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NEW TRENDS IN EUROPEAN FAMILY PROCEDURAL LAW

ABSTRACT

*The system of the European family procedural law is based on the multiple cross-border institutes which are developing gradually. It represents a complex system of many interrelated regulations directly regulating the cross-border family relations, through which European legislator seeks to equalize, where possible, or to connect the rules on jurisdiction and recognition, declaration of enforceability and enforcement. Also, speaking about the legal sources of the European family procedural law it is necessary to signify the interpretative power of the European Court of Justice. This paper will discuss present actuality – the Brussels IIbis Regulation Recast, respectively the Proposal COM (2016) 411/2 published by the European Commission on 30 July 2016. The proposal, in major, predicts changes regarding the rules of jurisdiction, provisional and protective measures and enforcement rules, and also introduces the new rules on incidental questions, right of the child to express his views and new rule on concentration of local jurisdiction. However, it is inevitable to raise the issue whether some other provision required changes in terms of additional explanation, referring to the rules on the transfer of jurisdiction, in the light of the new CJEU ruling in the case *Child and Family Agency vs. J.D.**

Keywords: *jurisdiction, enforcement, declaration of enforceability, Brussels IIbis Regulation Recast, Child and Family Agency vs. J.D*

1. INTRODUCTION

The main objective of the unification of EU family law since its beginning in early nineties was the establishment of the principle of mutual trust between the Member States. It has been continuously built by adopting and improving the rules considering the free movement of the judgments, implying the rules on jurisdiction, applicable law and recognition and enforcement, constantly keeping in mind the protection of the best interest of the child. The aspiration to simplify and make the procedure more efficient is contributing to its straightening. The field of family matters in EU is currently being regulated by the Brussels IIbis Regulation, Rome III Regulation, Maintenance Regulation, Regulation on matrimonial property regimes, Regulation on the property consequences of registered partnerships, and with the closely connected Succession Regulation. Certainly, it is important

to note that the sources of European family law are also the conventions in family matters brought within the Hague Conference on Private International Law.¹ The Brussels *Ibis* Regulation, characterised as the cornerstone of judicial cooperation in family matters, is currently under revision. This paper will present the short overview of the European legislator's efforts on making the rules improving the principle of mutual trust, until its final product – the Proposal for Brussels *Ibis* Recast (Chapter 2). It will be followed by the remarks on the Proposal; respectively, the significant changes regarding the procedural matters, all with the purpose of determining to what extent the objectives of the unification were achieved (Chapter 3-5).

2. UNIFICATION OF THE EUROPEAN FAMILY LAW IN MATRIMONIAL AND PARENTAL RESPONSIBILITY MATTERS

The European Union was originally focused on securing the economic freedoms rather than the family law matters until the Maastricht Treaty² had created the idea of the European Union citizenship,³ providing the number of rights upon the European citizenship with emphasis on the right of free movement of the person.⁴ However, the concept of citizenship established by the Maastricht Treaty did not bring effective rights to the EU citizens. They found themselves able to exercise their substantive rights, but unable to enforce the judgments determining those rights, especially in matrimonial matters.⁵ European Community had no authority to adopt supranational legislation and the Council could only recommend the member states to adopt the conventions it had drawn up⁶ because the judicial cooperation in civil matters had not yet been transferred from the third pillar to the first pillar of European integration.⁷ At the meeting held in Brussels in 1993 the European Council had considered the possibilities of extending the scope of

¹ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; 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; Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

² Treaty on European Union [1992] OJ C 191.

³ Article 8 TEU (Maastricht).

⁴ *Ibid.* Art K.1.

⁵ Perin Tomičić, I., *Private International Law Aspects of the Matrimonial Matters in the European Union – Jurisdiction, Recognition and Applicable Law*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 57, No. 4-5, 2007, pp. 848-880, p. 849.

⁶ Article K.3(2) TEU (Maastricht).

⁷ de Boer, T.M., *What we should not expect from a recast of the Brussels Ibis Regulation*, *Nederlands Internationaal Privaatrecht*, Vol. 33, No. 1, 2015, pp. 10-19, p. 10.

the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters⁸ to matters of family law.⁹ After a few years of negotiations, a Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (hereinafter: Brussels II Convention)¹⁰ was agreed upon. As the treaty of Amsterdam¹¹ allowed its conversion into regulation, the European Commission had quickly drafted a proposal for a regulation covering the same topics. The 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 spouses¹² (hereinafter: Brussels II Regulation) was the first instrument adopted in the area of judicial cooperation in civil matters.¹³ The content of the Brussels II Regulation was taken over from the Brussels II Convention with few new provisions aimed to secure the consistency with certain provisions of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁴ (hereinafter: Brussels I Regulation).¹⁵ The Brussels II Regulation came into force on 1 March 2001. For the reason that the children born out of wedlock and children who are not mutual to both parents remained out of the Brussels II Regulation sphere¹⁶, there were proposals for its revision even before it entered into force.¹⁷ On May 2002 the

⁸ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299.

⁹ Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr Alegria Borrás Professor of Private International Law University of Barcelona [1998] OJ C 221/27, p. 31.

¹⁰ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters - Declaration, annexed to the minutes of the Council, adopted during the Justice and Home Affairs Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C 221.

