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International child abduction in the case law of the Court of Justice of the European Union: learning from the past and looking to the future[1]

Keywords: *international child abduction, Regulation 2201/2003, Regulation 2019/1111, child's best interests, recognition and enforcement of foreign judgments*

1. International Child Abduction in European Law: from 2201/2003 (Brussels II Bis) Regulation to 2019/1111 (Brussels II Ter) Regulation

International child abduction is a phenomenon of enormous practical relevance and for which, as for a few others, a rapid reaction is essential. This reaction, at the same time, must be the result of cooperation between authorities of different States, normally based on the 1980 Hague Convention on the Civil Aspects of International Child Abduction[2] (hereinafter called the 1980 Hague Convention). The practical application of international law in this area, however, is not without its challenges, many of them arising from the plurality of legal sources and actors involved[3]. When an international abduction occurs, the parent whose custody rights have been affected usually turns to the courts of the

[1] This article has been written with the support of the Spanish Ministry of Science and Innovation, in the framework of the project "Towards a Civil Procedure convergent with Europe. Current Milestones and Future Challenges" (PGC2018-094693-B-I00).

[2] For a comprehensive study, see P. Beaumont, P. McEleavy, *The Hague Convention on International Child Abduction*, Oxford 1999.

[3] See D. Coester-Waltjen, *Das Zusammenspiel von Rechtsquellen und Institutionen bei internationalen Kindesentführungen*, „International Journal of Procedural Law" 2012/1, p. 12–35.

State where the child is currently located to seek the immediate return of the child, in accordance with the provisions of the 1980 Hague Convention itself. In many cases, the nationality of the parents becomes a de facto relevant element, as removals or retentions take place to or in the countries of nationality of the abducting parent. This, in turn, gives rise to a kind of "jurisdictional nationalism", so that more often than would be desirable, the courts of that State are reluctant to order the return, for which they make extensive interpretations of the exceptions provided for in the 1980 Hague Convention (especially in Art. 13 or, to put it colloquially, they "play with the timing of the process". Moreover, it is also not uncommon for custody proceedings to take place in parallel, both in the State of the child's habitual residence prior to the abduction – usually at the request of the parent who is being deprived of custody – and in the State where the child is located – this time at the request of the parent responsible for the wrongful removal or retention.

Having detected the shortcomings, the European Union decided to deal actively with this matter when drafting the 2201/2003 Regulation[4]: at that time, it was decided to expand the scope of European procedural legislation on family law from strictly matrimonial matters – the only ones covered by the Brussels II Regulation – to parental responsibility. If it wanted to regulate parental responsibility, moreover, the European legislator had no choice but to put in place the means to ensure the practical effectiveness of custody rights and that, in turn, made it inevitable to address international child abduction within the Union. In this matter, the European legislator, as is well known, did not design its own system, but introduced in 2003 special mechanisms to reinforce the practical effectiveness of the return mechanisms of the 1980 Hague Convention when Member States of the Union are involved in the case[5].

1) Firstly, certain requirements have been added to the proceedings in which the return of the abducted child is requested, which seek to reduce the chances that the State to which the child has been wrongfully removed or in which the child is being wrongfully retained will issue a decision denying the return. Specifically:
   a) return proceedings must be dealt with urgently and, unless exceptional circumstances are given, must be resolved within a maximum period of six weeks (Art. 11.3 BR II bis);
   b) the hearing of the child during the process is reinforced, for it must be mandatory, unless it is considered inappropriate due to his or her age or degree of maturity (Art. 11.2 BR II bis);
   c) the return may not be refused on the basis of Art. 13 b) of the 1980 Hague

[4] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (OJ L 338, p. 1, as amended), hereinafter called the Brussels II bis Regulation or BR II bis.

[5] In general terms (and in English), see U. Magnus, P. Mankowski (eds.), *Brussels II bis Regulation*, Munich 2012; C. Honorati (ed.), *Jurisdiction in matrimonial matters, parental responsibility and international abduction. A handbook on the application of Brussels IIa Regulation in national courts*, Torino 2017.

Convention[6] if it is shown that adequate measures have been taken to ensure the protection of the child after such return (Art. 11.4 BR II bis); and finally

d) the return may not be refused without the person requesting such return having been given an opportunity to be heard (Art. 11.5 BR II bis).

2) Secondly, a sort of "right of last word" is granted to the courts of the State where the child was habitually resident before the wrongful removal or retention: the aim is to give priority to the decisions of the courts of that Member State ordering the return of the child over a possible prior decision of non-return taken by the courts of the Member State where the child is present after the wrongful removal or retention. In this way, the Brussels II bis Regulation seeks to prevent the wrongful removal of the child from depriving of jurisdiction the courts of the child's habitual residence, which the legislator considers the best placed to protect the child's best interests. To this end, in 2003 the European legislator established the following:

   a) The non-return decision taken by a court of the Member State where the child is present after the abduction must in any event be communicated to the authorities of the Member State of the child's habitual residence prior to the abduction: it must be notified immediately to the court of the place where the child was habitually resident prior to the abduction (directly or through the central authority of that State), accompanied by the relevant documents, including a transcript of the hearings held – as a way of forcing the hearing of the child and the parent who requested the return (Art. 11.6 BR II bis).

   b) If proceedings concerning parental responsibility for the child were already pending in the Member State of the child's habitual residence prior to the abduction, the court shall take a formal notice of the existence of the non-return decision for the purpose of taking the proper arrangements regarding enforcement of a subsequent return decision on its part.

   c) If no proceedings were pending in the Member State where the child was resident prior to the abduction, the court or central authority which receives the non-return judgment – and which, for the time being, is not seized of any proceedings – has the duty to notify the parties and, above all, to invite them to make submissions to the court, within three months, in order for the court to examine the question of the child's custody and, if necessary, to issue a judgment ordering the child's return. In short, the aim is to "provoke" the existence of proceedings and a decision on the child's situation in the Member State of residence prior to the abduction (Art. 11.7 BR II bis).

   d) If the court of the Member State in which the child was resident prior to the abduction issues a judgment ordering the child's return – because it was already hearing the proceedings on parental responsibility or because those proceedings

[6] According to which "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that (...) b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

have been commenced as a result of the notice of refusal of return – such a judgment shall be immediately enforceable and shall be enforced in the Member State where the child is located, even if a non-return judgment has been issued there in accordance with Art. 13 of the 1980 Hague Convention (Art. 11.8 BR II bis). In particular, such a decision will be automatically enforceable without the need to obtain a prior exequatur.

This absence of exequatur, to which we are now accustomed, was in 2003 absolutely novel in the European Area of Justice: it was, in fact, the first manifestation of abolition of exequatur in the EU, even prior to the adoption of the European enforcement order for uncontested claims, in 2004. And it is the clearest manifestation of the will of the European legislator to reinforce the jurisdiction of the courts of the State where the child resided prior to his or her wrongful removal or retention to decide on his or her personal situation and on the exercise of parental responsibility for him or her. This jurisdiction is, in turn, one of the key elements for an effective response to the de facto situations to which international child abduction can often lead.

As it is well known, the Brussels II bis Regulation will be replaced on 1 August 2022 by a new legal text, Regulation (EU) 2019/1111[7]. The change in the title – which now includes an explicit reference to child abduction – already shows the will of the European legislator to improve the regulation on this matter, with a level of development and details designed to reinforce the legal certainty and the predictability of the actions to be carried out by the parties and courts involved.

