority. This means that they either have not yet been forwarded to the requested Central Authority or have not yet been registered by the latter. These requests still have to be processed. The current annual number of 300-400 placement requests through Central Authority channels can be expected to rise because of the unreported number of direct placements without consultation procedure which already exists, and because of growing awareness of the Regulation's rule on cross-border placement among child welfare authorities. As currently many Member States are unable to process incoming requests because there are no implementing measures, the rise will lead to even more illegal placements before consent is given, and will also prevent placements of vulnerable children in need. Notwithstanding the clear obligation established by the Court of Justice, infringement proceedings would be unlikely to achieve the objective of equal treatment for all children in need of placement throughout the Union because these proceedings against single States would not lead to a uniform and coherent treatment of all applications for cross-border placement in the EU.

#### **4.2. Subsidiarity**

The Union has shared competence under Article 81 para. 2 TFEU for measures aimed at ensuring (d) cooperation in the taking of evidence, (e) effective access to justice, and (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. Under the current text of the Regulation, the issues regarding placement identified in the problem description are left to self-regulation of Member States. In 2012, the Court of Justice ruled that "Member States are (...) required to establish clear rules and procedures for the purposes of the consent referred to in Article 56 of the Regulation, in order to ensure legal certainty and expedition. The procedures must, inter alia, enable the court which contemplates the placement easily to identify the competent authority and the competent authority to grant or refuse its consent promptly." Moreover, most Member States lack general rules that could be used to implement this provision and did not enact specific implementing measures either. Even if they did now, these different national rules would be unlikely to implement Article 56 of the Regulation on cross-border placements in a coherent and uniform manner. It is therefore maintained that only the creation of autonomous minimum rules in the Regulation, applicable to all cross-border placements originating from a court or authority, can remedy this problem.

### 4.3. Objectives

General objectives:

- (a) to safeguard the best interests of the child by ensuring that children in need can be placed<sup>93</sup>

Specific objectives:

- (a) to simplify the procedure for cross-border placements of children by reducing the delays<sup>94</sup> associated with it

### 4.4. Description of Policy Options

#### *Option 1: Baseline scenario*

This option does not involve any legislative intervention. The application of "soft law measures" as already developed by the Commission in cooperation with the Member States would continue. Such measures include the elaboration and regular update of the chart mentioned above, a Practice Guide drawn up by the Commission,<sup>95</sup> and the organisation of annual meetings of the Central Authorities of all Member States, enabling them to have an exchange of views on general matters relating to the application of the Regulation and bilateral meetings to discuss difficult individual cases.

*Option 2: Creation of an autonomous consent procedure to be applied to all cross-border placements, flanked by a time limit of eight weeks for the requested Member State to respond to the request*

This option includes the continued application of the soft law measures described in Option 1 plus introduction of the following new rules:

- Making consent of the receiving State mandatory for all cross-border placements originating from a court or authority in a Member State
- Introducing minimum requirements for documents to be submitted with the request for consent: the requesting authority has to submit a report on the child and set out the reasons for the contemplated cross-border placement
- Introducing a rule on translation requirements: the request has to be accompanied by a translation into the language of the requested Member State
- Channelling all requests through Central Authorities
- Introducing a time limit of eight weeks for the requested State to decide about the request

*Option 3: Creation of an autonomous consent procedure to be applied to all cross-border placements, flanked by a period for the requested Member State to object and harmonised grounds for refusal*

Option 3 corresponds to Option 2 but instead of a time limit for the requested State to decide about the application, a presumption of consent would be established if the requested State has not objected to the placement within a time to be fixed in the Regulation. This solution follows Article 33 of the 2000

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<sup>93</sup> Recital 5 of the Regulation speaks about equality of children. This was reiterated by CJEU 27 November 2007, Case C-435/06 – C, para. 47.

<sup>94</sup> Reducing the length of proceedings involving children is one of the recommendations of the Fundamental Rights Agency on child-friendly justice: see FRA, Child-friendly justice – perspectives and experiences of professionals, Summary, 2015, p. 4.

<sup>95</sup> Practice Guide for the application of the Brussels IIa Regulation, 3<sup>rd</sup> edition 2015, [http://ec.europa.eu/justice/civil/files/brussels\\_ii\\_practice\\_guide\\_en.pdf](http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf).

Hague Convention on the International Protection of Adults<sup>96</sup>. In addition, an exhaustive list of grounds for refusal would be added.

#### 4.5. Analysis of impact of Policy Options

##### 4.5.1. Option 1: Baseline scenario

For the impacts please see the problem definition. There are no other legislative initiatives at global or Union levels forthcoming on these issues. The disharmony with the consultation procedure under the 1996 Hague Convention would remain, creating double standards for placements under the Convention and the Regulation and rendering the latter less effective than the Convention. Even if more or all Member States were to enact implementing provisions on the consultation procedure, strong differences will remain as to whether it applies at all, and under which conditions.

##### 4.5.2. Option 2: Creation of an autonomous consent procedure to be applied to all cross-border placements, flanked by a time limit of eight weeks for the requested Member State to respond to the request

**Effectiveness to meet objectives:** The simplification would be achieved and the problem of **delay would be best overcome** by establishing autonomous rules in the Regulation which follow the example of the 1996 Hague Convention.

If consent needs to be obtained for **all** cross-border placements the time-consuming first step of finding out whether consent is required for a particular placement will no longer be necessary. Likewise, the establishment of autonomous minimum requirements for a request (a report on the child and the reasons for the placement) and the corresponding translation requirements will **speed up proceedings** because the requesting authority will know from the outset what is necessary and can attach it to the request. The requesting Central Authority receiving the request will thus be able to forward it immediately to the requested Central Authority. An explicit legal basis will moreover remedy data protection concerns about sending information not required.

**Delays will be further reduced** by channelling all applications through Central Authorities which would create a knowledge pool within the Central Authority and enable the latter to provide information on the situation in other Member States to a domestic authority contemplating a placement abroad. A further time saving will be achieved as the Central Authority of the requesting State does not need to find out which authority is competent to grant consent in the requested State; it simply needs to transmit the request to the Central Authority of the requested State which will then handle the consultation procedure in its State. A **fixed time limit** complementing this procedure takes account of the urgency of most placements and the precarious situation of the children waiting to be placed. The length of eight weeks has been chosen in light of the steps that the requested Central Authority needs to perform. In all Member States, as the Commission has learned from the annual meetings of Central Authorities, several national authorities have to be consulted in parallel and give their input to the consent procedure (child welfare authorities examining the family or institution where the child is supposed to be placed, aliens authorities examining residence and possibly visa issues if the child is not an EU national, authorities dealing with the funding of placement measures and possibly others). Experience of Central Authorities reported to the Commission shows that in Member States which have clear rules on the placement procedure, a decision can normally be reached after consultation within the Member State within eight weeks; so this is an ambitious but nonetheless realistic time limit which was suggested also by the Member States; in particular, the UK government advocates for it. As the consultation procedure is an internal administrative procedure among public authorities, considerations like the right to a fair trial

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<sup>96</sup> This Convention entered into force on 1 January 2009. It currently applies only in seven Member States (Austria, Czech Republic, Estonia, Finland, France, Germany and the United Kingdom).

which requires additional time for the defendant to prepare their case in child abduction cases do not apply here; hence the period can be shorter.

As for possible interferences with other global, Union or Member State initiatives, see 4.5.1.

**Cost savings:** The proposal will lead to cost savings because the first step (inquire whether consent is necessary) will be eliminated and the second step will become more streamlined because all necessary documents can be attached to the first mailing. Human resources can be redirected to new cases rather than to numerous inquiries aiming at the completion of pending requests. After sending a first question whether the consultation procedure is needed for a particular case, two or three reminders have to be sent to some Member States receiving a large number of placements. So the abolition of this step would relieve the requesting Central authority from these three or four letters in each case, freeing resources at the level of the administrative assistants or archivists supervising deadlines, of the case workers dealing with the content, of the secretarial staff handling the letters and/or mailings, of translation services, and of any hierarchy having to approve any outgoing correspondence. These savings cannot be quantified for two reasons: because of the different training and remuneration level of Central Authority staff in different Member States<sup>97</sup> and – intrinsically linked with the former – because of the differences in workflow. In some Member States the case worker directly sends out most of the correspondence (writing an e-mail him- or herself and not needing approval of superiors) while in others, internal protocol requires a formal letter with letterhead on paper, to be drafted by the case worker and prepared by administrative assistants, which first needs to be approved by some hierarchy (sometimes the director general or even the deputy minister) in the local language before it may be translated, then signed, scanned, e-mailed and posted as well. Obviously eliminating four of these letters would save far more human resources, time and costs than in Member States where one person sends out four e-mails.

As the need for a placement is generated by the needs of the particular child, it is not expected that the improved rules will lead to more requests for placement but only to swifter handling.

**Stakeholders' views:** 60% of respondents in general and 61% of those indicating practical experience in this field were of the view that the provision on cross-border placement does not function well. Only 25% of private individuals found that it works well. The introduction of uniform information standards between Central Authorities was suggested as the difference of powers between authorities in Member States leads to delays and confusion. 56% of respondents in general and 59% of those with experience in the area suggested this improvement. A time limit was also suggested by two Member States.

4.5.3. *Option 3: Creation of an autonomous consent procedure to be applied to all cross-border placements flanked by a period for the requested Member State to object and harmonised grounds for refusal*

**Effectiveness to meet objectives:** This option would have the same effect as Option 2 but goes further. Inactivity of the requested State would amount to consent under this Option. This rule would provide even more legal certainty. The harmonisation of the grounds for refusal would increase predictability.

As for possible interferences with other global, Union or Member State initiatives, see 4.5.1. This Option, however, would continue to provide for a different treatment of placements under the Regulation and under the 1996 Hague Convention, this time by going beyond the 1996 Hague system and moving to an even stricter and possibly more efficient system of presumed consent.

**Cost-savings:** This option would have the same effect as Option 2 as to costs.

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<sup>97</sup> See *supra* at 3.1., last paragraph.

**Stakeholders' views:** See under Option 2. In addition, Member States' representatives commented on the additional element of Option 3 (presumption of consent in case of silence) during a hearing on 12 October 2015. They voiced opposition because the consequences of a cross-border placement vary from one legal system to the other. In some Member States, consent is only granted if the requesting State offers to fund and supervise the placement whereas in others, consent means that the child will become integrated into the child welfare system of the receiving State which will then fund and supervise the placement carried out in its territory by a foreign court or authority. There is strong opposition among Member States to be committed to such funding and supervision obligations by mere silence.

#### 4.6. Comparing the Options and preferred Policy Option

| Objectives/Impacts  | Option 1          | Option 2  | Option 3  |
|---|-------------------|---|---|
|   | Baseline scenario | Creation of an autonomous consent procedure to be applied to all cross-border placements, flanked by a time limit for the requested Member State to respond to the request  | Creation of an autonomous consent procedure to be applied to all cross-border placements, flanked by a period for the requested Member State to object and harmonised grounds for refusal   |
| Safeguard the best interests of the child by ensuring that children in need can be placed <sup>98</sup> |                   | This option would improve the protection of the best interests of the child as all children would be subject to the same <i>procedure</i> for cross-border placements throughout the Union.<br><br>However, the outcome of the request for consent to the placement may still differ, because the grounds for refusal are still defined by national law and <b>some children might therefore not benefit</b> from cross-border placement intended for them by the requesting authorities. | This option would improve the protection of the best interests of the child as all children would be subject to the same <i>procedure</i> for cross-border placements throughout the Union.<br><br>Given that the outcome of the request for consent to the placement would also be the same in every Member State if grounds for refusal were made uniform, <b>all children would benefit</b> from it. |
| Reduce delays associated with cross-border child placements   | 0                 | This option would ensure swifter procedures for obtaining consent to cross-border child placements.   | This option would have the same impact.   |
| Cost savings  | 0                 | This option would save costs as fewer human resources would be needed due to streamlined procedures.  | This option would have the same impact.   |
| Proportionality   |                   | This option <b>respects proportionality</b> as it requires explicit consent.  | This option <b>would not respect the proportionality</b> as it relies on a "silent" presumption of consent.   |

Option 2 is the preferred option. It respects proportionality and it is less intrusive than Option 3. Uniform grounds for refusal would moreover go beyond merely "promoting the compatibility of the rules on civil procedure applicable in the Member States" as they interfere with the Member States'

<sup>98</sup> Recital 5 of the Regulation. This was reiterated by CJEU 27 November 2007, Case C-435/06 – C, para. 47.

substantive national law on child welfare. The preferred option meets also the operational objectives to introduce minimum requirements for applications for consent and to set time limits for authorities to respond to requests.

## 5. RECOGNITION AND ENFORCEMENT OF JUDGMENTS

### 5.1. Problem definition

The evaluation study has collected feedback from a wide range of national experts (mostly legal practitioners) who confirm that parents and, in particular, children suffer from the complex, lengthy and costly procedures they have to go through in order to obtain enforcement of a parental responsibility judgment abroad. This is mainly because judgments on custody and placement decisions cannot be automatically enforced in another Member State. *Recognition* of all judgments under the Regulation is by operation of law unless and until it is successfully challenged by the other party before a court. Recognition is the indispensable precondition for any other steps that might follow. It was recalled by some Member States<sup>99</sup> and confirmed by legal experts in the evaluation study as well as in the meeting with Member States' representatives that sometimes recognition is all that is needed, e.g. when a court only orders that both parents have joint custody. In some instances, though, the order explicitly or implicitly imposes a duty on the defendant parent to do or not to do something, e.g. to hand over the child to someone who has been granted sole custody. If the person obliged by the judgment does not comply with it voluntarily, State organs will enforce it through coercive measures.

In order to be *enforced* in another Member State, the Regulation requires a judgment to be enforceable in the State of origin. This is not the case in many legal systems if the judgment is still subject to appeal, but in several legal systems provisional enforceability can be ordered. In other legal systems, the judgment is provisionally enforceable but the appellate court can stay enforcement while the appeal is pending. Given the different time limits for filing an appeal, the number of possible appeals and the length of appeal proceedings, it can take very long for a judgment to become enforceable even in its State of origin.<sup>100</sup>

Provided that the judgment is at least provisionally enforceable in the State of origin, for cross-border enforcement a court in the Member State where enforcement is sought first has to "validate" the decision by declaring it to be enforceable also in that State. This is done in a special intermediate court procedure for obtaining "*exequatur*", which takes place after the judgment has been issued and become enforceable in one Member State and before concrete measures of enforcement can be taken in another Member State<sup>101</sup>. In the *exequatur* proceedings, the defendant parent can invoke grounds for refusing recognition and the declaration of enforceability which are listed in the Regulation. However, even if a parent successfully completes the *exequatur* step, other proceedings, namely those related to the actual enforcement of a judgment, will need to be launched and thereby add to the overall time needed to see the judgment executed, and to the costs incurred.

In 2005, the Regulation abolished the need for *exequatur* concerning access rights and some return orders. If a judgment granting access rights is enforceable in the State of origin and the court of origin issues a certificate confirming the enforceability and that certain standards of procedure were met, the judgment is directly enforceable in all other Member States, and recognition cannot be challenged anymore either (see also below on access rights; return orders were discussed in chapter 3).

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<sup>99</sup> This issue was signalled in the Commission's application report (2014) 226 final, p. 10.

<sup>100</sup> 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. 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](http://ec.europa.eu/civiljustice/publications/docs/family_rights/study_family_rights_synthesis_report_en.pdf), p. 41. The number of appeals to courts of different level varies from one to three in most Member States.

<sup>101</sup> Enforcement measures are ordered under the national law of the requested State. In several Member States this is done in one step together with granting *exequatur* while in other Member States this is a separate step.

In this respect, a study of the European Parliament<sup>102</sup> as well as petitions submitted to the Commission, highlight contradictory situations where a Member State must enforce **access** rights under the Regulation (and maintenance claims for the child under the Maintenance Regulation) while, at the same time, the recognition and/or enforcement of **custody** rights<sup>103</sup> granted in the same judgment may be challenged and perhaps refused in the same Member State. Parties have to bear court fees for processing the application. Often a lawyer is hired to prepare the documentation and handle the procedure abroad. Finally, costs for translation<sup>104</sup> and service of documents add to the bill.

The delay and costs involved in obtaining cross-border recognition and enforcement of judgments discourage people from making full use of the possibilities offered to them by the right to free movement in the EU.

The **time for obtaining *exequatur*** varies between the Member States; it can take from a couple of days to several months, depending on the jurisdiction and the complexity of the case. The time indicated does not take into account the time required for collecting the documents necessary for the application and translations. These data are available only for civil and commercial matters but as the procedure is the same in family matters, one may assume that the duration would be similar. If an appeal is lodged against the grant or refusal of *exequatur*, this delay increases considerably: appeal proceedings can take up to two years in some Member States. This is particularly frustrating for parents who expect that decisions concerning children take effect without unnecessary delay (see Annex 8 concerning delays for obtaining *exequatur* in the Member States).

Above all, the delays in obtaining enforcement can have very negative consequences on children given that time is of the essence in relation to decisions on parental responsibility matters in light of the irreversible consequences that may arise.

The **costs for obtaining *exequatur*** equally vary throughout the EU. For a straightforward case of *exequatur*, identifiable costs (which include court and lawyers' fees, costs for service of documents and translations) range from € 1,100 (in Bulgaria) to almost € 4,000 (in the United Kingdom). On average, € 2,200 have to be paid for processing the application. This amount can increase exponentially in a more complex or contested case.

The discussion with Member States' representatives, preceded by a request to inform about the number of refusals to recognise and declare enforceable a decision from another Member State, and anecdotal cases collected in the evaluation study revealed that in a vast majority of cases (more than 90%), the *exequatur* procedure is a pure formality as there are no reasons to refuse recognition and the declaration of enforceability of the foreign judgment. Also appeals against the decisions to grant *exequatur* are rarely successful. Only in a very low number of cases does the procedure actually lead to a refusal of recognition and the declaration of enforceability.<sup>105</sup>

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<sup>102</sup> 2010 Study on the parental responsibility, child custody and visitation rights in cross-border separations, prepared by the Institut Suisse de droit comparé (ISDC), available at:

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

<sup>103</sup> In some Member States, a judgment attributing custody to a parent is considered as a mere status decision with no enforceable content. In other Member States, the attribution of custody also implies that the person who was granted custody can claim the handover of the child from the other parent. Recognition of the judgment in other Member States implies that it must be given the same effect which it has in the State of origin.

<sup>104</sup> Translation of the judgment to be enforced and of the mandatory certificate accompanying it is not mandatory under the Regulation but may be required by the courts of the Member State of enforcement (Article 38(2)). Costs of translations have been calculated on a basis of a 10 page document x € 30 per page = € 300.

<sup>105</sup> Representatives of the Member States in the meeting on 12 October 2015 confirmed that data concerning the number of cases resulting in the non-recognition of judgments is not collected at the national level in most Member States. Some Member States could provide a few exemplary judgments where non-recognition was decided.

### *The abolition of exequatur for decisions concerning rights of access*

The above-mentioned abolition of the need for *exequatur* concerning access rights is generally seen as a positive development. Nevertheless, it has been criticised to some extent by the national experts in the evaluation study as the system does not always leave sufficient leeway to protect the rights of the child which is the "object" of the enforcement (and of the judgment's debtor/defendant parent) if exceptionally the situation so requires. If the judgment on access rights is enforceable (albeit only provisionally) and accompanied by the certificate issued by the court of origin (which replaces *exequatur* by the State where enforcement is sought), it has to be enforced in all other Member States. According to the case law of the Court of Justice, even a stay of enforcement proper has to be requested from the court of origin of the judgment, and not in the State where enforcement is sought. However, the defendant parent is not served with the certificate and may learn about its existence only at the moment when enforcement actually starts. As a result, it is *de facto* impossible for the judgment debtor to challenge the validity or correctness of the certificate in the Member State of origin **before enforcement takes place**, and the Regulation as interpreted by the Court of Justice prohibits any such challenge in the Member State where recognition and enforcement are sought.

### *Hearing of the child*

In addition, the case law of the Court of Justice<sup>106</sup> and the evaluation study demonstrated that there are discrepancies in the interpretation of the grounds for non-recognition. The Regulation is based on the principle that children's views must be taken into account in cases concerning them as long as this is appropriate in light of their age and maturity and in line with their best interests. A frequently raised ground of non-recognition has been the fact that the judgment was given without the child having been given an opportunity to be heard<sup>107</sup>. The national rules and practices on hearing children vary significantly. For example, the age at which a child is considered sufficiently mature to present his/her views ranges from 10 to 15. In some Member States, judges also hear children that are much younger (for example 2-3 years old) if they deem this appropriate in specific cases. Also, the term "hearing" seems to have different meanings in the various legal systems, ranging from "having been given an opportunity to express him- or herself" (which could take place outside court) to a formal hearing of the child before a court.

In this connection, difficulties arise due to the fact that Member States have diverging rules governing the hearing of the child. In particular, Member States with stricter standards regarding the hearing of the child than the Member State of origin are encouraged by the current rules to refuse recognition and *exequatur* if the hearing of the child does not meet their own standards. Such refusals by States with high standards, in the opinion of the Commission's expert group, do not enhance compliance of States having lower standards for hearing the child with the UN Convention on the Rights of the Child and the Charter of Fundamental Rights of the EU; therefore a more forward-looking solution should be found.

In addition, the importance of hearing children in all cases on matters of parental responsibility is not highlighted in the Regulation in general terms, but only in relation to return proceedings. If a judgment is given without having heard the child, there is a danger that the judgment may not take the best interest of the child into account to a sufficient extent. 78% of the respondents to the public consultation acknowledged the important role of the hearing of the child in avoiding problems relating to the recognition and enforceability of judgments.

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<sup>106</sup> Case C-491/10 – *Aguirre Zarraga*, *supra* note 75.

<sup>107</sup> Other grounds for the non-recognition of judgments reported by Member States were the faulty service of documents where the judgment was given in default of appearance, the failure to comply with the procedure laid down in the Regulation for the placement of a child in another Member State and the fact that the judgment was given without the applicant parent having been given an opportunity to be heard. These are important considerations referring to the right to an effective remedy and to a fair trial guaranteed by Article 47 of the Charter.

## *Actual enforcement of judgments*

There is almost unanimous consensus between all stakeholders that the actual enforcement of parental responsibility judgments is an area in need of improvement even if, at the same time, the ideas for improvement differ widely. 83% of the respondents to the public consultation point to delays and even non-enforcement and call for an amendment in this area. This is mainly due to the fact that, as reported in the evaluation study, in the majority of the complaints submitted to the Commission<sup>108</sup> and highlighted in the case law of the Court of Justice, even if the affected parent obtained an *exequatur*, decisions on parental responsibility are often enforced late or not at all. Efficient enforcement depends on the national structures put in place to ensure enforcement. Once an order has been made, it is important to have effective measures available for enforcing it<sup>109</sup> while it has to be borne in mind that for enforcement against children, it must still be possible to react quickly to any temporary or permanent risks to the child's best interest which might be caused by enforcement. The legal and practical approach to the enforcement of family orders varies among Member States, in particular with regard to the enforcement measures that may be taken. In most legal systems one or more of the following "coercive enforcement measures" exist: (1) fines,<sup>110</sup> (2) imprisonment,<sup>111</sup> and (3) the physical removal of the child from the parent by enforcement officers.<sup>112</sup> These three types of measures not only come under different labels,<sup>113</sup> but not all of them exist in every legal system. Furthermore, even where such measures do exist in the law, they are often not ordered due to considerations of the child's best interest.

As indicated in a specific study dedicated to the enforcement of family rights<sup>114</sup>, Member States demonstrate a wide variety in approaches towards the enforcement of family law decisions. In most Member States a **change of circumstances** has an effect on the enforceability. The legal effect of a change of circumstances is not the same in all Member States; however, in most Member States, in domestic cases (where a family judgment given in the same State needs to be enforced), an amendment or revision of the original judgment is possible. Consequently, courts hesitate where they are requested to enforce a judgment given in another Member State and the circumstances have changed since the judgment was given.<sup>115</sup> There is a great diversity between the Member States as to the effect of passing of time on enforceability. In some Member States family law decisions or the law set a specific time frame for enforcement (Cyprus, Estonia, and Hungary). In other Member States enforcement of family law decisions should take place as soon as possible, while the lapse of time may hinder the enforcement (Finland, France, and Germany). Sometimes **practical obstacles** lead to a temporary stay of

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<sup>108</sup> Citizens' complaints refer mostly to burdensome enforcement procedures, lengthy proceedings and diverging practices of national authorities which in some instances lead to non-enforcement.

<sup>109</sup> 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>. All information in this paragraph was taken from the Guide and the study carried out in its preparation (Enforcement of orders made under the 1980 Convention - A comparative legal study -, Prel. Doc. No 6 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (The Hague, 30 October – 9 November 2006), available at [https://assets.hcch.net/upload/wop/abd\\_pd06e2006.pdf](https://assets.hcch.net/upload/wop/abd_pd06e2006.pdf).

<sup>110</sup> 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).

<sup>111</sup> Available, e.g., in Austria, France, Germany, Greece, Malta, Netherlands, United Kingdom (Northern Ireland, Scotland).

<sup>112</sup> This is possible in Austria, Czech Republic, Finland, Germany, Luxembourg, Malta, Romania, Slovakia, and Sweden.

<sup>113</sup> Such as "contempt of court", "coercive enforcement measures", "fine", "*astreinte*" etc.

<sup>114</sup> 2007 Comparative study on enforcement procedures of family rights, prepared by T.M.C. ASSER Instituut, available at: [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc\\_civil\\_studies\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm).

<sup>115</sup> Also problematic, albeit in a different way, are judgments given after lengthy procedures lasting several years, where the child lawfully moved to another Member State during the proceedings. As – unlike the 1996 Hague Convention – the Regulation currently perpetuates the jurisdiction of the court of former habitual residence, the judgment and the jurisdiction it was based on are not in line with the proximity required by the child's best interests, thereby giving rise to problems of recognition and enforcement in the State of new habitual residence.

enforcement, e.g. if the child is sick at the envisaged moment of enforcement. In some States **children** of a more advanced age have the right to act as a party in court and may thus **raise objections** to an enforcement that concerns them.

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 opposes, 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,<sup>116</sup> as required by the case law of the European Court of Human Rights.<sup>117</sup>

In essence, this is an area of the law with at present very different approaches among the Member States. Often time is needed to first enquire about the specificity of the national procedure. The parents requesting enforcement cannot predict the outcome of such proceedings.

As demonstrated in some cases submitted to the Commission by the European Parliament, the concrete enforcement measures ordered by the court of the Member State of enforcement can be challenged under the national law of that State, and this judicial review sometimes amounts to a review on the merits of the original judgment at the stage of enforcement.<sup>118</sup> This is particularly problematic where the State of origin still has jurisdiction for the substance of the matter while the State of enforcement does not. The number of appeals against enforcement measures (which normally suspend enforcement of the judgment) often puts the expeditious enforcement of judgments at risk.

In a dedicated meeting Member States representatives reported that some national systems do not have special rules for the enforcement of family law decisions and parties must resort to procedures available for enforcing judgments in civil or commercial matters, which do not take into account the fact that, in the area of parental responsibility, the passing of time has irreversible consequences.

On the other hand, during the annual meetings of Central Authorities and judges in the framework of the EJM and in the expert group, it was mentioned that the "certificate solution" for access<sup>119</sup> can in exceptional cases also create problems. In addition to the problems already described above (the *fait accompli* and lack of efficient legal challenges when enforcing judgments which are only provisionally enforceable), problems arise in particular at the enforcement stage if the enforcement officer finds himself unable to enforce the judgment from another Member State just because the foreign judgment does not meet the requirements of the enforcement law of the State where enforcement is sought (e.g. because of insufficient specificity, lack of certain permissions in the judgment which the enforcement officer needs under his own law, such as to enter a private home, to enforce out of office hours, to draw upon police assistance etc.).<sup>120</sup>

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<sup>116</sup> For example, in Austria direct coercive measures may only be taken to enforce decisions on custody, but not on access rights. In Germany, direct coercive measures against the child are only permitted to enforce return, but not access, and only if this is compatible with the best interest 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 are not permitted against the child but may only be used against parents (e.g. GR, UK) (information from the Hague Conference study, supra note 109).

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, Section 108), the right of access is framed so as to entail an obligation on the parent's part (BGB, Section 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](http://www.justicewatch.eu/IPOL-JURI_NT%282010%29432735_EN.pdf)).

<sup>117</sup> See in particular *Ignaccolo-Zenide v. Romania*, ECtHR 25.01.2000, Application No 31679/96, paras 106, 108, and 112.

<sup>118</sup> For example, enforcement provisions in most Member States allow for appeals to be filed against enforcement orders.

<sup>119</sup> And for some return cases following child abduction; see chapter 3.

<sup>120</sup> Enforcement as such is governed by the law of the State where enforcement is sought, see Article 47.

All these difficulties have a corrosive effect on mutual trust in the overall functioning of the Regulation.

## 5.2. Subsidiarity

Under Article 81 para. 2 TFEU, the Union has shared competence (which it has already exercised) to adopt measures aimed at (a) the mutual recognition and enforcement of judgments between Member States and (c) the compatibility of the rules applicable in the Member States concerning jurisdiction. The **abolition of *exequatur*** is covered by the former. Experience has shown that Member States are not willing to go any further unilaterally in allowing judgments from other Member States to be enforced in their legal system without any "entrance control". As bilateral agreements are no longer possible because the Union has already made use of its legislative competence in this area, only EU intervention can complete the system and eliminate the delays and costs that EU citizens incur to apply for *exequatur* in the Member States where they intend to rely on the rights stemming from a judgment given in another Member State.

Although **enforcement as such** is a matter for the Member States, the CJEU has stated that the application of national rules for enforcement should not prejudice the useful effect of the Regulation<sup>121</sup>. The legal basis of EU competence would be a combination of Article 81 para. 2 (a) (mutual recognition and enforcement of judgments between Member States) and (f) (elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States). Where there are negative consequences resulting from inefficient enforcement procedures, these need to be addressed at EU level so that a successful outcome can be equally guaranteed in all Member States. Where intervention is identified as necessary in this area, it should be limited to the minimum necessary to ensure the objective of the swift and effective enforcement of judgments in a cross-border setting.

Bringing jurisdiction in line with the best interests of the child by nuancing *perpetuatio fori*<sup>122</sup> and letting jurisdiction follow the child in case of a lawful relocation is based on Article 81 para. 2 (c). Finally, the rules on the hearing of the child can be based on a combination of Article 81 para. 2 (f), (a) (see above) and (d) (cooperation in the taking of evidence). Only EU intervention in these cross-border proceedings can reinforce the mutual trust needed to ensure recognition and enforcement of judgments in line with the Charter of Fundamental Rights and the UN Convention on the Rights of the Child. Whilst this will imply an intervention in the Member States' procedural law, this is limited to the minimum necessary so as to respect the national procedural traditions, in particular, how the hearing is organised in each jurisdiction.

## 5.3. Objectives

General objectives:

- (a) to protect the best interests of the child and the relationship between children and their parents

Specific objectives:

- (a) to simplify the procedure by reducing delays and costs in relation to the recognition and enforceability of judgments as well as their enforcement
- (b) to consolidate mutual trust between the Member States overall and in particular relating to the hearing of the child and the child's best interests.

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<sup>121</sup> Case C-195/08 PPU *Rinau*, (*supra* note 75), para. 82.

<sup>122</sup> A principle of procedural law that a court may continue to exercise jurisdiction until it has rendered a judgment that is final and no longer open to appeal, even if in the meantime there has been a change in the circumstance on which jurisdiction was originally based.

## 5.4. Description of Policy Options

### *Option 1: Baseline scenario*

This option does not involve any legislative intervention. It would mean that the current system of recognition and enforcement, with its deficiencies, would continue to exist.

*Option 2: Extension of the current system for access judgments (abolition of exequatur plus certificate on enforceability and respect of procedural standards) to all types of judgments on parental responsibility matters*

This option implies exempting all judgments on parental responsibility which still require *exequatur* from the requirement of *exequatur* while maintaining the current system of the Regulation; which is to have two distinct steps: enforceability (declaring the judgment enforceable) and enforcement proper. Unlike under the system requiring *exequatur*, under this option judgments on parental responsibility would be made directly enforceable in any other Member State on the condition that the judgment is certified by the issuing court in the State of origin. *Exequatur* by the State where enforcement is sought would not be required any more, and recognition could no longer be challenged. A judgment could only be certified by the court of origin if certain procedural standards were met.

The enforcement *measures* (fine, arrest, physical force), though, would still need to be defined in the State where enforcement is sought.

Enforcement could only be stopped in a limited number of defined situations: the control would exist at the stage of delivering the certificate and then once delivered, there would be the possibility for control at the stage of enforcement either by a challenge of the original judgment on the merits<sup>123</sup> or the request for a stay of enforcement in the State of origin, or by a challenge of certain enforcement measures in the Member State of enforcement under the national law of that State, as the Regulation provides that enforcement shall take place under the same conditions as if the judgment had been delivered in that Member State.

*Option 3: Abolition of exequatur with appropriate safeguards to be invoked at the stage of enforcement, i.e. to challenge the recognition of the judgment issued by the State of origin or to challenge concrete enforcement measures ordered by the State where enforcement is sought, in one and the same procedure in the State where enforcement is sought*

This option would imply that all categories of parental responsibility judgments would be directly enforceable in any other Member State. However, where there is a concern that any of the grounds of non-recognition or grounds to challenge concrete enforcement measures might apply, the defendant could make an application to challenge recognition as well concrete enforcement measures in the Member State of enforcement in one and the same procedure or apply for a temporary stay of enforcement there.

This option would include uniform rules to define in which situations enforcement could be opposed. Such rules would govern for example the situations where a change of circumstances occurred. In addition, the rules would settle in a unified manner situations where the child opposes enforcement or enforcement cannot be carried out due to factual obstacles such as sickness of the child.

This option would direct the parent seeking an adaptation of the judgment on the merits to the Member State having jurisdiction on the merits at that moment (see notes 123 and 115 above).<sup>124</sup>

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<sup>123</sup> Provided that the State of origin still has jurisdiction on the substance of the matter.

<sup>124</sup> Depending on the circumstances, this might still be the court of origin of the judgment, but if the child has relocated to the Member State where enforcement is now sought, it might also be that Member State which has jurisdiction from now on to rule on the merits of parental responsibility (and consequently also to amend orders made by courts which had jurisdiction prior to the relocation) and may be outdated by the circumstances.

### ***Sub-Options on the hearing of the child***

To avoid problems with the application of the non-recognition ground relating to the hearing of the child, the option would also include one of the following sub-options:

#### ***Sub-Option A - Inclusion in the Regulation of a reference to Article 12 UN Convention on the Rights of the Child***

Article 12 of the UN Convention on the Rights of the Child, which all Member States have ratified, requires that children capable of forming views have the right to express those views freely in all matters affecting them and for this purpose requires them to be provided the opportunity to be heard in any relevant judicial and administrative proceedings. The principle that children should be able to express their views is reinforced by Article 24 para. 1 of the EU Charter of Fundamental Rights. This option should act as a reminder to the authorities applying the Regulation.

#### ***Sub-Option B - Introduction of common minimum standards regarding the question from what age a child must be given the opportunity to be heard***

Common minimum standards regarding the hearing of the child would ensure that there is a core minimum which all Member States would have to respect when it comes to determining whether it is appropriate to hear a child in a specific case.

This option would introduce clear standards regarding from what age a child should be given the opportunity to be heard. In the case of a 14-year-old child involved in parental responsibility proceedings, the sub-option provides that the child must always be given the opportunity to be heard, unless it is established that the child is not capable of forming his/her own views or it is considered that the hearing would be harmful for the child. In the case of a younger child, the sub-option provides that the child must be given an opportunity to be heard if he or she is capable of forming his or her own views, unless it is considered that the hearing would be harmful for the child.

#### ***Sub-Option C – Introduction of an obligation to give the child an opportunity to express his or her views***

This option would leave Member States' rules and practices on **how** to hear a child untouched, but would require mutual recognition between the legal systems. This would mean that an obligation to give the child who is capable of forming his or her own views an opportunity to express these views would be made explicit in the Regulation, bearing in mind that all Member States have ratified the UN Convention on the Rights of the Child which already obliges them to hear the children meeting the condition mentioned above in any domestic and cross-border proceedings concerning them. Notably a distinction would be made, as it is the case in the respective Article of the Charter of Fundamental Rights, between **when** the child needs to be given the opportunity to be heard on the one hand (i.e. when it is capable of forming/expressing his or her own views) and **what weight** the judge shall give to the child's views on the other hand (which depends on the age and maturity of the child). This distinction would have to be recorded in the judgment and in a certificate annexed to it. Courts would thereby be obliged to motivate in the judgment itself as well as in the accompanying certificate why they have either not heard the child or, if the child was heard, whether or not his or her wishes were taken into account when making the decision.

#### ***Option 4: Option 3 plus introduction of targeted measures to improve the efficiency of actual enforcement***

To tackle the problem of inefficient enforcement, in addition to Option 3, a **time limit** would be indicated for the actual enforcement of a judgment. This option would leave the means of enforcement and their requirements up to the Member State procedure, e.g. which specific enforcement measure should be ordered under which circumstances. In case the enforcement has not occurred after the lapse of six weeks from the moment the enforcement proceedings were initiated, the court of the Member

State of enforcement would have to inform the requesting Central Authority in the Member State of origin (or the applicant, if the proceedings were conducted without Central Authority assistance), about this fact and the reasons for the lack of timely enforcement. This information would also be collated annually and given to the Commission.

This option would also provide that the court of origin could **declare a decision provisionally enforceable** even if this possibility does not exist in its national law. This is useful in systems where the judgment is not yet enforceable while it is still subject to appeal.

#### *Option 5: Option 3 plus introduction of a uniform enforcement procedure*

This option would create a set of common rules for the enforcement of parental responsibility decisions. This uniform enforcement procedure would fully replace the enforcement provisions under national law for the cases falling within their scope.

## **5.5. Analysis of impact of Policy Options**

### *5.5.1. Option 1: Baseline scenario*

For the assessment of this option please see the problem definition. There are no forthcoming legislative initiatives at global or EU levels to deal with these cross-border issues – which individual Member States’ initiatives alone cannot tackle. Infringement proceedings would be unlikely to bring about significant improvement in obtaining cross-border enforcement of parental responsibility matters because the various different steps required – some to be taken directly under the Regulation like the granting of exequatur, others under national law like ordering actual enforcement measures and possible challenges against them – are currently enshrined in the Regulation itself. Moreover, proceedings against single States would not lead to a uniform and coherent treatment of all applications for exequatur and enforcement in the EU.