¹¹ Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts [1997] OJ C 340/1.

¹² 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 [2000] OJ L 160/19.

¹³ Perin Tomičić, I., *op. cit.* note 5, p. 854.

¹⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] **OJ L 012**.

¹⁵ Brussel II Regulation, *op. cit.* note 12, Rec 6.

¹⁶ Pranevičienė, K., *Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges Applying Regulation Brussels II Bis*, Baltic Journal of Law & Politics, Vol. 7, No. 1, 2017, pp. 113-127, p. 117.

¹⁷ Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforce-

Commission presented a proposal which had covered both matrimonial matters and parental responsibility and had brought together all proposed innovation concerning the abolition of exequatur for decisions on access rights, and expansion of the regulation's substantive scope with regard to parental responsibility, cooperation between central authorities and demarcation in relation to the 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 Children¹⁸ (hereinafter: 1996 Hague Convention).¹⁹ The new Regulation, 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 1347/2000²⁰ (hereinafter: Brussels IIbis Regulation), entered into force on 1 August 2004 and applies from 1 March 2005.²¹

Still, at the time, there remained an unenviable situation for parties seeking a divorce.²² There were no Community provisions on applicable law in divorce. On 17 July 2006 the Commission presented a Proposal for a Council regulation amending the Brussels IIbis Regulation as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters²³ (hereinafter: 2006 Proposal).²⁴ Because of the extensive discussion regarding the 2006 Proposal the

ment of judgments on rights of access to children [2000] OJ C 234.

¹⁸ Council Decision of 5 June 2008 authorising certain 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 and Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children [2008] L 151/36.

¹⁹ de Boer, *op.cit.* note 7, p. 11.

²⁰ 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 [2003] OJ L338.

²¹ *Ibid.* Art 72.

²² Henderson, T., *From Brussels to Rome: The necessity of resolving divorce law conflicts across the European Union*, Wisconsin International Law Journal, Vol. 28, No. 4, 2011, pp. 768-794, p.769.

²³ 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.

²⁴ The Proposal was named Rome III, which led to the confusion due to the fact that the designation "Rome" has been used for instruments which only contained conflict of laws rules whereas "Brussels" indicated that only procedural issues were being addressed, such as jurisdiction, recognition and enforcement. *Supra.* Boele-Woelki, K., *To be, or not to be: Enhanced cooperation in international divorce law within the European Union*, Victoria University of Wellington Law Review, Vol. 4, 2008, pp. 779-792, p. 783.

adoption of the choice of forum was genially welcomed by the Member States while the conflict of law rules were highly unaccepted.²⁵ When it became clear that the unanimity required for the adoption of the Rome III Proposal could not be obtained, eight Member States²⁶ informally reported the Council regarding their indentation to launch the enhanced cooperation mechanism and to request the Commission to draft a proposal to that end.²⁷ The 14 participating Member States²⁸ adopted Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter: Rome III Regulation),²⁹ which became applicable on 21 June 2012.³⁰

Finally, we come to the last proposal. Pursuant to the Article 65 of the Brussels II*bis* Regulation, every five years, the Commission shall present to the European Parliament, to the Council and to the European Economic and Social Committee, a report on the application of Brussels II*bis* Regulation on the basis of the information supplied by the Member States. On 15 April 2014 the Commission had published a Report on application of the Brussels II*bis* Regulation,³¹ which represented a first assessment of its application.³² Afterwards, on 30 June 2016 the 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) (hereinafter: 2016 Proposal) was published.³³

²⁵ *Ibid.* p. 784.

²⁶ Austria, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain.

²⁷ Boele-Woelki, K., *op.cit.* note 24, p. 785.

²⁸ Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

²⁹ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10.

³⁰ The Regulation applies in Lithuania from 2014 and in Greece from 2015, which gives the result of 16 Member States included in enhanced cooperation. Source: Law applicable to divorce and legal separation, European E-justice Portal, URL=https://e-justice.europa.eu/content_law_applicable_to_divorce_and_legal_separation-356-en.do?init=true. Accessed 18 January 2017.

³¹ 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.

³² It was based on the inputs received from the members of the European Judicial Network in civil and commercial matters, available studies, the Commission's Green Paper, the 2006 Proposal and the work done within the framework of the Hague Conference on Private International Law on the follow-up of the 1980 and 1996 Hague Conventions. Also, it took into account citizen letters, complaints, petitions and case law of the Court of Justice of the European Union. *Ibid.* p. 4.

³³ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in

3. BRUSSELS II *BIS* REGULATION RECAST

As it was noted in the 2016 Proposal's Explanatory Memorandum the objective of the recast was to further develop the European area of Justice and Fundamental Rights based on Mutual Trust, saying that among the two areas covered by the Brussels II*bis* Regulation, the matrimonial and parental responsibility matters, the latter was identified to have caused acute problems which need to be addressed urgently³⁴ while there is only limited evidence of existing problems regarding the matrimonial matters.³⁵ As introduction to the review of certain proposed changes, it is to be highlighted that the 2016 Proposal introduced a definition of a child which covers any person up to the age of 18.³⁶ The intention was to equalize the Regulation with the 1996 Hague Convention, in relation to non-child abduction child related matters within the scope of the Regulation.³⁷ The word *court* has been replaced by the word *authority*, while *judgment* has been replaced with the *decision*. This goes in favour of the objective of strengthening the legal certainty and increasing of flexibility while erasing the differences in national rules and legal terminology of the Member States. This legal terminology has already been seen in recent date regulation such as Succession Regulation³⁸, Regulation on matrimonial property regimes³⁹ and Regulation on the property consequences of registered partnerships.⁴⁰ Also, it is difficult no to see the significant increase of the recitals, from 33 to 57.