The basic ideas that guided the European legislator in 2003 are maintained in the newest version: (1) to complement the system of the 1980 Hague Convention (Art. 22 BR II ter); (2) to recognize the preference of the courts of the State of habitual residence of the child prior to his or her abduction to conduct parental responsibility proceedings concerning him or her (Art. 9 BR II ter) and (3) to expedite the return proceedings and, in particular, the enforcement of the return decision issued by the court having jurisdiction to decide on parental responsibility after it has learnt of the adoption of a non-return decision in another Member State (Art. 43 BR II ter). On this basis, however, numerous elements are added, among which the following should be highlighted:

[7] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ L 178, p. 1), hereinafter referred to as the Brussels II ter Regulation or BR II ter. See I. Viarengo, F.C. Villata (eds.), *Planning the Future of Cross Border Families. A Path Through Coordination*, Oxford 2020; B. Musseva, *The recast of the Brussels IIa Regulation: the sweet and sour fruits of unanimity*, "ERA Forum" 2020/21(1), p. 129–142; P. Beaumont, L. Walker, J. Holliday, *Parental responsibility and international child abduction in the proposed recast of the Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings*, "International Family Law Journal" 2016, p. 307 ff.; Th.M. de Boer, *What we should not expect from a recast of the Brussels IIbis Regulation*, "Nederlands Internationaal Privaatrecht" 2015/1, p. 10 ff.; A.S. de Sousa Gonçalves, *Wrongful removal or retention of children and the Brussels IIa proposed recast*, "Anuario español de Derecho internacional privado" 2018/18, p. 351 ff.; B. Ubertazzi, *The hearing of the child in the Brussels IIa Regulation and its recast proposal*, "Journal of private international law" 2017/3, p. 568 ff.

(a) The door is opened to the choice of court agreements in matters of parental responsibility, subject to certain requirements of connection and compatibility with the best interests of the child (art. 10 BR II ter); and to their also being operative in situations of international abduction (art. 9 BR II ter).

(b) The existence of mediation and other forms of alternative dispute resolution is recognized, which can contribute to resolving situations of abduction, so that their use is encouraged (arts. 25 and 79(g) BR II ter).

(c) The law provides for several tools, ultimately aimed at ensuring the welfare of the child and, if necessary for that purpose, the maintenance of the child's relationship with the parent seeking return, before deciding on the return application or enforcing a return order. These include the following:

(i) the direct communication of judicial authorities with each other or with administrative authorities is encouraged to obtain relevant information on the situation of the child and on the risks he/she might face in case of return (Art. 27.4 BR II ter)[8];

(ii) it is provided that at any time during the proceedings the court shall consider, in the light of the best interests of the child, whether it must promote contact between the child and the person seeking his or her return (Art. 27.2 BR II ter);

(iii) the return order may be accompanied by provisional, including protective, measures to protect the child from the risks referred to in Art. 13 I b) of the 1980 Hague Convention (Art. 27.5 BR II ter);

(iv) the return order may be declared provisionally enforceable, even if it is not final (Art. 27.6 BR II ter); and

(v) the enforcement of the return order may be suspended if it exposes the child to a serious risk of physical or psychological harm due to temporary impediments that have arisen after the judgment has been rendered (Art. 56.4 BR II ter); if the serious risk is to be of a lasting nature, then the enforcement may be refused (Art. 56.6 BR II ter).

(d) The communication between the court refusing the return and the competent court to rule on parental responsibility is very detailed, as well as the way to open proceedings on the merits of the parental responsibility (Art. 29 BR II ter).

(e) The enforcement without an exequatur is generalized to the entire scope of the Regulation (Art. 34 BR II ter), although a privileged situation is maintained for return decisions rendered in the Member State having jurisdiction over custody rights after a decision on non-return (Arts. 29.6 and 42 to 50 BR II ter), especially because the grounds for the refusal of enforcement are limited to certain situations of irreconcilable decisions rendered subsequently (Art. 50 BR II ter).

The entry into force of the Brussels II ter Regulation will undoubtedly contribute to strengthening cooperation between the judicial authorities of the Member States with a view to reacting effectively to "intra-European" international child abduction. However, regardless of what has been established so far in the Brussels II bis Regulation and, in the

[8] Addressing the relevance of fostering direct communication, see P. McEleavy, *Judicial Communication and Co-operation and the Hague Convention on International Child Abduction*, "International Journal of Procedural Law" 2012/1, p. 36–53.

future, in the Brussels II ter Regulation, it is clear that its application and interpretation will always be a source of doubts and difficulties. In particular, when it comes to civil procedural rules originating in the European Union, the case law of the Court of Justice of the European Union (hereinafter, the CJEU), issued in response to questions referred for a preliminary ruling by the national courts, has become the key to identifying the real problems raised by the European legislative provisions and what should be the "autonomous" solution to be offered in response to the doubts or difficulties detected by the internal applicators.

It is therefore advisable to review the decisions handed down so far by the CJEU on international child abduction, which will allow us to look both to the past and to the future. In this way, it will be possible to detect, first, what is the settled ground, i.e., which apparent or potentially controversial issues have ceased to be so thanks, to a large extent, to the work of the CJEU itself. At the same time, the content of one of the most recent preliminary rulings also makes it possible to identify the new challenges. These pages are devoted to a review of the former and an outlook for the latter.

2. Settled ground: the Rules of the Brussels II bis Regulation on Child Abduction in the Case Law of the Court of Justice of the European Union

The questions referred for a preliminary ruling on the Brussels II bis Regulation concerning child abduction have enabled the CJEU to build up a body of case law that revolves around five main issues. These are (2.1.) the material scope of application of the Regulation; (2.2.) the criterion for determining whether the removal or retention of a child in a certain State can be considered wrongful; (2.3.) how to articulate the relationship between the different proceedings that may arise in different States in respect of decisions on parental responsibility, including the removal of children between States; (2.4.) the system of recognition and enforcement of decisions rendered in Member States; and (2.5.) the articulation between the Brussels II bis Regulation and the fundamental rights of those involved in the proceedings that fall within its scope of application. With the clarifications that will follow, this case law can also serve as a guide for the interpretation and application of the Brussels II ter Regulation.

As is customary in the case law of the CJEU, the interpretation of the provisions of the Regulation takes into account not only their wording and the context of each provision, but also the objective of the rule as a whole and the consistency of the decisions with the fundamental rights at stake. Regarding international child abduction, the CJEU essentially uses two parameters. The first parameter is the best interests of the child and the protection of his or her rights, including the possibility of maintaining a relationship with both parents, which is particularly at stake in these cases[9]. The second one is the need to avoid wrongful removal and retention and, to this end, the importance of preventing the de

[9] See, for instance, CJEU 5 October 2010, C-400/10 PPU, J.McB. v. L.E., ECLI:EU:C:2010:582.

facto situation created by the offending parent from being transformed into a procedural advantage[10].

2.1. A Material Scope of Application of the Brussels II bis Regulation

The Brussels II bis Regulation has a very broad material scope, covering matrimonial matters (namely, divorce, legal separation, and marriage annulment) and parental responsibility. One aspect of parental responsibility is the right of custody, and it is the infringement of the right of custody that makes the removal of a child to or retention of a child in another State unlawful. Both parental responsibility and custody rights are autonomous notions for the purposes of the Brussels II bis Regulation, and their broad definitions allow them to encompass, as is clear from the CJEU decision in Hampshire County Council[11], administrative decisions ruling on the guardianship of children, since they affect different aspects of parental responsibility, and may form the basis for a decision to return a child who has been removed to another State.