### *5.5.2. Option 2: Extension of the current system for access judgments (abolition of exequatur plus certificate on enforceability and respect of procedural standards) to all types of judgments on parental responsibility matters*

**Effectiveness to meet objectives:** There would be **some positive impacts on simplification** as any judgment on parental responsibility would be directly enforceable in any other Member State on the condition that the judgment is certified. In addition, situations in which a judgment contains some elements that are directly enforceable and some element that require a declaration of enforceability (e.g. custody and access rights), which can cause confusion, would be avoided because all (certified) judgments would be covered by the same rules. As any judgment on parental responsibility would be directly enforceable in any other Member State, citizens would not need to provide additional administrative documents and/or pursue *exequatur* proceedings. When seeking enforcement, citizens would only need to provide a copy of the judgment and the certificate issued by the court of origin together with the required translations.

Enforcement as such, and the ordering of, and possible challenges to, individual enforcement measures, would still be governed by the law of the State where enforcement is sought, and the challenges would have to be brought there. A stay of enforcement, however, needs to be applied for exclusively in the State of origin of the judgment according to the case law of the Court of Justice. This gives rise to very complex legal situations and blockages which can also put the best interests of the child at risk because the legal "jungle" prevents a quick reaction to problems arising in the actual enforcement against a child.

Likewise, if a judgment is only provisionally enforceable and still subject to appeal in the State of origin, experience with the current abolition of *exequatur* for certain judgments has shown that the

twofold procedure in two different Member States gives rise to very complex legal situations and blockages.

An enforceable judgment which is still subject to appeal needs to be challenged in the State of origin. Enforcement measures, however, would still need to be ordered by the court in the State where enforcement is sought, and would be determined by the national law of that State. The lack of harmonised grounds for challenging concrete enforcement measures undermines the efficiency of the Regulation and **will not protect the best interest of the child** as the enforcement as such could be still refused of various grounds.

**Cost savings:** Costs related to *exequatur* proceedings could be fully eliminated; there would be no need to go through additional procedures to apply for enforceability. For *exequatur* proceedings, costs of around € 1,100 to 4,000 have been reported to be incurred per case. In cases of appeal, however, the associated costs are higher.

**Stakeholders' views:** The opinions concerning a potential abolition of *exequatur* proceedings are generally positive but cautious. Private individuals are the most prominent group seeking to expand the abolition of *exequatur* (82%), followed by judges and lawyers (71% collectively). Those with practical experience of the Regulation are mostly in favour of full abolition of *exequatur*, with 66% of positive votes.

However, in light of the problems described above,<sup>125</sup> only a smaller group of stakeholders favoured abolishing *exequatur* proceedings using the current system.<sup>126</sup> Instead, many stakeholders demanded additional measures. Some interviewees 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 for the best interests of the child.

Finally, five of the eight responding Member States (BE, DE, FR, PL, UK) indicate that *exequatur* should not be fully abolished. The UK and Germany, in particular, stated that it would be inappropriate to completely abolish *exequatur* and that safeguards should be maintained.

### 5.5.3. *Option 3: Abolition of exequatur with appropriate safeguards to be invoked at the stage of enforcement*

**Effectiveness to meet objectives:** This option would **simplify** the procedure. Thanks to it, citizens would not need to provide additional administrative documents and/or follow additional proceedings and thereby **delays would be eliminated**. Enforcement measures would still need to be ordered by the court in the State where enforcement is sought, and would be determined by the national law of that State. Nonetheless, this option is likely to generate **strong positive impacts on the best interests of the child**. In addition to the reduction of delays connected with the *exequatur* proceedings, this option would ensure a possibility for the defendant to apply for a stay or refusal of enforcement in the Member State of enforcement where any of the grounds for non-recognition can be raised in the same procedure. Moreover, this option would **ensure predictability of the enforcement proceedings** as a specific enforcement measure could only be opposed on the grounds stipulated in the Regulation. It would also enhance transparency and predictability of the enforcement proceedings as opposed to the current situation where parents requesting enforcement are facing a variety of obstacles vested in national laws. A change of circumstances could be taken into account through the nuancing of *perpetuatio fori*; this

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<sup>125</sup> The *fait accompli*-problem and lack of effective legal remedies to stay enforcement in exceptional situations, and the complications and delays caused if the clarifications needed by the enforcement officer depend solely on the court of origin rather than on an enforcement court in the State where enforcement is sought.

<sup>126</sup> I.e. the issuance of a certificate by the State of origin where any legal challenges against the judgment, and requests for a stay of enforcement have to be brought while legal challenges against modalities of enforcement are to be brought in the State of enforcement.

would ensure that judgments giving rise to recognition and enforcement problems caused by a change of circumstances would significantly be reduced in numbers and thus greatly enhance mutual trust.

**Cost savings:** This option would significantly reduce costs, because there would be no need to go through additional procedures to apply for enforceability, and challenges against the judgment and against enforcement or enforcement measures could be brought in the same proceedings. For *exequatur* proceedings, costs of around € 1,100 to 4,000 have been reported to be incurred per case. In cases of appeal, however, the associated costs are higher.

**Stakeholder's views:** Member States indicated that the system of merged recognition and enforcement could be accepted under the condition that safeguards be put in place for the requested State and/or the defendant to challenge recognition and/or concrete enforcement measures. Such a system would be similar in some respects to the approach agreed in the case of the Brussels I recast and therefore more likely to be acceptable to Member States than Option 2.

#### The impact of the sub-options for the hearing of the child:

Sub-Option A - *Include in the Regulation a reference to Article 12 UN Convention on the Rights of the Child (UNCRC)*

**Effectiveness to meet objectives:** This option would not create a new obligation. A disadvantage of it is, however, that in case of doubt, national courts would not be able to refer questions on Article 12 UNCRC to the Court of Justice. Moreover, this option would not fully ensure that judgments are not refused on the basis of mere differences of Member States' standards concerning the hearing of the child as the UNCRC, which is in force for all Member States, leaves the modalities of the hearing up to the national law and a Member State can still refuse the recognition of a judgment which violates fundamental principles of procedure in that Member State. However, it might be considered to have only marginal real impact in practice.

**Transposition and compliance:** This option would not necessarily cause a need for additional training for **judges** because it will continue to be a matter for national procedure **who** hears the child and **in what setting** (judge or social worker, in- or outside of the courtroom). Moreover, already now the hearing of children in court proceedings, which is given more and more attention, is a recurring topic on the agenda of national and international judges' conferences and training events, and the Commission will continue to give its support to such events.

Sub-Option B - *Introduction of common minimum standards regarding the question from what age a child must be given the opportunity to be heard*

**Effectiveness to meet objectives:** This option would have a positive effect as it would oblige the authorities in each Member State to give children above a certain age the opportunity to express their views freely. In addition, the authorities would need to consider the child's views in accordance with their age and maturity. Both aspects would be confirmed in the judgment as well as in a certificate accompanying it so that the authorities of the Member State in which the enforcement is sought could not refuse its recognition. If the court states that it did not hear the child, or that it did not give due weight to his or her views, reasons must be given.

An age limit, however, (be it 14 years or lower) for the right to be heard would run contrary to UNCRC principles because under Article 12 UNCRC, any child capable of forming his or her own views shall enjoy the right to express those views freely in all matters affecting the child, regardless of his or her age. Children below the defined age limit would therefore not be sufficiently protected by this option.

**Transposition and compliance:** See Option 1.

Sub-Option C - *Introduction of an obligation to give the child an opportunity to express his or her views and obligation of mutual recognition*

**Effectiveness to meet objectives:** As the obligation to hear children who are capable of forming their views is already established by the UN Convention on the Rights of the Child, its addition to the text of the Regulation would not create a new obligation. It would therefore have a positive impact on the national legal system in the Member States where the common practice of hearing children in all proceedings concerning them is not yet sufficiently practiced despite the legal obligation embedded in the UN Convention on the Rights of the Child. The general obligation to give the children the possibility to express their views, as proposed in this option, would also avoid creation of possibly different regimes for domestic and cross-border cases. This option would ensure that a judgment could circulate without being hindered by divergent rules in the Member State of origin and the Member State of enforcement. Problems would be avoided for example in Member States with stricter standards regarding the hearing of the child (such as Germany where very young children are heard) as these Member States would not be encouraged to refuse recognition and *exequatur* if the hearing of the child which does not meet their own standards. In addition, enhanced protection could be ensured for the child, permitting the court to decide, in a specific case, not to hear the child if there is a risk of harm to the child. The key new element is that the obligation for courts to give active consideration to this matter and motivate this accordingly. Member States would be obliged to recognise the decisions from other Member States on this point. Overall, this would strengthen the best interests of the child which is the overriding principle of the Regulation.

**Transposition and compliance:** Making the obligation to hear the child explicit in the Regulation would enable courts in case of doubt to refer questions on this provision to the Court of Justice, and if complaints are brought before the Commission, the Commission could examine whether Member States complied with this obligation in the particular case. Like Options 1 and 2, the obligation would not necessarily cause a need for additional training for **judges** because it will continue to be a matter for national procedure **who** hears the child and **in what setting** (judge or social worker, in- or outside of the courtroom). Moreover, already now the hearing of children in court proceedings, which is given more and more attention, is a recurring topic on the agenda of national and international judges' conferences and training events, and the Commission will continue to give its support to such events.

Comparison of sub-options:

|  | <b>Sub-Option A:<br/>Reference to the UN Convention on the Rights of the Child</b>   | <b>Sub-Option B:<br/>Standards on from what age the child needs to be heard</b>  | <b>Sub-Option C:<br/>Introduction of an obligation to give the child an opportunity to express his or her views</b>  |
|--|--|--|--|
| To consolidate mutual trust between MS in relation to the hearing of the child | This option would only <b>marginally improve</b> mutual trust as it would only remind of the existing obligation.  | This option would improve significantly mutual trust and <b>eliminate non-recognition</b> of judgments.  | This option would improve mutual trust to a reasonable extent and significantly <b>reduce the non-recognition</b> of judgments.  |
| To protect the best interests of the child                                     | It only <b>marginally improves</b> the best interests of the child.  | It would improve the best interests of children above a certain age <b>but not of the children below the age limit.</b>  | It would improve the best interests of the child <b>irrespective of age.</b>   |
| Impact on legal systems  | 0  | This option <b>would avoid creating</b> different standards for domestic and cross-border cases.   | This option <b>would avoid creating</b> different standards for domestic and cross-border cases.   |
| Coherence with international instruments                                       | Yes  | <b>Not in line with UNCRC and the Charter</b>  | Yes  |
| Transposition and compliance   | No <b>new</b> obligation<br><br>No need for Member States to oblige judges in person to hear the child (thus existing procedures can be kept)<br><br>Training at national and international levels is already available<br><br>Commission would continue to support such training.<br><br>References to the CJEU for preliminary rulings and implementation action on the side of the Commission not possible based on UNCRC | No <b>new</b> obligation<br><br>No need for Member States to oblige judges in person to hear the child (thus existing procedures can be kept)<br><br>Training at national and international levels is already available<br><br>Commission would continue to support such training.<br><br>Transposition and compliance would be ensured by guidelines issued by the CJEU through preliminary rulings and implementation action on the side of the European Commission. | No <b>new</b> obligation<br><br>No need for Member States to oblige judges in person to hear the child (thus existing procedures can be kept)<br><br>Training at national and international levels is already available<br><br>Commission would continue to support such training.<br><br>Transposition and compliance would be ensured by guidelines issued by the CJEU through preliminary rulings and implementation action on the side of the European Commission. |

Sub-Option C is preferred as it would require Member States to mutually respect their national rules while obliging them to give the child the opportunity to express his or her views and take due account of them. The choice of this sub-option is guided by the principle of proportionality. It respects national laws but avoids at the same time that mere differences between the Member States serve as a ground for non-recognition. Introduction of common European standards, Option B, for the hearing of the child would have an even stronger impact but this option would not be in line with the UNCRC.

#### 5.5.4. *Option 4: Option 3 plus introduction of targeted measures to improve the efficiency of actual enforcement*

**Effectiveness to meet objectives:** This option would **strongly simplify** the procedure for recognition and enforcement of judgments. In addition to what was said on Option 3, this addition would **reduce delays** through the indication of a time limit (e.g. six weeks from the moment the enforcement proceedings are initiated) when the actual enforcement of a judgment has to be completed at the latest. In cases where enforcement was not achieved within the time limit, the reporting obligation to the requesting Central Authority (or applicant) would allow the parent to be informed about this fact. This extra transparency would over time have an overall beneficial impact on mutual trust. Moreover, this addition would **reduce delays** by ensuring that the court of origin could declare a decision provisionally enforceable notwithstanding contrary national law on the matter and therefore the cross-border enforcement could be carried out without delays if this is appropriate under the circumstances.

**Cost savings:** Parents seeking enforcement would save money as the work of a highly specialised lawyer would be needed for a shorter period of time. Even though it is not possible to estimate in how many cases such savings could be achieved, it should be noted that every 10 hours of work of a specialised lawyer generate costs between € 1,000 and 4,000. Similarly, there could be a small reduction of costs for Central Authorities if procedures are shorter at the enforcement stage; their assistance would be required for a shorter period. However, given the different organisation of work and remuneration of the Central Authorities' staff it is not possible to quantify such savings.<sup>127</sup>

**Stakeholders' views:** The differences between national systems were generally seen as the most significant area for improvement by public consultation respondents. In particular, 92% of the lawyers who responded were of the view that the enforcement of decisions concerning parental responsibility could be improved. 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. In addition, several respondents indicated that enforcement is not sufficiently speedy. Parents and practitioners clearly advocated for the adoption of common minimum standards or even suggested a uniform enforcement procedure.

#### 5.5.5. *Option 5: Option 3 plus introduction of a uniform enforcement procedure*

**Effectiveness to meet objectives:** In addition to what was said on Option 3, this option would have a strong positive impact on the effectiveness and predictability of the enforcement proceedings in all Member States. It would provide for a uniform procedure for the enforcement of family decisions, containing rules concerning the refusal of enforcement as such and the challenge of specific enforcement measures. Parents seeking enforcement would know in advance the procedure to follow in all Member States.

**Cost savings:** Parents seeking enforcement would save money as they would not necessarily need to look for a highly specialised lawyer with knowledge of the foreign enforcement system. Even though it is not possible to estimate in how many cases such savings could be achieved, it should be noted that every 10 hours of work of a specialised lawyer generate costs between € 1,000 and 4,000. In addition, there could be a small reduction of costs for Central Authorities; if procedures are more harmonised and shorter at the enforcement stage, there should be fewer requests for assistance and/or their assistance would be required for a shorter period. However, given the different organisation of work and remuneration of the Central Authorities' staff it is not possible to quantify such savings.<sup>128</sup>

**Stakeholders' views:** In the public consultation, Member States signalled enforcement as being a highly sensitive matter. Some (BE, NL, PL) agreed that there is an issue with enforcement and that the

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<sup>127</sup> See *supra* at 3.1., last paragraph.

<sup>128</sup> See *supra* at 3.1., last paragraph.

national law does not always guarantee efficient procedures for implementing decisions on parental responsibility. However, the views on the ways for improvement varied. While France and the UK were not supportive of common minimum standards at the European level they noted 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 this question.

In the meeting organised with Member States, most representatives (SK, UK, SE, LV, LT, ES and FI) recognised the complexity of national procedures but spoke against any intrusive EU action in this regard.

### 5.6. Comparing the Options and preferred Policy Option

| Objectives/Impacts  | Simplify/Reduce delays and costs for recognition and enforceability as well as for enforcement  | Ensure best interests of the child  | Consolidate mutual trust   | Impact on legal systems  |
|---|---|---|--|--|
| <b>Option 1: Baseline scenario</b>  | 0   | 0   | 0  | 0  |
| <b>Option 2: Abolition of <i>exequatur</i> plus certificate on enforceability and respect of procedural standards</b> | This option would have <b>some positive impact</b> on reducing delays and costs as the judgments would not require <i>exequatur</i> and there would be no need to pay for <i>exequatur</i> . Enforcement delays would however remain as they are. | It would have <b>limited positive impact</b> on best interests of the child as delays would remain including at the stage of enforcement. Moreover, there would be no consistent refusal grounds for enforcement proper. The system provides no flexibility to deal quickly with a request for a stay of enforcement in exceptional cases if enforcement seems harmful to the child's best interests. | Non-recognition could be reduced to some extent. The existing difficulties at the stage of enforcement would remain.       | 0  |
| <b>Option 3: Abolition of <i>exequatur</i> with appropriate safeguards to be invoked at the stage of enforcement</b>  | This option would have a <b>very positive impact</b> as the procedure for challenging recognition and enforceability would merge into one with challenging specific enforcement measures and thereby significantly reducing delays.               | The option would have a <b>positive impact</b> on the best interests of the child as there would be an exhaustive list of refusal grounds. The system would provide flexibility to deal quickly and under uniform conditions with exceptional situations where enforcement seems harmful to the child's best interests.   | Non-recognition could be reduced to a greater extent. Refusal of enforcement could equally be avoided to a greater extent. | This option would have to some extent an impact on Member States' national procedures as it would harmonise some aspects of enforcement law. |

|   |  |  |  |   |
|---|--|--|--|---|
| <p><b>Option 4: Option 3 plus introduction of targeted measures to improve the efficiency of actual enforcement</b></p> | <p><b>Very positive impact</b> like Option 3. The additional indicative time limit for enforcement (e.g. six weeks) triggering reporting obligations will enhance the timely enforcement of judgments.</p> <p>The possibility for the court of origin to declare a decision provisionally enforceable will reduce delays even further.</p> | <p>Same as Option 3. Moreover, it would <b>protect the child even more</b> than Option 3 due to the introduction of time limits.</p> | <p>Same impact as Option 3 on non-recognition but in addition, actual enforcement would be improved.</p>                                 | <p>This option would have to some extent an impact on Member States' national procedures as it would harmonise some aspects of enforcement law.</p> |
| <p><b>Option 5: Option 3 plus introduction of a uniform enforcement procedure</b></p>                                   | <p>This option would provide for a uniform and transparent enforcement procedure; therefore most delays would be eliminated.</p>   | <p>It would offer the <b>strongest protection of the child</b> as most delays would be eliminated.</p>                               | <p>Same impact as Option 3 on non-recognition but in addition, actual enforcement would be improved further as compared to Option 4.</p> | <p>This option would have an increased impact on the Member States' national procedures compared to Options 3 and 4 above.</p>                      |

The preferred policy option for recognition and enforcement is Option 4. In line with the operational objectives, it would abolish the *exequatur* requirement while maintaining appropriate safeguards (grounds for non-recognition and for refusal of enforcement) to be invoked by the defendant at the stage of enforcement in one and the same procedure before the courts of the State where enforcement is sought. This will shorten the overall duration of the proceedings. To diminish problems relating to the differences in the national practices for the hearing of the child and the resulting refusals of the recognition of the judgment, the combination with the Sub-Option C on hearing the child would require Member States to mutually respect their national rules while obliging them to give the child the opportunity to express his or her views and take due account of them. The choice of this sub-option is guided by the principle of proportionality. It respects national laws but avoids at the same time that mere differences between the Member States serve as a ground for non-recognition. The introduction of common European standards for the hearing of the child would have an even stronger impact but this is disproportionate and politically not feasible.

Option 4 will guarantee that the enforceability or actual enforcement of judgments can only be refused on the basis of a limited list of fully uniform grounds. The additional introduction of a time limit and the possibility to declare a judgment provisionally enforceable even if the national law of the State of origin does not provide for this will clearly enhance the efficiency of the proceedings. This would be balanced by some flexibility to deal quickly and under harmonised conditions with exceptional cases where enforcement seems harmful to the child's best interests. While an even more unified enforcement procedure would enhance predictability to an even greater extent and avoid undue delays (Option 5), it would however be seen as an intrusive intervention into the Member States' national procedures.

## 6. COOPERATION BETWEEN NATIONAL AUTHORITIES

### 6.1. Problem definition

The cooperation between Central Authorities in specific cases on parental responsibility<sup>129</sup> is essential to support effectively parents and children involved in cross-border proceedings relating to child matters. Central Authorities shall, for example, collect and exchange information on the situation of the child (for instance in connection with proceedings regarding custody, access or the return of the child), assist holders of parental responsibility to have their judgments recognised and enforced (in particular concerning access rights and the return of the child) and facilitate mediation. Their quick and efficient handling of child cases is an indispensable prerequisite for mutual trust which is the core of good cooperation between the authorities of different Member States.

The cooperation between Central Authorities was regularly discussed at their annual meetings organised by the Commission since 2006. Also the national experts in the framework of the evaluation study as well as judges and parents assessed its functioning via public consultation. The general opinion on the cooperation differs between the national experts interviewed for the evaluation study, who recognise some deficiencies on one hand, and parents, on the other hand, who generally perceive the work of Central Authorities as bureaucratic and slow.

One source of the problem, observed by all stakeholders, including Member States, is the unclear drafting of the article<sup>130</sup> setting out the assistance to be provided by Central Authorities in specific cases on parental responsibility. This has led to delays which were detrimental to children's best interest. In some cases the result was even the non-fulfilment of requests, which then put the welfare of the child concerned at risk. According to the results of the consultation, the article does not constitute a sufficient legal basis for national authorities in some Member States to take action because their national law would require a more explicit autonomous legal basis in the Regulation.

First, according to its chapeau, the Central Authorities shall provide their assistance only “upon request from a central authority of another Member State or from a holder of parental responsibility”. Courts and child welfare authorities are not mentioned although the duties listed in the article also include the obligation to provide assistance to courts in transferring jurisdiction to another Member State if they think that the courts there are better placed to hear the case, and to provide assistance to courts envisaging to place a child in a family or institution another Member State (on this aspect, see chapter 2.4.). This has given rise to doubts, in particular by UK judges, whether courts may avail themselves of the assistance of the Central Authorities under this provision or not, and to ensuing delays in handling requests for assistance.

A second area signalled by the Central Authorities and judges where problems arose is the collection of child-related information. Pursuant to Article 55 (a) Central Authorities shall – again upon request from a Central Authority of another Member State or from a holder of parental responsibility – collect and exchange information on the situation of the child, any procedures under way and decisions taken concerning the child. To this end, the Regulation provides that they shall act directly or through public authorities or other bodies in accordance with the law of their Member State in matters of personal data protection. Requests for information under this article which are transmitted by the Central Authority of another Member State can *inter alia* originate from courts in that State or from public authorities, e.g. child welfare authorities. If they originate from a court, Member States sometimes refuse to apply this article and refer to the Regulation on the Taking of Evidence<sup>131</sup> which provides for a more formal (and

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<sup>129</sup> Article 55 of the Regulation.

<sup>130</sup> Article 55.

<sup>131</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1.

therefore lengthier) procedure. Courts, however, often prefer to use the more recent and more specialised Brussels IIa Regulation for the following reasons:

The Evidence Regulation is a horizontal instrument from 2001 which applies to all civil law proceedings – adversarial proceedings in civil and commercial matters (covering in particular financial matters) as well as proceedings (e.g. relating to parental responsibility ) which fall under the regime of so-called voluntary or non-contentious jurisdiction. For the first group of cases, there are very strict formal standards on what kind of evidence may be used and how it may be obtained by a court because the Regulation struck a general balance between the need for speed and the protection of the parties. In parental responsibility and child protection matters, however, there are not always two parties litigating between themselves, but there is always some public interest at stake (namely, the best interests of the child) which gives the court a stronger role (often with ex-officio-duties) and a greater discretion as to the evidence and the procedure for obtaining it. If a court in a child protection case is of the view, for example, that it prefers for reasons of urgency to rely on information obtained through a less formal procedure than under the Evidence Regulation because this can be obtained more quickly, this is normally possible under the national procedural law. Therefore, for obtaining social reports from abroad, courts often use even out-of-court channels like the International Social Service (ISS), a non-governmental organisation which has correspondents in more than 120 countries because they consider this to be quicker than to proceed under the Evidence Regulation (the time limit under that Regulation is 90 days following receipt, and transmission is normally on paper by post). Since 2005, when the Brussels IIa Regulation with its network of Central Authorities entered into force, courts have started to use this specialised channel more and more in child-related cases because it is as quick as the informal ISS channel, using transmission by e-mail or fax and ensuring swift handling of the request, and moreover cost-free (unlike ISS; under the Evidence Regulation costs may be levied under certain conditions) and therefore better for the parties. In addition, ISS does not have correspondents in all States. Gradually, more and more judges from the Member States have been participating in the annual meetings of Central Authorities under the Brussels IIa Regulation, and judges and Central Authorities repeatedly stated that it is unsatisfactory that in some cases, when the judge decides to proceed under Brussels IIa through the dedicated Central Authority channels to obtain a social report quickly, this works while in other Member States the request is not carried out because of the unclear wording of the relevant article, thus causing delay. They perceive the Central Authorities as their natural contact point for support in cross-border parental responsibility cases, which is indeed what they were meant to be under the Brussels IIa Regulation for this specialised area of law.<sup>132</sup>

Child welfare authorities requesting information on a child, on the other hand, are not entitled to make use of the Evidence Regulation. Another problem is that the requested child welfare authorities act under their own national law, and it often happens that their national law contains further conditions for the establishment of a social report on a child – e.g. that there are indications that the child’s welfare is at risk. If the conditions established by the national law of the requested State are not met, the social report is not provided - which leads to delays in the proceedings in the requesting Member State or renders them impossible.

Thirdly, the article contains another important gap. Under the jurisdiction rules of the Regulation, child matters will normally be brought before a court in the Member State of habitual residence of the child. Therefore the child is present within the jurisdiction of the court seised, and there is no need for a social

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<sup>132</sup> In this context it is worth mentioning that another horizontal instrument, the Legal Aid Directive, is hardly used either in cases falling within the parental responsibility chapter of the Brussels IIa Regulation because either legal aid is granted automatically for those cases or Central Authorities provide the relevant assistance in obtaining it. Outside this specialised area, citizens often need assistance in obtaining legal aid for a case to be brought in another Member State and therefore turn to the Legal Aid Directive but under Brussels IIa it is quicker to channel all requests and information through one and the same channel, namely the Central Authorities which were created to assist citizens, courts and authorities in their child-related proceedings.

report on the *child* from another Member State. But the Regulation, as presented in a real case example in the evaluation study, does not provide for cross-border social reports in cases where the Member State of habitual residence of the child needs information about an adult or siblings in child-related proceedings pending before it.

**Example 1: Request for a social report on a potential temporary carer**

An eight-year old girl of Czech nationality, an orphan, is living in an institution in the Czech Republic and is placed under guardianship. A Czech aunt of the child who is living in France offers to host the child in France during the summer school holidays. The Czech child care authorities ask the Czech court for permission, and the court wants to request a social report from France about the aunt, stating whether the environment there is suitable for the child and whether the aunt seems fit to care for the girl during holidays. The answer, which comes only after several months, is that the Regulation only provides for the establishment of a social report on the situation of the child, not on the situation of the aunt. By then it is too late for the court to use the Evidence Regulation because the summer holidays are about to begin. As a result, the child was not allowed by the Czech court to spend the holidays with her aunt. A year later, the Czech court allows the child to travel to France to stay with the aunt and asks the French authorities for a social report on the situation of the child as soon as the girl has arrived at her aunt's home. In this case, the report is established, but the Czech court had taken the risk of sending the child abroad without being sure that the conditions there would be in accordance with the child's best interests.

Please see Annex 9 for further examples of cooperation between the national authorities.

In an informal meeting, Member States' representatives pointed to the fact that the Regulation provides that the requested Central Authority shall comply with the law of its Member State on personal data protection. As the Regulation does not explicitly mention information on persons other than the child at issue, the data protection rules normally prevent the transmission of such information. In sum, the provisions on cooperation have thus been considered as incomplete and not sufficiently specific. Problems have also been reported by the national experts in the evaluation study and the public consultation with regard to the translation of the requests and the information exchanged because the Regulation is silent on this. This is another key factor in causing delays for parents and authorities in child-related proceedings.

The Regulation is designed to apply as a self-contained system (one-stop shop) which provides all the tools necessary for proceedings on parental responsibility matters in a swift, informal way, based on the cost-free assistance of Central Authorities. But whenever a social report about an adult or siblings of the child concerned by the proceedings is required, courts must have recourse to the Taking of Evidence Regulation also in cases where other aspects of the case are dealt with through Central Authority channels. Moreover, this latter possibility does not exist for child welfare authorities which often have tasks similar to courts under the law of the Member States. This duplicates procedures and causes delays as well.

Lastly, it is worth mentioning that due to a lack of financial and/or human resources, some Central Authorities appear to be impeded in handling all requests with the appropriate swiftness and therefore need to prioritise. In practice this often means that they deal with child abduction cases first, and cooperation requests under the article discussed here (or under the placement article discussed *supra* under 2.4.) are only dealt with if there are still resources left – which is often not the case.<sup>133</sup> This negative opinion was in particular voiced by the private individuals who replied to the public consultation but it was also confirmed by Central Authorities during their annual meetings in the

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<sup>133</sup> This problem can be compounded in cases where the same individuals in a Central Authority also have to respond to requests under other EU instruments, for example, the Maintenance Regulation, the Taking of Evidence Regulation or the Legal Aid Directive.

framework of the European Judicial Network in civil and commercial matters. Such delayed performance or non-performance is detrimental to mutual trust and places a burden on future cooperation (see Annex 9 for the overview of human resources of Central Authorities).

## 6.2. Scale of the problem

In the years 2012, 2013 and 2014 the Central Authorities of all EU Member States together registered a total of 502, 775 and 769 incoming requests under this provision on the exchange of information.<sup>134</sup> There are no figures about the outcome of these requests (information received or not) but during the annual meetings of the Central Authorities it was repeatedly highlighted that requests concerning information about the children often take very long to be answered and are sometimes not answered at all because the Regulation is considered too vague.

## 6.3. Subsidiarity

The shared Union competence (which has already been exercised through the Regulation) flows from Article 81 para. 2 (e) (effective access to justice) and (f) (elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States) TFEU. For the actions to be performed by national authorities, the article at issue here was intended to provide an autonomous legal basis. Practice in the application of the Regulation has shown, however, that it is not sufficiently specific to fulfil this purpose in all legal systems of the Member States. Even within the same Member State it often happens that one local authority accepts a request under this article while another local authority would reject a request with identical wording. These drafting deficiencies of Union law can only be corrected by Union law in order to ensure the uniform application of this article throughout the Union.

## 6.4. Objectives

General objective:

- (a) to enhance cooperation between the national authorities and thereby better protect parents and children in cross-border proceedings
- (b) to simplify the cross-border cooperation between the Central Authorities

Specific objectives:

- (a) to reduce delays associated with cross-border cases concerning children, thereby safeguarding the best interests of the child
- (b) to increase mutual trust among national authorities, in particular Central Authorities, cooperating in child matters across borders

## 6.5. Description of Policy Options

### *Option 1: Baseline scenario*

This option does not involve any legislative intervention. The "soft law measures" already in place should continue. They include a Practice Guide on the Regulation which was developed by the Commission and is updated as the need arises,<sup>135</sup> regular meetings of the Central Authorities of Member States organised at least annually by the Commission in the framework of the European Judicial

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<sup>134</sup> Responses received from the Central Authorities of the Member States to a Questionnaire developed by the Working Group on Statistics formed by Central Authorities within the framework of the European Judicial Network for Civil and Commercial Matters in 2015.

<sup>135</sup> [http://ec.europa.eu/justice/civil/files/brussels\\_ii\\_practice\\_guide\\_en.pdf](http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf).

Network in civil and commercial matters to discuss structural problems and (in bilateral meetings between Central Authorities) individual cases. A dedicated website with up-to-date information on the family mediation framework in each Member State was created, reaching out to disputing parents and promoting the use of international family mediation, in particular in cases of international parental child abduction, as a sustainable means of dispute resolution.

*Option 2: Clarification of the Central Authorities' and other requested authorities' tasks*

Under this option, in addition to the soft law measures described in Option 1, clarification would be provided on the following aspects: (1) Who can ask (2) which assistance or information (3) from whom and (4) under which conditions. It would be made clear that also courts and child welfare authorities can request the assistance of Central Authorities. Moreover, with respect to the transmission of social reports, the provision would be clarified to cover also reports on adults or siblings which are of relevance in child-related proceedings under the Regulation. It would be made clear that this is (for courts) a cost-free alternative (except for possible translation costs) to the Evidence Regulation and for child welfare authorities an alternative to obtaining such information through the International Social Service, an international Non-Governmental Organisation. As in other provisions of the Regulation, in the 1996 Hague Convention and the 1980 Hague Convention, it should be stated that the request is to be accompanied by a translation into the language of the requested State. Likewise, it seems advisable to establish some minimum requirements for a request for a social report, namely a description of the proceedings for which it is needed and the factual situation that gave rise to those proceedings. A standard form could be developed for requests for assistance under the Article, thereby limiting the need for translation. The Regulation could also establish an autonomous time limit for the requested authority to respond. As concerns the requested national authority, e.g. when a social report is asked for, the Regulation could make clear that the requested authority is under an autonomous obligation created by the Regulation to provide such report, without any additional requirements existing under the national law of the requested State having to be met.

*Option 3: Clarification of the Central Authorities' and other requested authorities' tasks plus addition of an article on adequate resources*

As a starting point, this option would include the same soft law measures as Option 1 and the same drafting changes as Option 2. In addition, an article stating that Member States shall ensure that Central Authorities have adequate financial and human resources to enable them to carry out the obligations assigned to them under this Regulation. Similar provisions have already been included in other Union instruments.<sup>136</sup>

## **6.6. Analysis of impact of Policy Options**

### *6.6.1. Option 1: Baseline scenario*

The maintaining of the legislative '*Status quo*' implies that no legislative changes would be made; for the impacts see problem definition. Figures for 2012-2014 show a significant rise of applications from 2012 to 2013; the number of applications under this provision subsequently remained stable at about 770 per year. As the number of international couples and cross-border mobility are generally increasing, it can be expected that also the number of requests for cross-border cooperation in child-related matters will increase. In child-related cases, time is of the essence as children have a different perception of time. The "soft law measures" would continue to be applied because they are important for the smooth operation of the Regulation and the efficient handling of cases by courts and authorities concerned, but

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<sup>136</sup> See, e.g., Article 3a, subpara. 3 of Directive 2002/21/EC as amended by Directive 2009/140/EC of 25 November 2009, OJ 18.12.2009, L 337, p.37 (47) and Article 2(2a) of Council Decision 2001/470/EC as amended by Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009, OJ 30.6.2009, L 168, p. 35 (37).

these measures alone cannot overcome neither the legislative deficiencies perceived in the article on cooperation nor the resource problems demonstrated in the problem definition. As for the operation of the current Article on cooperation, infringement proceedings, which need to be based on a perceived structural deficit in the implementation of the Regulation, would promise little success as the provisions are admittedly unclear. There are no other legislative project at global or Union levels forthcoming to deal with this cross-border issue – which Member States cannot tackle individually.

#### 6.6.2. *Option 2: Clarification of the Central Authorities' and other requested authorities' tasks*

**Effectiveness to meet objectives:** Including courts and authorities among those who can request the assistance of Central Authorities will remove doubts as to whether courts and authorities are entitled to such assistance. Extending the Article to the transmission of social reports not only about the child, but also on adults and siblings if this is of relevance in proceedings concerning the child, together with the clarification in a Recital that this is in addition and without prejudice to using the Evidence Regulation, will allow the court or authority requiring the information to use the Central Authority as a one-stop-shop for all information required, rather than resorting to different instruments with different conditions and transmission channels. Standard forms, and autonomous rules on reasons/requirements of the request, necessary translations, together with an autonomous obligation of the requested authority to provide the information, and autonomous data protection rules setting out which information may be revealed to Central Authorities will remove all existing doubts about who can request which information from whom under this article which have given rise to questions, delays and non-fulfilment of requests. An autonomous time limit for the response will further contribute to a smooth and quick handling of requests for assistance under this Article. In addition, the soft law measures would need to be continued (see baseline scenario). While these measures will enhance the cooperation under this article and lead to some savings of human resources, it is not to be expected, however, that these savings are sufficiently big to convert Central Authorities which are currently seriously under-staffed and under-resourced to fully operational authorities.

**Cost savings:** Those Central Authorities which have so far refused to assist courts and authorities upon their request, and to obtain or provide social reports about adults and siblings which are of relevance for child-related proceedings, will in the future have to carry out such requests, which may increase their workload. However, as the Central Authority is normally not the authority drawing up the social report but only passing on the request to the competent national authority and later transferring the report to the requesting Central Authority, the additional work is limited. Likewise, the assistance to courts with the transfer of jurisdiction and the forwarding of judgments is normally limited to a mere letter-box function so that the workload of Central Authorities would only increase to a minimal extent (if at all) because the current correspondence discussing whether a request falls under the Regulation or not will no longer occur. In total, the reformulation of the Article therefore is likely to save costs. When the text of this Article spells out all the necessary details, allows for a one-stop-shop and contains a time limit, requests for assistance, in particular for social reports, can be fulfilled more quickly in a single, streamlined procedure under this Regulation, thereby shortening the proceedings for which they are needed and reducing the amount of human resources necessary to process a request. However, given the different organisation of the work at Central Authorities, the number of staff and their remuneration it is not possible to make any precise estimates in this regard.<sup>137</sup>

**Stakeholders' views:** Stakeholders' views on cooperation were mixed during the public consultation. Of the Central Authority staff members who responded, 83% (i.e. 5 of 6) believe that cooperation between Central Authorities functions well. Also 58% of the legal practitioners who responded (i.e. 31 of 53) are of this view. However, the majority of private individuals who responded (76%, i.e. 26 of 34), are of the view that cooperation does not function well. Lack of cooperation and communication

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<sup>137</sup> See *supra* at 3.1., last paragraph, and at 4.5.1.

was a main feature of most answers. Excessive procedural formalities and slow transfer of information were mentioned.

### 6.6.3. *Option 3: Clarification of the Central Authorities' and other requested authorities' tasks plus addition of an article on adequate resources*

For the clarification part see the preceding section on Option 2. For the additional article on adequate resources, the following needs to be added:

**Effectiveness to meet objectives:** An explicit obligation in the Regulation for Member States to provide sufficient financial and human resources for their Central Authorities will give extra weight to the implementation of the Regulation and render explicit what should already be considered as implicit in terms of effective implementation of the Regulation. Indeed, in the interests of mutual trust, it is important that there is a "two-way street" in terms of cooperation. The proposed resource article will be important if priorities have to be set at national level and budget has to be allocated accordingly within a Member State. An explicit obligation spelled out in the Regulation should stress the political importance of duly equipped Central Authorities in order to ensure an efficient application of the Regulation. The indicator for sufficient resources would be the performance of the respective Central Authority. Monitoring the performance of Central Authorities by the Commission could take place more effectively, in particular upon complaints from other Central Authorities.

**Costs:** For some Member States the obligation to provide their Central Authority with adequate resources is likely to generate additional costs (in particular for human resources) if their Central Authorities currently are not sufficiently equipped.