The following chapters will present the significant changes proposed by the 2016 Proposal concerning the matrimonial matters and parental responsibility. As well,

matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final.

³⁴ The 2016 Proposal identified the six main shortcomings concerning parental responsibility: child return procedure, placement of the child in another Member State, the requirement of exequatur, hearing of the child, actual enforcement of decisions and cooperation between the Central Authorities.

³⁵ 2016 Proposal, *op. cit.* note 33, p. 1-2.

³⁶ *Ibid.* Art. 2(1)(7).

³⁷ Beaumont, P., Walker, L. and 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, Vol. 4, 2016, pp. 1-16, p. 13.

³⁸ Regulation (EU) No 650/2012 OF the European Parliament and the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

³⁹ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] L 183/1.

⁴⁰ Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] L 183/1.

they will include the areas not affected by the 2016 Proposal but considered to be needed introduced or amended.

4. MATRIMONIAL MATTERS

4.1. Exclusive and residual jurisdiction

The change proposed by the 2016 Proposal concerning the jurisdiction refers to the present rules on exclusive nature of jurisdiction⁴¹ and residual jurisdiction,⁴² which had considered being very complex and confusing.⁴³ While the Court of Justice of the European Union (hereinafter: CJEU) gave the interpretation of the Article 3, 6 and 7 in the case *Sundelind Lopez*⁴⁴ saying that domestic rules on private international law of a Member State will only determine jurisdiction if none of the Brussels *Ibis* rules is applicable,⁴⁵ there is still no clear answer to the question whether jurisdiction may be derived from national law if the respondent is a national or resident of a Member State, and no court in a Member State would have jurisdiction pursuant to the Regulation, namely it is doubtful whether the application of national law under Article 7 is excluded if one of the requirement of Article 6 has been met.⁴⁶ There is an example where French woman lives with her German husband in Canada. They separate and she returns to Paris with the intention to initiate the divorce proceeding immediately. No court of Member State has jurisdiction under Article 3 to 5 of the Brussels *Ibis* Regulation since the parties are not habitually residents in a Member State, they do not share a common nationality and the wife does not have the habitual residence in France for a sufficient time. Is the wife able to rely on the French residual rules, or, is she unable because her husband has a German nationality and had special protection under the Article 6?⁴⁷ The “exclusive nature” of the rules seems to suggest that domestic

⁴¹ “A spouse who: (a) is habitually resident in the territory of a Member State; or (b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her ‘domicile’ in the territory of one of the latter Member States, may be sued in another Member State only in accordance with Articles 3, 4 and 5.” Brussels *Ibis* Regulation, *op. cit.* note 20, Art 6.

⁴² “Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.” *Ibid.* Art 7(1).

⁴³ Ní Shúilleabháin, M., *Cross-Border Divorce Law. Brussels II Bis*, Oxford Private International Law Series, Oxford, 2010, p. 156.

⁴⁴ Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECLI:EU:C:2007:740, para 24.

⁴⁵ Kruger, T., Samyn, L., *Brussels Ibis: successes and suggested improvements*, Journal of Private International Law, Vol. 12, No. 1, 2016, pp. 132-168, p. 139.

⁴⁶ de Boer, *op. cit.* note 7, p. 13.

⁴⁷ *Supra.* McEleavy, P., *The Communitarization of Divorce Rules: What Impact for English and Scottish Law?*, The International and Comparative Law Quarterly, Vol. 53, No. 3, 2004, pp. 605-642, p. 612.

private international law cannot be applied.⁴⁸ The 2014 Practical Guide for the application of the Brussels IIbis Regulation was quite clear on this matter saying that because of the exclusive nature of the rules set out in Article 3 to 5, as is provided in Article 6, the rule in Article 7(1) only applies in relation to a respondent who is not habitually resident in nor a national nor domiciled in a Member State.⁴⁹ The questions remained whether the 2016 Proposal had removed those obstacles in the interpretation and had given the solution to the above described situation.

The 2016 Proposal connects those two articles in one, saying that where no authority of a Member State has jurisdiction pursuant to Article 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that Member State. This rule does not apply to a respondent who: (a) is habitually resident in the territory of a Member State, or (b) is a national of a Member State, or, has “domicile” in the territory of one of the Member States.⁵⁰ It is to be admitted that the proposed rule very easily solved the doubts in the interpretation of existing rules. Regardless, there is a still unsolved issue for the situation as one mentioned above, but for the applicant to wait for the prescribed timeframes to be fulfilled. Possible solution could be found in the introduction of a *forum necessitates* for a situation where no court in Member State can assume jurisdiction,⁵¹ under conditions like already contained in the Maintenance Regulation,⁵² Succession Regulation, Regulation on matrimonial property regimes and Regulation on the property consequences of registered partnerships.⁵³

4.2. Prorogation of jurisdiction

The proposal for the introduction of the rule on choice of court can be found in the 2006 Proposal, which introduced the prorogation in matrimonial matters, as

⁴⁸ *Ibid.*, p. 140.