The application of the Brussels II bis Regulation is not uniform for all the matters falling within its scope, since for some issues it governs only cases involving Member States, while in others the courts of the Member States must apply it irrespective of whether the foreign element of the case involves a Member State or a third State. The application of the Brussels II bis Regulation to matrimonial matters and to parental responsibility does not require that the legal relationships that constitute the subject matter of the proceedings involve Member States. However, the existence of a cross-border element does not in itself determine the applicability of the Brussels II bis Regulation to the recognition and enforcement of judgments in matrimonial matters or in matters of parental responsibility or to situations of international child abduction; in these matters, the Brussels II bis Regulation comes into play only between Member States, and not when third States are involved[12].

Regarding child abduction, the CJEU's interpretation on this point is linked to the interplay between the Brussels II bis Regulation and the 1980 Hague Convention. Between Member States, Art. 11 of the Brussels II bis Regulation combines the rules of both legal texts, as developed by the CJEU in the J.McB judgment, which also refers, unsurprisingly, to the primacy of the Regulation in this internal area. The opposite situation is found in the SS case[13], which addresses the non-applicability of the Brussels II bis Regulation and, specifically, of its Art. 10, to child abduction to a third State, on the basis of the validity of international conventions to which both Member States and non-Member States are parties.

[10] For example, see CJEU 23 December 2009, C-403/09 PPU, Jasna Deticek v. Maurizio Sgueglia, ECLI:EU:C:2009:810.

[11] CJEU 19 September 2018, joined cases C-325/18 PPU and C-375/18 PPU, Hampshire County Council v. C.E. and N.E., ECLI:EU:C:2018:739.

[12] CJEU 17 October 2018, C-393/18 PPU, UD v. XB, ECLI:EU:C:2018:835, provides a clear and concise review on the whole system.

[13] CJEU 24 March 2021, C-603/20, SS v. MCP, ECLI:EU:C:2021:231.

2.2. Criteria for Determining the Unlawfulness of Removal or Retention

The wrongful removal or retention of a child implies, according to Art. 2(11)(a) of the Brussels II bis Regulation, the infringement of a right of custody, which is an autonomous notion independent of the law of the Member States, and which attributes in any case to its holder the right to decide on the child's place of residence (this was clearly proclaimed by the CJEU in J.McB). But, the acquisition of the right of custody does depend on the law of the Member States, so that it will be held by the person who has been granted it by law, by a court decision or by an agreement having legal effect in accordance with the provisions of the law of the State of the habitual residence of the child prior to the removal or retention.

As a result, the wrongfulness of the removal of a child for the purposes of the application of the Brussels II bis Regulation "is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place", in the words of the CJEU in J.McB. This means that, in order to determine whether a removal or retention is wrongful or not, it is first necessary to determine which is the State of habitual residence of the child (see the Court's ruling in the OL case[14]), since only in the light of its legal system will it be possible to determine whether the removal or retention has infringed a previously existing custody right[15].

The central role played in the Brussels II bis Regulation by the Member State of the child's habitual residence, which is the forum of central jurisdiction for matters relating to parental responsibility and also the legal parameter for determining the lawfulness or unlawfulness of movements of children between States, explains the numerous rulings of the CJEU on the elements making it possible to identify what is the habitual residence of the child.

Along the same lines as other decisions ruling on the habitual residence of the child with respect to other aspects and problems of parental responsibility, in the area of child abduction the Mercredi judgment[16] defines "habitual residence" as an autonomous notion that requires a uniform interpretation in the different contexts in which it is used, always bearing in mind that the best interests of the child are linked, when it comes to establishing the jurisdiction of a court, to a criterion of proximity: the European legislator considers that it is the court geographically closest to the child that is in the best position to assess which measures are in the best interests of the child.

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[14] CJEU 8 June 2017, C-111/17 PPU, OL v. PQ, ECLI:EU:C:2017:436.

[15] The particularities of national law may result in an initially lawful removal becoming unlawful. This is clear from the CJEU 9 October 2014, C-376/14 PPU, C. v. M., ECLI:EU:C:2014:2268, concerning a child who is removed on the basis of an interim decision which is contested in the State of origin. When in that State the initial authorisation is revoked and the child is required to return, his or her retention in the State of destination becomes unlawful, and this prevents him or her from creating a situation of habitual residence in the State of destination that would confer jurisdiction on the merits of the case on its courts.

[16] CJEU 22 December 2010, C-497/10 PPU, Barbara Mercredi v. Richard Chaffe, ECLI:EU:C:2010:829.

The Mercredi judgment itself already defines some elements that allow the courts of the Member States to determine, on a case-by-case basis, what can be considered the habitual residence of the child. The CJEU considers the stability and duration of the residence, the external data revealing an intention to stay, the integration of the child in a social and family environment, the reasons that determine his or her presence in a given State or the nationality of the child. The Court also notes that the age of the child is a determining factor in assessing these issues – in the Mercredi case the child was an infant – so that the younger the child is, the more they must be understood as referring to the person who has custody of him or her, adding other specific elements about the child, such as the reasons why he or she has moved to another Member State or his or her geographical, linguistic and family origins. If all these circumstances together do not make it possible to clearly establish the State of habitual residence of the child, the determining criterion would be the child's physical presence.

Other subsequent decisions add details and nuances along the same lines. The CJEU's ruling in OL – also with custody of an infant at stake – insists that the habitual residence is a question of fact, a circumstance that allows it to be based on elements of rapid verification, thus perfectly serving the objective of expediting the return of a child wrongfully removed or retained. Neither the intentions or plans of the parents that constituted the case of the previous decision, nor the circumstances that determine the permanence of the child in a given State, even if they were of criminal relevance or could involve the infringement of fundamental rights, as can be seen in the CJEU judgment in the UD case, justify that, compared to the State in which the child is located, another State in which the child has never been, or only occasionally has stayed, can be considered as his or her habitual residence[17]. Sometimes the CJEU promotes alternatives that it considers compatible with the rules it interprets: in this specific case, it recalls that Art. 14 of the Brussels II bis Regulation allows Member States, on the basis of their national law, to confer jurisdiction on themselves to hear cases falling within the scope of the Brussels II bis Regulation when its rules do not establish the jurisdiction of any other Member State.

2.3. Managing the Interplay between Related Proceedings

As has been seen, the prevailing forum for taking decisions in matters of parental responsibility is the habitual residence of the child. However, it is not the only one. And, in relation to international child abduction, it is important to consider at least two other fora.

On the one hand, if the child has been wrongfully removed or retained, the courts of the State of habitual residence prior to the removal or retention continue to retain their jurisdiction (Art. 10 BR II bis), as a means of preventing the offending parent from also acquiring a procedural advantage from the change of residence of the child.

[17] For a critical view of this case law, see G. Biagioni, *Jurisdiction in Matters of Parental Responsibility Between Legal Certainty and Children's Fundamental Rights*, "European Papers: a Journal on Law and Integration" 2019/1, p. 285–295.

On the other hand, and based on the interests of the child, the Brussels II bis Regulation allows the intervention of courts of States other than the State having jurisdiction to hear the merits of the case in certain circumstances and on a provisional basis.