**Stakeholders' views:** See Option 2. The additional element of including an article on adequate resources was not addressed during the consultation of stakeholders

## 6.7. Comparing the Options and preferred Policy Option

| Objectives/Impacts   | Option 1<br>Baseline scenario | Option 2<br>Addressing the identified shortcomings by clarifying the Article on Central Authority assistance, setting out who is entitled to assistance, which assistance, by whom, and what are the requirements   | Option 3<br>Clarification of the Central Authorities' and other requested authorities' tasks plus addition of an article on adequate resources  |
|--|-------------------------------|---|---|
| Reduce delays associated with cross-border cases concerning children         | 0                             | This option would ensure somewhat swifter procedures for obtaining results in cross-border cases concerning children as the need for requests for clarification would be eliminated as the obligations of Central and other national authorities under this provision would be unambiguous. | This option would ensure much swifter procedures for obtaining consent to cross-border cases concerning children as the need for requests for clarification would be eliminated. In addition, the obligation imposed on Member States to equip their Central Authority with adequate resources would reduce delays caused by a lack of resources. |
| Safeguard the best interests of the child / Protection of fundamental rights | 0                             | This option would have a <b>positive impact</b> on fundamental rights, since it would enhance overall effectiveness and therefore protect the best interests of the child. The effect would however be subject  | This option would have an even <b>greater positive impact</b> on fundamental rights, since it would enhance overall effectiveness and therefore protect the best interests of the   |

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|--|--|--|---|
|  |  | to authorities being sufficiently resourced. | child. In addition, the obligation imposed on Member States to equip their Central Authority with adequate resources would improve speed and quality of their work, thereby enhancing the protection of the best interests of the children concerned. |
|--|--|--|---|

On the basis of the analysis set out above, Option 3 is the preferred policy option as maintaining the *status quo* would not address the existing problems which can be summarised by the words uncertainty, unpredictability and ensuing delays and sometimes non-fulfilment of requests. It is to be expected that the described clarification of the parts of the article reported as insufficiently clear and the addition of explicit legal bases for the parts currently missing will solve the problems described to a large extent. In addition, the well-established soft law measures will need to be continued to provide an ongoing supporting structure for those handling applications under the Regulation. Therefore, the preferred option will meet the operational objectives of clarifying the obligations of Central and other national authorities under the cooperation article of the Regulation and establishing time limits for national authorities to respond to requests for information under the Regulation. For those Member States which have already equipped their Central Authorities with sufficient resources, the new article requiring adequate resources does not create additional obligations or burdens going beyond what they already consider their obligation under the current text. *Vis-à-vis* those Member States who did not comply with the implicit obligation so far, the addition of an explicit obligation constitutes the necessary legislative minimum intervention which will strengthen the position of those in charge of implementing the Regulation in domestic budget negotiations.

**IV. CONCLUSION**

**7. OVERALL EVALUATION OF IMPACT OF PREFERRED POLICY OPTIONS**

**7.1. Summary of the preferred Policy Options**

The preferred policy options for the revision of the Regulation can be summarized as follows:

For matrimonial matters, the preferred policy option is retaining the *status quo*. This means that spouses in an international marriage will continue to have a possibility to consolidate the different proceedings as foreseen in the Regulation and other family law instruments (such as the Maintenance Regulation). At the same time, the flexibility for the spouses to apply for a divorce in one of the fora indicated in the Regulation will be maintained. The benefits of reducing or abolishing this flexibility would be outweighed by the disadvantages of the options considered to respond to the "rush to court" problem (transfer of jurisdiction or hierarchy of grounds) signalled by a few Member States. Also, spouses not having a common EU nationality who live in a third State but retain links with a certain Member State and want to get divorced will continue to rely on the national rules to access EU courts or to have their judgment (obtained in a third country) recognised in the EU.

Retaining the *status quo* is mainly motivated by the following reasons. While possible problems were signalled in the evaluation, overall the current available information shows that the functioning of the Regulation in matrimonial matters has proved to be to a high extent satisfactory. In contrast to the parental responsibility issues, only limited evidence of existing problems (including statistics) was available to allow a precise indication of the need to intervene and the scale of the problems, and a fully informed choice of any considered option. In order to possibly re-consider these matters at a later stage, it seems necessary to collect further relevant data, such as on the size of the problems, practices and eventual impacts, for example through the European Judicial Network in civil and commercial matters.

In addition, matrimonial matters seem currently a highly sensitive political issue on which it is difficult to reach a unanimous agreement. Some Member States have signalled their difficulty to accept any proposal which would relate, even indirectly, to the definition of marriage as embedded in the national laws. This has recently been demonstrated by the failure to reach unanimity on the proposal concerning matrimonial property regimes.

In this context, it is considered that a review of the matrimonial matters in the Regulation is not opportune at this stage, but may better be dealt with at a later moment, as needed. The Commission will therefore monitor the evolution of national laws and practices on these matters so as to appreciate when the time may be ripe for changes in this area.

With regard to the parental responsibility matters, the preferred option is for an EU intervention as motivated by the scale and urgency of the problem. More specifically, the **child return procedure** should be improved through an option clarifying the current mechanism and introducing new measures such as concentration of jurisdiction and the possibility for the court of refuge to order urgent protective measures which can also "travel with the child" to the State of habitual residence if necessary. The new rules would make the time limit for the return achievable by specifying the time frame for the proceedings before the courts of the first and second instance separately. Proceedings would be shortened by introducing a time limit also for the requested Central Authority, and by limiting the number of appeals possible against an order on return or non-return to one. The preferred option would explicitly invite the judge to consider whether the judgment should be provisionally enforceable.

For **placement decisions** an autonomous consent procedure should be established to be applied to all cross-border placements, flanked by a time limit for the requested Member State to respond to the request.

*Exequatur* would be abolished while maintaining appropriate safeguards (grounds for non-recognition and challenges against enforcement as such or of specific enforcement measures) to be invoked jointly by the defendant parent at the stage of enforcement in the Member State of enforcement, thereby shortening the overall duration of the proceedings. To diminish problems resulting from different national practices for hearing children and from judgments issued by courts lacking a close connection with the child at the time of judgment, and the resulting refusals of the recognition of the judgment, the preferred option would require Member States to mutually respect their national rules while obliging them to give the child the opportunity to express his or her views and take due account of them, and bring the jurisdiction in line with the guiding principle of proximity to the child by nuancing *perpetuatio fori*. As far as enforcement is concerned, the preferred option would guarantee that enforcement could only be refused on the basis of a uniform and limited list of grounds for refusal. There would also be a time limit indicated for enforcement with a reporting obligation where this is surpassed and the possibility for the court of origin to declare a judgment provisionally enforceable in case of an appeal against the judgment while leaving leeway to deal with urgent risks to the child's best interest at the enforcement stage, which would in turn clearly enhance the efficiency of the proceedings and the protection of the best interests of the child.

With regard to **cooperation**, a clarification of the respective article should specify; (1) who can ask (2) which assistance or information (3) from whom and (4) under which conditions. A time limit would be indicated for the requested authority to respond. It would be made clear that also courts and child welfare authorities can request the assistance of Central Authorities. In addition, the well-established soft law measures would be continued to provide an ongoing supporting structure for those handling applications under the Regulation. The addition of the proposed article on adequate resources would render explicit the current implicit requirement which is presently met in the case of certain Central Authorities, but not all, and would thereby increase mutual trust.

## 7.2. The preferred options' effectiveness to achieve the policy objectives

As indicated in the assessment of the individual policy options, the preferred options address the problems identified better than any of the other options (see Annex 11 for the summary of the general, specific and operational objectives) taking into account the current political framework.

As regards **matrimonial matters**, the preferred policy option which is the *status quo* will continue to be applied. Spouses who want to choose a court to settle their divorce will not be able to do so. They would, however, be able to consolidate the different family proceedings through the existing possibilities given in other instruments. Spouses not having a common EU nationality who live in a non-EU country would access EU courts in accordance with the national law. The problem of rush to court, perceived by a limited number of Member States, would remain as long as Rome III does not apply in all Member States (see problem definition in sections 1.1. and 2.1. on matrimonial matters).

The preferred package of policy options for parental responsibility matters would meet the **simplification** objectives by reducing delays relating to the return of the child, the placement decisions, and cooperation between the Central Authorities, and eliminate unnecessary delays and costs related to the *exequatur* requirement. At the same time it would also respond to the urgency of remedying the problems currently faced in this area, where it is of utmost importance to act and set the scene for changes on the ground keeping in mind the situation of children, families and their best interest.

**The efficiency of the proceedings** would be improved, as regards the child return procedure, by reducing the number of appeal levels, providing for provisional enforceability of judgments, by defining the role and duties of Central Authorities more clearly and obliging Member States to concentrate jurisdiction in a limited number of courts in a manner coherent with the structure of their respective legal system. For placement decisions, the delays with obtaining consent will be reduced by establishing an autonomous consent procedure and by a time limit (max. eight weeks as opposed to the current 6 months and more) for the requested Member State to respond to the request. As regards recognition and enforcement, delays relating to obtaining *exequatur* (taking up to several months) will be eliminated. As the safeguards (grounds for non-recognition and challenges against enforcement as such or of specific enforcement measures) would be invoked jointly by the defendant at the stage of enforcement the overall duration of the proceedings would be shortened. Similarly, the preferred option would reduce delays (in some instances going beyond one year) for the actual enforcement by establishing a maximum time frame of six weeks. Finally, the clarification of the role of Central Authorities will reduce delays in their mutual cooperation.

Efficient procedures will ultimately enhance the protection of the **best interests of the child** and protect the relationship between parents and their children.

The preferred policy options for parental responsibility matters would **be coherent** with other international instruments in this area, namely the 1980 and the 1996 Hague Conventions, and would align the Regulation even more with them.

The preferred policy options would lead to **cost savings** for European citizens engaged in cross-border litigation. The abolition of *exequatur* would allow them to save the major part of the current costs of the procedure (on average € 2,200 to be paid for processing the application). In addition, the preferred policy option for enforcement would contribute to saving costs by parents seeking enforcement as they would not necessarily need to look for highly specialised lawyers with knowledge of the foreign enforcement system. Even though it is not possible to estimate in how many cases such savings could be achieved, it should be noted that every 10 hours of work of a specialised lawyer generate costs between € 1,000 and 4,000. There could be a small reduction of costs for Central Authorities; if procedures contain unified rules or are shorter at the enforcement stage, there should be fewer requests for assistance, and/or assistance would be required for a shorter period. However, given the different organisation of work and remuneration of the Central Authorities' staff it is not possible to quantify such

savings. Similarly, the reformulation of the cooperation rule is likely to save costs. Detailed description of the cooperation of the Central Authorities allows for a one-stop-shop and contains a time limit for responding to requests for assistance, in particular for social reports. The obligations can thus be fulfilled more quickly in a single, streamlined procedure under this Regulation, thereby shortening the proceedings for which the assistance is needed and reducing the amount of human resources necessary to process a request.

### **7.3. Compliance costs**

Taken as a whole, the preferred policy options would trigger relatively modest compliance costs. The abolition of *exequatur* and the concentration of jurisdiction would require Member States to incur costs for training to familiarize the legal profession with the new procedures envisaged. Training is however already necessary today, and without concentration of jurisdiction, far more judges need to be trained. Experience in Member States which have concentrated jurisdiction, on the other hand, has shown that judges hearing more abduction cases are more likely to participate in any training that is offered, and the judgments by those specialised and experienced first instance courts are appealed less frequently, thereby generating cost savings in the individual case and for the administration of justice in general, as appellate courts are less congested. For some Member States the obligation to provide their Central Authority with adequate resources is likely to generate additional costs (in particular for human resources) if their Central Authorities currently are not sufficiently equipped, but this obligation is enshrined in the Regulation already now.

The other changes envisaged constitute relatively straightforward changes to existing rules which would not require the creation of new procedures and should be able to be applied by the authorities without the need of special training.

### **7.4. Impact on fundamental rights**

All elements of the preferred policy options respect and enhance the rights set out in the Charter of Fundamental Rights, and in particular the right to an effective remedy and the right to a fair trial guaranteed in its Article 47. Given the subject matter of the Regulation, notably the relationship between parents and their children, the preferred policy options for parental responsibility matters will enhance the right to the respect for private and family life (Article 7). Finally, the preferred policy options will strengthen the rights of the child (Article 24) through the proposed measures relating to the hearing of the child and the measures proposed to enhance the efficiency of return proceedings. The proposed changes will bring the Regulation further in line with the United Nations Convention on the Rights of the Child by linking the provisions more closely to it.

## **8. PROPORTIONALITY OF EU ACTION**

The proportionality principle requires measures taken to be proportionate to the size and extent of the problems.

National substantive rules will to some extent be affected by the proposed action, insofar as common standards on enforcement are proposed. This is, however, justified by the aim of ensuring full efficiency of the Regulation and the fact that for individuals to be able to fully exercise their rights wherever they might be in the Union, the incompatibilities between judicial and administrative systems between Member States have to be removed.

There is a large and growing number of EU citizens that are affected directly and indirectly by cross-border child related proceedings. The costs of the proposed reforms are modest and the benefits are, in comparison, very large. The proposed options would strengthen legal certainty, increase flexibility, ensure access to court and efficient proceedings whilst Member States retain full sovereignty with regard to the substantive laws on parental responsibility.

The problems that the preferred policy option would address stem from the cross-border nature of the matters involved. No Member State acting alone would be able to address and solve the problems identified in the current situation as there is always more than one Member State concerned.

In addition, the lack of EU action in this area would significantly damage the legitimate interests of EU citizens, who have expectations on the functioning of the common judicial area. In the current situation, parents face lengthy proceedings when it comes to proceedings concerning children. The preferred policy option of EU legislative action would be able to address such problems.

## **9. LEGAL BASIS**

The legal basis for Union action in family matters is established in Articles 81(1), (2) and (3) of the Treaty on the Functioning of the European Union. These provisions state that the Union is to ‘develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases’. The Council shall act unanimously after consulting the European Parliament.

## **10. MONITORING AND EVALUATION**

Monitoring and evaluation of the Regulation are important elements to ensure its efficiency and effectiveness in addressing the problems and meeting policy objectives. In order to monitor the effective application of the amended Regulation, regular evaluation and reporting by the Commission will take place. To fulfil these tasks, the Commission will prepare regular evaluation reports on the application of the Regulation, based on consultations of Member States, stakeholders and external experts. Regular expert meetings will also take place to discuss application problems and exchange best practices between Member States in the framework of the European Judicial Network.

In most Member States, there is no systematic collection of statistical data on the application of the Regulation making it very difficult to measure how the Regulation affects cross-border litigation. A requirement on Member States to provide information on the application of the Regulation is already included in the Regulation. Well in advance of the next review of the Regulation, a targeted request to Member States inviting their courts to keep statistics on certain legal aspects of matrimonial matters over a limited period of time and subsequently provide them to the Commission could be circulated. It may be assumed that such limited and targeted request, formulated with the assistance of experts from Member States within the EJM and circulated with a sufficient pre-warning before the period for which statistics are requested begins, should be acceptable to Member States as they also have an interest in underpinning possible proposals by statistical evidence and this would be a one-time effort rather than imposing ongoing administrative burdens on Member States (like keeping statistics on these matters on an ongoing and regular basis). The results should then help to assess more precisely the scale of the problems and the need for a specific EU intervention and possible future solutions.

In order to provide guidance in the monitoring process, some indicators are listed in the table in Annex 12. In terms of timing, an evaluation every 5 years would be useful in order to closely monitor the evolution of the impacts and the context in which the Regulation operates.

## ANNEX 1 - PROCEDURAL INFORMATION

### Lead DG: Directorate General Justice and Consumers

#### Agenda Planning

| <i>Reference AP N°</i> | <i>Short title</i>      | <i>Foreseen adoption</i> |
|------------------------|-------------------------|--------------------------|
| 2013/JUST/003          | Brussels IIa Regulation | June 2016                |

On 15 April 2014, the Commission adopted a report on the application of the Brussels IIa Regulation<sup>138</sup>. In this report, the Commission announced a further policy evaluation of the existing rules and their impact on citizens and to take action as appropriate on the basis of this evaluation.

The Commission in its 2016 Work Programme<sup>139</sup> announced that the existing legislation should be reviewed to make sure that it is fit to make a real difference on the ground. The Brussels IIa Regulation is one of the initiatives mentioned in Annex II to the Work Programme, REFIT initiatives.

#### Organisation and timing

Pending the political validation, a first Inter-Service meeting took place on 10 June 2015 to discuss the outcomes of the evaluation of the Regulation. A formal Inter-Service Group (ISG) was set up in September 2015. The Inter-Service Group is chaired by the Directorate General Justice and Consumer (JUST) and the following Directorates General have been invited to participate: General Secretariat (SG), Legal Service (LS), Migration and Home Affairs (Home), Education and Culture (EAC), Employment and Social Affairs (EMPL), and Budget (BUDG).

The Inter-Service Group met 3 times until the submission of the Impact Assessment to the Regulatory Scrutiny Board in November 2015; the last meeting took place on 9 November 2015. The Inter-Service Group approved the Inception Impact Assessment that was published on 8 October 2015 and the Impact Assessment Report.

#### Consultation of the Regulatory Scrutiny Board

The Impact Assessment Report was examined by the Regulatory Scrutiny Board on 2 December 2015. Recommendations from the Board were transmitted on 4 December 2015 and were implemented as follows:

| <b>Board's Recommendations</b> | <b>Implementation of the recommendations into the revised IA Report</b> |
|--------------------------------|---|
|                                |   |

<sup>138</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (COM (2014) 225 final).

<sup>139</sup> COM(2015) 610 final of 27.20.2015, p.4 and Annex II, p. 2, Item 27.

**1. The findings from the REFIT exercise should be presented at the beginning of the report.** Such a section should include a presentation of the results of the evaluation study and highlight the Commission services' conclusions from the REFIT exercise. It should clarify how the areas for simplification were identified and how the proposed solutions will simplify and/or modernise the existing instrument to reflect today's context (e.g. explaining whether the proposal also covers registered partnerships). Finally, the anticipated burden reduction should be quantified. If this is not possible, it should be clearly explained why not.

**2. The report should better present the evidence base that led to the proposed amendments.** After clarifying the overall EU (e.g. Rome III Regulation, Brussels I Regulation) and international family law context (e.g. the Hague Convention), key findings from the evaluation of the existing Brussels IIa Regulation should be presented. In view of the limited amount of available hard evidence, the report should better trace back problems with the source from which they were identified (case law, evaluation, stakeholder consultations).

**3. The baseline scenario, as a dynamic and not static concept, should incorporate likely developments and evolutions in the context of EU family law. The description of options should also take into account this diverse and dynamic context.** When presenting the options, the report should explain how the proposed modifications are articulated coherently with other existing instruments

1. A new chapter called "REFIT" was added in the introductory part to present the results of the evaluation study and to clarify how the areas for simplification were identified. It includes information concerning the anticipated burden reduction. Moreover, in the analysis of impact of the individual options, an attempt has been made to quantify time and cost savings as far as possible. Where this was not possible, reasons are now given for this.

As for registered partnerships, it is now stated explicitly that they are not covered by the Regulation and/or the proposed recast. It is also made explicit that no substantive changes will be proposed to the sensitive part on matrimonial matters as a unanimous agreement in the Council in this area seems to be unlikely and the scarce data did not allow for a fully informed choice of option.

2. The report, in chapter 2 of the introduction, clarifies the background and the interplay with other EU and international family law instruments. It also explains how qualitative and quantitative data was collected. Each problem description now contains information about the source from which the problem was identified.

3. The likely evolution of the situation without EU legislative intervention is described in each problem description. To take account of the dynamic context, in the analysis of impact of the baseline scenario for each issue, a discussion of other possible (in particular legislative – EU or Member State- ) developments was added, i.e. the consideration of the probability of adoptions/amendments of other instruments such as the Rome III Regulation or Member States' legislation.

The argumentation for specific options was strengthened by including wherever relevant an explanation of the effectiveness of some of the proposed measures that are already in place in

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| <p>and practices already in place in some Member States (e.g. how would the proposed measures to prevent a "rush to court" coexist with the provisions of the Rome III regulation in force in 16 Member States). The argumentation for specific options should also be strengthened by including an explanation of the effectiveness of some of the proposed measures that are already in place in some Member States (e.g. use of specialist courts) and how they could benefit other Member States.</p> <p><b>4. The report should better distinguish between minor adjustments and substantial changes proposed.</b> It should summarise the concrete implications of such changes for different Member States. The need for the more intrusive measures should be further substantiated, together with an analysis of their proportionality and Member States' willingness to accept such changes. In this respect, the report should also clarify the possibility and implications of having potentially different regimes in some Member States when dealing with domestic or cross-border cases (e.g. in parental responsibility matters, as regards hearing of the child).</p> <p><b>5. Procedure and presentation</b><br/>The report could be further shortened, with a view to make it more accessible. In addition, the language could be rendered less technical / legalistic in order to better bring out the underlying objectives of the initiative and the evidence base. Given the currently limited provision of quantified evidence, the basis and rationale for the proposed amendments should be summarised for each option.</p> | <p>some Member States and their proven benefits.</p> <p><b>4.</b> The report marks clearer which of the proposed changes are substantial in nature by making explicit references in the text. The justification for such measures and the stakeholders' opinion was added. It was also clarified whether the modification would lead to differences when dealing with domestic or cross-border cases.</p> <p><b>5.</b> To fully implement the Board's comments, it was necessary to add further explanations and therefore it was not possible to shorten the report. However, the language was improved to make it better readable and understandable for a non-expert. This includes the description of the options.</p> |
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**Evidence used**

The review of the Regulation was based upon comprehensive information from the following sources:

***Sources of the Commission***

The report adopted by the Commission in April 2014<sup>140</sup> on the application of the Regulation constituted the first assessment of the functioning of the Regulation. It was based on input received from the members of the European Judicial Network in civil and commercial matters (in particular Central Authorities and judges), the Commission's Green Paper on applicable law and jurisdiction in divorce matters, and the work carried out within the framework of the Hague Conference on Private International Law, of which EU is a member, with regard to the monitoring of the 1980 and 1996 Hague Conventions on international child abduction and international child protection. Finally, it took into account citizens' letters, complaints, petitions and case law of the Court of Justice of the European Union.

### ***Consultation***

Between 15 April and 18 July 2014 the Commission carried out a 3-month public consultation on the functioning of the Regulation and its possible amendments which was addressed to the broadest general public. In response to it, there were 193 replies submitted by stakeholders: Member States, legal practitioners, Central Authorities, academics, NGOs and citizens<sup>141</sup>.

Moreover, in the course of the review the Commission consulted members of the European Judicial Network in civil and commercial matters three times (2013, 2014 and 2015).

Furthermore, the Commission held an informal meeting with the Member States in October 2015 to discuss some key amendments to the Regulation which were under consideration. In the preparation of this meeting Member States were asked for assistance in completing the data gathered so far on the operation of the Regulation to feed the Impact Assessment.

### ***Studies***

An evaluation study on the functioning of the Regulation and the policy options for its amendment<sup>142</sup> was finalised in June 2015. It examined whether the core objectives of the Regulation, i.e. mutual recognition and mutual enforcement of decisions in matrimonial matters and in matters of parental responsibility based on common rules on jurisdiction and mutual trust, minimising cases of non-recognition, and return without delay of children wrongfully removed to or retained in another Member State have been achieved effectively and efficiently. The Impact Assessment part of the study assessed different policy options for each of the legal issues identified. Based on this analysis, the comprehensive preferred option (consisting of a matrix of preferred policy options) was developed and assessed against the status quo of the application of the Regulation.

In addition, the following studies were taken into account:

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

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

[2011](#) Statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Part II — Regional Report, Prel. Doc. No 8 B — update of November 2011 for the attention of the Special Commission of June 2011, available at <http://www.hcch.net>, prepared by Prof. Nigel Lowe, Cardiff University Law School, available at:

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<sup>140</sup> COM(2014) 225 final

<sup>141</sup> The results were published at: <https://ec.europa.eu/eusurvey/publication/BXLIIA>.

<sup>142</sup> Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Evaluation, Final Report, May 2015, available at: [http://ec.europa.eu/justice/civil/document/index\\_en.htm](http://ec.europa.eu/justice/civil/document/index_en.htm).

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### ***Surveys***

In a survey with the Central Authorities carried out in 2015 specific data concerning parental responsibility was collected. In particular, Member States were asked to identify the overall number of refusals of recognition or enforcement of judgments from another Member State concerning matrimonial or parental responsibility matters, the specific grounds which were invoked to refuse a judgment as listed in Articles 22 and 23 of the Regulation and the reasons for applying these grounds. In case no data was collected, examples of judgments given in the respective jurisdiction which concerned a refusal of recognition or enforcement of a judgment from another Member State were asked for.

### ***External expertise***

In 2015 an expert group consisting of independent experts specialised in private international law and in particular international family law was set up to discuss the problems encountered with the application of the Regulation and to suggest concrete solutions. The group met five times in the course of 2015. The

work of the group, reports of its activity and its members have been made public on the Commission's Registry of Expert Groups<sup>143</sup>.

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143 Expert group Brussels IIa (E03294), information available at: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3294&NewSearch=1&NewSearch=1>.

## ANNEX 2 - STAKEHOLDER CONSULTATION

### Brief summary of the consultation strategy/process

In line with the Commission's minimum standards regarding participation and openness to stakeholders' views presented in the Better Regulation Guidelines<sup>144</sup>, a consultation strategy has been developed to ensure a wide participation throughout the policy cycle of this initiative starting from the preparatory works to the report adopted on 15 April 2014 on the application of the Regulation and concluding with an informal meeting with Member States to discuss the envisaged amendments (October 2015). The Commission has sought a wide and balanced range of views on issues covered by the Regulation by giving the opportunity to all relevant parties (interested individuals, legal practitioners, academics, organisations, courts, national authorities and Member States) to express their opinions.

The Commission organised the following consultations throughout the Impact Assessment process:

#### 1. Public Consultation

An open 3-months web-based public consultation ran from 15 April to 18 July 2015. 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. The aim of this public consultation was to collect these parties' views on the functioning of the Regulations. The public consultation resulted in 192 responses from all categories of stakeholders from across the EU.

The detailed responses to the public consultation can be consulted on the Commission's website<sup>145</sup>.

In line with the Better Regulation Guidelines, the Inception Impact assessment (IIA) for this initiative was published on 8 October 2015 on-line for stakeholder comments. As of 28 October 2015 no comments had been received.

### Main trends

#### *Party autonomy and rush to court in matrimonial matters*

Those Member States which responded to this question (BE, DE, NL, UK, CZ, PT, PL) support the introduction of the possibility for spouses to *choose the competent court*. Also, the majority of the respondents share this view of the Member States and agree with the Member States that certain limitations should be set up for the choice of court. It should be possible to choose the courts of those Member States where the spouses have had their habitual residence for at least a certain period of time. A smaller share of the respondents support that the choice of court be limited to the courts of a Member States of which one of the spouses is a national. Other respondents think that it should be possible to choose one of the courts competent under the main jurisdiction provisions of the Regulation. Among the Member States there are different views on which criteria should apply to the choice of court. As to the question whether other EU instruments should be used as a source of inspiration for the choice of court, the majority of the respondents refer to the 'Maintenance Regulation'. The 'Rome III Regulation' is

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<sup>144</sup> SWD(2015) 111.

<sup>145</sup> <https://ec.europa.eu/eusurvey/publication/BXLIIA>. An analysis is included in the Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final Report, Analytical Annexes, 2015, Annex 4. [http://ec.europa.eu/justice/civil/files/bxl\\_ii\\_a\\_final\\_report\\_evaluation.pdf](http://ec.europa.eu/justice/civil/files/bxl_ii_a_final_report_evaluation.pdf).

mentioned as another source of inspiration. The Member States in particular are divided on this question. They either mention the 'Maintenance Regulation' or the 'Rome III Regulation'.

The majority of the respondents to the public consultation believe that the *ways of identifying the competent court in matrimonial matters* should be revised in order to reduce the risk of a 'rush to court'. The majority thinks that this risk might be reduced by establishing an order of priority of the several alternative grounds for jurisdiction for matrimonial matters, whereas a minority of the respondents favours the option of requiring the other spouse's agreement when the responsible court has been identified based on the habitual residence of the applicant. The majority of the answering Member States, however, do not support an amendment of the jurisdiction rules to tackle the problem of the 'rush to court'.

### ***The operation of the regulation in the international legal order***

In some cases the Regulation leaves the identification of the court which has jurisdiction to national law. A significant majority of the respondents maintain that it would be useful to introduce a *uniform rule for the determination of jurisdiction* for all cases. The support for such a harmonised rule on residual jurisdiction is higher amongst legal practitioners<sup>146</sup> and private individuals than among academics. Of those Member States that responded, three (NL, PL, PT) were in favour of creating a uniform rule on residual jurisdiction if no court in a Member State has jurisdiction under the Regulation and three against: FR and BE both denied the need for it because their national law already provides for residual jurisdiction based on nationality, CZ gave no reasons, and DE stated that a redraft of Articles 6 and 7 would be sufficient and could leave the national rules on residual jurisdiction intact. The UK also expressed hesitations.

The majority of the respondents agree that access to justice should be ensured in cases where the competent courts outside the EU cannot exercise their jurisdiction. The introduction of a *forum necessitatis rule* is supported by the majority of the legal practitioners. Of those Member States that responded, five (CZ, DE, NL, PL, PT) were in favour of creating a *forum necessitatis* and two against (FR and BE who both denied the need for it because their national law already provides for a *forum necessitatis* based on nationality). The support among private individuals and academics is slightly smaller than among legal practitioners. Respondents reiterate that justice and human rights should be ensured in all circumstances. Some respondents think that the rule on the *forum necessitatis* should only apply to parties with a sufficient connection with the Member State where they seek to bring their case.

On parallel proceedings in a non-Member State, the majority of the respondents think that the Regulation should include a provision to prevent *lis pendens* before the courts of a Member State and the courts of a non-Member State. The Regulation should address its own relation with bilateral treaties adopted with third States and 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. The Member States are divided on the introduction of a *lis pendens* rule for proceedings pending in non-EU-countries.

### ***The return procedure in cases of parental child abduction***

The majority of the respondents, including the Member States, think that the Regulation has not ensured the immediate *return of the child* within the EU. The responses from private individuals and legal practitioners are quite different. Whereas private individuals argue that the Regulation has not ensured immediate return, legal practitioners were divided which is particularly the case for lawyers. Respondents believe, respectively, that the best way to improve the return procedure is to introduce

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<sup>146</sup> Legal professionals includes the following categories: 'Judge', 'Lawyer', 'Notary', 'Other Legal Practitioner', 'Court Staff Member'.

"automatic enforcement of judgments" (without explaining, though, what they meant by this), stricter time-frame compliance and sanctions for non-compliance. Some respondents consider that the issue should be dealt with under criminal law and a number of respondents believe that the police should intervene and cooperate in the proceedings. Addressing the problem of delays featured in the contributions from all Member States who responded to the public consultation. BE suggests that it may be appropriate to regulate the return procedures more strictly by limiting the number of hearings, opportunities for appeal, and by setting common minimum standards for enforcement procedures. The United Kingdom 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.

### ***Placement of the child in another Member State***

The majority of the respondents, including the Member States, believe that the *rules on the placement of a child in another Member State* do not function well. Among the practitioners a slightly greater percentage regards the rules as functioning satisfactorily. In contrast, a large majority of private individuals regard the rules as functioning unsatisfactorily. The respondents make different suggestions on how the rules could be improved. However, in these responses no clear trend can be observed.

### ***Recognition and enforcement of judgments***

The majority of the respondents are in favour of a free circulation of all judgments, authentic instruments and agreements concerning parental responsibility between the Member States without *exequatur*. In case of a complete abolition of *exequatur*, it was recommended that a number of safeguards be put in place. Of those who do not agree, only a few respondents think that *exequatur* should just be abolished for judgments concerning the placement of a child in institutional care or with a foster family in another Member State. Private individuals are the most prominent group in favour of expanding the abolition of *exequatur*, followed by judges and lawyers. Academics have mixed views, with an equal share of responses for each position. A slight majority of the Member States are against a full abolition of *exequatur*. The respondents stress particularly the importance of safeguards concerning the right of the child to be heard, the right to be heard in general and the proper service of documents.

The *hearing of the child* is a particular problem in the context of recognition and enforcement. The majority of the respondents think that common minimum standards for the hearing of the child could help to resolve these problems. The support for developing common minimum standards is the biggest among legal practitioners followed by private individuals. Academics and Member States are more divided. The main problem is that there are different standards across Member States for determining the suitable age or capacity of the child to be heard. Divergences are also observed in the modes of hearing the child, i.e. who hears the child and where and whether this occurs with the parents present or not.

As to the *actual enforcement of decisions on parental responsibility*, the majority of the respondents agree that this is an important area for improvement. The majority of legal practitioners think that enforcement needs to be improved. In particular lawyers hold that there is need for improvement whereas judges are more divided. The main suggestion concerns the adoption of common minimum standards including uniform enforcement procedures. Member States are divided on the adoption of common minimum standards for the enforcement procedure. Other suggestions of the respondents include a new Regulation on enforcement, harmonisation of national laws, increased communication and specialised bodies and instruments to increase the efficiency of enforcing decisions.

The majority of the respondents state that it is important to improve the *actual enforcement of return orders*. Among the practitioners, judges were divided, whereas the majority of lawyers favour

improvements. Sanctions for non-compliance are suggested for improving the actual enforcement of return orders. Other suggestions include increased cooperation, common standards and procedures, improved communication methods and a specialised tool or instrument for enforcement of decisions. All Member States agreed on the importance of improving the actual enforcement of return orders. However, there are diverging opinions on the ways to improvement.

### ***Cooperation between Central Authorities***

A small majority of the respondents think that the *cooperation between Central Authorities* does not function well. However, the answers are mixed among the different categories of respondents. Of the few Central Authority staff members who responded the vast majority believes that the cooperation between Central Authorities functions well, whereas the majority of private individuals think the opposite.

The *main problem identified in relation to the cooperation between Central Authorities* is a lack of cooperation and communication. Reasons mentioned for the missing cooperation are excessive procedural formalities, distrust and slow transfer of information. However, there are diverging opinions regarding the measures to be taken. Another problem mentioned is that the Central Authorities are allegedly not always be aware of the existence of the Regulation or would be unfamiliar with its application.

The majority of the respondents support the *use of forms* as a mean to improve the cooperation between the Member States. Also a slight majority of Member States favour the use of translated forms.

A slight majority of the respondents indicate that it would be useful to add a provision encouraging the *use of mediation*. A large majority of private individuals share this view. In contrast, a slight majority of legal practitioners do not think that an additional provision to enhance the use mediation should be introduced.

In connection with the placement of a child in another Member State the *Central Authorities have the obligation to provide information and assistance as needed by the courts*. The majority of the respondents indicate that there is a need for improvement in this field. Legal practitioners are divided, contrary to the private individuals who largely see a need for improvement. As methods of improvement more efficient use of IT tools and improved communication between authorities are suggested.

The majority of the respondents do not believe that the *cooperation between Central Authorities and the local child welfare system* works as well as it should in order to ensure the smooth operation of the regulation. Legal practitioners are relatively divided in this area, in contrast to private individuals who think largely that cooperation does not function as well as it should. From the few Central Authorities that replied a small majority considers that the cooperation with local child welfare system functions well. The respondents mention lack of knowledge and unclear responsibilities as reasons for unsatisfactory cooperation between the Central Authorities and the local child welfare system. The respondents support preponderantly adaptations to the cooperation between the Central Authorities and the local child welfare authorities. Although legal practitioners are relatively divided on the overall functioning of the cooperation between these authorities, it was indicated by a clear majority 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 cooperation between the Central Authorities and the local child welfare authorities should be adapted to take better account of cross border cases. Half of the few responding Central Authorities consider that there is no need for such adaptations.

## **2. Special consultations targeting the Member States**

An informal meeting with the Member States was held on 12 October 2015. The discussion focused on jurisdiction in matrimonial matters, the abolition of *exequatur*, the return of the child procedure, cooperation between the Central Authorities and the placement of the child in another Member State.

## **Main trends**

### ***Party autonomy in matrimonial matters***

The Member States considered as useful the possible introduction of a *choice of court* for the spouses.

### ***The operation of the Regulation in the international legal order***

Member States were sceptical towards the possible introduction of a uniform rule on *residual jurisdiction*. They voiced some support for rules on *forum necessitatis* and *lis pendens* concerning proceedings pending outside the EU.

### ***The return procedure in cases of parental child abduction***

There was agreement among the Member States (SK, DE, HU, AT, CZ, ES, FR) that the current system has to be improved. The Member States support different measures to improve the functioning of the return procedure. There is a large consensus that mediation should be facilitated during the return procedure.

### ***Placement of the child in another Member State***

The discussion confirmed the findings of the public consultation that the rules on the placement of child in another Member States need to be improved. There was agreement that the rules needed to be clarified by adding requirements for the request for consent. The proposal to presume consent in case of silence was rejected by Member States while the proposal to introduce a time-limit for the requested States was expressly supported by some whereas others remained silent.

### ***Recognition and enforcement of judgments***

In accordance with the replies of the Member States in the public consultation, most Member States (AT, SK, HU, IE, UK, LI, ES, FI and FR) stressed the need for a safeguard mechanism if *exequatur* was abolished in all cases. Some Member States (DE, LV and IT) spoke against the introduction of minimum standards, such as age limits for the *hearing of the child*. Some Member States support an alternative solution, being the mutual recognition of the Member States' rules and practices regarding the hearing of the child.

On the *enforcement of parental responsibility decisions*, in particular return orders, the results of the public consultation as regards the Member States were confirmed in the informal meeting. While Member States (UK, FR and IT) acknowledge that there is a need for improvement, many of them (SK, UK, SE, LV, LT, ES and FI) are reluctant to tackle the problem by a harmonisation of the actual enforcement rules.

### ***Cooperation between national authorities***

Several Member States (FR, SE, DE, HR, SK, ES) supported a clarification of the rules on the cooperation between Central Authorities and the introduction of rules on the cooperation between the Central Authorities and welfare authorities.

## Annex 3

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



May 2015

### **FINAL REPORT Evaluation**

A study prepared for the  
European Commission DG Justice

**This study was carried out for the European Commission by:  
Deloitte and Coffey**

#### ***Acknowledgements***

*This assignment was conducted by a team from Deloitte, headed by  
Luc Chalsège with the support of Éva Kamarás, Katarina Partz, Anna Siede*

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# 1 Introduction to the report

The present report constitutes the Final Report of the “Study on the assessment of Regulation (EC) No 2201/2003 (‘Brussels IIa’ Regulation) and the policy options for its amendment”, carried out by Deloitte on behalf of the European Commission, Directorate-General for Justice.

It presents the completed **Evaluation** of the Brussels IIa Regulation, which looks into the *Relevance, Coherence, Effectiveness, Efficiency*, as well as *EU added value and utility* of this instrument. The assessment of *Effectiveness* in the main body of the report is conducted at the level of the specific and general objectives. A more detailed analysis of this evaluation criterion, at the level of the operational objectives, is presented in the separate volume of Analytical annexes.

The Impact Assessment on the Regulation, which was conducted within the framework of the same assignment, and was based on this Evaluation, is provided in another separate volume.

The present **Evaluation report’s structure** is the following:

- Chapter 2: Objectives and scope of the Evaluation and the Impact Assessment Study;
- Chapter 3: Evaluation of the Brussels IIa Regulation.