⁴⁹ European Commission, *Practice Guide for the application of the Brussels IIa Regulation*, 2014, p. 13, URL: http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf. Accessed 10 January 2017.

⁵⁰ 2016 Proposal, *op. cit.* note 33, p. 37.

⁵¹ Kruger, T., Samyn, L. *op. cit.* note 45, p. 140.

⁵² 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 [2009] L 7/1.

⁵³ “Where no court of a Member State has jurisdiction pursuant to Articles 3, 4, 5 and 6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised.” *Ibid.* Art. 7. *Supra.* Art 11 of the Succession Regulation, Art 11 of Regulation on matrimonial property regimes and Art 11 of Regulation on property regimes of registered partnerships.

it already existed in respect to the parental responsibility.⁵⁴ Meaning that in the proceedings relating to divorce and legal separation to the spouses are allowed a limited choice of court. According to proposed rule they may select forum within the European Union with which they have some connection with that Member State by virtue of the fact: (a) any of the grounds of general jurisdiction applies, or (b) it is the place of the spouses' last common habitual residence for a minimum period of three years, or (c) one of the spouses is a national of the Member State or, has his or her "domicile" in territory of one of the Member States.⁵⁵ Above mentioned rule had never given legal force. As already noted, the product of 2006 Proposal, Rome III Regulation, only contains the rules on law applicable to divorce and legal separation, while the originally proposed rules on jurisdiction in matrimonial matters remained unsettled by the way it was proposed at the time. Still, the adoption of the choice of court was at the time genially welcomed by the Member States unlike the conflict of law rules.⁵⁶ Therefore, there was no reason for the drafter not to introduce this rule in 2016 Proposal giving that the forum choice can benefit the parties as it gives them additional control in a view of predictability and legal certainty and to help them to prevent the rush to court.⁵⁷

5. PROPOSED CHANGES CONCERNING THE PARENTAL RESPONSIBILITY

5.1. Jurisdiction

5.1.1. *Provisional, including protective, measures*

The existing rule on provisional measures caused a problem in application by saying that the provisions of the Regulation shall not prevent the courts of a Member State from taking provisional, including protective measures in respect of persons or assets in that State. It was unclear to which the word "person" had referred to.⁵⁸ If is to be interpreted in the relation to the 1996 Hague Convention,⁵⁹ the rule re-

⁵⁴ de Boer, T. M., *The second revision of the Brussels II regulation: jurisdiction and applicable law*, In: Boele-Woelki, K. and Sverdrup, T. (Eds.), *European challenges in contemporary family law*, European family law series; No. 19, Antwerpen: Intersentia, 2008, pp. 321-341, p. 4. (UvA-DARE version of article used. URL= <http://dare.uva.nl/search?arno.record.id=285566>. Accessed 9 January 2017).

⁵⁵ 2006 Proposal, *op.cit.* note 23, p. 13.

⁵⁶ Boele-Woelki, *op. cit.* note 24, p. 784.

⁵⁷ Kruger, T., Samyn, L. *op. cit.* note 45, p. 144.

⁵⁸ *Ibid.* p. 147.

⁵⁹ "In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection." 1996 Hague Convention, *op. cit.* note 18, Art 11.

fers to the child. But, the CJEU caused confusion in his ruling in the case *Detiček*⁶⁰ saying that a provisional measure in matters of parental responsibility ordering a change of custody of a child is taken not only in respect of the child but also in respect of the parent to whom custody of the child is now granted and of the other parent who, following the adoption of the measure, is deprived of that custody.⁶¹ The 2016 Proposal is giving the solution by adhering to the solution from the 1996 Hague Convention, precisely saying that in urgent cases the authorities of a Member State where the child or property belongings to the child is present still have jurisdiction to take provisional, including protective measures.⁶² But still there is a disparity in relation to the provisional measures taken in child abduction case in relation to the new Article 25(1)(b). Namely, Recital 29 explains that before refusing to return the child, the court should, however, consider whether appropriate measures of protection have been put in place or may be taken to eliminate any risks to the best interest of the child. It could be that in certain cases measures are ordered in respect of the child which could ensure the protection of the parent.⁶³

The Proposal moves the provision on provisional, including protective, measures to the jurisdiction chapter which means any measures made under this provision can be recognised and enforced in another Member State.⁶⁴ This significant change is contained in new Article 48 clarifying that enforcement rules shall apply to provisional, including the protective measures, which brings the Regulation in line with the 1996 Hague Convention.⁶⁵

5.1.2. *Transfer to a court better placed to hear the case. Case C-428/15 Child and Family Agency vs. J.D.*⁶⁶

As it follows from the text of the Article 15 the rule on the transfer to a court better placed to hear the case should be an extraordinary measure, but it is used fairly often in practice.⁶⁷ In spite of that, the practitioners are faced with the problems

⁶⁰ Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECLI:EU:C:2009:810.