This plurality of criteria leads to complicated factual situations: when children are transferred between different Member States, it is common for proceedings relating to parental responsibility over the child to be brought both in the State where the child was before the transfer and in the State of destination, which often result in the adoption of incompatible measures. For this reason, there are several rulings of the CJEU which have an impact on the relationship between different proceedings concerning parental responsibility over the same child. The jurisdiction of the court of the child's habitual residence prior to the wrongful removal or retention is reinforced by these decisions, because the CJEU is discarding interpretations that would allow measures adopted by courts of other States to hinder or devalue decisions adopted by the court to which the Regulation confers the substantive decision on the attribution of parental responsibility and the measures resulting therefrom.

The Deticek judgment examines the scope of the provisional measures provided for in Art. 20 of the Brussels II bis Regulation, i.e., measures taken by a court that does not have jurisdiction to rule on the substance of the case and, in particular, the impact they may have in relation to those granted in the main proceedings, before the court having jurisdiction to rule on the custody of the child, being the court of the State of residence prior to the removal or retention. The Court starts from the premise that measures taken under Art. 20 represent an exception to the general system of jurisdiction in the Regulation and are therefore subject to a strict interpretation of the conditions allowing them[18]. Additionally, they cannot be an obstacle to the effectiveness of the measures granted in the main proceedings by the court having jurisdiction as to the substance of the case. This reinforces the value to be attached to the jurisdiction of the courts of the State of the child's habitual residence of origin. If another solution to this "conflict of measures" were allowed, it would result that provisional measures, which must always be used for the benefit of the child, could be used to turn them into an instrument prolonging or legitimising his or her wrongful removal. Also, the CJEU in the Purrucker case[19] limits the extension of provisional measures adopted under Art. 20, excluding them from the system of recognition and enforcement of decisions provided for by the Brussels II bis Regulation, to avoid that what was envisaged and agreed as provisional and urgent could become a more stable and definitive situation if other States are obliged to recognise it. Art. 20 measures, in short, will only be effective within the limits of the State in which they have been adopted and cannot be used as an instrument that defines the outcome of the dispute on the merits[20].

[18] In the same vein, and regarding another of the conditions set in Art. 20 of the Brussels II bis Regulation, see also CJEU Hampshire County Council.

[19] CJEU 15 July 2010, C-256/09, Bianca Purrucker v. Guillermo Vallés Pérez, ECLI:EU:C:2010:437.

[20] I. Pretelli, *Provisional Measures in Family Law and the Brussels II Ter Regulation*, "Yearbook of Private International Law" 2018/19 (20).

The CJEU ruling in Povse[21] establishes the same restrictive interpretation for the circumstances provided for in Art. 10(b) of the Brussels II bis Regulation, which allow a child who has been wrongfully removed or retained to acquire a new habitual residence in the Member State of destination and thereby confer jurisdiction on its courts[22].

The Purrucker II judgment[23], for the first time in the field of the Brussels II bis Regulation, rules on a frequent issue when cross proceedings take place, that of lis pendens. Applying the general criteria built on the 1968 Brussels Convention and on the Brussels I Regulation, the Court concludes that there is no situation of lis pendens between a proceeding whose purpose is to adopt interim measures and another one aimed at deciding on the merits of the case. However, it is important to note that the decisive elements are indeed the claim, the subject-matter of the proceedings and the legal title that is invoked before the court seized by the parties, and not so much the name of the proceedings used or other aspects that may be determined by specific features of national law[24]. In the Liberato case[25], the CJEU also rules on lis pendens, recalling that, if issues relating to parental responsibility are brought together with those relating to the dissolution of the marital relationship, they follow the rules of lis pendens specific to the latter.

2.4. The Recognition and Enforcement of Decisions on Child Abduction

As regards the enforcement of judgments given in the different Member States, the CJEU emphasised at an early stage that the Brussels II bis Regulation establishes two ways of granting the cross-border effectiveness of judgments, one which is considered ordinary, and another, privileged one.

The first of these (the ordinary one), which is contained in the second section of Chapter III (Arts. 28–36 BR II bis), allows for an application for recognition of any decision rendered under the Regulation. It also allows an application for a declaration of non-recognition to be made, even if no previous application for recognition has been

[21] CJEU 1 July 2010, C-211/10 PPU, Doris Povse v. Mauro Alpago, ECLI:EU:C:2010:400.

[22] The specific case concerned the circumstance referred to in Art. 10(b)(iv) of the Brussels II bis Regulation, namely that the State of origin had given a decision on the custody of the child which did not entail the child's return. This condition, the CJEU notes, refers to a final decision (albeit one that is, by its nature, reviewable), which is taken by the State of origin on the basis of a full examination of all aspects of the case. The court concludes that if an interim decision were to result in the loss of jurisdiction on the merits of the case, the courts might be reluctant to give such a decision even if it were in the interests of the child.

[23] CJEU 9 November 2010, C-296/10, Bianca Purrucker v. Guillermo Vallés Pérez, ECLI:EU:C:2010:665.

[24] In words of the CJEU in Purrucker II, which sets out this question in paras. 73 to 78, "(…) no distinction can be drawn on the basis of the nature of the proceedings brought before those courts, that is, according to whether they are proceedings for interim relief or substantive proceedings. (…). The crucial issue therefore is whether the applicant's claim before the court first seised is directed to obtaining a judgment from that court as the court with jurisdiction as to the substance of the matter within the meaning of Regulation No. 2201/2003".

[25] CJUE 16 January 2019, C-386/17, Stefano Liberato v. Luminita Luisa Grigorescu, ECLI:EU:C:2019:24.

lodged. Thus, the party who is adversely affected by a judgment given in another Member State, which in his opinion is subject to a ground for non-recognition (pursuant to Art. 23 of the Brussels II bis Regulation), does not have to wait for the opponent to seek such recognition and enforcement before objecting; he can also be proactive and apply for a declaration of non-recognition, which will be binding if such recognition is sought by the opponent in the future.

This double game, however, has a limit, which was made clear by the CJEU in the Rinau judgment[26]: the possibility of seeking non-recognition does not apply in the case of judgments that become enforceable through the second method, i.e., by virtue of Arts. 11(8) and 42(1) of the Brussels II bis Regulation[27]. The CJEU insists that direct recognition of judgments from other Member States is the rule that follows from the Brussels II bis Regulation and the system of mutual trust that inspires judicial cooperation between Member States. Consequently, the grounds for non-recognition must be interpreted and applied restrictively.

In particular, the public policy clause has deserved the attention of the CJEU's decisions in P.[28] and in Liberato, which reject its invocation to control the application of the national rules contained in the decision whose recognition is challenged, or of the European rules on jurisdiction and lis pendens. Through these rulings the CJEU carries out an important pedagogical work, setting out how the parties can achieve the objectives they seek by making use of procedural instruments and remedies that are compatible with the Brussels II bis Regulation. Sometimes it will be appropriate for the parties to challenge the decision at stake before the courts of the State where it was rendered; at other times they may seek a return decision from the courts of the State of origin, or recognition of the decisions rendered by the competent court from the courts of the State of destination. It is true that these solutions are not equally effective or possible in all cases, but when they are, they serve the purpose of avoiding the tendency to overreach the function of the public policy clause.