The following **annexes** are presented **in a separate volume**:

## *Analytical annexes*

- Annex 1: Analysis of the effectiveness of the Brussels IIa Regulation at the level of the operational objectives;
- Annex 2: Context of the Brussels IIa Regulation;
- Annex 3: Contextual factors and unsubstantiated issues;
- Annex 4: Analysis of the public consultation;
- Annex 5: Assessment of the impacts of options proposed for non-priority legal issues;
- Annex 6: Quantitative analysis;
- Annex 7: Compliance costs and stress.

## *Methodological annexes*

- Annex 8: Main elements of the methodology for the Evaluation and Impact Assessment of the Brussels IIa Regulation;
- Annex 9: Potential modifications to the Regulation to address non-prioritised legal issues;
- Annex 10: Assumptions and formulas used for the hypothetical cases;
- Annex 11: Data concerning the application of the Brussels IIa Regulation.

## 2 Objectives and scope of the Evaluation and the Impact Assessment Study

This chapter presents the objectives and scope of the Evaluation and Impact Assessment Study of the Brussels IIa Regulation.

### 2.1 Objectives of the Evaluation and the Impact Assessment Study

In line with the Terms of Reference (ToR), the objectives of the study were to carry out an **evaluation and impact assessment study of the application of the Brussels IIa Regulation**.

The main objectives of the study were thus:

- *To evaluate the application of the Brussels IIa Regulation.*  
The study evaluates the Brussels IIa Regulation as it is in force today. In particular, it examines the relevance, coherence, effectiveness, efficiency, EU added value and utility of the Regulation as it exists today.
- *To identify and assess practical problems encountered by citizens, courts and practitioners, as well as the impacts of identified policy options to address the problems.*  
The study identifies and assesses the problems currently experienced by citizens, courts and practitioners. Based on the problem assessment and taking account of the findings of the evaluation of the Regulation, various policy options are developed with a view to addressing the problems identified. Legislative as well as non-legislative actions are considered. The impacts of the different policy options for the future of the Regulation is assessed relative to the status quo, based on a common set of assessment criteria, in compliance with the Commission's Impact Assessment Guidelines. The preferred option is identified based on a comparison of the options.

### 2.2 Scope of the Study

The scope of the study was largely determined by the **scope of the Brussels IIa Regulation**. This said, certain aspects that are not covered by the Regulation, such as standards in relation to parental responsibility decisions, were relevant for examination. This was in line with the ToR.

The Regulation establishes provisions concerning judicial cooperation in civil matters having cross-border implications. Within this framework, the material scope of the study is:

- Civil matters relating to the breaking of marriage links in terms of divorce, legal separation and marriage annulment (matrimonial matters); and
- Civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility.

The term 'parental responsibility' is to be understood broadly, referring to all rights and duties relating to the child or the property of a child. It includes rights of custody and rights of access. In relation to the child's property, the Regulation is limited to protective measures that need to be

taken with regard to that property, such as the appointment of a person or a body to assist and represent the child with regard to the property.

In terms of the provisions established by the Regulation, the following broad areas are covered:

- The general scope of the instrument;
- Jurisdiction in matrimonial matters (relating to the breaking of the marriage link) and in matters of parental responsibility;
- Recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility; and
- Cooperation between central authorities.

The rules in applicable law concerning matrimonial matters and matters of parental responsibility are not analysed.

The relationship with other legal instruments has been taken into account.

The geographical scope of the study is all EU Member States with the exception of Denmark.

# 3 Evaluation of the Brussels IIa Regulation

This chapter contains the evaluation of the Brussels IIa Regulation. The evaluation is structured according to its five evaluation criteria: relevance, coherence, effectiveness, and efficiency, as well as EU added value and utility. The assessment of effectiveness in this chapter is conducted at the level of the specific and general objectives. A more detailed analysis of this evaluation criterion at the level of the operational objectives is presented in Annex 1.

## 3.1 Relevance

This section presents the findings on the relevance of the Brussels IIa Regulation. The following evaluation questions guided this work, and are dealt with in turn in the next sub-sections:

- In what way has the initial problem evolved?
- To what extent does the scope of the legislation still match the current needs or problems faced by EU citizens?

***Our key finding is that the number of international couples and families affected by the Regulation remains significant and the Regulation remains relevant in light of both this statistical evolution and in view of the qualitative assessment of the evolution of the initial problem.***

The Brussels IIa Regulation was adopted to address challenges faced by ‘international’ married and unmarried couples, and families (i.e. couples with or without children). At the time the Regulation was adopted this was becoming more common as a result of the growing mobility of EU citizens.

More specifically, it was recognised at the time that when international couples want to break their marriage link, ***the spouses could face a number of practical and legal difficulties due to the differences in legislation across the Member States.*** These issues were identified as hindering the free movement of persons and judgments, and thus to be at odds with the goal of setting up an area of freedom, security and justice:

- It was **unclear which courts had jurisdiction** to handle the divorce, legal separation or marriage annulment of international married couples, as the competent court is determined in different ways in the Member States.
- It was **unclear which national law was to be applied** to these cases.<sup>147</sup>
- The differences in determining the competent court and conflict-of-law rules led to **issues over recognition and enforcement** of judgments, authentic instruments and agreements.
- When the spouses or unmarried couples had children, issues arose with regard to **cross-border rights of access to children**. Further problems were also faced in

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<sup>147</sup> This was determined by means of the conflict-of-law rules of the Member State where the action was 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 can differ depending on where the action is filed and the outcome is difficult to foresee. This could have serious repercussions given 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, not every Member State recognises the concepts of legal separation and annulment.

relation to parental responsibility, with additional complications and sensitivities e.g. in cases of child abduction<sup>148</sup>.

The Brussels IIa Regulation included provisions to address all but the second problem identified above. The Regulation set out common jurisdiction rules, as well as provisions on the mutual recognition and enforcement of judgments, authentic instruments and agreements for matrimonial matters and matters of parental responsibility<sup>149</sup>.

It did not establish harmonised conflict-of-law rules. This was addressed in Council Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation<sup>150</sup> ("Rome III Regulation"), which was adopted in 2010. This instrument provides a uniform set of rules on the law applicable to divorce and legal separation and is applicable in 15 Member States<sup>151</sup>.

### 3.1.1 Evolution of the initial problem

**High levels of mobility of citizens across Europe**<sup>152</sup> coupled with international migration are believed to be leading to a constant increase in the number of international couples, as well as of international families<sup>153</sup>, and hence substantiate the relevance of the Brussels IIa Regulation.

The number of international divorces and legal separations has increased over the last decade and has been stable (with slight fluctuations) between 2008 and 2012.

Our analysis shows that every year from 2008 to 2012, approximately 200,000 citizens in **international marriages divorced**.

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<sup>148</sup> Which was identified as being the cause of "appalling distress to the children and parents concerned", c.f. Commission press release on the 2002 proposal: "Commission proposes EU-wide recognition of family law rulings to tackle child abduction", IP/02/654, Brussels, 3 May 2002, [http://europa.eu/rapid/press-release\\_IP-02-654\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-02-654_en.htm?locale=en).

<sup>149</sup> A previous Regulation (EC) No 1347/2000 of 29 May 2000 (the 'Brussels II Regulation'), which was first EU instrument adopted in the area of judicial cooperation in family law matters, introduced rules on jurisdiction, recognition and enforcement of judgments on divorce, separation and marriage annulment as well as judgments on parental responsibility for the children of both spouses. In terms of jurisdiction, the amendment of the scope of the convention in Regulation (EC) No 2201/2003 resulted in a change in the structure of Chapter II. This is now divided into three sections: the first on jurisdiction in matters relating to divorce, legal separation and marriage annulment, the second on jurisdiction in matters of parental responsibility, and the third on provisions common to both. In terms of the recognition and enforcement of judgments, the inclusion of provisions on parental responsibility made it necessary to include enforcement provisions in Regulation (EC) No 1347/2000. This is why Regulation (EC) No 2201/2003 has a Section 1 on recognition, a Section 2 on declaration of enforceability and a Section 3 on common provisions.

<sup>150</sup> 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>

<sup>151</sup> Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. The Rome III Regulation has been applied in Lithuania only since 22 May 2014 (OJ L 323, 22.11.2012, p. 18). It will apply in a sixteenth Member State, Greece, from 29 July 2015 (OJ L 23, 28.1.2014, p. 41).

<sup>152</sup> In 2011 there were 33.3 million foreign citizens resident in the EU-27, 6.6% of the total population. There were 48.9 million foreign-born residents in the Union in 2011, 9.7% of the total population (Statistics in Focus, 31/2012: "Nearly two-thirds of the foreigners living in EU Member States are citizens of countries outside the EU-27", Eurostat) <http://ec.europa.eu/eurostat/en/web/products-statistics-in-focus/-/KS-SF-12-031>.

<sup>153</sup> According to a 2012 Eurostat study ("Merging populations. A look at marriages with foreign-born persons in European countries", Giampaolo Lanzieri), across Europe, for the period 2008-10, on average one in 12 married persons was in a mixed marriage. The study shows wide differences in the prevalence of mixed marriages across Europe. The range is from about one mixed married couple out of five in Switzerland and Latvia, to almost none in Romania. However, for most countries, there is an increase over time, while the geographic distribution suggests a North-West/South-East divide, with some exceptions such as the Baltic countries. In general, countries in which immigration is a more recent phenomenon or is less relevant show lower values. The study is available at: [bookshop.europa.eu/en/merging-populations-pbKSSF12029/](http://bookshop.europa.eu/en/merging-populations-pbKSSF12029/).

While the **number of children affected by international divorces** decreased steadily from 2008 to 2012 (-4%), we observe that the **number of children born outside marriage** and thus affected by parental responsibility proceedings under the Regulation has increased by 10%.

Finally we note that an estimated **175,000 to 240,000 international families are affected by the Regulation**.

The modern trend in of family law is to encourage the parties to reach mutual agreement and party autonomy is supported.<sup>154</sup> **The Regulation currently does not seem to take this trend into account.** This can be demonstrated *inter alia* by the absence of choice of court for the parties in matrimonial matters.<sup>155</sup> The problem has evolved therefore because of the lack of flexibility given to parties who issue proceedings under the Regulation.

***The objectives of the Regulation are still relevant to the problem as it has evolved. This is supported by comments made by the stakeholders consulted for this study. In short, the problem as it has evolved consists of a larger number of international couples and issues related to the application of the Regulation, such as ‘forum shopping’, delays, costs and threats to the well-being of the child and family relationships.*** While the objective of the Regulation to reduce the additional costs of cross-border cases as compared to the costs of domestic cases is therefore still relevant, the potential positive effects of the Regulation, are not always achieved.

### **3.1.2 The relevance of the scope of the Regulation in view of the current needs or problems faced by EU citizens**

In accordance with Article 2, the Brussels IIa Regulation applies to “matrimonial matters” in terms of measures that are related to breaking the marriage link. This includes divorce, annulment and legal separation. The Regulation only deals with the breakig of the marriage link, and not the actual conclusion of the marriage contract. Hence ‘marriage’ is not defined by the Regulation.

It does not include any matter relating to prior circumstance or consequences, such as the grounds for divorce or the property consequences.<sup>156</sup> As indicated above, the Regulation does not establish substantive or applicable law rules. Its scope is limited to conflict of jurisdiction, and provisions on free movement of judgments, authentic instruments and agreements.

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<sup>154</sup> “The trend in recent Union instruments in civil matters is to allow for some party autonomy (see, for instance, the 2008 Maintenance Regulation or the 2012 Successions Regulation)”, page 5 of the Commission’s Application Report (Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0225>).

<sup>155</sup> Indeed, before the adoption of the Brussels IIa Regulation two possible starting points were taken into consideration for determining jurisdiction in matrimonial matters, (and neither of them included party autonomy): either to incorporate uniform rules of jurisdiction in matters of divorce, providing a limited number of alternatives without any hierarchy, or, taking the opposite approach, to incorporate no rules of jurisdiction but simply establish permissible grounds of jurisdiction. Article 3 of the Brussels IIa Regulation (Article 2 of the previous Brussels II) followed the first approach. The decision to include a number of specific grounds reflected their existence in the legal order of various Member States and their acceptance by the other Member States.

<sup>156</sup> More details on the contextual factors found important for the scope of the Regulation are spelt out in Annex 3.

Our interviewees and national experts generally perceived the scope as being **rather clear and appropriate**. Expert panel members also regarded the scope of the Regulation for matrimonial matters as **functioning well overall**.<sup>157</sup>

#### Matrimonial matters – potential coverage of same sex-marriages, registered partnerships and declaratory judgments

On the issue of the coverage of **same-sex marriages**, interviewees and expert panel members highlighted that the fact that the Regulation does not specify whether or not same-sex marriages are covered by its scope. This means that there is currently no legal basis for same-sex couples to divorce if they move to a Member State where same-sex marriages are not recognised.<sup>158</sup>

This point was brought up in the expert panel. The panel participants agreed that leaving the coverage of same-sex marriages undefined in the Brussels IIa Regulation allows Member States to apply the Brussels IIa Regulation to same-sex marriages, while not forcing them to do so (e.g. if this is against their public policy). Expert panel participants felt that an explicit inclusion of same-sex marriages within the scope of the Brussels IIa Regulation would be too politically sensitive.

The same is broadly true of **registered partnerships**. As discussed in further detail in Annex 3, very different rights and administrative procedures apply to the dissolution of the registered partnerships that exist in some Member States. Nevertheless, in some Member States registered partnerships actually provide a status very similar to marriage, and EU citizens are increasingly entering into registered partnerships. This has led to uncertainty in these Member States as to whether or not registered partnerships should be deemed to be covered by the Regulation. Despite not explicitly being covered by its scope, some Member States' courts do apply the Regulation to registered partnerships.

We note that it is disputed in legal literature whether **declaratory judgments**<sup>159</sup> (on the existence or non-existence of a marriage) are covered by the Regulation,<sup>160</sup> or whether the material scope of the Regulation is restricted to proceedings aiming at an alteration of the status of the spouses.

Based on the national expert reports we note that the issue of whether or not declaratory judgments are covered by the Regulation does not seem to have come up in Member States' case law. However, according to our national experts, the subject itself has generated debate in several Member States, albeit without reaching any conclusion. Consequently, only a few of the national experts believed there was a need for declaratory judgments to be interpreted as covered by the Regulation. Similarly,

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<sup>157</sup> For information on the role these groups played in arriving at our findings, please see Annex 7.

<sup>158</sup> More details on the issue of same-sex marriages in the context of the Regulation is spelled out in Annex 3.

<sup>159</sup> I.e. legal determination by a court resolving legal uncertainty for the parties, e.g. regarding the existence of the marriage.

<sup>160</sup> Daphne-Ariane Simotta refers to German literature and concludes – after illustrating both points of view – that declaratory judgments are not covered by the Brussels IIa Regulation. In: Fasching/Konecny, *Kommentar zu den Zivilprozessgesetzen*, 2<sup>nd</sup> edition, 2010, Article 1 Brussels IIa Regulation marg. No. 9 *et seq.* Furthermore, some commentators maintain that the Regulation should not be limited by excluding declaratory judgments if accepted in another Member State. Siehr goes as far as saying that recognition of these types of declaration could lead to a “necessary liberalisation” of marriages: Kurt Siehr in Ulrich Magnus and Peter Mankowski (eds) *Brussels II bis Regulation (2012)* European Law Publishers. Cited Dornbluth (fn. 1) pp. 60-62; Hau, *FamRZ* 1999, 485; id., *FamRZ* 2000, 1333; Gruber, *FamRZ* 2000, 1130; Schack (fn.1) p. 620; Vogel, *MDR* 2000, 1046; contra Helms (fn. 3) p. 259; Spellenberg, (fn. 1) pp. 125-126; ei., in: *Festschrift Ekkehard Schumann* (2001) p. 99.

most interviewees considered this issue to be of minor importance. (It was estimated that these judgments are seen in less than 1% of cases).

### Parental responsibility – Coverage of children in all civil matters, grandparents, definition of "child" and custody rights

Under the Regulation, the term ‘parental responsibility’ is to be understood broadly, referring to all rights and duties relating to the child or the property of said child<sup>161</sup>. It includes rights of custody and rights of access.<sup>162</sup>

Interviewees and expert panel participants generally considered the scope of the Regulation in matters of parental responsibility to be **rather clear and appropriate**. There were comments, in particular, that the inclusion of children in relation to all civil matters and not only children of divorcing parents as previously was a “much needed” expansion of the law<sup>163</sup>. Overall the Regulation is perceived to be responding rather well to the needs of holders of parental responsibility.<sup>164</sup> However, **some issues were identified that are currently not covered or not clearly specified in the Brussels IIa Regulation**.

Two issues were identified relating to the scope of the concept of ‘parental responsibility’. First, a number of national experts (AT, BE, CZ, IE, IT, FI, LU, NL, PL, RO) pointed to cases where courts had difficulties in deciding whether specific situations would be covered by the **term ‘parental responsibility’** (e.g. it was not clear, whether issues of grandparent’s contacts with grandchildren were covered).

Second is the **absence of definition of the term ‘child’** in the Regulation. Ambiguities arise across the Member States in identification of who is to be considered a “child” under the Regulation. Since the definition of the term ‘child’ differs across the Member States, as well as in third countries,<sup>165</sup> this may result in legal uncertainty<sup>166</sup> and may affect the well-being of the child.

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<sup>161</sup> Concerning the child’s property, the Regulation is limited to protective measures that need to be taken with regard to the child’s property, 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 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“the Brussels I Regulation”). In this context, we draw attention to the Regulation on mutual recognition of protection measures in civil matters adopted in 2013 **Regulation (EU) No 606/2013**.

<sup>162</sup> In this regard, it is worth noting 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 was extended to all matters relating to parental responsibility, regardless of whether or not the parents are/were married and regardless of whether both are the biological parents.

<sup>163</sup> c.f. <http://www.familylawweek.co.uk/site.aspx?i=ed347>; Peter Stone perceived this as “the most important advance made by the Brussels IIa Regulation” in *EU Private International Law: Harmonization of Laws* (2006) Edward Elgar Publishing p. 404.

<sup>164</sup> The analysis of the public consultation found that the majority of respondents (66%-78%) regard the Regulation as “helpful” in matters concerning parental responsibility. See Q6-Q8 of analysis in Annex “*Analysis of the European Commission’s public consultation*”.

<sup>165</sup> From a comparison of national laws, it was noted that not all Member States have a definition of “child”. Where this is not the case, usually the age eighteen 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 considered an adult earlier than that. For an overall treatment of this issue, see: “*Different interpretations of the term “child” across the Member States*”, Annex 3.

<sup>166</sup> Peter Stone regards the omission of an indication as to the ages at which a person ceases to be a child “very regrettable” in *EU Private International Law: Harmonization of Laws* (2006) Edward Elgar Publishing p. 405.

Finally, two members of the expert panel raised some issues in relation to two other concepts – custody rights and access rights, on the one hand, and parenthood recognition, on the other. One expert stated that the terms **custody rights** and **access rights** in the Brussels IIa Regulation stem from the Hague Convention on the Civil Aspects of International Child Abduction, but are not clearly defined in the Brussels IIa Regulation. This has led to difficulties due to the fact that the understanding of these concepts varies across the Member States, causing legal uncertainty. Another expert noted that the issue of **parenthood recognition** is closely related to the Brussels IIa Regulation, but dealt with by the jurisdiction rules of other instruments. The expert stressed that while recognition of parenthood is already excluded from the scope of the Brussels IIa Regulation, the Regulation does not sufficiently highlight the fact of the exclusion, thus creating confusion.

## 3.2 Coherence

This section presents the findings on the **coherence** of the Brussels Ila Regulation with other EU policy objectives in the area of judicial cooperation in civil matters.

The following sub-sections present the findings related to the assessment of the coherence of the Brussels Ila Regulation with other EU policy objectives. The analysis was based on the following indicators:

- Extent to which there are practical difficulties in relation to delineation of scope with other EU instruments;
- Extent to which there are overlaps in scope in combination with conflicting provisions between the Regulation and the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1996 Hague Convention on the International Protection of Children; and
- Extent to which there are practical difficulties in relation to the interrelationship with the Nordic Convention of 6 February 1931 on private law.

### 3.2.1 Delineation of scope with other EU instruments

*Our analysis shows that the multitude, complexity and interrelationship of Union instruments in family law (e.g. the Brussels Ila Regulation, the Maintenance Regulation (4/2009), the Brussels I Recast Regulation (1215/2012), the Rome III Regulation (1259/2010), etc.) have led to practical difficulties, such as the lack of understanding on the part of citizens and practitioners, or confusion on the extent of jurisdiction of the competent court pursuant to the Brussels Ila Regulation on the part of the parties.*

There are a number of EU instruments in the field of judicial cooperation in civil matters, which are closely related to the Brussels Ila Regulation (e.g. the Maintenance Regulation, the Rome III Regulation, Brussels I Recast Regulation). While most national experts did not identify any practical difficulties in relation to the delineation of the scope of the Brussels Ila Regulation with other Union instruments, our national experts for DE, FI, HR, IT, LU, LT and PL pointed to general problems related to **the multitude and complexity of EU instruments in family law** – in particular when combined with domestic law, bilateral agreements and multilateral conventions. Several interviewees also described the relationship with other regulations in the area of judicial cooperation in civil matters as problematic.

In addition, most of our expert panel participants also agreed that the multitude and complexity is creating practical problems for citizens and legal practitioners – such as non-use due to a lack of knowledge, misinterpretations and additional costs for specialised legal advice.

Furthermore, we note the **absence of clear practical guidance** for practitioners on the interrelationship of the Brussels Ila Regulation, the Maintenance Regulation, and the Rome III Regulation. This results in problems for practitioners and citizens in understanding these three instruments well and quickly. Overall, several of our interviewees and respondents to the public consultation concluded that as more and more Regulations enter into force, it becomes more and

more difficult for practitioners and citizens to understand the system of EU civil procedure. This not only results in them incurring extra costs, but it causes frustration for the parties that (in absence of a **single procedure**) **divorce is not necessarily dealt with the same way** (i.e. by the same court, within the same procedure) as the other procedures they regard as integral part or consequence of their divorce (i.e. parental responsibility, maintenance (of spouse and child), matrimonial property consequences).

Similarly, expert panel members argued that citizens want family law issues to be solved in “one package” (approaching one single lawyer and one single court in one single proceeding), but that the multitude and non-harmonisation of Union instruments makes this impossible. In line with this argumentation, our national expert for Luxembourg indicated that the parties generally (wrongly) assume that the court with jurisdiction over matrimonial matters also has jurisdiction over maintenance obligations. Luxembourg courts have pointed out that there is a fragmentation of jurisdiction and that the court which has jurisdiction over matrimonial matters pursuant to the Brussels IIa Regulation does not necessarily have jurisdiction over maintenance obligations.<sup>167</sup>

The delineation of scope also seems to be problematic in matters of recognition and enforcement.

**Case example: Interrelationship of Brussels IIa Regulation with other Union instruments (Luxembourg)**

In a case from 2009, a judgment on maintenance obligations was declared enforceable pursuant to the 1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations.<sup>168</sup>

The respondent lodged an appeal against the decision and raised several grounds for non-recognition on the basis of multiple instruments, including the Brussels I Regulation (44/2001), the Brussels IIa Regulation and the 1973 Hague Convention on the Recognition and Enforcement of Decisions.

The Luxembourg Court of Appeal stated that it was *'inconceivable'* that the foreign decision had to fulfil the requirements of several instruments cumulatively in order to be recognised. Firstly, the court ruled that maintenance obligations were excluded from the scope of the Brussels IIa Regulation pursuant to Article 1 para 3 lit. e). Therefore, the decision was not subject to the grounds of non-recognition established by the Brussels IIa Regulation. Secondly, the Court stated that the 1973 Hague Convention prevailed over the Brussels I Regulation. The national expert for Luxembourg concluded that this decision shows that the **multiplicity of EU instruments in the field of family matters is causing difficulties** for parties.

The interplay between the Brussels IIa Regulation and the **Maintenance Regulation** is not fully understood by practitioners. In particular, uncertainties were reported relating to the application of the **system of certificates** contained in the Brussels IIa Regulation in relation to those in the **Maintenance Regulation**. The Maintenance Regulation refers to grounds of jurisdiction that are based on the Brussels IIa Regulation. Therefore, proceedings related to custody and to maintenance should generally be handled by the same court.<sup>169</sup> However, in some cases, court officials were not sure which certificates to use in cases in which both the Maintenance Regulation and the Brussels IIa Regulation play a role. In Estonia, court officials are advised to use partial certificates. They use the Brussels IIa certificates for custody cases and the Maintenance Regulation certificates for maintenance obligations. This system works, but it needs clarification.

The interplay with the **Maintenance Regulation** also seems to be problematic in relation to the residual jurisdictional basis of **sole domicile or nationality** (i.e. Article 3(1)b). Although residual

<sup>167</sup> *Tribunal d'arrondissement de Luxembourg, 17 June 2008, case no 11341' and 113949*

<sup>168</sup> *Cour d'appel, 30 April 2009, case no 32999; Cour d'appel, 11 March 2010, case no 34352*

<sup>169</sup> In Estonia, divorce matters, custody matters, and maintenance matters can all be dealt with in one proceeding.

jurisdiction may be used for a divorce, it is not available for maintenance and therefore is rarely used by an applicant for maintenance.

**Case example: Interplay between the Brussels II and the Maintenance Regulations (Ireland)**

Our **Irish** national expert highlighted that in *O’K v A* [2008] 4 IR 801, the High Court observed that “[i]n our law judicial separation is inextricably linked to “proper provision” for dependant [*sic*] children and divorce under Article 41 of the Constitution is also inextricably linked to “proper provision”. It is difficult to envisage how these matters can be properly separated.” It is therefore notable that Buckley (2012) has observed that since the enactment of the **Maintenance Regulation**<sup>170</sup>, “[t]he fact that different aspects of the same relationship may be dealt with in different jurisdictions, or under the law of different Member States, increases rather than decreases confusion. The separation of marital status from marital property claims is not suited to a regime such as Ireland’s, where divorce is dependent on a particular standard of provision. Furthermore, the separation of support and property issues appears highly artificial in the Irish context, given that Irish legislation makes no such distinction and seeks only an overall fair or “proper” outcome. Such an outcome will often depend on **trading off various aspects of provision against one another**<sup>171</sup>—for instance, claims for spousal support or a share in pension rights or in the family business might be exchanged for an additional share of the family home or other property. This type of trade-off may prove highly dangerous under the new jurisdictional rules, as the court ruling on one aspect of provision may have no overview or understanding of what has been determined elsewhere. Indeed, under the relevant applicable law, such intended exchanges may be entirely irrelevant to the case at issue. This in turn undermines the overall standard of provision.”

A Slovakian interviewee highlighted the issue that the Maintenance Regulation grants the same court jurisdiction that has jurisdiction in matters of parental responsibility. It is possible that a court has jurisdiction under Article 12 of the Brussels IIa Regulation, but not under the Maintenance Regulation. This would arise in cases where Article 12(1) does not apply. Under the Brussels IIa Regulation, the court could in that case only decide on matters of divorce. Under Slovak law, matters relating to breaking the marriage link, maintenance and parental responsibility have to be decided in one proceeding. However, according to the Slovakian interviewee, as Article 12(1) prohibits jurisdiction in matters of parental responsibility, this is not possible. The interviewee stressed that in the Slovak judicial system, the concept of *forum non conveniens* does not exist, so as the courts have to exercise jurisdiction. This has led to confusion in the past.

According to a German interviewee, there is a need to allow couples that are not married to decide on prorogation of jurisdiction in accordance with Article 12 in cases where **maintenance** proceedings are on-going.

Our national expert for Germany pointed to **difficulties in relation 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** in relation to **provisional measures** under Article 20 of Brussels IIa.. He stated that as Article 20 has priority over protection measures adopted under Regulation No.

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<sup>170</sup> Emphasis added.

<sup>171</sup> Emphasis added.

606/2013 (see Article 2 para 3 of that Regulation), there is a lack of clarification with regard to the type of measures that could be ordered provisionally under Article 20 in matrimonial matters.

Other procedures stemming from a divorce (maintenance, property consequences etc.) do not require a **declaration of enforceability**. Interviewees reported that maintaining this procedure for Brussels IIa does not make sense for citizens and hence creates frustration for them. A specialised French lawyer and some respondents to the public consultation<sup>172</sup> highlighted the problem that the **rules on jurisdiction** are not **harmonised across Union instruments in family law** (Brussels IIa, Rome III, Maintenance Regulation, etc.) The current situation with different criteria for determining jurisdiction is creating unnecessary complexity and often requires ad hoc solutions in practice. Similarly, a Spanish judge noted that habitual residence is used as the main criterion for jurisdiction under Rome III and the Maintenance Regulation, while the Brussels IIa Regulation provides a number of specific alternative (rather than hierarchical) grounds to determine jurisdiction in matrimonial matters (Article 3), and a general jurisdiction rule based on the habitual residence of the child (Article 8) for matters of parental responsibility.

Some interviewees indicated that the fact that the **choice of court** is not possible under the Brussels IIa Regulation is inconsistent with other EU instruments. A Bulgarian interviewee indicated in particular the inconsistency of there being possibilities for choosing the court in other situations, but not for divorce. Indeed, 85% of the respondents to the public consultation<sup>173</sup> complained that the Regulation does not include the possibility for spouses to choose the court responsible by common agreement.

The national expert for Croatia noted that **many judges** in Croatia are **not sufficiently trained in differentiating the sectoral scope of application of the various Union instruments**. He explained that all the judges finished law school at a time when EU law was not part of the curricula.

### 3.2.2 Interrelationships between the Regulation and relevant Conventions

*Despite the rules laid down in Article 60 on relations with certain multilateral conventions, the interrelationship of the Brussels IIa Regulation with international conventions and bilateral agreements appears still to be very complex. In some cases it is not fully clear for practitioners which instrument applies and there are conflicting provisions/interpretations, which are hampering the practical operation of the Brussels IIa Regulation.*

While Article 59 provides for general guidance on the **relationship with other instruments**, Article 60 specifies that the Brussels IIa Regulation shall take precedence in relation to the specific Conventions it lists.

It has been argued that – despite the rules laid down in Article 60 – it is in some cases not fully clear which instrument to apply<sup>174</sup>. Indeed, the national experts of BG, DE, ES, HR, IE, IT, LU, LT and SE

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<sup>172</sup> This point is referred to with the general term “some” due to the fact that it cannot be accurately quantified. It was repeated on a general level across the body of responses to different open questions of the public consultation.

<sup>173</sup> i.e. 139 of 163 respondents.

<sup>174</sup> Dieter Martin notes that conflicts and difficult questions of competence have arisen with the Hague Conventions. See ‘Is Unification of Family Law Feasible or even Desirable?’ in: *Towards a European civil code*, (2011), p. 429-458

reported some **lack of clarity, conflicting provisions** or **practical difficulties** in relation to the interrelationship of the Brussels IIa Regulation and other instruments in their countries.

An issue relating to the **1961 Hague Convention** on the protection of minors was, for example, reported by the national expert for Germany. According to Article 60(a) the Regulation has priority over the Hague Convention on the protection of minors, but only “*between the Member States*”. The interpretation of this rule is controversial in German legal literature if the Contracting State of the Hague Convention involved is not an EU Member State.<sup>175</sup> The problem is particularly relevant in the relationship between Germany and Turkey.

In this regard, the French expert pointed out that the Convention might be applicable under a residual competence rule under Article 14 of the Brussels IIa Regulation if third states are involved. However, there was also one case where the courts used the Convention as a basis for jurisdiction although the habitual residence of the child was in France.

Furthermore, the national expert for Luxembourg concluded that five cases from 2013<sup>176</sup> demonstrate that given the **fragmentation of the private international law rules in different instruments**, Luxembourg courts had to apply Portuguese law to the divorce and Luxembourg law to parental responsibility matters. This fragmentation and the **lack of synchrony between the laws applicable make the proceedings more complex for the parties and the practitioners, as well as the courts**. More precisely, the five cases reported dealt with the interrelationship between the Brussels IIa Regulation and the **1961 Hague Convention**.

In all the cases, Luxembourg courts had jurisdiction over parental responsibility issues pursuant to Article 12 of the Brussels IIa Regulation. In other words, the Luxembourg courts had jurisdiction over both matrimonial and parental responsibility matters. As for the law applicable to divorce, the Luxembourg courts ruled that pursuant to Luxembourg conflict-of-law rules, Portuguese law should apply (as the law of the nationality of both spouses).

With regard to the law applicable to custody matters, the Luxembourg Courts expanded on the interrelationship between the 1961 Hague Convention and the Brussels IIa Regulation. Firstly, the Courts of First Instance referred to Article 60 of the Brussels IIa Regulation, which states that the Regulation should prevail over the 1961 Hague Convention. Secondly, the Luxembourg Court of First Instance mentioned the scope of each instrument and emphasised the fact that the Brussels IIa Regulation does not contain rules on the applicable law. Consequently, the Luxembourg court ruled that the **prevalence of the Brussels IIa Regulation did not apply to the provisions on the law applicable established by the 1961 Hague Convention**. As a result, Article 2 of the 1961 Hague Convention applied to determining the law applicable to parental responsibility, which was determined to be Luxembourg law.

With regard to the **1980 Hague Convention**, 51%<sup>177</sup> of respondents to the public consultation were of the view that the rules governing its relationship with the Regulation do not work satisfactorily. Respondents pointed out that there is room for improvement in particular by simplifying the rules,

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<sup>175</sup> Hausmann, IntEuSchR B No. 255, 256

<sup>176</sup> Tribunal d'arrondissement de Luxembourg, 13 June 2013, case no 124754; Tribunal d'arrondissement; 13 June 2013, case no 130507; Tribunal d'arrondissement, 13 June 2013, case no 101915; Tribunal d'arrondissement de Luxembourg, 4 July 2013, case no 122093; Tribunal d'arrondissement de Luxembourg, 11 July 2013, case no 142027 and 1142633; Tribunal d'arrondissement de Luxembourg.

<sup>177</sup> i.e. 76 of 148 valid responses.

that confusion arises with a parallel reading of the two instruments. A number of respondents mention that the rules in relation to return orders are particularly unclear between the two instruments. It was also pointed out that the Regulation suffers from the absence of up-to-date practical guidance which takes into account the case law which has been established in this area. The national experts (BG, HR, LT, SK, UK) and stakeholders interviewed also identified issues relating to the application of the instruments (implying that mistakes have arisen in application due to a lack of knowledge on the part of practitioners. According to our Bulgarian national expert, **there were cases<sup>178</sup> where Bulgarian courts have disregarded Article 60 of the Brussels IIa Regulation and applied the 1980 Hague Convention** without taking into consideration the fact that the case involved two EU Member States and the factual situation occurred in 2013, i.e. when the Republic of Bulgaria was already a EU Member State. Similar observations were made by the Slovakian and French<sup>179</sup> national expert.

**Case example: Interrelationship between Brussels IIa and the 1980 Hague Convention (Bulgaria)**

The national expert for Bulgaria reported that some Bulgarian courts disregard Article 60 lit. e of the Brussels IIa Regulation and apply the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

In one case (*Decision № 6011/02.08.2013, Case № 5581/2013, Sofia City Court*), the court did not take into consideration the fact that the case was connected to two EU Member States (Bulgaria and Spain) and that the factual situation occurred after the accession of the Republic of Bulgaria to the EU. The case concerned a child abduction, where the mother – a Bulgarian national residing in Spain, moved her child from Spain to Bulgaria without the consent of his father, a Spanish national with habitual residence in Spain.

The Bulgarian court not only disregarded the application of Brussels IIa, but also did not take into consideration the hierarchy and the ratio between national legislation, the EU acts and the general international treaties. As a result, instead of applying first the EU act (i.e. the Brussels IIa Regulation), the court applied the Child Protection Act of Bulgaria “*in connection with*” (quotation) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Obviously, the court should not have applied the Hague Convention but the Regulation in view of Article 60 lit. e of the Brussels IIa Regulation. When referred to the Brussels IIa Regulation, the court again referred first to the Child Protection Act of Bulgaria “*in connection with*” the Brussels IIA Regulation.

The same approach was taken in *Decision № 6019 /02.08.2013, Case № 4848/2013, Sofia City Court*, and a similar approach was taken in *Decision № 6168/14.08.2013, Case № 3043/2013, Sofia City Court*, with an almost identical factual situation involving a child abduction between Bulgaria and Belgium which took place after 2009.

Similar observations were made by the Slovakian expert as well as a German judge interviewed.

Related to these issues, the Lithuanian and the UK national experts noted that the precedence of the Regulation was not sufficiently clear for practitioners. This was supported by the expert for the UK. He indicated that Nigel Lowe, a legal scholar, had identified certain ambiguities. As Lowe comments<sup>180</sup>, the two fundamental questions of whether or not the Brussels IIa Regulation applies on the basis of Article 60(e) and, if so, how, are not always straightforward. In terms of jurisdiction, the Brussels IIa Regulation can apply to children who are habitually outside the EU.

In terms of how the Brussels IIa Regulation might apply, questions arose whether it is even permitted to use the Hague Convention to enforce a return order. In contrast to this perception, other experts were of the opinion that the Regulation is clear on this matter (e.g. CY, HR).

<sup>178</sup> Decision № 6011/02.08.2013, Case № 5581/2013, Sofia City Court, Decision № 6019 /02.08.2013, Case № 4848/2013, Sofia City Court, Decision № 6168/14.08.2013, Case № 3043/2013, Sofia City Court.

<sup>179</sup> Civ 1, 29 February 2012 n°11-15613.

<sup>180</sup> *International Family Law* [2013] pp. 114-118.

Our Irish national expert indicated that the Irish court faced difficulties in one case because the father did not have custody rights within the meaning of Article 3 of the Hague Convention, but did have custody rights under the Brussels IIa Regulation, as the latter is to be interpreted in the light of Article 8 of the European Convention on Human Rights (ECHR).

In 2010, the Austrian Supreme Court rendered a judgment on the impact of a provisional measure within the meaning of Article 20 of the Brussels IIa Regulation – taken in the Member State where the child is actually resident – on the enforcement according to the Hague Convention on child abduction of 1980.<sup>181</sup> Generally, custody decisions are prohibited in the state of enforcement (Article 16 Hague Convention on child abduction of 1980). If such a decision is rendered nonetheless, this decision does not constitute grounds for refusing enforcement (Article 17 Hague Convention on child abduction of 1980). According to the Supreme Court’s case law, this provision also applies if provisional measures within the meaning of Article 20 of the Brussels IIa Regulation are taken in the Member State of enforcement. Hence, such provisional measures do not hinder the enforcement of a decision according to the Hague Convention on child abduction of 1980.