⁶¹ *Ibid.* para 50 and 51.

⁶² 2016 Proposal, *op. cit.* note 33, Art 12.

⁶³ Beaumont, P., Walker, L. and Holliday, J., *op. cit.* note 37, p. 11.

⁶⁴ *Ibid.* p. 10.

⁶⁵ 1996 Hague Convention, *op. cit.* note. 18, Art 11(2).

⁶⁶ Case C-428/15 *Child and Family Agency vs. J.D.* [2016] ECLI:EU:C:2016:819.

⁶⁷ Friedrich, L., *The Experience of the National Central Authority*, Recasting the Brussels IIa Regulation Workshop 8 November 2016, Compilation of briefings for the JURI Committee, 2016, pp. 45-55, p. 54, URL= [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU\(2016\)571383_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf). Accessed 9 January 2017.

in its application⁶⁸ and also there are the examples of poor interpretation of this rule. This is confirmed by the case where a child, living in Italy, was neglected by the mother and instituted in hospital. The residence of the father was unknown and the Italian authority initiated a question of his adoption by a grandmother living in Lithuania. After deciding that this issues fall within the scope of Brussels IIbis Regulation, the Italian Court issued a decision on the transfer of the proceedings to a Lithuanian court where it omitted to set out the time limit by which the Lithuanian court should have been seized, thus leaving uncertain whether and when the Italian proceeding might have been resumed.⁶⁹ Most common situation of the application of this rule was in cases where courts wanted to transfer a case concerning custody instituted after a motion by a parent who subsequently moved to another state with the child.⁷⁰ However, 2016 Proposal is excluding this possibility by amending the rule on general jurisdiction in parental responsibility matters saying that where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the authorities of the Member State of the new habitual residence shall have jurisdiction.⁷¹ Still, with no proposed amendment of this rule the practitioners depend on the interpretation of the CJEU. While they were deprived from the CJEU's answer in the Case *E. v B.*⁷² regarding the application of Article 15 in cases where there are no current proceedings concerning the child, there is a recent ruling in the Case *Child and Family Agency vs. J.D.* finally giving some explanation.

Ms D, UK national, was a subject to a „pre-birth assessment“ carried out by the child protection authorities in UK in anticipation of the birth of her second child, R. The competent authorities considered that R. should after his birth be placed in the care of a foster family. Ms D. moved to Ireland shortly after. R. was born.

⁶⁸ Some of the problems were indicated by the Croatian practitioners as follows: possibility of receiving the case file in the foreign language, acceptance of the evidences presented by another court, situation where circumstances of the case change or the child moves to another country, possibility of submission of the request under Article 15 in the appeal procedure. *Supra*. Župan, M., Drventić, M., *Croatian Exchange Seminar, Osijek, 13-14 October 2016, Report on the Croatian Good Practices*, 2016, p. 12. The Report was drafted as a research output within the Project „Planning the future of cross-border families: a path through coordination“ (EUFam's), coordinated by the University of Milan, co-funded by the Directorate-General for Justice and Consumers of the European Commission, within the programme “Projects to support judicial cooperation in civil or criminal matters” (Justice Programme), under the code JUST/2014/JCOO/AG/CIVI/7729. URL= <http://www.eufams.unimi.it/category/research-outputs/>. Accessed on 10 January 2017.

⁶⁹ Tribunale per i minorenni di Roma, 25 January 2008, EUFam's database: ITF20080125, URL= <http://www.eufams.unimi.it/category/database/>. Accessed 10 January 2017.

⁷⁰ Friedrich, L., *loc. cit.*

⁷¹ 2016 Proposal, *op. cit.* note 33, Art 7(1).

⁷² Case C-436/13 *E. v B.* [2014] ECLI:EU:C:2014:2246.

Shortly after, the Agency made an application to the District Court in Ireland for an order that the child should be placed in care. The Circuit Court ordered the provisional placement of R. in foster care. The Agency further made an application to the High Court requesting that the substance of the case be transferred to the UK court, pursuant to Article 15. That application was supported by R.'s guardian *ad litem*. The High Court authorized the Agency to make an application to the UK court to assume jurisdiction. After Ms D.'s appeal, the Supreme Court decided to stay the proceedings and to refer to CJEU. It asked to explain whether Article 15 applies to child protection proceedings based on public law, where such proceedings are brought by a competent authority in a first Member State although it is an institution of another Member State that will have to bring separate proceedings, under different legislation and relating to different factual circumstances. Also, it sought guidance regarding the interpretation and connection of the terms "better placed" and of "the best interests of the child". The CJEU answered that Article 15 is applicable where a child protection application brought under public law by the competent authority of a Member State, where it is a necessary that an authority of that other Member State thereafter commence proceedings that are separate from those brought in the first Member State, pursuant to its own domestic law and possibly relating to different factual circumstances. Further, the CJEU explained that the concepts "better placed" and "the best interests of the child", must be interpreted by taking into account their context and the objectives pursued by the Regulation. In order to determine the "better placed" concept, the court having jurisdiction must be satisfied that the transfer is such as to provide genuine and specific added value to the examination of that case, taking into account, *inter alia*, the rules of procedure applicable in that other Member State. The court having jurisdiction should not take into consideration the substantive law of that other Member State, doing so would be in breach of the principles of mutual trust between Member States and mutual recognition of judgments. In order to determine the "best interest of the child concept" the court having jurisdiction must be satisfied that that transfer is not liable to be detrimental to the situation of the child.