Decisions to which the ordinary system of recognition of the Brussels II bis Regulation applies are subject to prior exequatur proceedings for their enforcement. One of the main changes that the transition from the Brussels II bis Regulation to the Brussels II ter Regulation will bring about is precisely the abolition of exequatur, which is extended from the strictly patrimonial sphere to that of family law (see Arts. 30 to 35 of the Brussels II ter Regulation). However, the grounds for opposing the recognition and declaration of enforceability under the Brussels II bis Regulation remain in the Brussels II ter Regulation. In the cases of recognition in the strict sense things do not really change, for the recognition has been automatic since 2003. In the case of enforcement, the exequatur as an intermediate procedure disappears, but the grounds for opposing it can still be

[26] CJEU 11 July 2008, C-195/08 PPU, Inga Rinau, ECLI:EU:C:2008:406.

[27] Furthermore, the CJEU ruling in Rinau adapts the procedure provided for in Art. 31 of the Brussels II bis Regulation to the application for recognition, allowing the defendant, interested party in the recognition to present arguments in these cases.

[28] CJEU 19 November 2015, C-455/15 PPU, P. v. Q., ECLI:EU:C:2015:763.

invoked, this time in the context of enforcement proceedings (Arts. 38 and 39 BR II ter). As in civil and commercial matters, the abolition of exequatur as a procedure has not led to the abolition of exequatur as a control. Therefore, the case law of the CJEU will retain its value, even if it is to be invoked or used in a different procedural context.

The second system provided for by the Brussels II bis Regulation for the recognition and enforcement of decisions is established in the fourth section of Chapter III (Arts. 40 to 45 BR II ter) and deals specifically with decisions concerning rights of access and for those which, on the basis of the 1980 Hague Convention, order the return of the child to the State of habitual residence prior to the wrongful removal or retention[29]. The return orders referred to in this rule are those which have been issued by the State of origin under Arts. 11.8 and 42.2 of the Brussels II bis Regulation following a decision of non--return by the courts of the State of destination: it is, in short, a kind of "reaction" in the State of origin to the decision of the courts where the child has been removed or is being retained, if they have refused such return on the grounds referred to in Art. 13(b) of the 1980 Hague Convention. As already noted, these decisions are directly enforceable, without the need for the exequatur, which means that they take precedence over any decision taken in the State to which the child has been removed or where he or she is being retained.

In Povse, the CJEU clarified that these judgments are procedurally autonomous from the disputes in the State of origin itself on parental responsibility for the child. Accordingly, it is not necessary for the State of origin to have made a final decision on the custody of the child or on any other issue to render such a return judgment or order. The extraordinary effectiveness conferred on them by the Regulation when they have been certified by the State of origin is made clear in the same Povse judgment, and earlier in Rinau. In these judgments, the CJEU insists that these return decisions cannot be ignored, suspended, or rejected by the requested State, nor can any procedural action taken in the latter after the non-return decision originally issued alter the enforceability of the return decision issued by the requesting State.

Moreover, return decisions that become enforceable under this procedure cannot be disregarded by the requested State even where it appears possible that the decision may have infringed the child's fundamental right to be heard, as is clear from the CJEU decision in Aguirre Zarraga[30]. The parties can only challenge procedural or substantive irregularities they observe in the return decision before the court that rendered it, i.e., in the State of origin, not in the State of enforcement. Therefore, as it was also said in Rinau, when faced with such a return judgment, the requested State is only responsible for verifying the enforceability of the certified judgment, checking the authenticity of the certification, and ordering the immediate return of the child.

[29] If the return judgment is not based on compliance with the 1980 Hague Convention but on the rules on parental responsibility in the Brussels II bis Regulation, the judgment cannot be enforced according to Art. 11 procedure but will have to be subject to the general rules on recognition and enforcement. This follows from CJEU Hampshire County Council.

[30] CJEU 22 December 2010, C-491/10 PPU, Joseba Andoni Aguirre Zarraga v. Simone Pelz, ECLI:EU:C:2010:828.

It should also be borne in mind that this privileged system of cross-border enforcement, which does not admit of a defence in the State of enforcement, has been considered compatible with the European Convention on Human Rights by the European Court of Human Rights (hereinafter, the ECtHR), precisely in the Povse affair[31]. Indeed, once the doubts raised by the Austrian Supreme Court have been resolved, and on the basis of the provisions of Arts. 11(8) and 42(2) of the Brussels II bis Regulation, the Austrian courts ended up ordering the Povse child's return to Italy, considering that the enforcement system without the exequatur introduced by the Regulation at this point did not allow them to do anything different. This "blind compliance" of the Austrian courts was, in fact, the subject of the complaint against Austria before the ECtHR: both applicants (the daughter and the mother) complained that the Austrian courts had violated their right of respect for their family life, since they disregarded that the daughter's return to Italy would constitute a serious danger to her well-being and lead to a permanent separation of the mother and the child. The basic argument of the Austrian Government against the complaint was to argue that its authorities had merely complied with their obligations under the Brussels II bis Regulation and, in accordance with its p effects on the child. The ECtHR decided to apply to this case the doctrine of the "pre rovisions, they were not entitled to refuse to enforce the return decision nor to rule on its possible negative sumption of compliance", which it had previously used in Bosphorus v. Ireland[32], M.S.S. v. Belgium and Greece[33], and Michaud v. France[34]. In Povse v. Austria the ECtHR turned the focus to the European Civil Procedure and, more specifically, to Brussels II bis Regulation and the abolition of exequatur in international child abduction matters. In the opinion of the Court a presumption exists that when a State is limited to meet its obligations as a member of an international organization (in this case, those arising from the EU membership), it is also complying with the European Convention on Human Rights (ECHR) if the international organization provides fundamental rights having a protection degree equivalent to that derived from the European Convention itself (as with the European Union). Therefore, the ECtHR, by majority declared the application inadmissible. This doctrine was further elaborated by the ECtHR in a subsequent case, Avotiņš v. Latvia, this time regarding the Brussels I Regulation[35].

[31] Decision of the ECtHR of 18 June 2013, Application 3890/11, Sofia Povse and Doris Povse v. Austria, HUDOC.

[32] ECtHR 30 June 2005, Application 45036/98, Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland, HUDOC, a case involving the implementation of Council Regulation (EEC) No. 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) (OJ L 102, p. 14).

[33] ECtHR 21 January 2011, Application 30696/09, M.S.S. v. Belgium and Greece, HUDOC, a case regarding the Dublin II Regulation on asylum.

[34] ECtHR 6 December 2012, final 6 March 2013, Application 12323/11, Michaud v. France, HUDOC, concerning the implementation of EU legislation on money laundering and the obligation of lawyers to report suspicious transactions of their clients.

[35] ECtHR 23 May 2016, Application 17502/07, Avotiņš v. Latvia, HUDOC.

As it has already been pointed out, the drafting of the Brussels II ter Regulation has led to the general abolition of exequatur, so that the distinction between the two types of enforcement has been blurred. However, the intention has been to maintain the singularity of judgments handed down in this second type of situation through a system that the Brussels II ter Regulation itself calls "privileged". Paradoxically, however, it can be seen how the European legislator, despite having the backing of Strasbourg, has taken the opportunity to establish some counterweights to the absolute effectiveness of the return decisions adopted in the State of habitual residence subsequent to – or in response to – the non-return decision issued by the courts of the State where the child is located. It is possible that the cases decided by the CJEU – apart from national practice itself – have made it advisable to provide for some limits to this effectiveness, even if it is still called privileged.