With regard to the **1980 Hague Convention on the Civil Aspects of International Child Abduction**, a few respondents to the public consultation highlighted an issue relating to the coordination between Article 11(4) of the Brussels IIa Regulation and Article 13 of the Hague Convention. An academic from the UK highlighted the fact that, while 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, the rules set out by Article 11(4) of Brussels IIa Regulation on refusing a return application are not sufficiently clear. The respondent stated that the automatic return of the child set by Article 11(4) should therefore be interpreted as a less rigid principle as the child’s welfare still has to be safeguarded. A judge from Austria stressed that, to prevent the return of the child from being ordered even though it could put the child at risk, the return cannot be ordered automatically.<sup>182</sup>

In relation to the **1996 Hague Convention**, 46%<sup>183</sup> of respondents to the public consultation indicated that the rules governing its relationship with the Regulation do not work satisfactorily. Conflicts were also outlined by the national expert for Germany regarding cases in which the child moves from a participating state of the Brussels IIa Regulation to a state that does not apply the Brussels IIa Regulation, but the Hague Convention. If, for example, a Danish child whose habitual residence is in Germany moves to Denmark after one parent has initiated legal proceedings on parental responsibility before a German court, jurisdiction continues to lie with the German court under Article 61 lit. a and Article 8 para 1 of the Brussels IIa Regulation. Under Article 5 para 2 of the Hague Convention, on the other hand, the Danish courts have jurisdiction as soon as the child has established habitual residence in Denmark. Therefore, Germany by relying on Article 8 para 1 of the Regulation and the principle of *perpetuatio fori*, violated its international obligations to Denmark when ratifying the Hague Convention.<sup>184</sup> The same issue was raised by the French national expert.

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<sup>181</sup> Judgment of 11.02.2010, Oberster Gerichtshof, 5 Ob 260/09k.

<sup>182</sup> To support his point, this respondent to the public consultation mentioned the case *Neulinger and Shuruk vs. Switzerland* of the ECtHR, stating that the return of the child cannot be ordered automatically, and that the effects of the time limit elapses since the child moved to another country.

<sup>183</sup> I.e. 65 out 142 valid responses.

<sup>184</sup> See Hausmann, IntEuSchR B No. 260 with further references to the German legal debate.

Similarly, a representative of the Czech Ministry of Justice noted that the Brussels Ila principle of *perpetuatio fori* is not recognised in the 1996 Hague Convention – a situation that may lead to jurisdictional conflicts.

The Swedish expert also identified difficulties. He raised the question as to which instrument should be used to transfer a case to a court of a third state better placed to hear the case when the child is habitually resident in a Member State. Article 15 of the Regulation only allows for a transfer to a court of another Member State. Article 10 of the 1996 Hague Convention would allow to transfer a case to third state that has ratified the Convention. However, according to Article 61 of the Regulation, the 1996 Hague Convention should not apply, as the Brussels Ila Regulation takes precedence.

A Romanian expert stated that the **non-ratification of the 1996 Hague Convention by Italy** is creating many problems in practice when it comes to the establishment of the applicable law. In such cases, Romanian courts apply Romanian law, which may be less predictable for the parties.

While a large majority of national experts did not identify any **other issues relating to the relationship with other legal instruments**, the national experts for BG, HR and SK pointed to practical difficulties linked to the application of bilateral agreements and the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

More specifically, according to the national experts for Croatia and Slovakia, there is very often uncertainty as to whether **bilateral conventions with third countries** regulating jurisdiction in matrimonial and parental responsibility matters can be applied. For instance, Croatia has ratified numerous bilateral agreements with neighbouring non-EU States which do not clearly differentiate which one is applicable. In a case heard by the Court of First Instance of Rijeka<sup>185</sup>, the court first found its grounds in a bilateral agreement, and then shifted over to a multilateral agreement.

In Bulgaria, some lack of clarity emerged about the interrelationship between the Brussels Ila Regulation and the **Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents**.

**Case example: Interrelationship between Brussels Ila and the Apostille Convention (Bulgaria)**

In Bulgaria, the Supreme Administrative Court (*Decision № 15903/12.12.2012, Case No 4237/2012*) held that the certificate attached to a foreign divorce decision of a court of a Member State in conformity with Article 39 of the Brussels Ila Regulation (which is a standard form set out in Annex I) should bear an *apostille* (i.e. an international certification comparable to notarisation in domestic law). The Court correctly applied Article 21 para 1 of the Regulation and did not adopt any special procedure for the recognition of the decision in question. Furthermore, it acknowledged that Article 21 should apply in conformity with Article 37. As Article 52 of the Regulation does not include certificates (referred to in Article 39) in the list of documents that do not need legalisation or other similar formalities (documents referred to in Articles 37, 38 and 45), the Court inferred that in conformity with the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (5<sup>th</sup> October 1961, The Hague, the “Apostille Convention”) this certificate needs to bear an apostille. The Court substantiated this by further underlining that the Brussels Ila Regulation does not exempt certificates under Article 39 of the Regulation from the requirement for an apostille and that all EU Member States are parties to the Apostille Convention. As a result, the divorced parties were forced to apply for an apostille in the Member State of origin of the certificate.

<sup>185</sup> No. P.-1278/13 of 10 October 2013. – final.

### 3.2.3 Interrelationship with the Nordic Convention

***No major practical difficulties were identified in interrelationship with the Nordic Convention have been identified.***

The **Nordic Convention** (referred to in Article 59 of the Brussels IIa Regulation) could potentially impact on national procedures in Sweden and Finland.

While the national expert for Finland did not identify any practical difficulties, the national expert for Sweden noted that the **rules of jurisdiction in the Nordic Convention**, in accordance with the requirement in Article 59 (2)(c), are **modelled on the previous Brussels II Regulation**, i.e. Regulation 1347/2000, and **only cover decisions handed down in connection with a divorce decision**. The Nordic Convention needs to be amended to reflect the present wording of the Brussels IIa Regulation.

According to the experts interviewed and stakeholders in Sweden and Finland, no practical issues have, however, been identified in relation to the Nordic Convention. A Swedish judge pointed out, in particular, that Nordic decisions are generally enforced without a declaration of enforceability.

### 3.3 Effectiveness

This section presents the findings on the **effectiveness** of the Brussels IIa Regulation at the level of the specific and general objectives.

The following evaluation questions have guided this work, and are dealt with in the sub-sections below:

- To what extent have the core objectives been achieved?
- Is the Regulation applied smoothly in the Member States?

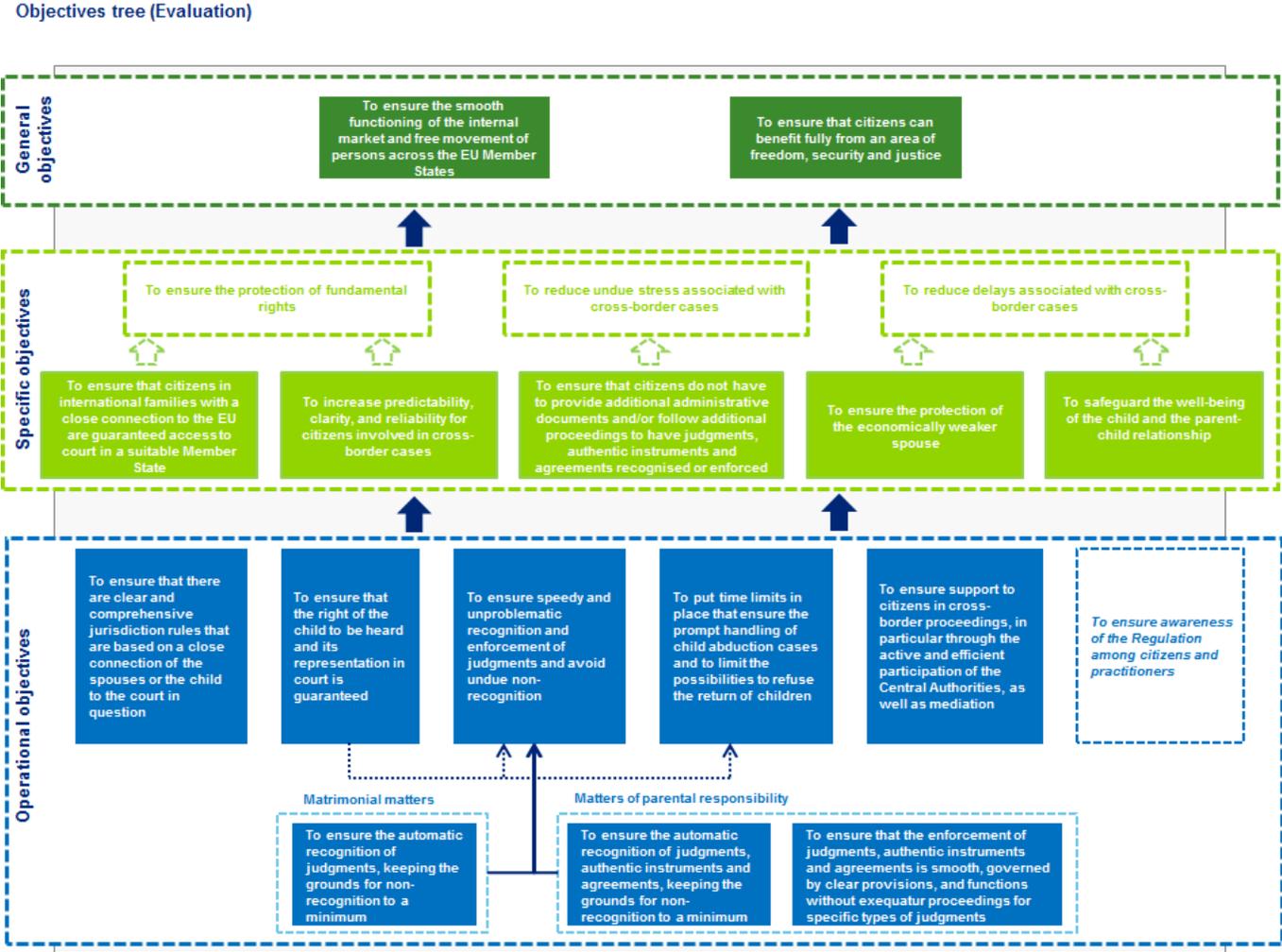
A systematic analysis of the Brussels IIa Regulation's core objectives and its ability to achieve these guided the assessment of the instrument's effectiveness. The **core objectives** of the Brussels IIa Regulation were identified at three levels:

- **General objectives** are derived from Treaty-based goals (and therefore constitute a link with the existing policy-setting) at the level of impact indicators.
- **Specific objectives** relate to the specific domain and nature of the intervention under consideration. The specific objectives correlate with result indicators. Defining these is also crucial as they set out in detail what the Commission wants to achieve with the intervention.
- **Operational objectives** relate to deliverables or actions and have a close link with output indicators.

The figure below outlines the objectives identified, illustrated by means of an 'objectives tree'. The figure flows from bottom to top.

The assessment of effectiveness in this chapter is conducted at the level of the specific and general objectives. A more detailed analysis of this evaluation criterion, at the level of the operational objectives, is presented in Annex 1.

Figure 1: Objectives tree – Matrimonial matters and parental responsibility



Source: Deloitte

### 3.3.1 Achievement of the specific objectives

This section presents the findings on the **effectiveness** of the Brussels IIa Regulation at the level of the specific objectives. The table below displays the five specific objectives as well as the shortened denominations, which have been used as headings in the sub-sections below.

**Table 1: Specific objectives and their shortened denominations**

| Specific objective   | Shortened denominations  |
|--|--|
| <b>Specific objective 1: <i>To ensure that citizens in international families with a close connection to the EU are guaranteed access to court in a suitable Member State</i></b>                    | Access to court for citizens in international families with a close connection to the EU |
| <b>Specific objective 2: <i>To increase predictability, clarity, and reliability for citizens involved in cross-border cases</i></b>   | Predictability, clarity, and reliability for citizens involved in cross-border cases     |
| <b>Specific objective 3: <i>To ensure that citizens do not have to provide additional administrative documents and/or follow additional proceedings to have judgments recognised or enforced</i></b> | Smooth recognition and enforcement of judgments, authentic instruments and agreements    |
| <b>Specific objective 4: <i>To ensure the protection of the economically weaker spouse</i></b>   | Protection of the economically weaker spouse   |
| <b>Specific objective 5: <i>To safeguard the well-being of the child and the parent-child relationship</i></b>   | Well-being of the child and parent-child relationship                                    |

As depicted in the objectives tree in the previous section, the achievement – or potential barriers to the achievement – of these objectives in turn has an impact on the **protection of fundamental rights**, as well as the levels of **stress and delays faced by citizens**. Impacts on the other specific objectives related to the protection of fundamental rights, reduction in stress and delays, are dealt with in Annex 7. Impacts on the costs are dealt with in the section on efficiency (Section 3.4) and in Annex 7.

The analysis of the achievement of the specific objectives presented in this chapter builds on the detailed analysis that was carried out at the level of the operational objectives (presented in Annex 1). For each of the operational objectives, a number of legal issues were identified, which hamper the achievement of the operational objectives and, in turn, the specific objectives. The table below shows the link between the high-priority legal issues identified for each operational objective and the specific objectives of the Regulation. In addition, the table identifies whether the legal issues relate only to matrimonial matters, only to parental responsibility matters, if they are horizontal in character and thus refer to both, or if they refer to other specific issues (see the column ‘type of issue’). The legal issues listed below were identified to be particularly significant<sup>186</sup> and given high priority status throughout the analysis. The full list of legal issues identified is provided in Annex 1 of the present report.

For each of the high-priority legal issues in the table below, the specific objective which is most impacted has been identified and marked in dark green. Other specific objectives on which a legal issue has a clear, but lesser, impact are marked in light green. In the analysis of the achievement of the specific objectives that follows, a detailed discussion of each legal issue has been included only

<sup>186</sup> The criteria for defining the high priority issues were as follows: (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. The list of issues and their prioritisation were agreed with the European Commission. Please refer to the section “*What are the legal issues under the Regulation?*” in Annex 8 for an explanation of the methodological approach used for the identification and prioritisation of the issues affecting the application of the Brussels IIa Regulation.

under specific objective where the legal issue has been marked with dark green, in order to avoid repetition. Cross-references are provided within the sections to the other specific objectives.

**Table 2: Links between specific objectives, operational objectives and identified high priority 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  |  |  |   |  |   |
|  | Parental responsibility              | Different interpretations of the term ‘habitual residence’   |  |  |   |  |   |
|  | Horizontal issues                    | Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court   |  |  |   |  |   |
| 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)                          | Parental responsibility              | Different interpretations of the term ‘recognition’ leading to differing practices as to which judgments require a declaration of enforceability   |  |  |   |  |   |
|  |                                      | Exequatur proceedings are still in place for some types of   |  |  |   |  |   |

| 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) |
|  |   | 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) to (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 has been established in the return proceedings and possibly after a long time has passed |  |  |   |  |   |
|  | 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) | Cooperation between Central Authorities     | 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   |  |  |   |  |   |

| 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) |
| Operational objectives (OO)     | 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   |  |  |   |  |   |
| Information and awareness (OO6) | Horizontal issues                    | <b>Practitioners</b> are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions of the Brussels IIa Regulation   |  |  |   |  |   |
|                                 |                                      | <b>Citizens</b> 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 following sub-sections provide an overview of how the high-priority legal issues impact on the achievement of the specific objectives by causing various problems for citizens. A detailed legal analysis of all legal issues (i.e. of all levels of priority) is provided in Annex 1 on the achievement of the operational objectives.

The findings are based on the triangulation of data collected through various channels, including desk research, interviews, the expert panel, the 27 national reports produced by the network of national legal experts, a survey of Central Authorities, and the analysis of the responses to the European Commission's public consultation<sup>187</sup>. The relevant evidence is provided in Annex 1, while the present section focuses on the main insights and conclusions based on these sources.

Quantitative estimates are provided in the chapter "*Quantitative analysis and hypothetical cases*". Additional analysis on costs, delays, stress and fundamental rights is also provided for each hypothetical case in the same section.

For each specific objective, we present the following information:

- A first box (with a blue frame) about the following elements:
  - How the topic addressed is important for citizens;
  - How the Regulation addresses this topic;
- Then a summary of the main findings in a free text; and
- Finally a table analysing for each **high-priority legal issue** the link with the specific objective; we invite the reader to focus on the lines that are marked as "dark green", inasmuch as the "light green" ones are then further explained in another specific objective (following the logic of Table 2); cross-references for the light green ones are indicated in order to facilitate the search for information.

Access to court for citizens in international families with a close connection to the EU

#### How is the topic important for citizens?

**Citizens with a close connection to the EU who are in an international family conflict and want to obtain a divorce or a separation, or a ruling on parental responsibility expect to be granted access to a suitable court within the EU.** In this regard, the Charter of Fundamental Rights of the European Union<sup>188</sup>, in its Article 47 (Right to an effective remedy and to a fair trial) guarantees the access to justice as well as legal aid where necessary.

#### How does the Regulation address this topic?

The Brussels IIa Regulation ensures access to court for citizens in international families with a close connection to the EU through clear **rules on jurisdiction** in international disputes on matrimonial matters and matters of parental responsibility.<sup>189</sup>

In addition to ensuring the access to court through clear jurisdiction rules, the provisions of the Brussels IIa Regulation aim at providing **access to the most suitable court** for each specific case:

- In matrimonial matters, jurisdiction can be established based on different alternative grounds, which are linked to the spouses' current or former habitual residence or their nationality. The alternative grounds provide some flexibility to the spouses to file their case before the most suitable court.
- In matters of parental responsibility, jurisdiction is based on the criterion of proximity

<sup>187</sup> A detailed description of the study's methodology including the data collection activities is provided in the chapter "*Main Elements of the Methodology for the Evaluation and Impact Assessment of the Brussels IIa Regulation*".

<sup>188</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>

<sup>189</sup> In this regard, please also refer to the analysis regarding the specific objective "*Predictability, clarity, and reliability for citizens involved in cross-border cases*" of the Brussels IIa Regulation.

(i.e. the habitual residence of the child), subject to some flexibility. This ensures that the child’s view can be taken into account without the child having to travel, that procedures relating to the collection of evidence (e.g. situation reports) can be completed as quickly as possible, and that the court has an understanding of the situation in the Member State the child lives in.

Furthermore, the Regulation provides **possibilities for grouping or transferring cases to more suitable courts**.<sup>190</sup> Finally, Article 50 of the Brussels IIa Regulation aims to ensure that Member States provide **legal aid to those who need it**, thereby securing effective access to justice for vulnerable groups.<sup>191 192</sup>

While the existing provisions on jurisdiction and legal aid are ensuring effective access to (a suitable) court for citizens in international families with a close connection to the EU in a very large majority of cases<sup>193</sup>, three **legal issues** relating to **jurisdiction rules** are still leading to risks of citizens being excluded citizens from their fundamental right to access to a court within the EU or to situations, where the court that has been determined as having jurisdiction may not be the most suitable one to hear the case. The three legal issues are discussed in more detail in the table below.

**Table 3: High-priority legal issues under specific objective 1 “Access to court for citizens in international families with a close connection to the EU”**

| High-priority legal issues   |  | Specific objective 1: Access to court for citizens in international families with a close connection to the EU   |
|--|--|--|
| <b>Jurisdiction rules</b>  |  |  |
| The current jurisdiction rules do not sufficiently promote a common agreement between spouses              |  | As discussed further under specific objective 4 “Protection of the economically weaker spouse”, the <b>failure to enable the choice of court may prevent couples from access to the most suitable/convenient court</b> (from the parties’ perspective). <sup>194</sup>   |
| Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court |  | The jurisdiction rules of the Brussels IIa Regulation do not apply to families of different nationalities living in a third State. In these situations, <b>national rules are used to establish jurisdiction</b> . <sup>195</sup> In other words, the courts of the Member States may avail themselves of national rules of jurisdiction (so-called “ <b>residual jurisdiction</b> ”). <sup>196</sup> In matrimonial proceedings, residual jurisdiction rules may be applied if the <b>spouses have nationalities of different EU Member States and their place of residence in a third country</b> . For matters of parental responsibility, the rules on residual jurisdiction are relevant for <b>children who are EU citizens and have their</b> |

<sup>190</sup> A comprehensive analysis of these issues can be found in the sections “Ambiguities in the interpretation of the rules on prorogation of jurisdiction” and “Limited actual use of the possibility to transfer a case” in Annex 1.

<sup>191</sup> The provisions on legal aid are restricted to the main recognition and enforcement procedures: Article 21 (Recognition of a judgment), Article 28 (Enforceable judgments), Article 41 (Rights of access), Article 42 (Return of the child), Article 48 (Practical arrangements for the exercise of rights of access).

<sup>192</sup> A comprehensive analysis of this issue can be found in the section *Legal aid systems do not sufficiently take into account the specific needs and costs related to proceedings under the Brussels IIa Regulation* in Annex 1.

<sup>193</sup> A comprehensive analysis can be found in the section “Jurisdiction rules” in Annex 1.

<sup>194</sup> A comprehensive analysis of this issue can be found in the section “Jurisdiction rules applicable to matrimonial matters”, sub-section *The current set-up of jurisdiction rules does not sufficiently promote a common agreement between spouses* in Annex 1.

<sup>195</sup> Article 7 for matrimonial matters and Article 14 for parental responsibility

<sup>196</sup> A comprehensive analysis of this issue can be found in the section *Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court* in Annex 1.

### habitual residence in a third country.

The national rules of jurisdiction are not harmonised, but based on different criteria, such as nationality, residence or domicile.<sup>197</sup> 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 irrespective of residence. **In the other half, it is not possible for residents of third countries to bring proceedings in the Member States' jurisdiction.**<sup>198</sup> The issue is thus very sensitive, as in those countries where the latter situation applies, the groups referred to above (couples and children with nationality of an EU Member State but residence in a third country) **may potentially be excluded from access to a court in the EU**, although they might have a close connection to a Member State by means of their nationality.

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, it was not possible to identify any evidence on actual cases of this nature. Nonetheless, the respect of the fundamental right of access to justice (Article 47 of Charter of Fundamental Rights of the European Union) might be considered as jeopardised by the potential (i.e. theoretically possible) exclusion of certain groups of citizens to access to a court in the EU due to the non-harmonisation of rules on residual jurisdiction.

It is important to note that – unlike recent legislative instruments, such as the Maintenance Regulation or the Succession Regulation (650/2012) – the Brussels IIa Regulation does not provide for a *forum necessitatis*<sup>199</sup> – i.e. a forum which is provided to individuals to whom no other forum is available and where the dispute has a sufficient connection with the Member State concerned.<sup>200</sup> The absence of a *forum necessitatis* in the Brussels IIa Regulation in combination with the reliance on (non-harmonised) national rules to establish residual jurisdiction **may lead to**

<sup>197</sup> For an overview of the national rules on residual jurisdiction, please refer to the sub-section Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court of section “Horizontal issues” in the Chapter “Jurisdiction Rules” in Annex 1.

An overview of national rules on divorce prepared by the *European Judicial Network in Civil and Commercial Matters* is available at: [http://ec.europa.eu/civiljustice/divorce/divorce\\_ec\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_ec_en.htm)

<sup>198</sup> The national rules on residual jurisdiction were reviewed in a study commissioned by the European Commission in 2007: 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. For **matrimonial matters**, 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, LV, MT, NL, Scotland. 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). For **matters of parental responsibility**, the study found that citizenship of the child or of one parent is not a ground of jurisdiction in the following Member States: CY, DE, DK, FI, LV, MT, NL, PT, RO, Scotland, SE, SK, SI (however, the citizenship of both parents is a ground of jurisdiction). This information is subject to any legislative changes that may have occurred since 2007. An overview of national rules on divorce prepared by the *European Judicial Network in Civil and Commercial Matters* is available at: [http://ec.europa.eu/civiljustice/divorce/divorce\\_ec\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_ec_en.htm).

<sup>199</sup> 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 demanded 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.

<sup>200</sup> A comprehensive analysis of this issue can be found in the section *Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court* in Annex 1.

|  |  |
|--|--|
|  | situations where EU citizens are excluded from any jurisdiction on matrimonial matters and parental responsibility, i.e. do not have access to court in the EU. <sup>201</sup>   |
| Different interpretations of the term ‘habitual residence’ | As discussed further under specific objective 5 “ <i>Well-being of the child and parent-child relationship</i> ”, there are difficulties in applying the <b>concept of habitual residence of the child</b> . <sup>202</sup> Based on the vagueness of the concept, there can be situations in which proceedings are held in a Member State that is not the best placed to hear the case. This is <b>detrimental to the objective of ensuring effective access to the most suitable court</b> . |

Predictability, clarity, and reliability for citizens involved in cross-border cases

**How is the topic important for citizens?**

**When international married couples want to divorce or separate, or decisions must be made on the exercise of parental responsibility in international families, citizens expect predictable, clear and reliable rules as part of an internal market that is functioning effectively and a common judicial area.** Disputes on international family law issues are already very stressful for citizens and it is imperative that legal obstacles and ambiguity of applicable rules not cause further issues and stress.

**How does the Regulation address this topic?**

One of the core aims of the Brussels IIa Regulation is to offer EU citizens legal certainty and predictability in cross-border disputes through clear rules concerning jurisdiction (i.e. what court (in what country) is competent to handle the case), and the recognition and enforcement of judgments. The Brussels IIa Regulation provides a **comprehensive set of rules on international jurisdiction as well as recognition and enforcement of foreign judgments in matrimonial matters and matters of parental responsibility**. National substantive rules are not affected by the Brussels IIa Regulation.

Legal clarity, predictability and reliability are cross-cutting issues that concern all provisions of the instrument and are mainly ensured through detailed and unambiguous provisions, as well as coherent implementation in practice in all Member States. In some cases, additional clarifications have been provided through interpretations of the European Court of Justice (ECJ). In addition, to ensure support to citizens in cross-border proceedings relating to parental responsibility, all Member States have established **Central Authorities**. These bodies assist citizens in the understanding and use of the rules laid down in the Brussels IIa Regulation in specific cases of parental responsibility matters. Finally, various European Commission and Member State **soft measures** – such as training, information portals<sup>203</sup> or the publication of guides<sup>204</sup> and brochures – aim at improving the awareness and understanding of the functioning of the Brussels IIa Regulation among citizens and legal practitioners.

<sup>201</sup> Numerous stakeholders and experts as well as a large majority of the respondents to the European Commission’s public consultation (77%) noted that the absence of a “*forum necessitatis*” hampers legal certainty and the assurance of EU citizens’ fundamental right of access to court. Please refer to the section “*Quantitative analysis*” for an estimation of the number of citizens affected by this issue.

<sup>202</sup> See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term ‘habitual residence’* in Annex 1.

<sup>203</sup> See for instance European e-justice portal: [https://e-justice.europa.eu/content\\_family\\_matters-44-en.do](https://e-justice.europa.eu/content_family_matters-44-en.do)

<sup>204</sup> See for instance the European Commission’s practical guide for the application of the Brussels IIa Regulation, [http://ec.europa.eu/civiljustice/publications/docs/guide\\_new\\_brussels\\_ii\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/guide_new_brussels_ii_en.pdf)

There is broad agreement among experts and stakeholders that – compared to the situation before the enactment of the Brussels IIa Regulation – the Regulation has brought about increased predictability, clarity and reliability for citizens involved in international disputes in matrimonial matters and matters of parental responsibility. Establishing common rules on international jurisdiction and recognition and enforcement, has smoothed the resolution of such disputes.

Nonetheless, a **series of remaining legal issues** are negatively affecting the predictability, clarity, and reliability for citizens involved in cross-border cases. These issues are discussed in the table below.

**Table 4: High-priority legal issues under specific objective 2 “Predictability, clarity, and reliability for citizens involved in cross-border cases”**

| High-priority legal issues   | Specific objective 2: Predictability, clarity, and reliability for citizens involved in cross-border cases  |
|--|---|
| <b>Jurisdiction rules</b>  |   |
| Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court | As discussed under specific objective 1 “Access to court for citizens in international families with a close connection to the EU”, the Brussels IIa Regulation does not apply to families of different nationalities living in a third State. In these situations, national rules are used to establish jurisdiction (so-called “residual jurisdiction”). The national rules on jurisdiction are not harmonised, and in some Member States it is not possible for residents of third countries to bring proceedings in the Member State’s jurisdiction. In addition, the Brussels IIa Regulation does not provide for a <i>forum necessitatis</i> – i.e. a forum which is provided to individuals to whom no other forum is available and where the dispute has a sufficient connection with the Member State concerned. The different treatment in different Member States of residents of third states may lead to situations where it is not clear to EU citizens whether they have access to a court in the EU. The <b>uncertainty on whether their fundamental right of access to court in the EU is guaranteed</b> can be a significant source of stress for citizens. |
| Potential for ‘rush to court’/‘forum shopping’ on the basis of the alternative grounds of jurisdiction     | As discussed further under specific objective 4 “Protection of the economically weaker spouse”, the jurisdiction rules of the Brussels IIa Regulation <sup>205</sup> leave room for ‘rush to court’ or ‘forum shopping’ behaviour. <sup>206</sup> This behaviour <b>reduces predictability</b> , as spouses may feel pressured to act fast and file applications in different courts shortly after each other. This can be a significant source of stress for citizens.   |
| The current jurisdiction rules do not sufficiently promote a common agreement between spouses              | As discussed further under specific objective 4 “Protection of the economically weaker spouse”, the jurisdiction rules of the Brussels IIa Regulation currently do not provide for a possibility for spouses to choose the competent court by common agreement (choice of court) <sup>207</sup> <b>preventing couples from predetermining the jurisdiction of potential divorce proceedings</b> . This <b>creates uncertainty</b> on the applicable jurisdiction and the <b>risk of a rush to court in case of divorce</b> .  |
| Different interpretations of the term ‘habitual residence’   | As discussed further under specific objective 5 “Well-being of the child and parent-child relationship”, the <b>vagueness of the concept of the habitual residence of the child</b> has in some cases led to challenges regarding the determination of jurisdiction in cases relating to parental responsibility matters. <sup>208</sup> The <b>vagueness</b> of the concept  |

<sup>205</sup> Notably Article 3 and 19 of the Brussels IIa Regulation.

<sup>206</sup> A comprehensive analysis of this issue can be found in the section *Potential for rush to court/forum shopping on the basis of the alternative grounds of jurisdiction* in Annex 1.

<sup>207</sup> A comprehensive analysis of this issue can be found in the section *Jurisdiction rules applicable to matrimonial matters*, sub-section *The current set-up of jurisdiction rules does not sufficiently promote a common agreement between spouses* in Annex 1.

<sup>208</sup> See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term ‘habitual residence’* in Annex 1.

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|  | leaves room for <b>long debates</b> about it in court with <b>uncertain outcomes</b> . This may be very stressful for the parties involved.  |
| <b>Hearing of the child and its representation in court</b>  |  |
| 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 discussed further under specific objective 5 “ <i>Well-being of the child and parent-child relationship</i> ”, the vagueness of provisions on the hearing of the child and the differences in national standards in this regard have led to <b>reservations and refusals of the recognition and enforcement of certain judgments</b> , thus <b>standing in the way of the legal certainty and predictability for citizens</b> .   |
| Different practices relating to the representation of the child in court   | As discussed further under specific objective 5 “ <i>Well-being of the child and parent-child relationship</i> ”, the difficulties concerning the legal representation of the child in court are a source of <b>legal uncertainty for citizens due to different practices across the Member States and a lack of information on these practices</b> . The uncertainty for parents about whether and how their child will be represented in another Member State and how this will impact the court proceedings may be a significant source of stress.                    |
| <b>Recognition and enforcement</b>   |  |
| Different interpretations of the term ‘recognition’ leading to differing practices as to which judgments require a declaration of enforceability   | As discussed further under specific objective 3 “ <i>Smooth recognition and enforcement of judgments, authentic instruments and agreements</i> ”, there is currently <b>no uniform interpretation of the term ‘enforcement’</b> , leading to different practices in Member States on whether or not judgments require a declaration of enforceability. <sup>209</sup> On this basis, it is in some cases <b>difficult for citizens to predict whether or not they need go through exequatur proceedings</b> . <sup>210</sup>   |
| Exequatur proceedings are still in place for some types of judgments   | As discussed further under specific objective 3 “ <i>Smooth recognition and enforcement of judgments, authentic instruments and agreements</i> ”, the so-called <b>exequatur procedure</b> for the enforcement of judgments on the exercise of parental responsibility has been abolished for some types of judgments but pertains for others. This may lead to <b>contradictory and unclear situations</b> where a judgment refers to different aspects relating to parental responsibility that are governed by different procedures (e.g. access rights and custody). |
| 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                        | As discussed further under specific objective 3 “ <i>Smooth recognition and enforcement of judgments, authentic instruments and agreements</i> ”, some decisions on parental responsibility are never enforced because of <b>practical obstacles during enforcement procedures</b> . <sup>211</sup> For <b>citizens involved in cross-border cases on parental responsibility</b> , this is a <b>considerable factor of uncertainty</b> , as they <b>cannot be sure whether a judgment will eventually be enforced</b> .   |
| <b>Provisions specific to child abduction cases</b>  |  |

<sup>209</sup> A comprehensive analysis of this issue can be found in the section *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* in Annex 1.

<sup>210</sup> COM(2014) 225 final, p. 10.

<sup>211</sup> A comprehensive analysis of this issue can be found in the section *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* in Annex 1.

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| Difficulties relating to the time limit for return (i.e. not clear and not effective)   | As discussed further under specific objective 5 “ <i>Well-being of the child and parent-child relationship</i> ”, a <b>lack of clarity</b> exists on the application of the six weeks’ time limit. This may result in stress for citizens because they do not know when they can expect a wrongfully removed child to be returned.   |
| Questions on the practical application of Article 11(4) and ambiguity as regards the concept of ‘adequate arrangements’ under that provision  | As discussed further under specific objective 5 “ <i>Well-being of the child and parent-child relationship</i> ”, many experts and stakeholders reported that it is not clear how to interpret and apply the <b>concept of “adequate arrangements”</b> in Article 11(4). The <b>lack of clarity on the concept of ‘adequate arrangements’</b> and what arrangements need to be made to fulfil this criterion lead to significant legal uncertainty for citizens. There is no guideline regarding the procedural and substantive requirements. This leads to a situation where it is <b>difficult for the party to know whether the measures taken will be sufficient</b> . In addition, it is currently not clear who has to implement the measures, both from a practical and financial perspective. Finally, the <b>lack of precision of the Article leaves open the possibility of a refusal of return being legitimised</b> .  |
| 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                      | As discussed further under specific objective 5 “ <i>Well-being of the child and parent-child relationship</i> ”, in practice, <b>hurdles remain in connection with the actual enforcement of return orders</b> . <sup>212</sup> As enforcement procedures are subject to the law of the Member State of enforcement, the means of enforcement differ across Member States. In some Member States, <b>enforcement procedures can last for over a year</b> as enforcement courts re-examine the substance of the case, although return orders should be enforced immediately. In addition, the <b>actual enforcement of return orders is often delayed or not finalised at all</b> , leading to <b>serious doubts on the part of citizens with regard to the legal certainty, predictability and reliability of the instruments provided by the Brussels IIa Regulation</b> .   |
| <b>Support to citizens in cross-border proceedings by Central Authorities</b>   |  |
| Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children  | As discussed further under specific objective 5 “ <i>Well-being of the child and parent-child relationship</i> ”, <b>practical difficulties</b> have occurred regarding the <b>cooperation between Central Authorities and local authorities</b> . Given the practical roles of the latter authorities in cases on parental responsibility, <b>it is possible that cases are not handled correctly and/or that parents are not well informed</b> , e.g. on the possibilities for support offered by the Central Authorities. This can be a <b>significant source of uncertainty, delays and stress for citizens</b> .  |
| <b>Information and awareness</b>  |  |
| Practitioners are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions<br>Citizens are not sufficiently aware of the content of the Regulation and its implication for international | Despite the measures taken by the European Commission and the Member States – such as training, information portals <sup>213</sup> or the publication of guides <sup>214</sup> and brochures – aiming at improving the <b>awareness and understanding of the functioning of the Brussels IIa Regulation among citizens and legal practitioners</b> , several interviewees noted that awareness levels among citizens and legal practitioners are low. <sup>215</sup> <b>Citizens are often not aware of their rights and obligations</b> under the Brussels IIa Regulation. For instance, parents are very often not aware that they cannot bring their child to their country of nationality without the consent of the other parent. <b>Insufficient information and awareness on the part of citizens can lead to unintended illegal behaviour</b> (e.g. child abduction) and result in legal proceedings. Furthermore, it was reported that even many lawyers, judges and public child |

<sup>212</sup> A comprehensive analysis of this issue can be found in the section *Problems regarding the actual enforcement of return orders* in Annex 1.

<sup>213</sup> See for instance European e-justice portal: [https://e-justice.europa.eu/content\\_family\\_matters-44-en.do](https://e-justice.europa.eu/content_family_matters-44-en.do)

<sup>214</sup> See for instance the European Commission’s practical guide for the application of the Brussels IIa Regulation, [http://ec.europa.eu/civiljustice/publications/docs/guide\\_new\\_brussels\\_ii\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/guide_new_brussels_ii_en.pdf)

<sup>215</sup> A comprehensive analysis of issues related to the information and awareness of citizens and legal practitioners can be found in the section “*Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States*”.

proceedings on matrimonial matters, matters of parental responsibility or child abduction

protection services are not aware of the basic provisions of the Brussels IIa Regulation, e.g. the automatic recognition of (most types of) judgments. Courts outside the capital are also generally in need of information. In some cases, this leads to non-application or misapplication of (certain provisions of) the Regulation and is thus detrimental to legal certainty and predictability for citizens.

## Smooth recognition and enforcement of judgments, authentic instruments and agreements

### How is the topic important for citizens?

Citizens involved in cross-border conflicts need to hold proceedings in a Member State other than the Member State where they live. If a judgment is taken relating to divorce or matters of parental responsibility, citizens need this judgment to be valid ('recognised') also in the Member State where they live. Otherwise, several practical consequences of a decision cannot be implemented. The change of status caused by a divorce will need to be registered by the competent authorities in the Member State and civil status records need to be updated. In addition, a divorce potentially has consequences, for example, in relation to property or to taxes. A judgment on parental responsibility may specify who will be the main holder of custody rights, where the child will live, and the modalities of visits by the other parent. In some cases relating to parental responsibility matters, judgments do not only need to be recognised, but also enforced in order to ensure that all parties comply with the decision. In addition, it is possible that decisions relating to parental responsibility are not specified in a judgment, but in a different form. For example, visiting rights and arrangements could also be agreed in written form as a result of mediation sessions. Such agreements are referred to as 'authentic instruments and agreements'. Cross-border family conflicts are already very stressful and costly for the parties involved, and sometimes take several years. It is thus of great importance for citizens that the process of recognising, and possibly enforcing, a judgment be as smooth as possible and not entail any additional delays or additional costs.

### How does the Regulation address this topic?

The need for smooth recognition and enforcement across the EU is addressed by the Regulation in different ways. The Regulation states that, in line with the general priorities of the EU<sup>216</sup>, judgments, authentic instruments and agreements should as far as possible be recognisable and enforceable without extensive intermediate procedures.<sup>217</sup> For both matrimonial matters and matters of parental responsibility, the following applies with regard to the recognition of judgments:

- Judgments are automatically recognised and the effects, such as updating the civil status records, can be initiated without any additional procedure or request being necessary;<sup>218</sup> and
- There are only a few grounds for which the recognition of judgments may be refused in order to ensure that the majority of judgments are recognised without any difficulties.<sup>219</sup>

The rules on enforcement are only relevant for matters of parental responsibility, because the

<sup>216</sup> The Tampere European Council, which took place before the adoption of the Regulation in 1999, underlined that certain judgments on family matters should be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement'. (see [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm))

<sup>217</sup> See Recitals (22) - (24).