5.1.3. *Incidental questions*

The Commission proposed a new rule on the incidental questions saying that if the outcome of proceedings before an authority of a Member State depends on the determination of an incidental question falling within the scope of this Regulation, this authority may determine that question. The more precise explanation of this rule could be found in the Recitals by giving the practical example as follows: "...if the object of the proceedings is, for instance, a succession dispute in which

the child is involved and a guardian *ad litem* needs to be appointed to represent the child in those proceedings, the authority having jurisdiction for the succession dispute should be allowed to appoint the guardian for the proceedings pending before it, regardless of whether it has jurisdiction for parental responsibility matters under this Regulation. Any such determination of an incidental question should only produce effects in the proceedings in question”.⁷³ However, there is an obligation for the authority having jurisdiction to decide on incidental question to determine the law applicable to the incidental question. Usually in this kind of situations the authority has two possibilities; to apply his national conflict of law rules (*lex fori*) to determine the law applicable to the preliminary question, or he can use the conflict of law rules of the law of the main question (*lex causae*).⁷⁴ However, where the substantive law of the private international law has been harmonized, the choice between two approaches leads to one solution: *lex fori*.⁷⁵ It follows that, in relation to the proposed rule, the court deciding in e.g. succession proceeding and applying the law applicable to that matter, in relation to the raised incidental question will have to apply the law applicable for the parental responsibility. According to the 1996 Hague Convention that would be the law of the State of the habitual residence of the child.⁷⁶

While the Commission obviously tried to resolve the situation such as the one from the case *Matoušková*,⁷⁷ the question is was the proposer thorough enough by determining this rule. It is not for the sure that this rule will contribute to the highlighted legal certainty and flexibility by possibly imposing the obligation of application of foreign law to the authorities having jurisdiction to decide upon incidental question and by highly possible disparity of laws applicable to the main question and incidental question.

5.1.4. *Right of the child to express his or her views*

The rule saying that the child has to be given the opportunity to be heard has already been a part of the Brussels IIbis Regulation, contained in Article 11(2) with the respect of cases in which the Art 12 and 13 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction⁷⁸ (hereinafter: 1980

⁷³ 2016 Proposal, *op. cit.* note 33, Rec 22.

⁷⁴ Goessl, S., *Preliminary question in EU private international law*, Journal of Private International Law, Vol. 8, No 1, 2012, pp- 63-76, p. 64.

⁷⁵ *Ibid.* 67.

⁷⁶ 1996 Hague Convention, *op. cit.* 18, Art 15 and 16.

⁷⁷ Case C-404/14 *Marie Matoušková* [2015] ECLI:EU:C:2015:653.

⁷⁸ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Hague XXVIII, URL= <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>. Accessed 15 January 2017.

Hague Convention) had been applying. Currently, the importance of hearing children is not highlighted in the Regulation in general terms. The research within the Project “Conflicts of EU courts on child abduction”⁷⁹ showed that the majority of children in EU involved in proceedings under the Article (11)(8) were not heard by the courts; the overall data indicates that the child was heard in only 17 per cent of cases.⁸⁰ By setting the new rule under the Article 20 the Commission was giving stronger value to this matter by saying that the authorities of the Member State shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings. The authority shall give due weight to the child’s views in accordance with his or her age and maturity and document its considerations in the decision. Clearly the Commission recognised the existing issues by strengthen the right of the child to be heard.⁸¹ Also, the above rule was additionally strengthened in the Recital 23 by calling upon the Charter of Fundamental Rights of the European Union⁸² and the United Nations Convention on the Right of the Child.⁸³

5.2. Child abduction

The Article 11 of the 1980 Hague Convention prescribes that the judicial or administrative authorities of Contracting State shall act expeditiously in proceedings for the return of children. Namely, to issue a decision within six weeks from the date of commencement of the proceedings. To be able to adjudicate child abduction proceeding in terms of rendering quality and within the timeframe decision, a judge must have certain knowledge and expertise.⁸⁴ The cross-border abduction

⁷⁹ The Project was conducted by the principal investigator prof Paul Beaumont, University of Aberdeen, funded from the Nuffield Foundation. It gathered and analysed proceedings involving Articles 11(6)-(8) and 42 of the Brussels IIbis Regulation from every EU Member State apart from Denmark. *Supra*. URL= <http://www.abdn.ac.uk/law/research/conflicts-of-eu-courts-on-child-abduction-417.php>, Country reports available on: URL=[http://www.abdn.ac.uk/law/documents/Conflicts_of_EU_Courts_on_Child_Abduction_Country_Reports_25_May_\(Final\).pdf](http://www.abdn.ac.uk/law/documents/Conflicts_of_EU_Courts_on_Child_Abduction_Country_Reports_25_May_(Final).pdf). Accessed 15 January 2017.