(a) Thus, according to Art. 50 of the Brussels II ter Regulation, the enforcement shall be refused in cases of irreconcilable decisions. This was already provided for in Art. 47 of the Brussels II bis Regulation in an imprecise manner, but is now clarified in different terms from those decisions that could be deduced from the previous regulation. Specifically, the recognition and enforcement will have to be refused if and to the extent that the return judgment is irreconcilable with a later judgment on parental responsibility concerning the same child that was given in the Member State in which the recognition is sought or even in another Member State or in the non-Member State of the habitual residence of the child, provided that the later decision fulfils the conditions necessary for its recognition in the Member State in which such recognition is sought. In short, it specifies the validity of the subsequent incompatible judgment, something which was not clear in the previous rules. The aim is to avoid a kind of crystallisation of the jurisdiction of the courts of the State of habitual residence prior to abduction, which the Court's ruling in the SS case already declared incompatible with the system of the Brussels II bis Regulation. Therefore, a subsequent judgment, issued by a court having jurisdiction in matters of parental responsibility – this requirement, implicit in Art. 50 of the Brussels II ter Regulation, seems to us essential – must prevail over an earlier return order. It is thus recognised that the passage of time can have consequences for the legal situations involved and that if the courts of another State have become validly competent to rule on parental responsibility – because the conditions laid down in Art. 9 of the Brussels II ter Regulation are fulfilled – their subsequent decisions must prevail.

(b) Furthermore, it should now be noted that in the Povse case, the CJEU expressly stated that the automatic effectiveness of the enforcement of the return decision issued under Arts. 11(8) and 42(2) of the Brussels II bis Regulation could not be avoided even if a change of circumstances involving a serious danger to the child within the meaning of Art. 13(b) of the 1980 Hague Convention were found to have occurred. To close one's eyes to these new circumstances, when the best interests of the child may be at stake, may perhaps be excessive. That is why Art. 56 of the Brussels II ter Regulation, in its paras. 4 to 6, has opened another door, already discussed above.

Exceptionally, it is possible to suspend the enforcement of the return order, always at the request of a party – be it the person against whom such enforcement is sought, the child concerned or any other interested party acting in the best interests of the child – if the enforcement exposes the child to a serious risk of physical or psychological harm due to temporary impediments that have arisen after the order has been issued, or by virtue of any other significant change of circumstances.

In principle, such a suspension should be limited in time, so that the enforcement is resumed as soon as the serious risk of physical or psychological harm no longer exists. However, if the serious risk that led to the suspension is of a lasting nature, then the competent enforcement authority or the court may refuse, upon request, to enforce the decision.

2.5. Child Abduction Proceedings and Fundamental Rights

As it has been said, the respect and effectiveness of fundamental rights and, particularly, of those recognised for children in Art. 24 of the Charter of the Fundamental Rights of the European Union[36], is one of the interpretative vectors of the Brussels II bis Regulation in the decisions of the CJEU. However, there are also some rulings that refer specifically to the relationship between fundamental rights and the procedural development of matters within the scope of application of the Brussels II bis Regulation. Thus, the CJEU focuses in Aguirre Zarraga on the interpretation of the child's right to be heard provided for in the Brussels II bis Regulation in the light of Art. 24 of the CFREU. The CJEU considers that the right does not so much refer to being heard as to the possibility of being heard; a possibility that is assessed by the competent court taking into account the best interests of the child and considering elements such as his or her age, maturity, the stress to which he or she may be subjected or the implications of his or her physical presence. If the court considers it appropriate to hear the child, it is necessary to make available to him or her the procedures and possibilities that allow him or her to express him or herself freely in a real and effective manner, whether they are provided for in national law or in the instruments of cross-border judicial cooperation.

The Hampshire County Council judgment focuses on the right to effective judicial protection of the parties, which covers not only the right to appeal against decisions in accordance with the provisions of national law, but also the right to seek a stay of enforcement if national law so permits. The procedures provided for in the Brussels II bis Regulation must be carried out in a way that respects these rights, so that if a particular decision (in this case the decision provided for in Art. 33 of the Brussels II bis Regulation) is served after it has already been enforced, the right of the parties to seek to prevent its enforcement (if the law of the Member State concerned confers it) and thus the right to effective judicial protection are infringed, even if the lack of service prior to such enfor-

[36] Charter of Fundamental Rights of the European Union (OJ 2012 C 326, p. 391), hereinafter called CFREU.

cement does not interfere with the right to challenge the decision because the time limit for appeal runs from the time of service.

Finally, the child's fundamental rights and, ultimately, the primacy of EU rules over national law, are also the criterion followed by the CJEU in the RG case[37], to solve an apparent conflict between the Brussels II bis Regulation and the rules on the internal judicial organisation of a Member State and the attribution of jurisdiction to take various decisions provided for therein. In particular, under Belgian law, the jurisdiction to hear the merits under Art. 10 of the Brussels II bis Regulation and the jurisdiction to issue the return decision referred to in Art. 11.8 are vested in different courts. The question was therefore raised as to whether this bifurcation, perhaps not very operational, could be regarded as incompatible with the principle of effectiveness of EU law. The Court's answer was negative and consistent with its policy of not interfering in the judicial organisation of the Member States, unless indispensable.

3. A challenge for the future: the need of an interaction between criminal and civil proceedings

We have already seen how, on some issues, the lessons offered by the CJEU in interpreting the Brussels II bis Regulation have been taken up by the Brussels II ter Regulation: in some cases, to reinforce them; in others, to correct them or, at least, to make them more flexible. For the future, the new texts will obviously give rise to new doubts, which are impossible to predict. There is, however, one issue on which we would like to introduce a few considerations: the difficult interaction between civil and criminal proceedings in this area.

The bell was rung by a fairly recent judgment of the CJEU in the ZW case[38], which did not directly affect the application of the Brussels II bis Regulation. The request for a preliminary ruling concerned the interpretation of Art. 21 of the Treaty on the Functioning of the European Union[39] and of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[40]. A German court, more specifically, was asking whether the EU law must be interpreted as precluding the application of its criminal legislation under which the retention by a parent of a child from his or her appointed carer in another Member State attracts criminal penalties even in the absence of force, threat of serious harm or

[37] CJEU 9 January 2015, C-498/14 PPU, RG v. SF, ECLI:EU:C:2015:3.

[38] CJEU 19 November 2020, C-454/19, ZW and Staatsanwaltschaft Heilbronn, ECLI:EU:C:2020:947.

[39] Treaty on the Functioning of the European Union (OJ 2012 C 326, p. 47), hereinafter called TFEU.

[40] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, p. 77, as amended).

deception, whereas where such retention takes place in the territory of the first Member State, the same act is punishable only if the recourse is to have force, threat of serious harm or deception. Mere abduction at the domestic level is not punishable (without these aggravating factors), but it is punishable when it has an international dimension, regardless of whether the State of wrongful removal or retention of the child is a Member State or a third State. In the CJEU's view, the difference in the treatment between domestic situations and situations of international abduction can be justified by greater difficulties involved in achieving an effective return in the latter cases. However, the CJEU emphasises that, in intra-European situations, the system of the Brussels II bis Regulation marks a qualitative difference that cannot be ignored by the national criminal legislator. Paragraph 48 of the judgment expressly states that "An argument based, in essence, on the presumption that it is impossible or excessively difficult to obtain recognition, in another Member State, of a judicial decision on child custody and, in the case of the international abduction of a child, to secure the child's prompt return, effectively places Member States on the same footing as third States and is at odds with the rules and spirit of Regulation No 2201/2003". On this basis, the CJEU ultimately declared the German rule incompatible with Art. 21 of the TFEU.

