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## CONCENTRATION OF JURISDICTION IN CROSS-BORDER FAMILY MATTERS – CHILD ABDUCTION AT FOCUS

### **Abstract:**

*Court of Justice of European Union (hereinafter CJEU) recently rendered a decision dealing with organizational issues of judiciary, where such internal organization of a distinctive Member States had an impact on functioning and application of European Union (hereinafter EU) rules. Particularity of this decision in the framework of judicial cooperation in civil matters is that unlike usual conflict of jurisdiction among courts situated in several different Member States, here the problem is with the conflict of jurisdiction of the courts situated within one and the same Member State.*

*This paper elaborates on the function and nature of rules of international and internal jurisdiction; concentration of jurisdiction in family matters – both at universal and European level, with particular interest in child abduction matters; CJEU ruling in case C-498/14 of 9 January 2015. In the end authors question whether the Member States are still free to enact internal rules that influence rules on jurisdiction enacted with EU regulation, if such rules are impeding the functioning on internal EU legal order.*

**Keywords:** *child abduction, interest of child, EU legal order, cross-border family matters, conflict of jurisdiction*

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## I. INTRODUCTION

Court of Justice of European Union (hereinafter CJEU) recently rendered a decision dealing with organizational issues of judiciary, where such internal organization of a Member States has an impact on functioning and application of European Union (hereinafter EU) rules. Particularity of this decision in the framework of judicial cooperation in civil matters is that unlike usual conflict of jurisdiction among courts situated in several different Member States, here the problem is with the conflict of jurisdiction of the courts situated within one and the same Member State.

This ruling has opened doctrinal and practical issues, some of them are to be dealt here. First of all, question on the function and nature of rules of international and internal jurisdiction occurs. Interplay of these factors is in forefront of Chapter 2 of this paper. Principle of functionality is in adjudicating cross-border family matters best reflected through rules on concentration of jurisdiction. As they are advocated both on universal (Hague conference of private international law) and European level, paper would present the current state of fact as well as costs and benefits of such centralization of jurisdiction in settling child abduction cases (Chapter 3). Paper would further present the CJEU ruling in case C-498/14 of 9 January 2015 (Chapter 4). Chapter 5 contains remarks on several questions: are Member States still free to enact internal rules that influence rules on jurisdiction enacted with EU regulation, are such rules impeding the functioning on internal EU legal order?

## II. REGULATORY SCHEME FOR RULES ON INTERNAL / INTERNATIONAL JURISDICTION

In comparison to internal, in international dispute settlement jurisdictional issues have different function and relevance. Determining international jurisdiction is the first step that assures that dispute is settled within one national juridical system.<sup>1</sup> For this utmost importance, regulation of international jurisdiction was in the past perceived as purely autonomous national issue. International jurisdiction rules were settled within national law, pertaining to internal legal sources.<sup>2</sup> At international level such standing was long preserved within multilateral as well as bilateral international conventions. If one inspects the Hague conference on private international law (hereinafter HCCH) system, until the end of 20th century conventions contained only „indirect“ international jurisdiction – i.e., among the rules on recognition and enforcement legislator prescribed the desirable juris-

<sup>1</sup> Đ. Vuković, E. Kunštek, *Međunarodno građansko postupovno pravo*, Zagreb, Zgombić & partneri, 2005

<sup>2</sup> S. Triva, V. Belajec, M. Dika, *Građansko parnično procesno pravo*, Zagreb, Narodne Novine, 2004, p. 259.

dictions as a precondition for a judgement to be recognized in other contracting states! Contracting states are thus not directly obliged to alter their national rules on direct jurisdiction to align them with conventional (indirect) rules, but such development is desirable and self-evident.<sup>3</sup>

Although it has long been argued that true unification results would be achieved only with *convention double*, reaching such compromise on a global scale faced hardship. States with no political and economic relations and diverse standing on most appropriate criteria for determining jurisdiction clashed in the course of attempts to adopt the Hague judgments convention of 1999, which in the end failed adoption.<sup>4</sup> With exception of 1996 Hague Child Protection Measures Convention,<sup>5</sup> the indirect system is retained in HCCH conventions system, also in the most recent 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.<sup>6</sup>

Due to harmonizing activity of European Community Member States reached the agreement that free circulation of judgements could only be achieved if unified rules on the international jurisdiction exist. It was first confirmed with early adopted 1968 Brussels convention which is *convention double*.<sup>7</sup> EU has in the subsequent era significantly altered national systems of direct international jurisdiction. It has over the years enacted regulations dealing with wide range of subject matters, preserving the room for international jurisdictional rules deriving from national sources only to small array. If the inspection of the area of “civil and commercial matters” is narrowed to family matters, one realizes that variety of layers are however introduced. There is still a possibility to apply national jurisdictional criteria in divorce and parental responsibility matters if according to rules of jurisdiction prescribed by the 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<sup>8</sup> (hereinafter Regulation 2201/2003, Brussels II *bis* regulation) no oth-

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<sup>3</sup> M. Verwilghen, *Explanatory Report on the 1973 Hague Maintenance Conventions*, HCCH Publications, 1975, note 47.

<sup>4</sup> R. Brand, „Jurisdictional common ground: in search of a global convention“, in J. A.R. Nafziger, S. Symeonides (eds.), *Law and justice in a multi-state world: essays in honor of Arthur T. von Mehren*, Ardsley, 2002, p. 11 et.seq.