⁸⁰ Beaumont, P., Walker, L., Holliday, J., *Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU*, Journal of Private International Law, Vol. 12, No. 2, 2016, pp. 211-260, URL=<http://www.abdn.ac.uk/law/research/working-papers-455.php>, p. 25. Accessed 16 January 2017.

⁸¹ *Ibid.* p. 6.

⁸² Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Art 24(1).

⁸³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Art. 12. URL=<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>. Accessed 13 February 2017.

⁸⁴ Župan, M., Poretti, P., *Concentration of jurisdiction in cross-border family matters – child abduction at focus*, Vinković, M. (ed), New developments in EU labour, equality and human rights law, 2015, Osijek, pp. 341-359, p. 346.

cases are complex and sensitive but arise only on frequently for the individual judge when handled by every individual local family court. As a result, judges are less familiar with the procedures and provisions involved.⁸⁵ The advantages of the concentration of jurisdiction in child abduction cases can be manifested following advantages for the court system: clear system of jurisdiction, efficient case management and reviews of the performance.⁸⁶ Also, concentration of jurisdiction in Hague cases has been recommended by the academic's writing for many years.⁸⁷ Therefore, one of the most important innovations of the 2016 Proposal is the provision on concentration of local jurisdiction. This new rule requests the Member States to ensure that that the jurisdiction for the applications for the return of a child is concentrated on a limited number of courts.⁸⁸ It is explained that, depending on the structure of the legal system, jurisdiction for child abduction cases could be concentrated in one single court for the whole country or in a limited number of courts, using, for example, the number of appellate courts as point of departure and concentrating jurisdiction for international child abduction cases upon one court of first instance within each district of a court of appeal.⁸⁹

The second novelty governs that the court may declare the decision ordering the return of the child provisionally enforceable notwithstanding any appeal, even if national law does not provide for such provisional enforceability.⁹⁰ This rule is described as useful in systems where the decision is not yet enforceable while it is still subject to appeal. As a result, a parent would be able to have access to the child based on a decision provisionally declared enforceable while the appeal proceedings concerning that decision will be carried out on request of the other parent.⁹¹ Regarding this provision it is certainly needed to add that when deciding upon the provisional enforceability the court should keep in mind that the child's best interests will be most effectively served if coercive measures are only applied once it is clear that the return order will not be changed or annulled.⁹²

⁸⁵ 2016 Proposal, *op. cit.* note 33, p. 3.

⁸⁶ *Supra.* Župan, M., Poretti, P., *op. cit.* note. 84, p. 350.

⁸⁷ Beaumont, P., Walker, L. and Holliday, J., *op.cit.* note 37, p. 3.

⁸⁸ 2016 Proposal, *op. cit.* note 33, Art. 22.

⁸⁹ *Ibid.* Rec 26.

⁹⁰ *Ibid.* Art 25(3).

⁹¹ *Ibid.* p. 16.

⁹² Hague Conference on Private International Law Permanent Bureau, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part IV – Enforcement*, 2010, p. 19, URL=<https://www.hcch.net/en/publications-and-studies/details4/?pid=5208>. Accessed 10 February 2017.

Another novelty concerns the limitation of the number of appeals against a return order. It prescribes that only one appeal shall be possible against the decision ordering or refusing the return of the child.⁹³ Experience has shown that the appeal process in return cases can cause long delays before a final determination of the matter. This may be so even where a first instance decision has been made promptly. It should also be noted that the enforcement of a return order can be delayed because several levels of legal challenge exist and it is often not possible to enforce a return order until these have all been exhausted.⁹⁴ This proposed rule is supporting the requirement for the prompt return of the child and minimising the ability of the abducting parent to turn the appeal system in their favour.⁹⁵

5.3. Abolition of the declaration of enforceability

The time for obtaining exequatur varies between the Member States; it can take from couple of days to several months, depending on the jurisdiction and the complexity of the case.⁹⁶ There might also be contradictory situations where a Member State must enforce access rights under the Regulation while, at the same time, the recognition and/or enforcement of custody rights granted in the same decision may be challenged and perhaps refused in the same Member State because decision on both rights are currently subject to different procedures under the Regulation.⁹⁷ The amended rule says that a decision on matters of parental responsibility in respect of a child given in a Member State which is enforceable in the other Member State shall be enforceable in the other Member States without any declaration of enforceability required.⁹⁸ While current Brussels IIbis Regulation only abolished this requirement for decisions granting access and certain decisions ordering the return of a child, the Proposal now provides for a single procedure for the cross-border enforcement of all decisions in matters of parental responsibility. 1996 Hague Convention contains the exequatur in its provision, but sets out that each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.⁹⁹ Despite the difference, by

⁹³ 2016 Proposal, *op. cit.* note 33. Art 25(4).

⁹⁴ Permanent Bureau of the Hague Conference on Private International Law, *The link with international instruments and third countries*, Recasting the Brussels IIa Regulation Workshop 8 November 2016, Compilation of briefings for the JURI Committee, 2016, pp. 63-73, p. 66, URL=[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU\(2016\)571383_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf). Accessed 12 January 2017.

⁹⁵ Beaumont, P., Walker, L. and Holliday, J., *op. cit.* note 37, p. 3.

⁹⁶ 2016 Proposal, *op. cit.* note. 33, p. 4.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* Art. 30(1).