But, apart from the observation that the system of mutual recognition in civil matters may end up determining limits for the substantive criminal legislator, we are interested in focusing on two different situations: on the one hand, the issues arising when a party intends to justify the removal or retention of the child on the basis of the existence of a previous situation of gender-based and/or domestic violence, which will often have given rise to the existence of a criminal case in the State of habitual residence of the child prior to the abduction; on the other hand, the problems triggered when criminal proceedings for wrongful abduction are opened in that same State against the parent who carried out the act of abduction.

3.1. Gender-Based or Domestic Violence Criminal Proceedings and Child Abduction Civil Proceedings

In some cases, as we know, the reasons given to try to legitimise or justify an unlawful removal refer to the existence of situations of gender and/or domestic violence. This allegation is used to try to obtain a decision refusing the return under Art. 13(b) of the 1980 Hague Convention. It is, however, a double-edged sword, because the criminal proceedings against the parent take place in the State of origin and, at least for the time being, there is no way of interconnecting information, nor to ensure any kind of binding effectiveness to some relevant decisions. It seems to us, however, that in order to make the provisions of the new wording of Art. 56 the Brussels II ter Regulation operative, such cooperation would be more than reasonable. It is therefore convenient to assess what are the possibilities offered by the Brussels II ter Regulation and, in general, by the European legislation.

The impact of criminal proceedings for gender-based or domestic violence on the decision on a return application can be double. If the criminal proceedings have been terminated before the removal takes place, and they have resulted in the parent seeking the return having lost the custody rights entitling him or her to seek such return, the requested court may issue a non-return order under Art. 13(a) of the 1980 Hague Convention. These cases are difficult to imagine in practice, so that the most frequent way in which criminal proceedings for domestic or gender-based violence in the State of origin can be relevant to proceedings for the return of the child in the State to which the child has been removed is that the proceedings, or the facts which led to them being instituted, represent by themselves or together with other facts a serious risk that the return of the child would expose him or her to physical or psychological danger or place him or her in an intolerable situation of another kind. This circumstance also allows for a non-return decision to be issued, now based on Art. 13(b) of the 1980 Hague Convention. In order to further clarify the context in which this rule applies and such a decision can be made, three other elements must also be taken into account:

(i) The circumstance on which the non-return is based must be proven by the parent who opposes the return.

(ii) The return may also be refused if the child objects to it and is of sufficient age and maturity to have his or her opinion taken into consideration.

(iii) Art. 13 of the 1980 Hague Convention provides for the possibility of obtaining information on the child's situation from the authorities of the State of origin.

The existence of criminal proceedings for facts directly linked to the parental responsibility at stake and to the family life whose protection underlies the return request has no direct effect on the return proceedings, nor are there instruments attributing binding effects on the return decision to some of the decisions rendered in or linked to the criminal proceedings, such as the defendant's criminal record for equivalent facts or any restraining orders that may have been taken. European rules relating to information on criminal decisions and their recognition for the purposes of other proceedings are of little use in relation to civil proceedings. Both Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings[41] and Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States[42] provide for judicial cooperation designed for and between criminal proceedings and with very limited effectiveness for other types of proceedings.

However, the existence of criminal proceedings, and knowledge of the facts giving rise to them and the concrete situation of the proceedings, are of enormous importance

[41] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ L 220, p. 32).

[42] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ L 93, p. 23, as amended).

in assessing whether the return would indeed place the child in a situation of risk from which he or she should be protected. If the person opposing the return alleges gender-based and/or domestic violence which has given rise to criminal proceedings in the State of origin, the authority in charge of the proceedings should assess this circumstance, making use of the possibilities offered by European rules and institutions. A code of best practice along these lines, aimed at obtaining information quickly and without any more formalities than those required to make it easily understandable, would also help to provide the necessary basis in the Member States for the development in the courts dealing with this type of case of sufficient offices and teams of professionals to work with victims and cooperate with the administration of justice. Taking into account all these implications, the Brussels II ter Regulation focuses considerably on the ways in which the courts of the Member States can gather the information they need:

1) Art. 86 of the Brussels II ter Regulation establishes direct communication between courts for the purpose of cooperation and communication of information, while respecting the procedural rights of the parties and confidentiality. This possibility of direct communication is specifically foreseen for child return proceedings in Art. 27.4 of the Brussels II ter Regulation.
2) Art. 87 of the Brussels II ter Regulation provides for the transmission of information through Central Authorities for the same purposes.

Besides these institutional channels of communication, additional information can be gathered by other means, such as the contact points of the European Judicial Network. Recital 80, in fact, gives authorities and courts the power to choose freely between the different channels available. This flexibility is important in view of the fact that the court before which a request for the return of a child is brought under the 1980 Hague Convention must decide within a maximum period of six weeks, pursuant to Art. 24.3 of the Brussels II ter Regulation.

The existence of criminal proceedings for domestic or gender-based violence is also relevant for refusing to enforce a return decision which, as a consequence of a decision on the merits of the custody rights, may be issued by the State where the child was habitually resident before the removal. These decisions are enforceable under Art. 29.6 of the Brussels II ter Regulation even if a court of the requested State has issued a non-return decision, and they are also enforceable by means of the particularly privileged and expeditious procedure reserved in Art. 42 of the Brussels II ter Regulation for them and for decisions granting rights of access. However, this particularly privileged route can still lead to the stay or even the final refusal of the return judgment given by a court with jurisdiction to decide on parental responsibility and custody rights if, at the request of a party, the courts of the requested State assess the danger that such enforcement would "expose the child to a grave risk of physical or psychological harm due to of temporary impediments which have arisen after the decision was given, or by virtue of other significant change of circumstances", in the terms already mentioned in Art. 56.4 of the Brussels II ter Regulation. Criminal proceedings instituted in the State of origin after the return decision, the taking of certain decisions subsequent to the return decision in criminal proceedings that

had previously been instituted, or the termination of the criminal proceedings with a conviction, may represent the significant change of circumstances that allows the requested State to legitimately refuse, temporarily or definitively (Art. 56 para. 4 and 6 of the BR II ter), the enforcement of the return decision.

It is clearly important for the court considering the suspension or refusal of enforcement of a return decision on this ground to have a sound knowledge of the implications of criminal proceedings for gender or domestic violence in another Member State, and of the degree of incrimination of the offender at each of its stages; again, we must allude to the importance of the channels of direct and assisted communication between courts opened up by Arts. 86 and 87 of the Brussels II ter Regulation.

Finally, and beyond the influence of potential criminal proceedings on the return proceedings, it is also necessary to consider that the return proceedings may also affect the criminal proceedings and that, again, there is a lack of flexible instruments to arrange this interaction. As it has been seen, the court of the requested State could refuse the return on the basis of the danger that the existence of the criminal proceedings may pose for the child. But it could also adopt measures that contribute to mitigating this risk, as provided for in Art. 27.5 of the Brussels II ter Regulation. These measures have a specific treatment, since, despite being provisional and agreed by the courts of a State that lacks jurisdiction to hear the merits of the case, they must be recognised, as confirmed under Recital 30, establishing a difference between these measures and those regulated by Art. 15 of the Brussels II ter Regulation, to which reference has already been made and which stems from the case law relating to Art. 20 of the Brussels II bis Regulation. It is possible that these measures are intended to be effective, not in the civil proceedings dealing with parental responsibility, but in the criminal proceedings that may represent a risk for the child, because they consist, for example, in the condition that the child does not testify in the criminal proceedings, or that his or her statement is taken under certain conditions or by adopting certain precautions. Criminal proceedings do not fall within the scope of the Brussels II ter Regulation, and it is not clear that they can be conditioned by the recognition of a decision in the terms of this Regulation. If the court of the requested State considers that the conditions set may well not be fulfilled in the end, because the tools to promote its recognition in criminal proceedings are not clear, it will be more inclined to issue a non-return decision, which is certainly not the preferred option of the European legislator.