<sup>218</sup> Article 21.

<sup>219</sup> Articles 22 and 23.

aspects of matrimonial matters that are covered by the Regulation do not need to be enforced.<sup>220</sup> For parental responsibility matters, the Regulation aims to ensure that the enforcement of judgments, authentic instruments and agreements is as smooth as possible:

- In some cases, it is necessary for citizens to apply to a court that can ‘declare a judgment enforceable’. With such a declaration, a judgment can then be implemented in practice. The Regulation streamlines this procedure to ensure that it is as fast as possible and that most judgments will be enforced due to a limited number of grounds for refusing enforcement;<sup>221</sup> and
- For specific types of decision, including on rights of access and specific decisions on the return of the child, intermediate proceedings on enforcement have been abolished. These decisions are thus immediately enforceable on the basis of a certificate issued by the court that is responsible for the judgments.<sup>222</sup>

The evidence collected as part of this study suggests that the Brussels IIa Regulation has made it easier for citizens to have judgments recognised and enforced across borders. Administrative costs related to procedures for recognition and enforcement of judgments (e.g. court fees, legal advice, costs for submission of documents) and delays related to lengthy procedure for the recognition and enforcement have been reduced. Most stakeholders consider that the automatic recognition of *all* judgments and the abolition of intermediate proceedings on enforcement (exequatur) for *most* judgments are very valuable improvements introduced by the Brussels IIa Regulation. In addition, the fact that there are only few grounds for refusing the recognition or enforcement of a judgment is welcomed. The national experts and practitioners consulted could identify no or few cases, where the recognition of a judgment was refused and indicated that the majority of judgments are recognised.

However, some issues remain and lead to situations in which citizens still need to go through intermediate proceedings to have judgments recognised or enforced. This is associated with additional costs, delays and stress for citizens. While data on costs and delays in proceedings are scarce, it is estimated that the **costs** of exequatur proceedings that are not appealed is around EUR 1,000. Where they are appealed, the associated costs are higher.<sup>223</sup> As far as potential **delays** in the proceedings are concerned, data on the Brussels I Regulation shows that the average duration of exequatur proceedings ranges from one week in Austria to up to seven months in Greece. In general, however, the majority of delays in legal procedures occur where one of the parties appeals. The average length of such appeal procedures ranges from one to two months in England and Wales to up to three years in Malta.<sup>224</sup> On this basis, citizens face **stress** because they need to put additional effort into having their judgments recognised or enforced, and cannot be certain of the outcome. In cases related to matters of parental responsibility, the delays can also negatively affect the **well-**

<sup>220</sup> Other aspects that might be related to a divorce or legal separation and that might need enforcement are, for example, decisions on the property of spouses or assets. These aspects are not covered by the Regulation.

<sup>221</sup> Chapter III, Section 2 of the Regulation.

<sup>222</sup> Chapter III, Section 4 of the Regulation.

<sup>223</sup> These estimates are based on the 2007 Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union (available at: [https://e-justice.europa.eu/content\\_costs\\_of\\_proceedings-37-en.do](https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do)) and on Expert judgment.

<sup>224</sup> This is based on *European Commission; Commission Staff Working Paper SEC(2010) 1547 final* (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1547:FIN:EN:PDF>).

**being of the child** (cf. the introduction to the specific objective 5 “*Well-being of the child and parent-child relationship*”).

The main legal issues that affect this specific objective and the associated problems for citizens are discussed in the table below.

**Table 5: High-priority legal issues under specific objective 3 “*Smooth recognition and enforcement of judgments, authentic instruments and agreements*”**

| High-priority legal issues   |  | Specific objective 3: Smooth recognition and enforcement of judgments, authentic instruments and agreements |
|--|--|---|
| <b>Hearing of the child and its representation in court</b>  |  |   |
| 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) | <p>As discussed further under specific objective 5 “<i>Well-being of the child and parent-child relationship</i>”, the Regulation is based on the principle that in cases involving a child, that child’s views are to be taken into account.<sup>225</sup></p> <p>In particular, it is possible for Member States to refuse to recognise or enforce a judgment<sup>226</sup> on the grounds that the child was not given an opportunity to be heard.<sup>227</sup> The fact that the assessment of whether a child should be heard in a specific case (and how) may differ from court to court<sup>228</sup> has led to several cases where the <b>recognition of a judgment was refused</b> based on the fact that the child was not given an opportunity to be heard and make his/her views known in an effective way. This causes <b>delays and stress</b>.</p>  |   |
| <b>Recognition and enforcement</b>   |  |   |
| Different interpretations of the term ‘recognition’ leading to differing practices as to which judgments require a declaration of enforceability   | <p>As outlined in the Commission’s application report on the Regulation and supported by the stakeholders we consulted, <b>there is currently no uniform interpretation of the term ‘recognition’</b>.<sup>229</sup> Practitioners appear to have difficulties in distinguishing between the terms 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. Therefore, certain Member States may require a declaration of enforceability of a decision before it can be enforced whilst others recognise decisions automatically.</p> <p>This has implications for the question whether citizens can benefit from the automatic recognition of the decision or if they need to initiate proceedings in order to have the decision recognised. 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, practices vary depending on the Member State. Some Member States only require the recognition of the judgment attributing the guardianship, whilst others consider that issuing the passport is an enforcement act and thus require citizens to go through intermediate proceedings (a declaration of enforceability of the guardianship decision) before the passport can be issued.<sup>230</sup></p> |   |

<sup>225</sup> Recital (19), Brussels IIa Regulation.

<sup>226</sup> A comprehensive analysis of this issue can be found in the 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)* in Annex 1.

<sup>227</sup> For example, if the judgment is considered to have been “*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*”, Article 23(b). See also Article 41(2)(c), Article 42(1)(a) Brussels IIa Regulation.

<sup>228</sup> Examples of points where the assessment of two courts have differed as to if and how a child should be heard are provided under specific objective 5 “*Well-being of the child and parent-child relationship*”.

<sup>229</sup> A comprehensive analysis of this issue can be found in section *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* in Annex 1.

<sup>230</sup> COM(2014) 225 final, p. 10.

|  |  |
|--|--|
|  | <b>Additional proceedings</b> may thus need to be initiated, depending on the Member State concerned. Citizens may face <b>costs and delays</b> associated with such procedures (cf. the introduction of this section).  |
| Exequatur proceedings are still in place for some types of judgments   | The fact that there are still <b>intermediate procedures for declaring some kinds of judgments enforceable hinders the smooth enforcement of judgments</b> . Several national experts and practitioners regretted this. <sup>231</sup> Although such proceedings are a way of exercising control, e.g. on whether a judgment is indeed in line with the best interests of the child, this controlling function is applied only to a limited extent, because in some Member States the enforcement of judgments is not decided on by judges, but rather by administrative personnel at courts or authorities. However, such proceedings cause problems with smooth enforcement by creating <b>significant costs and delays for citizens</b> , because there are still administrative formalities and judicial procedures to go through. As explained in the introduction to this section, delays can be quite significant depending on the Member State and circumstances of the case. There are many factors that hinder the expeditious conduct of such proceedings in the Member States. Obtaining the documents and, in particular, translations can take a long time.  |
| 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  | Some decisions on parental responsibility are <b>never enforced due to practical obstacles during enforcement procedures</b> . <sup>232</sup> First, <b>delays</b> can ensue <b>at the stage of enforcement proceedings</b> . In particular, it was reported that the substance of judgments is sometimes reviewed at this stage. This is not in line with the Regulation, as Article 31(3) states that <i>under no circumstances may a judgment be reviewed as to its substance</i> . In addition, <b>appeals concerning</b> a declaration of enforceability can cause significant delays if they suspend enforcement. Second, <b>delays</b> may ensue <b>due to a lack of resources in the Member State</b> or because the parties involved, which could be court bailiffs, public social or welfare authorities, law enforcement authorities or other parties such as psychologists or mediators, are <b>not cooperating effectively</b> . For citizens involved in cross-border cases on parental responsibility, this is a <b>factor of uncertainty</b> , as they cannot be sure whether a judgment will eventually be enforced. If a judgment is not enforced, the efforts put into the legal disputes will have been in vain. In addition, there are implications for the <b>well-being of the child and the parent-child relationship</b> , e.g. if the <b>stressful</b> status of uncertainty about the arrangements of parental responsibility is prolonged. |
| <b>Provisions specific to child abduction cases</b>  |  |
| 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 | As discussed further under specific objective 5 “ <i>Well-being of the child and parent-child relationship</i> ”, particular obstacles <b>hindering the actual enforcement of judgments</b> <sup>233</sup> were reported <b>with regard to the return of the child</b> in cases of child abductions (where one of the parents moves abroad with the child without the other parent’s consent).   |
| <b>Information and awareness</b>   |  |
| <b>Practitioners</b> are not sufficiently aware of the Regulation, leading to  | As discussed further under specific objective 2 “ <i>Predictability, clarity, and reliability for citizens involved in cross-border cases</i> ”, there is a lack of awareness about the Regulation among practitioners. While the (automatic) recognition of judgments in  |

<sup>231</sup> A comprehensive analysis of this issue can be found in the section *Exequatur proceedings are still in place for some types of judgments* in Annex 1.

<sup>232</sup> A comprehensive analysis of this issue can be found in section *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* in Annex 1.

<sup>233</sup> A comprehensive analysis of this issue can be found in the section *Problems regarding the actual enforcement of return orders* in Annex 1.

the misapplication of certain provisions of the Brussels IIa Regulation

matrimonial matters and cases of parental responsibility functions well in practice, some practical issues, covering both matrimonial matters and matters of parental responsibility, were identified. These relate in particular to **ambiguities that have led to the Regulation being applied wrongly in the past**. For example, ambiguities exist with respect to the recognition of judgments: As noted above, the recognition of judgments and the updating of civil status documents should function automatically. However, in some Member States the provisions stipulating that recognition should be automatic<sup>234</sup> are interpreted differently way or not understood properly by the judges or public authorities responsible. As a consequence, there have been cases where citizens had to **produce additional documents to have a judgment recognised**, although this was not in line with the Regulation. Sometimes, such documents, which stem from a different Member State, also need to be translated to be considered valid. Thus, additional **costs** were incurred and the citizens faced **delays** as well as additional **stress**.

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<sup>234</sup> These include in particular Article 21.

## Protection of the economically weaker spouse

### How is the topic important for citizens?

**In the particularly stressful times of divorce or separation, or becoming adversaries in a parental responsibility case, the economically weaker spouse could be especially affected** (in addition to children, discussed under the separate specific objective 5). It is relevant in this regard that the Charter of Fundamental Rights of the European Union<sup>235</sup>, in its Article 47 (Right to an effective remedy and to a fair trial) stipulates that “*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.*”

### How does the Regulation address this topic?

The Brussels IIa Regulation contributes to the protection of the economically weaker spouse through **clear and fair rules on jurisdiction, and recognition and enforcement** in international disputes on matrimonial matters and matters of parental responsibility.<sup>236</sup> Such rules impede attempts to exploit the vulnerabilities of the economically weaker spouse, notably his/her relative difficulty in accessing professional legal advice. Furthermore, Article 50 of the Brussels IIa Regulation aims to ensure that Member States provide **legal aid to those who need it** in relation to some particularly important recognition and enforcement procedures<sup>237</sup> foreseen in the Regulation.

While the existing provisions on legal aid and the improved legal certainty and clarity for citizens (as compared to the situation before the enactment of the Regulation)<sup>238</sup> have contributed to the protection of the economically weaker spouse, **a series of legal issues** are still leading to situations where disadvantages persist. These legal issues are discussed in more detail in the table below.

**Table 6: High-priority legal issues under specific objective 4 “Protection of the economically weaker spouse”**

| High-priority legal issues   | Specific objective 4: Protection of the economically weaker spouse   |
|--|--|
| <b>Jurisdiction rules</b>  |  |
| Potential for ‘rush to court’/‘forum shopping’ on the basis of the alternative grounds of jurisdiction | The jurisdiction rules of the Brussels IIa Regulation <sup>239</sup> that allow for alternative grounds of jurisdiction, i.e. alternative possibilities on which courts are competent, have led to instances in which the spouses tried to beat each other in filing a claim in the Member State in which they expect the outcome will be most favourable to them (i.e. the so-called “ <b>rush to court</b> ” or “ <b>forum shopping</b> ” phenomenon). <sup>240</sup> Typically, <b>specialised legal advice is needed to take full advantage of the alternative grounds of jurisdiction (and rush to court/forum shopping) – a situation that may put the economically weaker spouse at a disadvantage, given that they may not be able to afford such advice.</b> <sup>241</sup> Indeed, rush to court/forum shopping is |

<sup>235</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>

<sup>236</sup> In this regard, please also refer to the analysis regarding the specific objective “*Predictability, clarity, and reliability for citizens involved in cross-border cases*” of the Brussels IIa Regulation.

<sup>237</sup> Article 21 (Recognition of a judgment), Article 28 (Enforceable judgments), Article 41 (Rights of access), Article 42 (Return of the child), Article 48 (Practical arrangements for the exercise of rights of access).

<sup>238</sup> A comprehensive analysis can be found in the sections “*Jurisdiction rules*” and “*Support to citizens in cross-border proceedings by Central Authorities*” in Annex 1

<sup>239</sup> Notably Articles 3 and 19 of the Brussels IIa Regulation.

<sup>240</sup> A comprehensive analysis of this issue can be found in the section *Potential for rush to court/forum shopping on the basis of the alternative grounds of jurisdiction* in Annex 1.

<sup>241</sup> N. A. Baarsma, *The Europeanisation of International Family Law* (Asser Press: 2011) 154

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|   | mainly exploited by wealthy spouses, who take advantage of legal advice to determine which court would entail the most advantageous outcome for them. <sup>242</sup>  |
| The current jurisdiction rules do not sufficiently promote a common agreement between spouses | The jurisdiction rules of the Brussels IIa Regulation currently do not provide for a possibility for spouses to choose the competent court by common agreement ( <b>choice of court</b> ). <sup>243</sup> This can prevent couples having their divorce proceedings in the Member State of their common choice. That <b>makes it impossible to conclude agreements that could protect the economically weaker spouse from a rush to court/forum shopping</b> in case of divorce (by predetermining the jurisdiction by common agreement). On the other hand, several stakeholders and respondents to the public consultation noted that choice of court agreements could be misused in a way that placed the economically weaker spouse at a disadvantage as they might not be able to assess the consequences of agreeing to choose a certain jurisdiction. However, the EU legislator has already concluded in other family law instruments (such as the Rome III Regulation and the Maintenance Regulation) that choice-of-court agreements are overall beneficial for parties in cross-border proceedings. The absence of the possibility of choosing a court in divorce proceedings is therefore not in line with more recent EU instruments.  |
| Different interpretations of the term 'habitual residence'                                    | As discussed further under specific objective 5 " <i>Well-being of the child and parent-child relationship</i> ", the <b>vagueness of the concept of habitual residence of the child</b> has in some cases led to prolonged disputes about jurisdiction for cases of parental responsibility matters. <sup>244</sup> In such cases, the <b>economically weaker spouse may be at a disadvantage by not being able to afford the necessary legal advice and representation to defend his/her interests adequately.</b>  |
| <b>Support to citizens in cross-border proceedings by Central Authorities</b>                 |   |
| The use of mediation is currently not promoted to a sufficient extent                         | The Central Authorities are required to contribute to the facilitation of an agreement between the parents, for example, through mediation (this is specified in Article 55 (e)) <sup>245</sup> . While the effectiveness and efficiency of mediation as an alternative conflict resolution mechanism in international cases of matrimonial matters and parental responsibility is widely acknowledged <sup>246</sup> , its <b>potential is currently not fully exploited, because it is not promoted to a sufficient extent.</b> <sup>247</sup> In general, it is regrettable that the recommendation for the use of mediation in the Brussels IIa Regulation is <b>limited to a sub-item of Article</b> , suggesting that the recommendation is of low importance. In addition, a number of specific weaknesses of the content of Article 55 (e) were identified that have led to an insufficient take-up and promotion of mediation in the Member States: <ul style="list-style-type: none"> <li>➤ The connection to the <b>Mediation Directive</b> (Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters) is not highlighted in the Brussels IIa Regulation;</li> <li>➤ <span style="float: right;">At EU</span> level, there is no complete <b>overview of certified mediators</b> specialised in international cases of matrimonial matters and parental responsibility. Such a list has already been prepared by some Member States, such as France, and is a</li> </ul> |

<sup>242</sup> Many interviewees and a majority of the respondents to the European Commission's public consultation (70%) believed that Brussels IIa does not sufficiently prevent rush to court/forum shopping behaviour in matrimonial matters.

<sup>243</sup> A comprehensive analysis of this issue can be found in the section *Jurisdiction rules applicable to matrimonial matters*, sub-section *The current set-up of jurisdiction rules does not sufficiently promote a common agreement between spouses* in Annex 1.

<sup>244</sup> See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term 'habitual residence'* in Annex 1.

<sup>245</sup> A comprehensive analysis of this issue can be found in the section *The use of mediation is currently not promoted to a sufficient extent* in Annex 1.

<sup>246</sup> The potential effects of mediation were underlined by the majority of stakeholders consulted for this study and were recently acknowledged in a study carried out by the European Parliament (available under: <http://www.europarl.europa.eu/studies> ). We note here that the effectiveness of mediation depends on the willingness of the parents to agree on a compromise in an amicable setting.

<sup>247</sup> A comprehensive analysis of this issue can be found in the section *The use of mediation is currently not promoted to a sufficient extent* in Annex 1.

recommended practice of the Hague Conference Good Practice Guide on Mediation<sup>248</sup>;

- **Judges do not always inform the parties** at the beginning of the proceedings about the possibility of mediation; and
- There are **ambiguities about the mutual recognition rule for mediation agreements** across all Member States, as this is not explicitly dealt with in the Regulation.

Based on the input received from some stakeholders consulted, it also appears 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.

These insufficiencies affect citizens, who cannot benefit from the use of mediation. Mediation is generally less costly for the parties involved than traditional court proceedings. Moreover, a solution found under mutual agreement is often more acceptable and satisfying for the parties than a decision taken by a judge. Thus, citizens **currently face additional costs and delays that could potentially be reduced through mediation**. This can be considered of particular relevance for economically weaker spouses, who could benefit from the support of a mediator who tries to establish a solution that is acceptable for both parties. As regards parental responsibility proceedings, **mediation can help to improve the well-being of the child and the parent-child relationship**. If parents are striving to find an amicable solution, this is **less stressful for the child**, e.g. because he/she does not need to take sides.

Furthermore, agreements that have been reached through mediation are often longer lasting and more sustainable compared to agreements reached before courts, because the mediator tries to ensure that all the arguments and perspectives are taken into account. Thus future conflicts may potentially be avoided.<sup>249</sup>

## Well-being of the child and parent-child relationship

### How is the topic important for citizens?

**Children can be considered as a particularly vulnerable group in the context of cross-border family disputes**, including divorces that involve children as well as all cases on matters of parental responsibility. All (national and international) cases of separation or divorce of the parents are very stressful and emotional for children, who are often caught up in the conflict between the parents, have to cope with the absence of one of the parents, have to get used to new living arrangements and may face economic hardship.<sup>250</sup> If such conflicts involve different countries, these factors can be magnified. It is possible that the child will need to move to a different country, and solutions on visiting rights will be more difficult to find and implement in practice. Children are often powerless in such situations. Children involved in international abduction cases (where one of the parents moves abroad with the child without the other parent's consent) may face additional stress because the act of abruptly taking the child from his/her surroundings can have traumatising effects and the ensuing conflicts are usually very confusing for children.

The importance of the well-being of the child is recognised in the Charter of Fundamental Rights of the European Union<sup>251</sup>. Article 24 of the Charter stipulates in general terms that the well-being of children is to be ensured by providing the protection and care they need. It stipulates in regard to legal actions that concern children, thus including proceedings on matters of parental responsibility, that the child's view must be taken into consideration. Furthermore, any action by public or private institutions is to be based on the best interests of the

<sup>248</sup> 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](http://www.hcch.net/upload/guide28mediation_en.pdf)

<sup>249</sup> This was explained during an interview with a mediator. This point is supported, for example, by Robert E. Emery, 'Renegotiating Family Relationships: Divorce, Child Custody, and Mediation', 2012.

<sup>250</sup> Robert E. Emery, 'Renegotiating Family Relationships: Divorce, Child Custody, and Mediation', 2012;

By Paul R. Amato, Professor for Sociology in *Journal Children and Divorce* Volume 4 Number 1 Spring/Summer 1994, <http://futureofchildren.org/publications/journals/article/index.xml?journalid=63&articleid=415&sectionid=2841>

<sup>251</sup> [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

child. Finally, it specifies that the parent-child relationship should be protected. In particular, children must have the right to maintain contact with both parents, unless this is not in line with their interest.<sup>252</sup>

#### How does the Regulation address this topic?

The Brussels IIa Regulation puts particular emphasis on ensuring the respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the EU.<sup>253</sup> On this basis, several principles and mechanisms were introduced to ensure the well-being of the child:

- The Regulation's rules on jurisdiction, i.e. the rules that decide where a case will be handled, are based on the principle that a case should be handled in the Member State with which the child has the closest connection. This means that the court in the Member State where the child lives (or is 'habitually resident') will by default be responsible, reflecting the **criterion of proximity**.<sup>254</sup> In addition, the Regulation allows for some limited flexibility to ensure that all cases can be handled in the most appropriate court, even if this might not be in the Member State where the child habitually lives.<sup>255</sup>
- Should one parent take the child to another Member State without the other parent's consent, the Regulation aims at ensuring that the child is returned as quickly as possible.
- The Regulation establishes a mechanism for the cooperation between and support of Central Authorities, with the aim of improving the handling of cases related to parental responsibility.
- The Regulation is based on the principle of requiring that the child's views be taken into account in cases concerning it.<sup>256</sup> It is possible for Member States to refuse to recognise or enforce a judgment on the grounds that the child was not given an opportunity to be heard.<sup>257</sup> In addition, the Regulation explicitly stipulates the requirement for a child to be heard in child abduction cases.<sup>258</sup>

In general terms, the evidence collected as part of this study suggests that the Brussels IIa Regulation has increased the extent to which the well-being of the child is safeguarded in cross-border cases. In particular, various stakeholders welcomed the provision in the Regulation of clear rules on jurisdiction that ensure that a case is handled in a Member State with which the child has a

<sup>252</sup> It can be noted in general terms that the **interpretation of the "best interest of the child"** varies significantly across countries, as pointed out by several interviewees. In addition, where the child is heard, the interpretation of what actually is in "best interests of the child" also depends significantly on the competence of the psychologist, social worker or judge responsible. Several interviewees highlighted the difficulty of assessing what is best for the child or for the parent-child relationship.

<sup>253</sup> See also Recital (33) Brussels IIa Regulation.

<sup>254</sup> Article 8. See also Brussels IIa Regulation, Recital (12).

<sup>255</sup> Article 12 provides holders of parental responsibility with the possibility of choosing a more suitable court under certain circumstances. Furthermore, the Regulation provides for a possibility of transferring a case or part of a case to another Member State if the latter is better placed to hear it and the transfer reflects the best interests of the child (Article 15).

<sup>256</sup> Recital (19), Brussels IIa Regulation.

<sup>257</sup> For example, if it 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*", Article 23(b). See also Article 41(2)(c), Article 42(1)(a) Brussels IIa Regulation.

<sup>258</sup> 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*“.

close connection. In addition, the involvement of the Central Authorities was considered to have contributed to a smoother handling of cases related to matters of parental responsibility.

However, a number of difficulties were identified that have negative consequences on this specific objective. While the concrete effects depend on the legal issues, some general remarks deserve to be made with respect to the negative effects of **delays**. Delays during proceedings or at the stage of recognition/enforcement prolong the time for which the child is affected by the conflicts between the parents and finds itself in circumstances that are unstable. Indeed, the child may not know where he/she will eventually live and how often he/she will see the parent who lives elsewhere. Moreover, contact with one of the parents may be hindered, in particular in relation to child abduction cases.

The main legal issues that affect this specific objective are discussed in the table below.

**Table 7: High-priority legal issues under specific objective 5 “Well-being of the child and parent-child relationship”**

| High-priority legal issues                                 | Specific objective 5: Well-being of the child and parent-child relationship   |
|--|---|
| <b>Jurisdiction rules</b>                                  |   |
| Different interpretations of the term ‘habitual residence’ | <p>The jurisdiction rules of the Regulation for matters of parental responsibility are based on the criterion of proximity, which means that jurisdiction by default lies with the Member State of habitual residence of the child. In most cases, this is considered to be the Member State with the closest connection to the child.<sup>259</sup> However, the criterion of proximity is undermined due to difficulties relating to the concept of ‘habitual residence’. There are, firstly, <b>difficulties in determining the court responsible</b> and, secondly, <b>situations in which a court is responsible that is not best placed to deal with a case</b>. More specifically, while the place of habitual residence of the child is the main factor that determines where a case will be dealt with, it is in some cases <b>very difficult to establish where the child has its habitual residence</b>,<sup>260</sup> it is in some cases <b>very difficult to establish where the child has his/her ‘habitual residence’</b>,<sup>261</sup> because there is no definition of the concept. Based on existing case-law<sup>262</sup>, the concept of ‘habitual residence’ is considered as often allowing for different conclusions. Particular challenges exist in complex cases, including in particular in the following situations:</p> <ul style="list-style-type: none"> <li>➤ The child moved back and forth between two or more Member States.<sup>263</sup> It could be that the time between the countries is not equally divided or that the child spends an equal amount of time in two countries.</li> <li>➤ The child’s living situation changes while the proceedings are already</li> </ul> |

<sup>259</sup> Recital (12) Brussels IIa.

<sup>260</sup> See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term ‘habitual residence’* in Annex 1.

<sup>261</sup> See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term ‘habitual residence’* in Annex 1.

<sup>262</sup> Next to several national cases identified by our network of legal experts, this issue was also referred to the ECJ at different occasions, including in particular the cases *Mercredi v Chaffe* (C-497/10 PPU) and *Re A* (C-523/07). Further details relating to the relevant case-law can be found in in the section *Different interpretations of the term ‘habitual residence’* in Annex 1.

<sup>263</sup> For example, in one 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 England and Belgium with his mother as the two parents divided their time between various residences. According to the Belgian national expert, this case reveals the delicate nature of the assessment to be carried out.

|   |   |
|---|---|
|   | <p>ongoing.<sup>264</sup></p> <p>➤ Parents have concluded an amicable agreement about the residence of the child. Such agreements are not directly covered by the jurisdiction rules of the Regulation.</p> <p>Although the ECJ has provided guidelines on the application of the principle, these are not always applied properly by the courts in the Member States. All the different groups of stakeholders consulted reported difficulties in establishing the child's habitual residence. These were regarded by many as one of the most severe challenges related to the application of the Regulation. It was reported by practitioners that there are cases where the habitual residence of the child is debated at length in the proceedings, thus leading to <b>undue delays</b> in some cases. Sometimes, appeals were based solely on the (potentially incorrect) determination of habitual residence. The ensuing delays prolong the situation in which the arrangements relating to parental responsibility remain unresolved. This is <b>detrimental to the objective of ensuring the well-being of the child</b>, as it prolongs a situation that is <b>very stressful</b> for the child. In addition, in some cases the fact that the determination of custody and access rights is pending might prevent or complicate contact between the child and the parents. In such situations, the <b>parent-child relationship may suffer</b> as well.</p> <p>Additionally, in some cases, the lack of guidance on the concept of 'habitual residence' has in the end led courts to accept jurisdiction when they were in fact not best placed to hear a case.<sup>265</sup> If proceedings are held in a Member State that is not the centre of the child's life, the child may have to travel during proceedings, there may be <b>delays in collecting evidence</b>, and the court that has jurisdiction may not be able adequately to take the circumstances in the Member State where the child actually lives into account.</p> |
| <p>Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court</p> | <p>As discussed further under specific objective 1 "<i>Access to court for citizens in international families with a close connection to the EU</i>", the <b>absence of a "forum necessitatis"</b> in the Brussels IIa Regulation in combination with the reliance on <b>(non-harmonised) national rules for establishing residual jurisdiction</b> may lead to situations where children who are EU citizens and have their habitual residence in a third country are not granted access to a court in the EU. Proceedings in a third country could be more difficult to hold and thus <b>more stressful</b>. For example, if the family does not speak the language of the relevant country fluently, it may be <b>more difficult to take the views of the child into account</b>, e.g. because an interpreter needs to be involved. Where one of the parents lives in the EU and the judgment would need to be recognised/enforced in the EU, there might be difficulties and delays, as the judgments taken in a third country would not be covered by the Regulation. Thus, there may be <b>delays</b> during the proceedings and until a judgment is recognised or enforced. During this time, the child may be in a <b>stressful</b> situation, in particular because the arrangements on parental responsibility are not resolved (cf. introduction to this section).</p>   |

<sup>264</sup> For example, the Irish expert reported that there were a number of Irish cases and that the approaches adopted by the courts were not always consistent. One of these cases was referred to the ECJ (Case C -376/14 PPU, C v M). Further details can be found in annex 1.

<sup>265</sup> In this regard it is interesting to note that the Regulation provides a possibility to remedy cases in which the responsible court is not or no longer considered the most suitable court. More specifically, there is an **option to transfer a case to a court that is better suited to deal with a case in light of the best interest of the child (Article 15)**. However, there was consensus among the stakeholders consulted that the current use of the article remains limited in the Member States. It was argued that the article is not sufficiently clear, which is why courts are currently hesitant to use it. **Thus, there may be cases in which proceedings are held in a Member State that may not be the most suitable in light of the situation of the child and that the possibility to transfer the case is not made use of.** A comprehensive analysis of this issue can be found in the section *Limited use at present of the possibility to transfer a case and lack of detail as concerns the procedural rules* in Annex 1.

### Hearing of the child and its representation in court

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)

The provisions of the Regulation currently leave a considerable level of discretion to judges as regards the assessment of when it is considered appropriate to hear a child; this is left to the Member States. The **national rules and practices on hearing a child vary significantly**. For example, the age at which a child is considered sufficiently mature to represent his/her views ranges from 10 to 15. In some Member States, judges also hear children that are much younger (for example 2-3 years old) if they deem this appropriate in specific cases.

Distrust by practitioners towards the rules in other Member States has led to reservations and refusals of the recognitions and enforcement of judgments.<sup>266</sup> Indeed, as pointed out above, the different practices and ideas on the hearing of the child can **hinder the recognition and enforcement of judgments**, leading to additional **stress for children and parents**.

In addition, several interviewees and participants in the expert panel regretted that the importance of the hearing relating to all cases on matters of parental responsibility is not highlighted in the Regulation in general terms, but only in relation to return proceedings. If a judgment is taken without having conducted a hearing of the child, there is a danger **that the judgment may not take the best interest of the child into account to a sufficient extent**.

<sup>266</sup> The national experts for Germany, Hungary and Italy indicated based on available national case law that doubts relating to the hearing of the child were the main reason why recognition of judgments was refused in the past. The Belgian national expert noted that courts in Belgium are quite reluctant to hear children and that this has led to recognition issues in Germany, where the standard is stricter (in Germany, courts are obliged to hear children who have reached the age of 14 years – subject to a limited number of exceptions – and children under the age of 14 have to be heard if the preferences, ties or intentions of the child are of relevance for the decision or if a hearing is deemed appropriate for other reasons). The German expert confirmed that German courts have refused to recognise judgments on this basis, but specified that the fact that the hearing did not take place before a judge but before a psychological expert is not considered a sufficient grounds for non-recognition. The French national expert noted that French decisions might not be recognised in a Member State where the hearing of the child is more strictly assessed, especially in cases where the child is heard ‘indirectly’ by the French court, i.e. if the child does not state his or her views personally but through a third party such as a lawyer. The Slovenian national expert referred to a ruling of the Supreme Court of the Republic of Slovenia, in which the Court stated that if there was no conversation with a child capable of understanding the meaning of the procedure and the consequences, this would be a basis for the refusal of the recognition of a foreign judgment, because it would mean a violation of essential procedural principles of the Slovenian legal order.

|  |   |
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| <p>Different practices related to the representation of the child in court</p>   | <p><b>The legislation and practices in the Member States with regard to the representation of the child in court vary and the provisions in the Regulation are not sufficiently clear.</b><sup>267</sup> In particular, differences exist with respect to the situations in which a guardian <i>ad litem</i> must be appointed, the persons that can act as guardian <i>ad litem</i>, the procedure of appointment and the competences of the guardian <i>ad litem</i>.<sup>268</sup> In addition, in some Member States<sup>269</sup> a guardian <i>ad litem</i> is not appointed in parental responsibility proceedings, because children are not considered to be parties to parental responsibility proceedings. The varying practices are <b>a source of legal uncertainty for citizens due to a lack of information on these practices.</b></p> <p>In addition, decisions could be appealed based on the fact that appropriate representation has not been appointed. <b>Appeal proceedings lead to delays and additional costs.</b> The delays affect the <b>well-being of the child and the parent-child relationship.</b> As noted before, it will be <b>stressful for the child</b> to endure an uncertain situation, in which he/she might potentially be prevented from having contact with one parent.</p> |
| <p><b>Recognition and enforcement</b></p>  |   |
| <p>Exequatur proceedings are still in place for some types of judgments</p>  | <p>As discussed further under specific objective 3 “<i>Smooth recognition and enforcement of judgments, authentic instruments and agreements</i>”, the requirement to undergo the exequatur procedure for certain types of judgments on parental responsibility leads to <b>delays</b><sup>270</sup>. Delays can have severe consequences for the child, because of <b>uncertainty about the arrangements for parental responsibility.</b> In addition, the <b>relationship with the parent</b> who does not live with the child during the period during which a decision is not enforced may suffer.</p>  |
| <p>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</p> | <p>As discussed further under specific objective 3 “<i>Smooth recognition and enforcement of judgments, authentic instruments and agreements</i>”, <b>some decisions on parental responsibility are never enforced and thus not implemented due to obstacles at the stage of enforcement.</b> For the child, <b>delays</b> or the impossibility to enforce or implement decisions can have serious consequences. If a decision is taken formally, but not implemented this may be a <b>confusing and stressful</b> situation for the child, as he/she cannot be sure what will happen and where he/she will live.</p>   |
| <p><b>Provisions specific to child abduction cases</b></p>   |   |
| <p>Difficulties relating to the time limit for return (i.e. not clear and not effective)</p>   | <p>Cases on the return of the child are to be handled within six weeks. The <b>application of this time limit has been identified as being problematic.</b> Two main difficulties have been identified:</p> <p>➤ <b>The time limit is not clear.</b> The interpretation of the six-week time limit set out in Article 11(3) seems to vary across Member States. In particular, it is not clear whether the six weeks refers to the time between an application and the final decision, or to</p>  |

<sup>267</sup> A comprehensive analysis of this issue can be found in the section *Different practices related to the representation of the child in court* in Annex 1.

<sup>268</sup> A comprehensive analysis of this issue can be found in the section *Different practices related to the representation of the child in court* in Annex 1.

<sup>269</sup> 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.

<sup>270</sup> It is not necessary to go through intermediate procedures for decisions on access rights and certain decisions implying the return of a child, as outlined under specific objective 3 *Smooth recognition and enforcement of judgments, authentic instruments and agreements*

each instance.

- **The time limit is not effective.** Only 15% of the applications between Member States are actually resolved within the six-week time limit.<sup>271</sup> **Delays** occur, for example, because not all Member States have introduced suitable structures to ensure that the judges dealing with cross-border child abductions have the necessary expertise and that cases can be handled smoothly. There are indications 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.<sup>272</sup> However, according to the Working Group, several Member States appear not to have implemented concentration of jurisdiction. As a result, judges in these Member States are not able to build up the necessary expertise and have less opportunities to receive specialised training, and are therefore less efficient.<sup>273</sup> A minority of stakeholders argues that the time limit is too short because it does not allow sufficient room for dealing with a case properly. However, it should be noted in this regard that six weeks is also considered to be an adequate target in the 1980 Hague Convention.

**Delays** in return proceedings can have **serious consequences for the well-being of the child and the parent-child relationship**. While the child is abroad with the abducting parent, he/she is separated from his/her regular surroundings, including the left-behind parent. Moreover, if too much time passes before the child is returned, it may not be in the child's best interests any longer to return to the original place of habitual residence, because the centre of life for the child has already shifted to the other country. On the other hand, if a child is not returned, the relationship with the left-behind parent is impaired.

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

**Another problem reported relates to the possible refusal to return the child.** The return of a child can only be refused if it is not possible to demonstrate that 'adequate arrangements' have been taken to counter any possible risk associated with the return.<sup>274</sup> The Regulation refers to the steps that may be taken as "adequate arrangements to secure the protection of the child after his or her return". The findings of the evaluation suggest that this formulation is currently not clear. Courts have a wide margin of discretion when it comes to determining what types of protective measures could serve as 'adequate arrangements' and how they will be examined. The following points appear not to be sufficiently clear:

- According to many national experts, respondents to the public consultation and the interviewees, it is **not clear what the concept 'adequate arrangements' entails**, i.e. which measures could qualify as 'adequate

<sup>271</sup> '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>

<sup>272</sup> Article 11 Working Group practice guide ([https://e-justice.europa.eu/content\\_parental\\_child\\_abduction-309-en.do?clang=en](https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en)). The Article 11 Working Group was initiated by the Central Authorities to compile and disseminate information related to the application of relevant provisions on child abductions in the EU, including Article 11 of the Brussels IIa Regulation and to identify common practices and standards.

<sup>273</sup> Estonia, Latvia, Lithuania, Poland, Slovenia and Spain. Article 11 Working Group practice guide ([https://e-justice.europa.eu/content\\_parental\\_child\\_abduction-309-en.do?clang=en](https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en)). See also the section *The return procedure under Article 11(1) to 11(5)* in Annex 1.

<sup>274</sup> See Article 11(4).