⁹⁹ 1996 Hague Convention, *op. cit.* note. 18., Art 26 (2).

requesting a “simple and rapid procedure”, the drafters sought to avoid long delays that may occur until a decision can be enforced and this amendment does not contradict the 1996 Hague Convention, considering that it renders the enforcement of decisions in matters of parental responsibility more effective.¹⁰⁰

5.4. Enforcement of the decision granting right of access or entailing the return on a child

Under the current rules the right of access granted and return of a child entailed in an enforceable judgement given in a Member State shall be recognized and enforceable in another Member State without the need for a declaration of enforceability without any possibility of opposing its recognition.¹⁰¹ The CJEU strengthened those strict rules by ruling in the case of *Povse*¹⁰² and soon confirmed in the case *Zarraga*.¹⁰³ As a consequence, and for the first time, a conflict of European Supranational Courts has arisen, with the European Court of Human Rights (hereinafter: ECHR) ruling in the Case of *M.A. v Austria*¹⁰⁴ considering the outcomes of the implementation of the rule potentially contrary to the best interests of the child.¹⁰⁵

Finally, there is a new rule governing the grounds for refusal of enforcement of decisions in matter of parental responsibility, not excluding the decisions granting right of access or entailing the return on a child. Besides, there is a new Article 49 saying that the provision in the Chapter on recognition and enforcement on matters of parental responsibility shall apply accordingly to decisions given in a Member State and ordering the return of a child in another Member State pursuant the 1980 Hague Convention. Thus, the Article 40(2) drew attention by ordering that enforcement of a decision may be refused by virtue of a change of circumstances since the decision was given, if the enforcement would be manifestly contrary to the public policy of the Member State of enforcement. The Proposal states two bases on which a violation of public policy can be found. First, the child being of sufficient age and maturity now objects to such an extent that the enforcement

¹⁰⁰ Permanent Bureau of the Hague Conference on Private International Law, *op. cit.* note 94, p. 71.

¹⁰¹ Brussels IIbis Regulation, *op. cit.* note 20, Art 41(1) and Art 42(1).

¹⁰² Case C-211/10 PPU *Doris Povse v Mauro Alpago* [2010] ECLI:EU:C:2010:400.

¹⁰³ Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECLI:EU:C:2010:828, para 48.

¹⁰⁴ Judgement *M.A. v Austria* (2013), Application no. 4097/13, para 136.

¹⁰⁵ Pretelli, I., *Child Abduction and Return Procedures*, Recasting the Brussels IIa Regulation Workshop 8 November 2016, Compilation of briefings for the JURI Committee, 2016, pp. 1-18, p. 11-12, URL=[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU\(2016\)571383_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf). Accessed 1 February 2017.

would be manifestly incompatible with the best interest of the child and secondly, other circumstances have changed to such an extent since the decision was given that its enforcement would now be manifestly incompatible with the best interest of the child. The first exception is compactable with the general approach of the proposal which seeks to give more weight to children's right especially the child's right to be heard.¹⁰⁶ Second exception is contrary to the CJEU ruling in the case *Povse* where court precluded a review in the state of enforcement because of a change in circumstances even if the enforcement was manifestly incompatible with the best interest of the child.¹⁰⁷ The described rule obviously goes in the way of better protection of child's right and in the favour of increasing the mutual trust between Member States. Its real effectiveness remains to be seen in the interpretation and application by the Member State courts.

6. CONCLUSION

The 2016 Proposal had not introduced significant improvement regarding matrimonial matters, although they proved to be necessary. The drafter missed the opportunity to introduce the choice of forum in proceedings relating to divorce and legal separation by which had not eliminated the possibility of forum shopping and forum racing. While this matter was already thoroughly researched by the both Commission and academics, there was already the existing draft of the rule governing this matter. Also, the introduction of the rule on *forum necessitates* in matrimonial matters was held beneficial by a number of commentators in order to fill the gap that occurred between the rule on general and residual jurisdiction, but still not included in the Proposal. However, there are quite significant improvements to be found regarding the parental responsibility. The proposal clearly seeks to enhance children's rights, referring explicitly to the EU's Charter of Fundamental Rights and to the UN Convention on the Rights of the Child. First of all, the child return procedure was significantly improved by introducing the rules on concentration of local jurisdiction, provisional enforcement of return order, limited number of appeal and by introducing the guarantee for the enforcement of protective measures. They are undoubtedly correspondent with the objective of simplifying the procedures and enhancing their efficiency. The same could also be stated concerning the abolishment of the exequatur in the parental responsibility matters. Finally, there is a substantial improvement regarding the right of the child to express his views and also regarding the new ability for the court in the State where the child is present to refuse enforcement of the return order issued by the

¹⁰⁶ Beaumont, P., Walker, L. and Holliday, J., *op. cit.* note 37, p. 9.

¹⁰⁷ *Ibid.*

court of child's habitual residence on the basis of public policy if the enforcement of the order is manifestly incompatible with the best interest of the child. Still, the biggest objection to the drafters is not amending the rule on transfer of jurisdiction in parental responsibility matters, which had shown the non-uniformity in application and necessity of its amendment in terms of clarification of incurred questions.

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