3.2. Child Abduction Criminal Proceedings and Civil Return Proceedings

The criminalisation of international child abduction, which is common to all Member States, may also have an impact on the conduct of civil proceedings for the return of children. Such prosecution is undoubtedly legitimate, given the relevant legal interests at stake. But it is important to underline that it can also become an obstacle to the conduct of civil proceedings in relation to the custody and return of the child.

First, the existence of criminal proceedings for child abduction may make it difficult for the abducting parent to adequately defend his or her legal position in civil proceedings on custody and parental responsibility in the State of origin, especially if national procedural rules require his or her physical presence in order to be able to make submissions: the risks of criminal prosecution and, above all, of protective measures affecting his or her liberty may deter him or her from acting in such civil proceedings. And this lack of a hearing, in turn, may become an obstacle to the recognition and enforcement of certain decisions – e.g., if Art. 39.1(c) of the Brussels II ter Regulation is interpreted very generously.

In any event, it is important that the authorities hearing the return proceedings in the State where the child is present may be aware of the existence and, where appropriate, the outcome of this criminal case, although it should not be recognised as being of decisive value in influencing the decision: the fact that the abducting parent is being prosecuted is neither surprising nor should, in principle, be objectionable, irrespective of the reasons he or she may put forward in his or her defence – and in some cases the criminal proceedings for abduction are interconnected with a reverse criminal proceeding for domestic or gender-based violence against the other party. As to the manner of communication between civil and criminal authorities of different States, the considerations made in the previous section should apply.

Nevertheless, it should be borne in mind that this type of criminal cases for child abduction can become a serious obstacle to consensual solutions, which the Brussels II ter Regulation also wants to promote. In this respect, Art. 25 of the Brussels II ter Regulation could not be more explicit: "As early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings"[43].

[43] In the same sense, recital 43 of the Brussels II ter Regulation states: "In all cases concerning children, and in particular in cases of international child abduction, courts should consider the possibility of achieving solutions through mediation and other appropriate means, assisted, where appropriate, by existing networks and support structures for mediation in cross-border parental responsibility disputes. Such efforts should not, however, unduly prolong the return proceedings under the 1980 Hague Convention. Moreover, mediation might not always be appropriate, especially in cases of domestic violence. Where in the course of return proceedings under the 1980 Hague Convention, parents reach agreement on the return or non-return of the child, and also on matters of parental responsibility, this Regulation should, under certain circumstances, make it possible for them to agree that the court seised under the 1980 Hague Convention should have jurisdiction to give binding legal effect to their agreement, either by incorporating it into a decision, approving it or by using any other form provided by national law and procedure. Member States which have concentrated jurisdiction should therefore consider enabling the court seised with the return proceedings under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of those return proceedings".

In this vein, and at least in some cases, it might make sense to open the doors to mechanisms of criminal mediation and restorative justice in relation to the offence of international child abduction, which could be interconnected with the mediation or equivalent mechanisms that are put in place to try to seek a consensual solution to the basic conflict, in the best interests of the child. There is no specific provision on this, but it would be worth trying to exploit to the maximum the potential offered by Art. 79(g) of the Brussels II ter Regulation. This provision, dealing with the mechanisms of cooperation between Central Authorities, includes among the specific tasks of the requested Central Authorities, to take all appropriate steps to facilitate agreement between holders of parental responsibility through mediation or other means of alternative dispute resolution, and facilitate cross-border cooperation to this end. And, in order to carry out this task, the provision itself indicates that the Requested Central Authorities shall take all appropriate steps to reach that goal "acting directly or through courts, competent authorities or other bodies".

Where such criminal mediation and restorative criminal justice mechanisms exist, therefore, the possibility of activating the co-operation mechanisms set out in the Brussels II ter Regulation to try to reach a solution that best serves the interests of the child should not be ruled out.

Abstrakt

Uprowadzenie dziecka za granicę w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej: doświadczenia i perspektywy

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Rozporządzenie Rady (UE) 2019/1111 z 25.06.2019 r. w sprawie jurysdykcji, uznawania i wykonywania orzeczeń w sprawach małżeńskich oraz w sprawach dotyczących odpowiedzialności rodzicielskiej oraz w sprawie uprowadzenia dziecka za granicę (wersja przekształcona) ustanawia nowe ramy prawne w kwestii traktowania przez państwa członkowskie uprowadzenia dziecka za granicę. W ciągu ostatnich piętnastu lat niektóre spośród najbardziej złożonych aspektów prawnych uprowadzeń dziecka za granicę były interpretowane i rozwijane w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej. Niniejszy artykuł ma na celu wyjaśnienie powyższych ram prawnych oraz odnośnego orzecznictwa TSUE, koncentrując się na najważniejszych zmianach

i wyzwaniach związanych z nadchodzącym wejściem w życie rozporządzenia Rady (UE) 2019/1111.

Słowa kluczowe: *uprowadzenie dziecka za granicę, rozporządzenie 2201/2003, rozporządzenie 2019/1111, dobro dziecka, uznawanie i wykonywanie orzeczeń zagranicznych*

Bibliography/References

Beaumont P., McEleavy P., *The Hague Convention on International Child Abduction*, Oxford 1999.

Beaumont P., Walker L., Holliday J., *Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings*, "International Family Law Journal" 2016.

Biagioni G., *Jurisdiction in Matters of Parental Responsibility Between Legal Certainty and Children's Fundamental Rights*, "European Papers: a Journal on Law and Integration" 2019/1.

de Boer Th.M., *What we should not expect from a recast of the Brussels IIbis Regulation*, "Nederlands Internationaal Privaatrecht" 2015/1.

Coester-Waltjen D., *Das Zusammenspiel von Rechtsquellen und Institutionen bei internationalen Kindesentführungen*, „International Journal of Procedural Law" 2012/1.

Honorati C. (ed.), *Jurisdiction in matrimonial matters, parental responsibility and international abduction. A handbook on the application of Brussels IIa Regulation in national courts*, Torino 2017.

Magnus U., Mankowski P. (eds.), *Brussels II bis Regulation*, Munich 2012.

McEleavy P., *Judicial Communication and Co-operation and the Hague Convention on International Child Abduction*, "International Journal of Procedural Law" 2012/1.

Musseva B., *The recast of the Brussels IIa Regulation: the sweet and sour fruits of unanimity*, "ERA Forum" 2020/21(1).

Pretelli I., *Provisional Measures in Family Law and the Brussels IIter Regulation*, "Yearbook of Private International Law" 2018/19(20).

de Sousa Gonçalves A.S., *Wrongful removal or retention of children and the Brussels IIa proposed recast*, "Anuario español de Derecho internacional privado" 2018.

Ubertazzi B., *The hearing of the child in the Brussels IIa Regulation and its Recast Proposal*, "Journal of Private International Law" 2017/3.

Viarengo I., Villata F.C. (eds.), *Planning the Future of Cross Border Families,* Oxford 2020.