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|   | <p>arrangements’.</p> <ul style="list-style-type: none"> <li>➤ According to several interviewees and respondents to the public consultation, there are <b>uncertainties about the procedural steps</b> to be taken to prove whether or not ‘adequate arrangements’ are in place. It is in particular not clear, which party has to prove whether or not adequate arrangements are in place and how the communication between the Member State where the proceedings are held and the Member States where the ‘adequate arrangements’ are to be enforced should function.</li> <li>➤ According to the Central Authorities consulted, the <b>administrative steps to be observed are not always clear</b>. In some Member States, orders refusing the return of a child do not directly include the grounds of the refusal, which then makes it difficult to identify whether the case falls under Article 11(4) and <b>lengthens the procedure</b>.</li> </ul> <p>These points lead to <b>uncertainty</b>, as it is difficult for the parties to know whether the steps taken are sufficient and will thus be recognised as adequate arrangements. In addition, these <b>ambiguities can lead to delays</b> if the court does not know how to assess the situation and to <b>costs for legal advice for the parties</b>. As outlined above, delays can have <b>serious consequences for the well-being of the child and the parent-child relationship</b>. In addition, <b>the well-being of the child could be endangered</b> if a proper test is not carried out.</p> <p>Furthermore, in the event the court is not certain that ‘adequate arrangements’ are provided for in the Member States of enforcement, it may refuse the return order, since a non-return order can be issued whenever it is not possible to establish, within six weeks, that ‘adequate arrangements’ have been taken.<sup>275</sup> This is in particular the case because the procedure currently has to involve court or authorities in both Member States. It is not possible for the court in the Member State of abduction to order certain <b>protective measures</b> that are considered a condition for the child to return safely. Rather, if it is not possible to establish that such conditions are met, e.g. because the courts/authorities in the Member State of origin react late, the court may refuse the return of the child. Therefore, the difficulties with this provision can cause a <b>higher number of refusals of return</b>.</p> |
| <p>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</p> | <p>After a refusal on the return of the child based specifically under Article 13 of the 1980 Hague Convention, the courts in the Member State of origin can be asked by the left-behind parent to examine the question of who has custody over the child once again.<sup>276</sup> In addition, Article 11(6)-(8) provides a possibility for a new decision on the return, which must be taken in the Member State of origin and is directly enforceable if certified according to Article 42 of the Regulation.</p> <p>The interplay of the initial return procedure and the subsequent hearings on a new decision return/on custody may result in a situation that is detrimental to the well-being of the child. The evaluation has identified several difficulties and shortcomings with respect to these provisions.</p> <p>First, there are <b>ambiguities related to the application</b> of the article, which lead to <b>delays</b>. It is not clear whether it is possible to refer the question of custody to a <b>court that is specialised in return proceedings</b> instead of the court that was previously seised for parental responsibility proceedings. In general terms, specialisation of courts can contribute to a faster handling of return cases, as mentioned in the</p>  |

<sup>275</sup> The Maltese national expert indicated that 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. 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.

<sup>276</sup> See Article 11(6) to (8).

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|   | <p>previous sub-section and the ECJ has recently rules that this is in principle possible also for hearings under Article 11(6)-(8).<sup>277</sup> Another practical problem relates to the <b>transmission of documents</b> to the original court which is prescribed in Article 11(6): whenever a court issues a non-return order, related documents including a copy of the judgment and a transcript of the hearing must be sent to the responsible court in the Member State of origin. It is currently not clear, which parts of these documents must be translated and by whom.</p> <p>Second, there are several practical difficulties related to the application of the article. <b>Extensive delays</b> occur since the court of origin decides on custody or on a new return order, while the child and one of the parents are in another Member State. Under these circumstances it is often very <b>difficult to organise hearings</b>, because the child and the abducting parent have to travel to participate in a hearing. This is particularly difficult to organise if the abducting parent is not cooperating, which is likely because he/she may be afraid that the court in the Member State of origin favours the other parent. There are no prescribed procedures to deal with such situations. In practice, such cases have been resolved by persuading the parent 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 <b>costs and delays</b>. On this basis, such hearings can take years in some cases. Based on these delays, an eventual return of the child may risk taking the child from the new surroundings, which he/she has grown accustomed to in the meantime and may thus have <b>severe consequences for the well-being of the child</b>. In addition, for the time such custody hearings are being carried out, the child has to live with the <b>uncertain and stressful situation of not knowing where he or she will eventually live</b>. It also appears that <b>courts do not in all cases take sufficient account of the reasons why a return was initially refused</b>. Article 11(8) gives the court in the Member State of origin the possibility to order the return of the child, although the court in the Member State of abduction came to the conclusion that a return would endanger the well-being of the child. If the court in the Member State where the child was present decided to refuse the return of the child, but the court in the Member State of origin decides that the child should be returned nevertheless, this can have <b>negative consequences for the well-being of the child</b>. Finally, <b>Central Authorities are not equally involved</b> in such hearings, although they could potentially support the application of these provisions. Finally, it can be questioned whether the provisions are at all useful. In fact, numerous stakeholders doubted the usefulness of these provisions, criticising that a decision on custody taken by the court of origin after proceedings on the return of the child are completed can potentially overrule the initial decision. Firstly, they have criticised that this can endanger the well-being of the child if courts do not take sufficient account of the reasons why a return was refused (cf. second bullet point above). In addition, parents may have to follow unnecessarily lengthy proceedings, first in the Member State where the child was abducted to, and then in the Member State of origin. The results of the second part of the procedure may render the first part of the procedure meaningless. This can antagonise parties, which may cause <b>additional stress for the child</b>.</p> |
| <p>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</p> | <p>The evidence collected for this study indicates that there are significant shortcomings relating to the enforcement of return orders. Indeed, the actual enforcement of return orders is considered by many respondents to the public consultation, interviewees, national experts and participants in the expert panel as <b>one of the most problematic areas related to enforcement</b>.<sup>278</sup> The procedures and means of enforcement differ across Member States and <b>delays</b> are common. In some Member States, enforcement procedures can take over a year as enforcement courts re-</p>  |

<sup>277</sup> This question was posed to the ECJ in Case C-498/14, David Bradbrooke v Anna Aleksandrowicz.

<sup>278</sup> A comprehensive analysis of this issue can be found in the section *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* in Annex 1.

reservations against the content of decisions

examine the initial decision that implied the return of the child. This is not in line with the objectives of the Regulation. There are several factors that can contribute to delays. Sometimes, enforcement can be hampered because the parent who abducted the child and the child are in hiding and the authorities are not able to locate them. In terms of the actors involved, it is regretted that Central Authorities are not involved to a sufficient extent because they could positively facilitate enforcement due to their experience with abduction cases and their involvement in the main proceedings. In addition, the coordination between the different parties involved does not always function properly. This can lead e.g. to a situation in which the parties involved are not informed of a risk relating to the child's well-being. Moreover, as there is no mechanism for ensuring a high level of competence to the same extent in all cases, there may be cases where enforcement is more stressful than it needs to be, e.g. because there is nobody with psychological expertise. Finally, in some cases it is not ensured to a sufficient extent that the child is prepared for the reunion with the left-behind parent.

Criticism was voiced in this regard that the Regulation does not include more detailed guidelines as to how expeditious enforcement can be achieved, e.g. through the involvement of Central Authorities. In addition, the lack of effective sanctions for non-compliance (i.e. if judgments are never enforced) was criticised by respondents to the public consultation, interviewees and participants in the expert panel. The delays have **severe consequences for the well-being of the child and the parent-child relationship**.

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

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

The Central Authorities are responsible for the collection and exchange of information on the situation of the child.<sup>279</sup> Reports about the (potential) living situation of children are often a required piece of evidence for judgments on matters of parental responsibility for both national and international cases. The difficulties identified generally lead to **delays in the procedure** that is used in international cases to obtain such reports. While employees at the Central Authorities explained that delays can ensue in both national and international cases, **specific factors contribute to additional delays in international cases**:

- There is currently **no deadline for Central Authorities to respond** to requests by other Central Authorities. Practitioners stated that this is one of the reasons for delays. Sometimes, it takes several months until a request is answered.
- **Difficulties relating to communication can at times slow down cooperation.** There are still language barriers between certain Member States, which are generally solved through translations of documents, emails etc. In addition, some Central Authorities do not make use of electronic means for communication. Thus, there may be delays, because letters take a long time to be delivered.
- There are **no guidelines on which types of information need to be attached to a case file that is exchanged across borders**. In some cases, there are disagreements as to which specific pieces of information need to be transmitted in response to requests. In some Member States, data protection requirements prevent the Central Authorities from sending personal data related to the child. Other Central Authorities may require this data to continue with a case. If the information submitted is not complete from the perspective of the receiving Authority, this can lead to **temporary standstill of a case**.

Courts are usually dependent on the reports that are prepared by the Central

<sup>279</sup> A comprehensive analysis of this issue can be found in the section “Cooperation of and support by the Central Authorities” in Annex 1.

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|   | <p>Authorities in order to make a decision on custody or access rights. Thus, a delay in the activities of the Central Authorities will also lead to a <b>delay in the procedure before the court</b>. As discussed above, delays can result in <b>negative consequences for the well-being of the child and the parent-child relationship</b>.</p>   |
| <p>Insufficiently specific provisions on the procedure for the placement of a child in another Member State</p>   | <p>Another task of the Central Authorities is to support courts when a child needs to be placed in institutional care or in a foster family in a different Member State.<sup>280</sup> Such placements could be necessary in cases where the child does not have anybody to look after him/her effectively or the child needs special support due to a mental or physical illness. Thus, such placements are usually required in order to ensure that the child experiences a sufficient level of protection in relation to his/her needs.</p> <p>However, it appears that the relevant provisions in the Regulation do not function in a satisfactory manner. This was highlighted by a majority of respondents to the European Commission’s public consultation<sup>281</sup> and other stakeholders.</p> <p>First, the procedures are too <b>time consuming and not adapted to the urgency</b> of such decisions. Several factors contribute to delays:</p> <ul style="list-style-type: none"> <li>➤ The Central Authority in the Member State where the child will be placed currently has to be asked for consent before a child may be sent to that Member State, but there is no rule that ensures a fast response. Thus, the approval can be <b>too time-consuming</b>, which is deleterious, as placing a child in institutional care or in a foster family is usually a matter of urgency. Thus, <b>a delay may have serious effects for the child’s level of protection and/or health</b>.</li> <li>➤ As with the general tasks, there are <b>difficulties relating to the communication</b> between Central Authorities, including in particular language barriers, a lack of clarity on the documents to be submitted to the requested Member State and a lack of clarity on which authority bears the costs of translation (cf. point (a)).</li> </ul> <p>In addition, there are examples <b>where placements were carried out before consent is granted</b>, which can lead to additional complications. For example, if a child is placed in a foster family in a different Member State without consent, it is possible that the foster family could not be examined beforehand or that the modalities (e.g. who bears the costs) could not be clarified. This may affect the well-being of the child, because the child may need to move again or be sent back, which can cause <b>additional stress</b>.</p> |
| <p>Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children</p> | <p>Social authorities play an important role in the application of the Brussels IIa Regulation. Generally, they fulfil, for example, the following tasks:</p> <ul style="list-style-type: none"> <li>➤ 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;</li> <li>➤ Collect and provide to the Central Authority all relevant information concerning the child, its parents, etc.; and</li> <li>➤ Facilitate the communication between the Central Authority and the child or the parents, etc.</li> </ul> <p>Practical difficulties have been reported regarding the cooperation between Central</p>  |

<sup>280</sup> A comprehensive analysis of this issue can be found in the section *Not sufficiently specific provisions on the procedure for the placement of a child in another Member State* in Annex 1.

<sup>281</sup> 60%, i.e. 85 of 141 responses

Authorities and local authorities. Difficulties appear to be based on the fact that **the role of the competent authorities and the extent to which they should cooperate with the Central Authorities is currently not specified in the Regulation**,<sup>282</sup> although these authorities play an important role in relation to parental responsibility cases in practice. Indeed, cooperation currently does not always function well and several stakeholders, e.g. in the context of the public consultation, considered it as an area for improvement.

In some cases, it is not clear how the social authorities should cooperate with the Central Authorities under the Regulation. The following difficulties have been identified:

- First, there are often **delays** in the cooperation within one Member State, i.e. between a Central Authority and its national social welfare authorities. This concerns situations when **the Central Authority requested by another Central Authority needs 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. 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.
- Second, questions arose with respect to the potential cooperation between the social authorities of one Member State and the Central Authority of the Member State where the child should be placed. Although there is currently no legal basis for such forms of cooperation, there was a case in which the Czech Central Authority and foreign social or local authorities cooperated. In this situation, the parties involved faced **uncertainty** because a form of cooperation was started that is not legally regulated.

In addition, there seems to be a **lack of awareness within these authorities** of the content of the Regulation and the role of the Central Authorities. As a result, it is possible that cases are not handled correctly and/or that parents are not well informed, e.g. on the possibilities for support offered by the Central Authorities. **This can be a significant source of uncertainty and stress for citizens.**

The use of mediation is currently not promoted to a sufficient extent

As discussed further under specific objective 4 “*Protection of the economically weaker spouse*”, the **take-up of mediation is currently not sufficiently promoted** because the provision in the Regulation<sup>283</sup> is not sufficiently strong and there are cases where mediation is in practice not promoted by the practitioners involved. This is of particular relevance from the child’s perspective<sup>284</sup>. Proceedings on parental

<sup>282</sup> A comprehensive analysis of this issue can be found in the section *Uncertainties relating to the cooperation between Central Authorities and local/child welfare authorities as well as to the role of social and local authorities* in Annex 1.

<sup>283</sup> Article 55(e) Brussels IIa.

<sup>284</sup> A comprehensive analysis of this issue can be found in the section *The use of mediation is currently not promoted to a sufficient extent* in Annex 1.

responsibility are very stressful for children, in particular if the parents fight to obtain a favourable solution. As regards the effects of mediation, it was argued that **mediation could help to further reduce delays as well as stress** and could, importantly, **help to improve the well-being of the child and the parent-child relationship**. If parents are striving to find an amicable solution, this is less stressful for the child, e.g. because he/she does not need to take sides. Furthermore, agreements that have been reached through mediation are often longer lasting and more sustainable compared to agreements reached before courts, because the mediator tries to ensure that all arguments and perspectives are taken into account. This may go beyond the matters that are covered by a legal dispute.<sup>285</sup>

#### Information and awareness

**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

As discussed further under specific objective 2 “*Predictability, clarity, and reliability for citizens involved in cross-border cases*”, there is a lack of awareness and understanding of the Regulation among practitioners and citizens. The lack of awareness and understanding mainly leads to **delays** which affect the **well-being of the child** in cases on matters of parental responsibility. The fact that citizens are not sufficiently aware of the content of the Regulation and its implication can have serious consequences. For example, it was pointed out by practitioners that parents are often not aware of the definition of child abduction and the consequences. Some parents have acted impulsively and taken a child to their home country after a fight with the other parent without knowing that this was an abduction. As soon as the child is abroad, the complex procedures for the return of the child might be initiated by the other parent and the child will thus need to go through these **stressful proceedings**. In some cases, such actions could possibly be avoided if the parents were aware of their actions and the far-reaching consequences.

### 3.3.2 Achievement of the general objectives

This section evaluates the Brussels IIa Regulation’s effectiveness in achieving its general objectives, namely:

- Ensuring that citizens can benefit fully from an area of freedom, security and justice; and
- Ensuring the smooth functioning of the internal market and free movement of persons across the EU Member States.

Ensuring that citizens can benefit fully from an area of freedom, security and justice

The **Brussels IIa Regulation** has **contributed to building a European area of justice** in the domains of matrimonial matters and parental responsibility. It has facilitated the settlement of cross-border litigation in matrimonial and parental responsibility matters through a comprehensive system of jurisdiction rules, a system of cooperation between Member State Central Authorities, the prevention of parallel proceedings, and the free circulation of judgments, authentic instruments and agreements. The provisions on the return of the child complementing the 1980 Hague Convention

<sup>285</sup> This was explained during an interview with a mediator. This point is supported, for example, by Robert E. Emery, ‘Renegotiating Family Relationships: Divorce, Child Custody, and Mediation’, 2012.

aimed at deterring parental child abduction between Member States are regarded as particularly useful.<sup>286</sup>

While it is considered that the Brussels IIa Regulation is functioning well overall and is delivering value to EU citizens, the operational functioning of the instrument is at times hampered by a series of legal issues<sup>287</sup> as well as a lack of awareness and information on the part of both citizens and legal practitioners.

Due to these legal issues, the Regulation has not yet achieved its full potential with regard to the objective of an area of freedom, security and justice.

Ensuring the smooth functioning of the internal market and free movement of persons across the EU Member States

The **increasing use of the rights of free movement of persons**, goods and services inevitably results in a high number of potential cross-border disputes, including on matrimonial matters and questions of parental responsibility.

The **Brussels IIa Regulation** contributes to **promoting trust in the internal market** by ensuring that citizens who move to another Member State (i.e. who make use of the internal market's fundamental principle of free movement of persons) can – in most cases (i.e. where not hampered by existing legal issues<sup>288</sup>) – rely on clear rules concerning jurisdiction, a functioning system of cooperation between Member State Central Authorities as well as the free circulation of judgments, authentic instruments and agreements. Were there no such rules and mechanisms this might potentially hamper EU citizens in exercising their right of free movement within the internal market because they might fear that potential cross-border disputes cannot be adequately solved. Nonetheless, the Brussels IIa Regulation could be more effective in promoting trust in the internal market if the numerous legal issues identified and the lack of awareness and information of both citizens and legal practitioners were to be addressed.

It is important to note at the same time, however, that the problems addressed by Brussels IIa (i.e. cross-border disputes in matrimonial matters and parental responsibility) are in part a consequence of the internal market, notably its core principle of free movement of persons.

### 3.3.3 Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States

While most stakeholders consulted concluded that the **Brussels IIa Regulation** is **generally applied smoothly in all Member States**, some issues were highlighted (in addition to the legal issues discussed in Annex 1 on the “*Achievement of the operational objectives*”), notably with regard to a lack of awareness and knowledge of the instrument (both among citizens and legal practitioners),

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<sup>286</sup> European Commission (2014): *Report 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. 16.

<sup>287</sup> Discussed in the section on Effectiveness and in further detail in Annex 1 on the “*Achievement of the operational objectives*”.

<sup>288</sup> Discussed in the section on Effectiveness and in further detail in Annex 1 on the “*Achievement of the operational objectives*”.

insufficient training offerings as well as the complexity of the structure and provisions of the Brussels IIa Regulation. These issues are to some extent preventing the Brussels IIa Regulation from functioning well. Finally, Member States have implemented a few additional measures affecting the application of the Brussels IIa Regulation.

*(a) Lack of awareness and knowledge of the Brussels IIa Regulation*

An issue raised by many national experts and interviewees is the fact that there seems to be a **lack of awareness and knowledge about the Brussels IIa Regulation among practitioners**. As a consequence, the Brussels IIa Regulation is sometimes not applied at all when it should be or applied wrongly, as illustrated in the following case example.

**Lack of awareness hampering the application of the Brussels IIa Regulation (Poland)**

The national expert for Poland concluded that Brussels IIa plays a minor role in the Polish legal system. Only five decisions directly refer the Regulation: *V ACz 252/09, ACz 1719/1712, V CZ 37/09, IV CSK 566/10, V ACa 13/13*. In addition, a large part of the decisions taken refer to a situation in which the court of first or second instance did not apply the provisions of the Brussels IIa Regulation in general (*ACz 1719/12, IV CSK 566/10, I ACz 2057/12, Ca II 1152-1113*), or applied them incorrectly (e.g. in *V ACa 13/13*). Despite the applicability of the Brussels IIa Regulation, Polish courts have regularly made use of Polish law only.

Another issue raised by some interviewees is the fact that many **citizens do not seem to be aware** of the rules contained in the Brussels IIa Regulation. According to a German lawyer, parents are often not aware that a move to another country changes the place of habitual residence of the child and, therefore, directly influences jurisdiction for possible court proceedings. There have been cases where parents were shocked to learn that parental responsibility proceedings could not be held in the country of their nationality, because - on the basis of Article 8 of the Brussels IIa Regulation - the courts did not have jurisdiction.

Furthermore, several stakeholders pointed to a **lack of knowledge and awareness about international rules on child abduction**. Many parents are not aware that abduction can have serious consequences because complex international judicial machinery is initiated as soon as the other parent files an application for the return of the child. Moreover, according to a mediator from Poland, about 95% of all parents do not know what an abduction is, and what the consequences of an abduction are. Usually, they legitimise their behaviour because they want to protect the child. The Polish mediator noted that awareness needs to be raised, for example, by providing information at airports. In addition, she argued that insufficient training is provided to law enforcement authorities to ensure that they can identify critical situations and make the parents aware of the consequences of their actions.

More generally, increased migration within, to and from the EU is leading to a high number of potential disputes in matrimonial matters and parental responsibility with an international (intra-EU) dimension, and thus significant use of the Brussels IIa Regulation. As a result, the **awareness of and experience with the application of the instrument is slowly increasing over time**. However, most experts agreed that this effect is insufficient to overcome the significant lack of awareness and knowledge about the Brussels IIa Regulation among citizens and legal practitioners.

*(b) Insufficient training*

Closely linked to the low levels of awareness and knowledge on the Brussels IIa Regulation, the **insufficient availability of specialised training on the Regulation** for legal practitioners was highlighted by a large majority of the national experts and interviewees. While training is provided both at EU and Member State levels, the training is often considered as insufficient for reaching all relevant legal practitioners.

**Insufficient training on the Brussels IIa Regulation (Slovenia)**

The national expert for Slovenia reported that despite the fact that the Brussels IIa Regulation has been used in Slovenia for one decade already, its presence and visibility are still at a low level. While the Brussels IIa Regulation is included in undergraduate as well as in post-graduate study programmes, its presence in Slovenian literature is very low; articles dealing concretely with the Brussels IIa Regulation are very rare, in spite of the almost ten years of use. There are some cases in which it is clear that decisions were taken (e.g. in case *IV Cp 1792/2007*) that can only be understood as a consequence of a lack of knowledge of the Regulation.

As a result of insufficient training, legal practitioners may also be reluctant to apply the Brussels IIa Regulation and they invoke other instruments, such as the Hague Convention, instead.

**Reluctance hampering the application of the Brussels IIa Regulation (Ireland)**

According to the national expert for Ireland, the lack of training has led to rather limited use of the Brussels IIa Regulation in Ireland, at least insofar as it is possible to document this. One key reason for this in the context of international child abduction proceedings is the significant overlap between the Hague Convention and the Regulation. For some time, practitioners did not seem especially inclined to invoke the Regulation in abduction proceedings. For example, in 2008, 173 applications (82%) were made under the Hague Convention, whereas just 21 applications (10%) were made under Brussels IIa and 16 applications (8%) under both instruments. There are signs that this is changing: the corresponding figures for 2010 were 117 (61%) for the Hague Convention, 30 (16%) under Brussels IIa and 46 (23%) under both. By 2012, this had shifted to 116 cases (42%) under the Hague Convention, 76 (28%) under Brussels IIa and 82 (30%) under both. Even so, in spite of the increasing reliance on Brussels IIa by practitioners, the judiciary remain somewhat reluctant to invoke the Regulation in their judgments unless it sheds a different light on the case than the Hague Convention. In cases where the legal frameworks have the same effect, judges tend to decide the case solely by reference to the Hague Convention, notwithstanding the fact that Brussels IIa had been pleaded by counsel.<sup>289</sup> Accordingly, Kilkelly (2008)<sup>290</sup> has observed that one of the primary effects of Brussels IIa in Ireland has been to unnecessarily complicate the law on international child abduction.

Due to the complexity of the rules (see below), it is not easy for generalist lawyers and judges, who only have a limited family law caseload, to participate in adequate training and receive enough practice in order to be able to apply the Brussels IIa Regulation correctly and with ease. For example, judges in very small courts in rural areas need to deal with all kinds of different subject matters and are not able to take the time that is necessary to understand the Brussels IIa Regulation correctly when this is only relevant for few of their cases.

**Training for specialised practitioners (Germany)**

In Germany, there has been a process of centralising return cases. Therefore, training can be offered to a targeted group that regularly deals with cases involving the Brussels IIa Regulation. As a result, the quality of the decisions taken in Germany has improved. Moreover, the number of cases where the six week deadline could be kept has increased (cf. Hague statistics).

<sup>289</sup> See *RP v SD* [2012] IEHC 579, *LJ v VN* [2012] IEHC 307, *Li v La* [2009] IEHC 585, *N v N* [2009] IEHC 213, *PMP v KTP* [2007] IEHC 217 and *SR v MMR* [2006] IEHC 10, among many other examples.

<sup>290</sup> Kilkelly, U, *Children's Rights in Ireland: Law Policy and Practice* (Haywards Heath: Tottel, 2008).

*(c) Complexity of the Brussels IIa Regulation*

Furthermore, numerous stakeholders pointed to the **complexity of the structure** as well as a **lack of clarity of certain provisions** of the Brussels IIa Regulation.<sup>291</sup>

For instance, an Irish interviewee suggested that the **complicated structure of the Brussels IIa Regulation** could be the cause of mistakes in the application of the Brussels IIa Regulation in the Member States. According to the interviewee, the Regulation is cumbersome to understand. For example, enforcement is dealt with in different sections of the Regulation.

Typically, the application of the Brussels IIa Regulation was **perceived as being smoother** in Member States **where legal practitioners can specialise**. According to the stakeholders interviewed, the application of the Brussels IIa Regulation would benefit from specialised judges and lawyers.

*(d) Additional measures introduced by the Member States and their effects*

The main measures attributable to the Member States in the context of the Brussels IIa Regulation relate to **training and awareness-raising** efforts for legal practitioners and citizens. While no detailed data is available on the extent of these efforts, there is some indication that training and awareness-raising efforts are insufficient with a view to achieving fully effective functioning of the Brussels IIa Regulation (see above).

The Member States have engaged to a variable extent in **mutual exchange** on their fundamental principles of family law with a view to building a better understanding of national differences, **building mutual trust** and enabling the smooth resolution of potential conflicts of law. In some rare cases, an **approximation of substantive laws** between Member States has been achieved. For instance, the new **Common Franco-German Matrimonial Regime**<sup>292</sup> (applicable since 1 May 2013) provides an optional matrimonial regime for couples with a habitual residence in France or Germany. The instrument thereby overcomes legal differences in matrimonial matters between both Member States. Other countries are explicitly invited to join this instrument.

The extent to which Member States have ratified **bilateral agreements** and **multilateral conventions** that may facilitate the application of the Brussels IIa Regulation also varies. For instance, the protection of vulnerable groups is fostered by the *Hague Convention of 13 January 2000 on the International Protection of Adults*<sup>293</sup>, which has so far been ratified by six Member States (AT, CZ, DE, FI, FR, UK).

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<sup>291</sup> See assessment of the specific provisions under the evaluation of the operational objectives above.

<sup>292</sup> French version: *Décret n° 2013-488 du 10 juin 2013 portant publication de l'accord entre la République française et la République fédérale d'Allemagne instituant un régime matrimonial optionnel de la participation aux acquêts, signé à Paris le 4 février 2010*, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027533762>

<sup>293</sup> [http://www.hcch.net/index\\_fr.php?act=conventions.text&cid=71](http://www.hcch.net/index_fr.php?act=conventions.text&cid=71)

## 3.4 Efficiency

This section assesses the efficiency of the Brussels IIa Regulation, i.e. in how far it has delivered its results that are ‘good value for money’ in terms of the resources used to obtain the actual effects. More specifically, this section addresses the following evaluation questions:

- What are the effects of the Brussels IIa Regulation on the additional costs of the cross-border cases covered by the Regulation compared to domestic proceedings?
- What were the costs the Regulation and how do they compare to the benefits?
- Could the same effects have been achieved at lower costs? Was the Regulation designed in an efficient way in terms of the types of measures included?
- To what extent could the Regulation be simplified?

### 3.4.1 Effects of the Brussels IIa Regulation on the additional costs of the cross-border cases covered by the Regulation compared to domestic proceedings

To assess this, it is of interest to differentiate between the general costs and delays of cross-border cases and those costs and delays that are specific to cases of matrimonial matters and cases of parental responsibility. These costs can be compared to the costs of purely domestic proceedings.

Quantitative estimates of the costs of proceedings under the Brussels IIa Regulation were developed based on nine hypothetical cases in Chapter 5 on “*Quantitative analysis*”. These cases provide insights into the typical costs encountered by citizens in cases covered by the Regulation. The nine hypothetical cases cover all the high-priority issues identified and are structured according to the specific objectives of the Regulation (c.f. chapter on *Effectiveness*). In addition, Annex 8.2.3 provides an overview of the costs of the cross-border cases covered by the Regulation compared to domestic cases.

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 stressed 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**.<sup>294</sup>

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<sup>294</sup> 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 and additional measures affecting the application of the Brussels IIa Regulation in the Member States*”.

### 3.4.2 Costs of the Regulation

Regarding the costs of the Brussels IIa Regulation, there is a need to distinguish first between (1) **compliance costs**, i.e. those costs generated by measures undertaken to comply with the provisions of the Regulation, and then (2) **costs for citizens**, i.e. those costs that citizens face in international proceedings on matrimonial matters and matters of parental responsibility. Finally, this section concludes on the overall efficiency of the Brussels IIa Regulation.

#### Compliance costs

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Compliance with the Brussels IIa Regulation has in itself generated **very limited costs**. What costs there are mainly relate to the operation of the Central Authorities as well as training of legal practitioners.

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 are staff costs (generally between 2 FTEs and 4 FTEs per Member State), office space, outsourced translation services and supplies. No separate detailed cost data is available for each Member State.<sup>295</sup>

**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 it was not possible to collect detailed data on the costs to Member States of awareness-raising and training activities, a large number of stakeholders consulted pointed to insufficient efforts of the Member States in this regard.<sup>296</sup>

#### Costs for citizens

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The Brussels IIa Regulation<sup>297</sup> has not resulted in any costs for citizens.

#### Conclusion on the efficiency of the Brussels IIa Regulation

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Overall, the analysis of the practical operation of the Brussels IIa Regulation (i.e. its effectiveness, c.f. previous chapter) and the assessment of the costs and delays generated by the instrument point to a good relationship between benefits and costs, i.e. a **satisfactory level of efficiency**. Indeed, as

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<sup>295</sup> A survey of the Central Authorities was conducted by the study team, but the responses received provided very limited insights into the costs and resources of Central Authorities. Please refer to Annex 8 for more information.

<sup>296</sup> 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 and additional measures affecting the application of the Brussels IIa Regulation in the Member States*”.

<sup>297</sup> Please refer also to the chapter “*Quantitative analysis*”, which includes quantitative estimates of the costs and delays related to the application of the Brussels IIa Regulation based on a series of hypothetical cases, and also to annex 8.2.3 for a general discussion on costs.

discussed above<sup>298</sup>, the Brussels IIa Regulation has achieved satisfactorily the five objectives (access to court, predictability, smooth recognition, protection of the economically weaker spouse and the well-being of the child), facilitated the circulation of judgements within the Union and resolved problems of parallel jurisdiction at a very limited cost.

### 3.4.3 Could the same effects have been achieved at lower costs?

While most stakeholders consulted concluded that the Brussels IIa Regulation is designed in an efficient way, some suggested that the efficiency of the instrument could be further improved through (1) increased promotion of mediation as an alternative conflict resolution mechanism and (2) increased efforts to foster awareness and knowledge of the instrument among practitioners and citizens.

For example, according to several interviewees, effective and efficient solutions in international cases of matrimonial matters and parental responsibility can often be found through mediation. **Mediation is generally a much cheaper method of conflict resolution** than judicial proceedings. Conflict resolution through mediation is typically shorter and less expensive, mainly because of more flexible procedures and the absence of legal assistance costs. Numerous stakeholders argued that the current efforts to promote mediation (in line with Article 55(e) of the Regulation) are insufficient to make best use of the potential of mediation. Nonetheless, some interviewees noted that not all conflicts can be solved by mediation as this requires some degree of good will on the part of the parties.<sup>299</sup>

Several interviewees noted that currently **insufficient information is provided to citizens** about the Brussels IIa Regulation.<sup>300</sup> As a result, citizens are often not aware of their rights and obligations under the Regulation. For instance, parents are very often not aware that they cannot bring their child to their country of nationality without the consent of the other parent. Better information of citizens could reduce costs for citizens by avoiding unintended illegal behaviour (e.g. child abduction) and the resulting legal proceedings. Better informed citizens might also require less specialised legal advice, thus also reducing the costs.

Finally, even **many legal practitioners are not aware** of basic provisions of the Brussels IIa Regulation, e.g. the existence of a Central Authority in their country. Courts outside the capital are also generally in need of information. Furthermore, it was reported to us that **public child protection services** do not know enough about the Brussels IIa Regulation. Several interviewees regretted that measures for raising **awareness** are only implemented at EU level (e.g. through the European Judicial Network) and not fully integrated in the national-level training of relevant legal practitioners (e.g. through an integration in national legal curricula).

In conclusion, it appears that while the Brussels IIa Regulation is considered as being relatively efficient, its efficiency in achieving its objectives could be further improved through increased

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<sup>298</sup> The costs of international cases in matrimonial matters and parental responsibility are discussed in detail in the section “*Costs of cross-border cases covered by the Regulation compared to domestic proceedings*”.

<sup>299</sup> A comprehensive analysis of this issue can be found in the section “*Promotion of mediation*” in Annex 1.

<sup>300</sup> A comprehensive analysis of issues related to the information and awareness of citizens and legal practitioners can be found in the section “*Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States*” above.

promotion of mediation and increased efforts to foster awareness and knowledge of the instrument. The decrease of costs for citizens that could be achieved through such measures are generally considered by most experts and stakeholders to largely outweigh the costs for the implementation of these measures.

#### **3.4.4 Possible simplification of the Regulation**

According to several stakeholders interviewed, the Brussels IIa Regulation (and its application) could be simplified through the **integration of existing ECJ case law** within a revised version of the instrument.

More broadly, several experts interviewed and participants in the expert panel argued that the **different Union family law instruments** should be **merged into a single instrument** – a single EU family code including all existing Union instruments (Rome III Regulation, Brussels IIa Regulation, Maintenance Regulation etc.). In their view, this would simplify EU legislation and lead to more clarity and awareness among practitioners, thereby ensuring an effective implementation of the instruments. This option goes beyond the scope of the Brussels IIa Regulation and was therefore not assessed in this study.

## 3.5 EU added value and utility

This section evaluates the EU added value and utility of the Brussels IIa Regulation, i.e. the potential advantages of EU action compared to action at national level, as well as whether the Regulation's effects correspond to the needs, by addressing the following evaluation questions:

- Added value – To what extent could the Member States have achieved the same results without EU intervention?
- Utility – To what extent do the effects of the Regulation correspond to the needs? Has the Regulation had any positive or negative unintended effects?

### 3.5.1 EU added value

Under the principle of subsidiarity laid down in Article 5 TFEU, in areas which do not fall within its exclusive competence, the Union should act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can be better achieved at Union level. This leads to the question of whether the objectives of the Brussels IIa Regulation could also be achieved without EU action, e.g. through Member State intergovernmental cooperation.

The objective of the Brussels IIa Regulation is to provide predictable, clear and reliable rules on jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. While this objective could in theory be achieved by convergence between the Member States' national conflict-of-law rules and substantive laws on matrimonial matters and matters of parental responsibility, there is currently no such convergence.<sup>301</sup> The **objective of providing predictable, clear and reliable rules on jurisdiction and recognition and enforcement of judgments** in matrimonial matters and matters of parental responsibility **can therefore be better achieved at EU level**. The action at Union level therefore has added value compared to action at Member State level.

### 3.5.2 Utility

As outlined in the chapters on the relevance and effectiveness of the Brussels IIa Regulation, **the objectives and the effects of the Regulation correspond to the needs of EU citizens**. According to most interviewees, the Regulation's core utility lies in the facilitation of the free movement of

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<sup>301</sup> For instance, there are considerable differences between the Member States' conflict-of-law rules concerning divorce. While in some Member States the rules applicable always correspond to their domestic laws ("*lex fori*"), the majority of Member States determine the applicable law on the basis of a scale of connecting factors that seek to ensure that the divorce is governed by the rules with which the spouse has the closest connection. The Rome III Regulation No 1259/2010 provides common rules for applicable law in divorce matters; however, only 16 Member States currently participate in this Regulation.

For more details, please refer to Annex II of the European Commission's 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*", Brussels, 17.7.2006, SEC(2006) 949.

Differences continue to exist in substantive law as well. For instance, due to the different family policies applied in the Member States and the disparate cultural values, significant differences exist between the Member States' divorce laws, both in relation to the grounds for divorce as well as the procedures. The differences between the substantive laws may mean that the conditions to be met for divorce (in terms of time, requirements of proof of separation periods, grounds for divorce - mutual consent; irreparable breakdown of the marriage; fault of one spouse -, etc.) change drastically from one Member State to the next. For more details, please refer to Annex I of the European Commission's 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*", Brussels, 17.7.2006, SEC(2006) 949.

judgments in matrimonial matters and parental responsibility, the re-enforcement of the 1996 Hague Convention, and the development of mutual trust between the judicial systems of the Member States.

In addition, the Regulation safeguards the legitimate interests of EU citizens, who have certain expectations of the functioning of the internal market and an effective common judicial area. More specifically, the Brussels IIa Regulation contributes to **promoting trust in the internal market** by ensuring that citizens who move to another Member State (i.e. who make use of the internal market's fundamental principle of free movement of persons) can rely on clear rules concerning jurisdiction as well as free movement of judgments in the event of cross-border matrimonial and parental responsibility disputes. The absence of such rules and mechanisms would potentially hamper EU citizens in exercising their right of free movement within the internal market.

However, the Brussels II Regulation has also had an **unintended negative effect**, namely the occurrence of a rush to court or forum shopping in international disputes on matrimonial matters or matters of parental responsibility. Even though limited by the Rome III Regulation, these issues may lead to significant stress and costs for the parties involved and a possible disadvantage for the economically weaker spouse who may have limited access to specialised legal advice.<sup>302</sup>

No other (positive or negative) unintended effects of the Brussels IIa Regulation were identified.

### 3.6 Main conclusions of the evaluation

This section summarises the main conclusions of the evaluation of the Brussels IIa Regulation.

#### 3.6.1 Relevance

Given that the overall number of international couples and families affected by the Brussels IIa Regulation is stable and in view of the qualitative assessment of the legal issues noted since its adoption, the **existence of and further improvement to the Regulation are relevant to the needs of citizens.**

The number of international couples and families affected by the Regulation remains significant and the Regulation remains relevant as well in view of the qualitative assessment of the evolution of the initial problem.

The objectives of the Regulation are still relevant to the situation as it has evolved since adoption of the Regulation, but we note that the Regulation does not reflect the international trend to grant more autonomy to the parties in civil law.

#### 3.6.2 Coherence

The Regulation is **coherent with and fosters well-functioning free movement** of persons within the EU.

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<sup>302</sup> A comprehensive analysis of this issue can be found in the section *Potential for rush to court/forum shopping on the basis of the alternative grounds of jurisdiction* in Annex 1.

However, it appears that the **multitude, complexity and interrelationship of Union instruments in family law have led to practical difficulties**, such as the lack of understanding on the part of citizens and practitioners or wrong assumptions on jurisdiction.

The **interrelationship of the Regulation with international conventions and bilateral agreements also remains very complex**. It is not always clear for practitioners which instrument applies and there are conflicting interpretations which are hampering the practical operation of the Regulation.

### 3.6.3 Effectiveness

The **Regulation** has **contributed to building a European area of justice** in the domains of matrimonial matters and parental responsibility. It has facilitated the settlement of cross-border litigation in matrimonial and parental responsibility matters through a comprehensive system of jurisdiction rules, a system of cooperation between Member State Central Authorities, the prevention of parallel proceedings and the free circulation of judgments, authentic instruments and agreements.

The **Regulation** contributes to **promoting trust in the internal market** by, for the most part, ensuring that citizens who move to another Member State can – in most cases – rely on clear rules concerning matrimonial matters and parental responsibility.

The **Brussels IIa Regulation appears to build on the right measures** – i.e. uniform European rules to settle conflicts of jurisdiction between Member States and facilitate the free circulation of judgments, authentic instruments and agreements in the Union by establishing rules on their recognition and enforcement in another Member State – in order **to achieve its general and specific objectives**.

While the **Regulation** is **generally correctly applied** in all Member States, the **lack of awareness** and knowledge of the instrument (both among citizens and legal practitioners), **insufficient training** offerings as well as the **complexity of the structure and provisions** of the Regulation are to some extent preventing the the Regulation from functioning as well as it should.

While the Regulation is considered to be functioning well overall and to be delivering value to EU citizens, the operational functioning of the instrument is at times hampered by a series of legal issues as well as a lack of awareness and information on the part of both citizens and legal practitioners.

We summarise below the effects of the most important high-priority legal issues at the level of each of the five specific objectives of the Regulation.

#### *Access to court for citizens in international families with a close connection to the EU*

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While the existing provisions on jurisdiction and legal aid are ensuring **effective access to (a suitable) court for citizens in international families with a close connection to the EU** in a very large majority of cases, a series of legal issues are still resulting in **risks that citizens will be excluded from their fundamental right to access to a court** within the EU or to situations, where the court that has been determined as having jurisdiction may not be the most suitable one to hear the case.

- The impossibility of choosing the competent court by common agreement (**choice of court**) may prevent couples from access to the most suitable/convenient court for the parties.
- The **absence of a *forum necessitatis*** in the Regulation in combination with the reliance on (non-harmonised) national rules for establishing residual jurisdiction may lead to situations where EU citizens are excluded from access to a court in the EU in relation to matrimonial matters and parental responsibility.
- The **vagueness of the concept of habitual residence of the child** has in some cases been detrimental to the objective of ensuring effective access to the most suitable court, notably in the best interests of the child.

#### Predictability, clarity, and reliability for citizens involved in cross-border cases

Compared to the situation before it was enacted, , the **Regulation has brought about increased predictability, clarity and reliability for citizens involved in international disputes** in matrimonial matters and matters of parental responsibility. By establishing common rules on international jurisdiction and recognition and enforcement, it has smoothed the resolution of such disputes.

Nonetheless, a **series of remaining legal issues** is negatively affecting the predictability, clarity, and reliability for citizens involved in cross-border cases.

- Potential exclusion of certain people due to the **non-harmonisation of rules on residual jurisdiction** and the **lack of a *forum necessitatis*** can generate significant uncertainty for citizens.
- The **uncertainty about the jurisdiction applicable in matrimonial matters** and the risk of a **rush to court** can be a significant source of stress for citizens.
- The **absence of a possibility for spouses to choose the competent court by common agreement (choice of court)** prevents couples from predetermining the jurisdiction of potential divorce proceedings by common choice and thereby reducing the uncertainty on the applicable law and the risk of a rush to court in case of divorce.
- The **vagueness of the concept of ‘habitual residence’ leaves room for long debates about it in court** as well as for conclusions that are not in the best interests of the child. This may be very stressful for the parties involved.
- **Significantly varying rules on hearing the child** have led to reservations and refusals of the recognition and enforcement of judgments, thus impeding the legal certainty and predictability for citizens.
- The **absence of common minimum standards** in the Regulation concerning the **legal representation of the child in court** is a source of legal uncertainty for citizens due to different practices across the Member States and a lack of information on these practices.
- The fact that Member States do not **interpret the term “enforcement”** in a uniform manner has led to differing practices, e.g. in terms of whether judgments require a declaration of enforceability, which are the source of significant costs and time delays for citizens.
- The **non-abolition of the exequatur procedure** for the enforcement of judgments on the exercise of parental responsibility in respect of a child (custody) has led to additional costs and time delays for citizens.
- **Practical obstacles during enforcement procedures** are a considerable factor of uncertainty for citizens involved in cross-border cases on parental responsibility, as

they cannot be sure whether a judgment will eventually be enforced. Significant delays or even failures to enforce return orders in practice are leading to doubts on the part of citizens with regard to the legal certainty, predictability and reliability of the instruments provided by the Regulation.

- The **lack of clarity on the application of the six week time limit** and the overall duration of return proceedings may result in stress for citizens because they do not know when they can expect a wrongfully removed child to be returned.
- The **lack of clarity on the concept of “adequate arrangements”** and what arrangements need to be made to fulfil this criterion leads to significant legal uncertainty for citizens.
- In practice, **hurdles** remain in connection with the actual **enforcement of return orders**.
- **Practical difficulties** have occurred regarding the **cooperation between Central Authorities and local child welfare authorities**, leading to delays for citizens and uncertainty about the support they may obtain.
- **Citizens are often not aware of their rights and obligations** under the Regulation – a situation which can lead to unintended illegal behaviour (e.g. child abduction) and resulting legal proceedings. **Even many lawyers, judges and public child protection services are not fully aware of the basic provisions** of the Regulation – leading to a risk non-application or mis-application of the Regulation.

#### *Smooth recognition and enforcement of judgments, authentic instruments and agreements*

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The **Regulation has contributed to the smooth recognition and enforcement of judgments** across borders, in particular by establishing automatic recognition of *all* judgments and the abolition of intermediate proceedings on enforcement for *most* judgments. However, a number of difficulties still remain:

- As concerns the **recognition of judgments for matrimonial matters and matters of parental responsibility**, the provisions of the Regulation are sometimes not applied or applied wrongly because of a lack of awareness of practitioners. As a consequence, additional costs, delays and stress are caused in cases where citizens have had to produce **supplementary documents** (including translations and apostilles) to have a judgment recognised.
- Additional hurdles remain with regard to the **recognition and enforcement of judgments on matters of parental responsibility**. In some cases, citizens cannot be sure whether or not a declaration of enforceability is needed due to the fact that there are different interpretations of the term “enforcement”. Costs and delays with regard to enforcement still occur due to the fact that intermediate procedures (exequatur) have only been abolished for some types of decision but are still required for others. Furthermore, recognition and enforcement of judgments is not ensured in all cases. For the citizens involved, this is a factor of uncertainty, as they cannot be sure whether a judgment will eventually be enforced. The child not having been given an opportunity to be heard is an important reason for refusing the recognition and enforcement of judgments. Finally, **some decisions on parental responsibility are never enforced** due to practical obstacles during national enforcement procedures.

### *Protection of the economically weaker spouse*

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While the existing provisions on legal aid and the improved legal certainty and clarity for citizens (as compared to the situation before the enactment of the Regulation) have **contributed to the protection of the economically weaker spouse**, a **series of legal issues** are still leading to situations where this spouse is put at a disadvantage.

- The unequal access to expensive specialised legal advice is putting **economically weaker spouses on an unequal footing**, notably in complex and unpredictable cases caused by issues such as rush to court/forum shopping or the lack of common minimum standards on the hearing of the child and the representation of the child in court.
- The **impossibility for spouses to choose the competent court by common agreement** makes it impossible to conclude agreements that could protect the economically weaker spouse from a rush to court/forum shopping in the event of an intention to divorce.
- The **vagueness of the concept of habitual residence of the child** has in some cases led to prolonged disputes about jurisdiction in cases of parental responsibility matters. This can be particularly burdensome for the economically weaker spouse who may not be able to afford adequate legal advice and representation.
- Even though **mediation** is broadly acknowledged as a cost-effective way of finding sustainable solutions that are acceptable to vulnerable spouses in international family conflicts, it is insufficiently promoted by the Central Authorities.

### *Well-being of the child and the parent-child relationship*

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While the **Regulation has improved the situation for children in cross-border cases to some extent**, **several shortcomings** were still identified in this regard.

- As concerns the establishment of jurisdiction, **difficulties in assessing the child's habitual residence** in a State lead to delays and create uncertainty and stress in detriment to the well-being of the child. Furthermore, having a determination of custody and access rights pending, as well as holding proceedings in a Member State that is not the centre of the child's life, might prevent or complicate contact between the child and the parents.
- Difficulties related to the **hearing of the child and his/her representation in court** lead to uncertainty and to cases where judgments are not recognised or enforced because of doubts that the hearing of the child was carried out effectively.
- **Issues with enforcement**, such as delays or in particular non-enforcement of a return order following abduction, result in a particularly stressful situation for the child.
- The difficulties with the interpretation of the **time limit for return** in cases of child abduction is an important concern, as the longer the child is away, the greater becomes the possibility of irremediable consequences for the child's relationship to the left-behind parent.
- Delays and additional stress still occur because the involvement of **Central Authorities** and local child welfare authorities is not always efficient and effective, and alternative means of conflict resolution (in particular, mediation) are not used to a sufficient extent.

### 3.6.4 Efficiency

Compared to domestic cases, **international cases in matrimonial matters and parental responsibility** are **typically more cost- and time-intensive**. Additional costs and delays are regularly linked to factors such as 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 judgments). Nonetheless, **if the Brussels IIa Regulation did not exist, these costs related to international proceedings would still arise** at a similar level.

The **Brussels IIa Regulation** itself has **generated very limited costs**, which are mainly related to the operation of the Central Authorities as well as the awareness-raising and training activities for legal practitioners and citizens.

Overall, the analysis of the practical operation of the Brussels IIa Regulation (i.e. its effectiveness) and the assessment of the costs and delays generated by the instrument point to a good relationship between benefits and costs, i.e. a **satisfactory level of efficiency**.

However, some evidence shows that the **efficiency of the Brussels IIa Regulation has not reached its full potential** due to insufficient promotion of mediation as an alternative conflict resolution mechanism, as well as to insufficient efforts to foster awareness and knowledge of the instrument among citizens and legal practitioners.

### 3.6.5 EU added value and utility

**There is nothing to indicate that the Member States could have achieved the same results without EU intervention**, i.e. without the Brussels IIa Regulation. The Brussels IIa Regulation is serving the legitimate interests of EU citizens, who have certain expectations of the functioning of the internal market and an effective common judicial area.

**ANNEX IV – WHO IS AFFECTED BY THE INITIATIVE AND HOW**

|                            | <b>Title of issue</b><br><i>Preferred policy option</i>                                   | <b>Practical implications for individuals</b>  | <b>Practical implications for national authorities/ courts</b> |
|----------------------------|---|--|--|
| <b>Matrimonial matters</b> | Party autonomy in matrimonial matters<br><br><i>Status quo</i>                            | <p>Since this option would entail no change, the problems described above would persist. Parties wishing to consolidate their matrimonial proceedings would continue to be able to do this only by bringing also parental responsibility and maintenance issues before one of the courts having jurisdiction for the divorce under the Regulation. The perceived problem of rush to court would continue to exist with regard to those Member States which have not yet joined Rome III.</p> <p>Approximately 200'000 citizens are involved every year in an international divorce. This number has to be narrowed down to the spouses who would like to benefit of the possibility to choose a court.</p> | No specific impact.  |
|                            | The operation of the Regulation in the international legal order<br><br><i>Status quo</i> | This option has implications for EU citizens who live in a third State but retain strong links with a certain Member State and want to get divorced. This policy option assumes that no legislative initiatives bringing about substantive changes would take place at EU level. This does not exclude, however, a clarification of the  | No specific impact.  |

|                                |   |  |   |
|--------------------------------|---|--|---|
|                                |   | Regulation's rules determining in which cases and under which conditions Member States may apply their rules on residual jurisdiction.   |   |
| <b>Parental responsibility</b> | <p>The return procedure in cases of parental child abduction</p> <p><i>Establishment of a separate time frame of 6 weeks for the proceedings before the requested Central Authority, the first and the second court instance plus introduction of several new elements to make the system more efficient and effective (in particular concentration of jurisdiction, limitation to one appeal, creation of jurisdiction for court of refuge to order protective measures if necessary).</i></p> | <p>This option has practical implications for the parents and the children involved in a parental child abduction case. It is estimated that there are up to 1,800 cases of child abduction within the EU every year. This obligation will not create any new obligations for the concerned individuals. The improvements of the procedure will lead to fewer delays and more effectiveness of the return procedure.</p> | <p>The introduction of specialised courts implies a reattribution of tasks between the courts within one Member State and the compliance with new procedural rules. This could lead to a shift of costs from one court to another. New costs will not be generated, except in some cases funding for additional training for the judges might be required. However, in the long term the specialised courts would contribute to cost savings due to efficiency gains. As the number of return procedures is generated by the number of parents abducting a child, it is not expected that the improved rules will lead to more return procedures.</p> |
|                                | <p>Placement of the child in another Member State</p> <p><i>Creation of an autonomous consent procedure to be applied to all cross-border placements, flanked by a time-limit for the requested Member State to respond to the request</i></p>  | <p>This option has implications for children who are being placed in an institution or a foster family in another Member State. Between 300 and 400 children per year are affected by this option.</p> <p>This option will not create any obligations for the concerned individuals. The cross-border placement procedure will be improved by reducing delays.</p>   | <p>This option has implications for the Courts and Central Authorities as new procedural rules will be introduced. Channelling all applications through Central Authorities will slightly increase their workload. However, this option will lead to cost savings as the current first step of inquiring whether consent is necessary is eliminated. The Central Authority can focus on the handling of the cases rather than requiring further information to complete pending requests. As the number of placements is generated by the needs of particular children, it</p>  |

|  |  |   |  |
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|  |  |   | <p>is not expected that the improved rules will lead to more requests for placements.</p>  |
|  | <p>Recognition and enforcement of judgments</p> <p><i>Abolition of exequatur with appropriate safeguards to be invoked at the stage of enforcement</i></p> <p><i>and</i></p> <p><i>concerning the hearing of the child: Introduction of an obligation to give the child an opportunity to express his or her views</i></p> | <p>This option has implications for all the individuals who want to have their judgements on custody and placement decisions enforced in another Member State and therefore need to get an <i>exequatur</i> in the Member State where enforcement is sought.</p> <p>This option will eliminate the obligation of obtaining an <i>exequatur</i>. As additional proceedings will be abolished, delays will decrease. The uniform refusal grounds for enforcement will enhance the predictability of the enforcement proceedings. The abolition of the exequatur procedure will lead to tangible cost savings as the costs for exequatur proceedings can amount to 1'100 - 4'000 EUR. In case of appeal, however, the associated costs are higher.</p> <p>The introduction of an obligation to give the child an opportunity to express his or her views will affect all children involved in the proceedings.</p> | <p>The abolition of exequatur will diminish the workload of the courts. From an overall perspective, the obligation to hear the child will in total not increase the workload and costs of Courts. As the hearing of the children is often a trigger of disputes on the enforceability of a judgment, clearer rules on the hearing of the child and an obligation to report on this in the judgement will lead to fewer applications on refusal of recognition or enforcement on the ground that the child rights were violated.</p> |

|  |   |  |  |
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|  | <p>Cooperation between National Authorities</p> <p><i>Clarification of the Central Authorities' and other requested authorities' tasks and addition of an article on adequate resources</i></p> | <p>This option has implications for individuals who are involved in specific cases on parental responsibility in which the Central Authorities have to undertake specific tasks such as exchange information on the situation of a child. In the last three years the Central Authorities registered annually between 500 and 770 incoming requests on the exchange of information.</p> <p>This option will not introduce any new obligations for the individuals concerned, but they will be able to benefit from several improvements.</p> | <p>Central Authorities which have so far not provided the required information will have to respond to such requests; this may increase their workload. With respect to the cooperation with child welfare authorities, Central Authorities' work consists mainly of transferring the requests to those authorities which draw up the social reports. The latter authorities might receive more requests. In total, the clarification of the existing obligations will lead to cost savings as the proceedings will be shortened and streamlined. The Central Authorities might need to re-organise their internal tasks and procedures to fulfil the requirements of the Regulation.</p> <p>For some Member States the obligation to provide their Central Authority with adequate resources is likely to generate additional costs (in particular for human resources) if their Central Authorities are currently not sufficiently equipped.</p> |
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## ANNEX 5 – GLOSSARY OF LEGAL TERMS

| Term                             | Definition  |
|----------------------------------|---|
| Authentic instrument             | This is a document recording a legal act or fact whose authenticity is certified by a public authority.   |
| Central Authority                | A national authority designated by the Member State to support parents and courts in cross-border parental responsibility cases and to cooperate with the other Central Authorities to ensure the smooth application of the Regulation.   |
| Certificate                      | In the context of the Regulation this term refers to a document issued by a court or authority which confirms the enforceability of a judgment and that certain standards of procedures were met.   |
| Child Abduction                  | Removal of the child to another State or retention there by a person (most often a parent) in violation of the custody rights of a person or body (most often the left-behind parent when both parents have joint custody for the child). |
| Choice of court agreement        | An agreement by which parties agree that any present or future dispute arising out of their relationship should be resolved by a particular court.  |
| Divorce                          | Legal dissolution of a marriage by a competent court or authority   |
| Enforcement                      | The act of a public authority by which a judgment or administrative order is put into practice through coercive measures against the judgment debtor.   |
| Exequatur procedure              | Formal court procedure by which a foreign judgment is declared enforceable (i.e. "validated" for enforcement) in the state where enforcement is sought.   |
| Exorbitant rules of jurisdiction | Rules of jurisdiction in which the court seized does not possess – by internationally agreed standards - a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action.         |
| Forum                            | A judicial body, e.g. a court or tribunal, where a dispute can be brought   |

|   |  |
|---|--|
| <i>Forum necessitatis</i>                     | [Latin, 'forum of necessity'] Forum which may exercise jurisdiction when no other forum is reasonably available.   |
| Habitual residence                            | Habitual residence is not defined by the Regulation. The European Court of Justice has indicated that "habitual residence" under the Regulation "must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration." |
| Hague Conference on Private International Law | An intergovernmental organisation with its seat in The Hague, NL, which is working for the progressive unification, by means of international conventions, of the rules of private international law.  |
| International couple                          | Spouses who are habitually residing in different Member States, have different nationalities or have the common nationality of a Member State, but are habitually residing in another Member State.  |
| Jurisdiction/International jurisdiction       | Jurisdiction is the power conferred upon a court or tribunal to hear a specific case; international jurisdiction is the competence of the courts of a particular country to hear a case.   |
| Legal separation                              | A "weakening" of the marriage bound by a decision of a competent authority by which the duties of marriages are redefined and the obligation to live together and to build a marriage community ends while the duty of maintenance remains.  |
| <i>Lis pendens</i> or litispendence           | [Latin, 'pending suit'] Situation in which at the moment when one court is seised, another court is already in the process of examining the same dispute.  |
| Matrimonial matters                           | In the context of the Regulation this term refers to civil matters of divorce, separation and marriage annulment.  |
| Member State of origin                        | The Member State where a decision was given.   |
| Member State of refuge                        | The Member State to which the child was removed or in which the child is retained by one of the parents in breach of rights of custody of the other.   |
| Parental responsibility                       | All rights and duties relating to the person or the property   |

|                           |   |
|---------------------------|---|
|                           | of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term includes rights of custody and rights of access.  |
| <i>Perpetuatio fori</i>   | A principle of procedural law that a court may continue to exercise jurisdiction until it has rendered a judgment that is final and no longer open to appeal, even if in the meantime there has been a change in the circumstance on which jurisdiction was originally based. In some jurisdictions <i>perpetuatio fori</i> even means that jurisdiction continues to persist even after a judgment has become final, but according to the Court of Justice this interpretation does not apply under the Regulation.  |
| Recognition               | The act of accepting a judgment or other act of sovereignty of another State and giving it the same effect in one's own State which it has in its State of origin.  |
| Residual jurisdiction     | Refers to the jurisdiction that is left to be determined by national law where the Union law currently does not provide any basis of jurisdiction for a particular dispute in any of the Member States.   |
| "Rush to court"           | Informal term used in the context of the Regulation to describe a spouse's behaviour to apply for divorce before the other spouse does so to ensure that the law applied in the divorce proceedings will safeguard his or her own interests.  |
| The 1980 Hague Convention | The <i>Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction</i> is a multilateral treaty adopted in the framework of the Hague Conference on Private International Law, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return.   |
| The 1996 Hague Convention | The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children is a multilateral treaty adopted in the framework of the Hague Conference on Private International law, which covers a wide range of measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children's property. |

## Annex 6 – Choice of court under EU family law instruments

|                                     | Which court can be chosen?  |
|-------------------------------------|---|
| <b>Brussels IIa</b>                 | For divorce or separation: <b><u>not allowed</u></b>  |
|                                     | Parental responsibility: parents can choose a court with which the child has a substantial connection (i.e. child's nationality or the State of the habitual residence of the parent)   |
| <b>Maintenance</b>                  | For spouses:<br><ul style="list-style-type: none"> <li>- a court of a Member State in which one of the parties is habitually resident,</li> <li>- a court of a Member State of which one of the parties has the nationality,</li> <li>- the court which has jurisdiction to settle the spouses' disputes in matrimonial matters, or</li> <li>- a court of the spouses' last common habitual residence for a period of at least one year.</li> </ul> |
|                                     | For children:<br>A court of a Member State<br><ul style="list-style-type: none"> <li>- in which one of the parties is habitually resident, or</li> <li>- of which one of the parties has the nationality.</li> </ul>  |
| <b>Matrimonial Property Regimes</b> | Spouses can choose a court of a Member State<br><ul style="list-style-type: none"> <li>- whose law was chosen by the parties, or</li> <li>- where divorce is being dealt with</li> </ul>  |

**ANNEX 7 – NUMBER OF APPEALS ON RETURN ORDERS IN CHILD ABDUCTIONS PROCEDURES<sup>303</sup>**

| <b>Jurisdictions with <u>one ordinary challenge</u></b>   |  |
|---|--|
| <b>State / jurisdiction<br/>Name of first instance court</b>  | <b>Name of second instance court<br/>Deadline for filing appeal</b>  |
| <b>Bulgaria</b><br>Sofia City Court<br>(court has 30 days to decide following receipt of the application) | Sofia Court of Appeal<br>14 days from day of hearing where decision was pronounced with reasons if party was present<br>14 days from notification of decision if party was not present<br>(court has 30 days to decide the appeal) |
| <b>Cyprus</b><br>Family Court   | Supreme Court<br>14 days; extension possible but difficult procedure and almost never approved   |
| <b>Czech Republic</b><br>District Court ( <i>Okresní soud</i> – there are 75)                             | Court of Appeal (Regional Court)<br>15 days  |
| <b>Finland</b><br>Helsinki Court of Appeal  | Supreme Court<br>14 days from day that decision was given  |
| <b>Germany</b><br>Family Court (concentration by venue rules on 22 courts in Germany)                     | Court of Appeal (Higher Regional Court – <i>Oberlandesgericht</i> )<br>immediate appeal ( <i>sofortige Beschwerde</i> )<br>2 weeks from receipt of decision  |
| <b>Italy</b><br>Juvenile Court ( <i>Tribunale per i minorenni</i> )                                       | Supreme Court ( <i>Corte di Cassazione</i> )<br>60 days from service of decision   |
| <b>Malta</b><br>Family Court (currently made up of two judges)  | Court of Appeal<br>20 days from date of the decision   |
| <b>Romania</b><br>Tribunal for minors and the family Bucharest  | Court of Appeal Bucharest<br>10 days from receipt of decision  |
| <b>Slovakia</b><br>District Court ( <i>Okresný súd</i> )  | Regional court ( <i>Krajský súd</i> )<br>15 days from service of decision  |
| <b>Spain</b><br>Judge of First Instance or Family Judge   | Audiencia provincial<br>5 days from notification of decision   |

<sup>303</sup> Source: Hague Conference on Private International Law, Enforcement of orders made under the 1980 Convention - A comparative legal study -, drawn up by Andrea Schulz, First Secretary, Preliminary Document No 6 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (The Hague, 30 October – 9 November 2006).

| <b>Jurisdictions with <u>two levels of ordinary challenge</u></b>  |  |  |
|--|--|--|
| <b>State / jurisdiction<br/>Name of first instance court</b>   | <b>Name of second instance court<br/>Deadline for filing appeal</b>  | <b>Name of third instance court<br/>Deadline for filing appeal</b>   |
| <b>Austria</b><br>District Court ( <i>Bezirksgericht</i> )<br>(concentration by venue rules on 16 courts in Austria)                     | Court of Appeal ( <i>Landesgericht</i> )<br>14 days from service of decision (plus 14 days for other party to reply before file is transferred from first instance to Court of Appeal) | Supreme Court ( <i>Oberster Gerichtshof</i> )<br>appeal on points of law ( <i>ordentlicher / außerordentlicher Revisionsrekurs</i> )<br>14 days from service of decision (plus 14 days for other party to reply)   |
| <b>France</b><br>Tribunal de Grande Instance<br>(concentration by venue rules on 30 courts in France plus 6 in the overseas territories) | Court of Appeal ( <i>Cour d'appel</i> )<br>15 days from service against a decree ( <i>ordonnance</i> )<br>1 month from service against a judgment                                      | Supreme Court ( <i>Cour de Cassation</i> )<br>2 months from service (plus 2 extra months for parties residing abroad)  |
| <b>Greece</b><br>Court of First Instance   | Court of Appeal<br>- 60 days from service of decision for party living abroad<br>- 3 years if decision was not served  | Supreme Court (Court of Cassation)<br>- 90 days from service<br>- 3 years if decision was not served   |
| <b>Luxemburg</b><br><i>Tribunal d'arrondissement</i><br>(there are 2 in Luxemburg: in the city of Luxemburg and in Diekirch)             | Court of Appeal ( <i>Cour d'appel</i> )<br>- 8 days from service for opposition against default decision<br>- 15 days from service for appeal against other decision                   | Supreme Court ( <i>Cour de Cassation</i> )<br>2 months (plus extra time for parties residing abroad where applicable for <i>recours en cassation</i> ; the rules concerning extra time depending on the distance are complex; e.g., the extra time for those living in Europe is 15 days)<br>- beginning from service for contradictory decisions<br>- beginning from day where no opposition is possible any more (i.e. after 9 days) for default decisions<br><i>opposition</i> against 2nd instance default decisions |

|   |   |   |
|---|---|---|
|   |   | (where 1st instance was not also given in default)<br>8 days from service               |
| <b>Jurisdictions with two levels of ordinary challenge</b>  |   |   |
| <b>State / jurisdiction</b><br><b>Name of first instance court</b>                                | <b>Name of second instance court</b><br><b>Deadline for filing appeal</b>                                       | <b>Name of third instance court</b><br><b>Deadline for filing appeal</b>                |
| <b>Netherlands</b><br>Children's Judge within the Court of First Instance                         | Court of Appeal<br>2 weeks from date of decision  | Supreme Court ( <i>Hoge Raad</i> )<br>4 weeks from date of decision                     |
| <b>Sweden</b><br>Stockholm District Court ( <i>Tingsrätt</i> )                                    | Stockholm Court of Appeal ( <i>Svea Hovrätt</i> )<br>3 weeks  | Supreme Court ( <i>Högsta domstolen</i> )<br>3 weeks<br>leave by Supreme Court required |
| <b>United Kingdom (England &amp; Wales)</b><br>High Court   | Court of Appeal<br>14 days after decision unless court fixed different period or appeal court alters time limit | House of Lords<br>3 months from date on which decision was given                        |
| <b>United Kingdom (Northern Ireland)</b><br>Family Judge at the Family Division of the High Court | Court of Appeal<br>6 weeks after decision was filed   | House of Lords<br>3 months from date on which decision was given                        |

|  |  |  |
|--|--|--|
| <b>United Kingdom (Scotland)</b><br>Court of Session | Inner House of the Court of Session<br>21 days from date of decision | House of Lords<br>3 months from date on which decision was given |
|--|--|--|

## Annex 8 - The time for obtaining *exequatur* in the Member States<sup>304</sup>

| Member State   | Average duration of first instance <i>exequatur</i> procedure                   | Average duration of appeal proceedings against <i>exequatur</i>  |
|----------------|---|--|
| 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 months  | 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  |

<sup>304</sup> Source: European Commission; Commission Staff Working Paper SEC(2010) 1547 final , see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1547:FIN:EN:PDF>

| <b>Member State</b> | <b>Average duration of first instance<br/><i>exequatur</i> procedure</b> | <b>Average duration of appeal proceedings<br/>against <i>exequatur</i></b> |
|---------------------|--|--|
| United Kingdom      | England & Wales: 1-3 weeks<br>Scotland: n/a                              | England & Wales: 1-2 months<br>Scotland: n/a                               |

## **Annex 9 – Examples of cooperation between Central Authorities**

### **Example 1: A Polish father seeking access to his child living in Germany**

A Polish father living in Poland brings access proceedings in Germany where his son lives together with his German mother to which the Polish father was never married. The mother has sole custody. The German court seized with the request of the father for access requires a social report about the father from Poland in order to assess whether the father is fit to have access with his son in general, and whether the father's situation in Poland also allows to grant him the right to have contact with the child at his home in Poland and not only in Germany. The Regulation does not mention the possibility to obtain a social report about the father from Poland which must then be obtained under the Evidence Regulation.

In contrast, if the father were living in Switzerland, a State party to the 1996 Hague Child Protection Convention, the father could request a social report from the Polish authorities in support of his access application brought in the courts of Switzerland. All EU Member States are parties to the 1996 Hague Convention, and in relations among them, the Regulation prevails over the Convention. The result is that EU citizens bringing access proceedings in non-EU-Member States can avail themselves of the 1996 Hague Convention and obtain a social report to support their access application while EU citizens bringing access proceedings in another Member State – with or without the assistance of the Central Authorities - do not have this possibility unless the court seized makes use of the Evidence Regulation.

### **Example 2: Request for information on pending proceedings concerning siblings and judgments already given**

A three-year old boy and his one-year old sister have been taken into care by the Austrian child protection authorities because their single mother maltreated them. The mother just moved to Austria eight months ago. Before that, she lived in Scotland where her three elder children were equally taken into care and placed in foster families. Before making its decision on the two youngest children, the Austrian court wants to obtain information through Central Authority channels on whether there are pending proceedings in Scotland on the two youngest children. The court also asks for copies of the decisions on the taking into care of the older children, and for any social reports on the siblings and their relationship with each other (including the two children now in Austria) and on the mother which might be available. The Scottish authorities inform that there are no proceedings – pending or closed - on the two youngest children. They refuse to provide information about the siblings and the mother as the Regulation only provides for the transfer of information about “the child”, i.e. the child who is the object of the proceedings giving rise to the request for information.

## Annex 10 – Human resources at Central Authorities

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Information has been requested from the Central Authorities about their resources and the costs relating to the management of the implementation of the Brussels IIa Regulation. The objective was to obtain a better picture of the difficulties and the workload Central Authorities have to face. In addition, it provides contextual information that may help understanding the potential lack of data concerning some indicators.

Nine Central Authorities provided additional information on their resources and costs, but for most of them it was incomplete. The scarceness of data provided can be explained by the fact that Central Authorities did not want to release certain information (in particular concerning their budget), or were not in the position to gather some types data.

The main findings are as follows.

### ➤ Budget of Central Authorities

No quantitative information could be collected regarding the budget of Central Authorities.<sup>305</sup> Some Central Authorities referred to their duty of secrecy (in particular for those which are part of national ministries). In addition, this question was difficult to answer for most of the Central Authorities because many do not have a separate budget from their parent administration.

### ➤ Human resources

The data collected concerning the human resources made available to Central Authorities highlights significant differences between the Central Authorities of the different Member States. These disparities can partially be explained by the different sizes of the countries, as well as their tendency to host foreign population.

| Member State  | Number of Full-Time Equivalents (FTE) |
|---|---------------------------------------|
| <b>Estonia</b>  | 2                                     |
| <b>France</b><br><i>Central Authority in charge with Article 56<sup>306</sup></i> | 2                                     |
| <b>Germany</b>  | 23                                    |
| <b>Latvia</b>   | 2                                     |
| <b>Luxembourg</b>   | 2                                     |
| <b>Malta</b>  | 2,5                                   |
| <b>Poland</b>   | 3,75                                  |

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<sup>305</sup> Responses have been received only from France and Poland.

<sup>306</sup> In the case of France, which has two Central Authorities in charge with different articles of the Brussels IIa Regulation, only the Central Authority in charge of Article 56 responded to this question, yet without providing quantitative data.

Assessing these figures, one may note that the French Central Authority in charge of Article 56 of the Brussels IIa Regulation has, for example, the same number of full-time employees as the Latvian or Luxembourg Central Authorities (that are, however, in charge of the entire Brussels IIa Regulation). The number of full time employees of the German Central Authority is particularly high compared to the other Central Authorities.

In spite of the differing needs in the Member States, some Central Authorities from smaller countries complained about the heavy workload and the general lack of resources. This lack of resources often also entails an impossibility to publish regular and reliable statistics.

➤ Processing time for Brussels IIa Regulation-related matters

Information on the time required to process Brussels IIa cases has only been provided by the French Central Authority in charge of Article 56 of the Brussels IIa Regulation and the Estonian Central Authority.

As far as the French Central Authority is concerned, the time spent on each case is estimated at 2.5 hours. Since 12 cases have been dealt with in 2012, this represents a workload of 30 hours, which corresponds to an average week of work of a civil servant (cadre A). The work directly relating to the Brussels IIa Regulation is thus to be estimated at around 2% of an FTE.

At the Estonian Central Authority, most of the work concerns the management of the requests coming under the co-operation agreements. Child abduction matters only represent 25% of an FTE.

Without giving precise figures, most of the respondents underlined the fact that they have to deal with several international conventions, and that the Brussels IIa Regulation is only a limited part of their overall activity. For example, the Central Authority of Luxembourg also deals with the Maintenance Regulation and the Hague Convention of 1980.

## Annex 11 – General, specific and operational objectives

| Issues  | General objectives  | Specific Objectives   | Operational Objectives  |
|---|---|---|---|
| <b>Party autonomy and "rush to court" in matrimonial matters</b>        | (a) to enhance access to court<br>(b) to ensure sound administration of justice   | (a) to increase party autonomy and thereby enhance predictability for international divorce proceedings<br>(b) to facilitate the consolidation of different family proceedings<br>(c) to limit "rush to court" and thereby reduce related costs | (a) to introduce the possibility for spouses to choose a court by agreement<br>(b) to introduce the possibility for a court to transfer jurisdiction to another Member State  |
| <b>The operation of the Regulation in the international legal order</b> | (a) to ensure equal access to justice in the Union for both spouses<br>(b) to enhance sound and efficient administration of justice | (a) to simplify the regulatory framework on international jurisdiction in divorce cases in the EU and its Member States<br>(b) to introduce flexibility for courts to take into account proceedings pending in third States                     | (a) to change the complex interaction between the Regulation's current reference to national rules on residual jurisdiction and the limitations protecting the defendant spouse<br>(b) to introduce a rule enabling courts to take account of proceedings between the same parties on the same subject matter which are pending in a third State  |
| <b>The return procedure in cases of parental child abduction</b>        | (a) to deter abductions, protect the parent-child relationship and thereby safeguard the best interests of the child                | (a) to ensure swift and safe return of the child to his or her State of habitual residence and thereby simplify the child return procedure  | (a) to clarify and strengthen the role of the court of origin<br>(b) to introduce a clear and realistic time frame for issuing an enforceable return order<br>(c) to concentrate the handling of the return cases by experienced judges<br>(d) to reduce appeal possibilities and the provisional enforceability of the judgments<br>(e) to ensure that the protective provisional measures have cross-border effects<br>(f) to ensure that the child's right to be heard |

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|---|---|---|---|
|   |   |   | is respected, even if the child is not physically present, in accordance with UNCRC and the Charter   |
| <b>Placement of the child in another Member State</b> | (a) to safeguard the best interests of the child by ensuring that children in need can be placed  | (a) to simplify the procedure for cross-border placements of children by reducing the delays associated with it   | (a) to introduce minimum requirements for applications for consent<br>(b) to set time limits for authorities to respond to requests   |
| <b>Recognition and enforcement of judgments</b>       | (a) to protect the best interests of the child and the relationship between children and their parent   | (a) to simplify the procedure by reducing delays and costs in relation to the recognition and enforceability of judgments as well as their enforcement<br>(b) to consolidate mutual trust between the Member States overall and in particular relating to the hearing of the child and the child's best interests | (a) to put in place rules that ensure speedy recognition and enforceability of judgments<br>(b) to ensure that right of the child to be heard is guaranteed by a clear provision and thereby avoid unnecessary non-recognition of judgments<br>(c) to provide rules to clearly establish when enforcement can be refused<br>(d) to establish time limits for the overall duration of the enforcement proceedings<br>(e) to give the possibility to a judge in the State of origin to declare a judgment provisionally enforceable |
| <b>Cooperation between national authorities</b>       | (a) to enhance cooperation between the national authorities and thereby better protect parents and children in cross-border proceedings<br>(b) to simplify the cross-border cooperation between the Central Authorities | (a) to reduce delays associated with cross-border cases concerning children, thereby safeguarding the best interests of the child<br>(b) to increase mutual trust among national authorities, in particular Central Authorities, cooperating in child matters across borders                                      | (a) to clarify the obligations of Central and other national authorities under the cooperation article of the Regulation<br>(b) to establish time limits for national authorities to respond to requests for information under the Regulation   |

## Annex 12 – Monitoring and evaluation

| Evaluation criterion   | Indicators  |
|--|---|
| To ensure that citizens in international families with a close connection to the EU are guaranteed access to court in a suitable Member State  | <ul style="list-style-type: none"> <li>✔ The number of cases where EU courts found that they lacked jurisdiction under the Regulation (courts' statistics)</li> </ul>   |
| To increase predictability, clarity, and reliability for citizens involved in cross-border cases   | <ul style="list-style-type: none"> <li>✔ The number of citizens potentially affected by interpretation problems and varying application of the Regulation in the Member States</li> <li>✔ The number and proportion of international families involved in 'problematic' and non-complicated cases</li> <li>✔ The number of preliminary ruling requests to the ECJ</li> </ul>        |
| 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 | <ul style="list-style-type: none"> <li>✔ Qualitative evidence concerning the types of documents needed for the proceedings, as well as the associated costs.</li> </ul>   |
| To safeguard the best interests of the child and the parent-child relationship   | <ul style="list-style-type: none"> <li>✔ The number of citizens in international families (EUROSTAT)</li> <li>✔ The number of children affected by international divorces and legal separations (EUROSTAT)</li> <li>✔ The number of children born outside marriage (EUROSTAT)</li> <li>✔ The number of international child abductions handled by the Central Authorities</li> </ul> |
| To reduce delays associated with cross-border cases  | <ul style="list-style-type: none"> <li>✔ The length of the child return proceedings under the Regulation (data collected by the Central Authorities)</li> <li>✔ The length of the proceedings in cases of the cross-border placement (data collected by the Central Authorities)</li> </ul>   |
| To ensure the protection of fundamental rights   | <ul style="list-style-type: none"> <li>✔ The extent to which the Regulation ensures the protection of the rights of the child, the right to respect for private and family life, the right of access to court, the right to non-discrimination and the right to proper administration. This data could be associated with the number of cases lodged before the ECtHR.</li> </ul>   |