<sup>5</sup> As 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 Children, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>, (accessed on 30 December 2015).

<sup>6</sup> Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support>, (accessed on 30 December 2015).

<sup>7</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) OJ L 299, 31.12.1972, p. 0032 – 0042.

<sup>8</sup> OJ L 338, 23.12.2003, p. 0001 – 0029.

er Member State has jurisdiction (Article 6-7, Article 14). On the other hand, in matters on maintenance obligations rules of international jurisdiction deriving from national sources have been abolished with enactment of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations<sup>9</sup> (hereinafter Maintenance Regulation). CJEU has given many decisions in preliminary ruling procedure where it clearly stated that no national interpretation of unified jurisdictional rules is acceptable: uniform interpretation which is in accordance to *ratio* of EU regulation is advocated. All of these figures clearly point to the fact that Member States have lost the grounds to enact / interpret rules in area on international jurisdiction falling under *rationae materiae* EU competence. Despite to it, the first preliminary ruling procedure regarding Maintenance Regulation poses new questions on interplay of rules on internal and international jurisdiction, which would be dealt with further in this paper.

### III. CONCENTRATION OF JURISDICTION IN ADJUDICATING CROSS-BORDER FAMILY MATTERS

Concentration of jurisdiction by definition means that within certain national jurisdiction a particular court or a limited number of courts can deal with distinctive issue.<sup>10</sup> Although concentration of jurisdiction has its roots in child abduction matters, it is getting ground in wider area of family matters. In some jurisdictions it has long term tradition to diverse cross-border family matters,<sup>11</sup> whereas in some states concentration of jurisdiction has been employed as a court organizational scheme for implementing international treaties.<sup>12</sup> Some EU Member States have introduced the system of concen-

<sup>9</sup> OJ L 7/1, 10.1.2009.

<sup>10</sup> There are various models of performing concentration of jurisdiction. Basics models are:

- a) jurisdiction of a court of higher level (appellate court)
- b) jurisdictions of specialized family courts
- c) jurisdiction of one/several first instance courts.

<sup>11</sup> See G. A. Serghides, „Cyprus” p. 11, B. Greenberger, „Israel”, p. 19, D. P. Cedeno, „Panama”, p. 21, M. E. Giménez d Allen, „Paraguay”, p. 22, in „Concentration of jurisdiction under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”, special edition of *The Judges' Newsletter on International Child Protection*, Vol. XX / Summer-Autumn 2013.

<sup>12</sup> Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Belgium, Bulgaria, Finland, Germany, Hungary), Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Bulgaria, Canada (through the Canadian networks of Judges), China (Hong Kong SAR) and Finland); Hague Convention of 19 October 1996 on jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (Canada, Finland and Germany); Hague Convention of 13 January 2000 on the International Protection of Adults (Germany); Hague Convention of 23 November 2007 on the International Recovery

tration as well as for EU instruments in child related matters. Belgium, Bulgaria, Cyprus, Finland, France, Germany, Hungary, Netherlands, Sweden and the United Kingdom have employed it regarding the Regulation 2201/2003,<sup>13</sup> whereas Germany did it in respect of Maintenance Regulation. Exactly the first preliminary ruling procedure regarding Maintenance Regulation posed new questions on interplay of rules on internal and international jurisdiction.

In joined cases C-400/13 and C-408/13<sup>14</sup> requests for preliminary ruling were made from the Amtsgericht Düsseldorf and the Amtsgericht Karlsruhe (Germany) whether according to the interpretation of the Article 3(a) and (b) of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations Paragraph 28(1) of the AUG is contrary to Article 3(a) and (b) of Regulation No 4/2009. In order to understand the cases at hand as well as the decision of the CJEU it is necessary to state the facts of the cases.

These cases have arisen in two disputes relating to claims for maintenance payments, first, between Miss Sanders, a minor represented by her mother, Ms Sanders, and Mr Verhaegen, Miss Sanders' father and, second, between Mrs Huber and her husband, Mr Huber, from whom Mrs Huber is separated. Those claims were brought, respectively, before the Amtsgericht (local court of first instance) of the German towns in which the maintenance creditors concerned habitually reside. Amtsgericht Düsseldorf and the Amtsgericht Karlsruhe, according to a provision implementing in German law the cases to which Article 3(a) and (b) of Regulation No 4/2009 refers, declined jurisdiction in favour of the Amtsgericht in the town of the seat of the Oberlandesgericht (Higher Regional Court) in whose area of jurisdiction those applicants reside.

In its decision the CJEU took the view that Article 3(b) of Regulation No 4/2009 must be interpreted as precluding national legislation such as that at issue in the main proceedings which establishes a centralization of judicial jurisdiction in matters relating to cross-border maintenance obligations in favor of a first instance court which has jurisdiction for the seat of the appeal court, "except where that rule helps to achieve the objective of a proper administration of justice and protects the interests of maintenance creditors while promoting the effective recovery of such claims, which is, however, a matter for the referring courts to verify". [48]

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of Child Support and Other Forms of Family Maintenance (Canada). Lortie, *Introduction. Concentration of jurisdiction*, p. 3.

<sup>13</sup> Belgium, Bulgaria, Cyprus, Finland, France, Germany, Hungary, Netherlands, Sweden and the United Kingdom (England & Wales and Northern Ireland), Lortie, *Introduction. Concentration of jurisdiction*, p. 3.

<sup>14</sup> Joined Cases C-400/13 and C-408/13 Sanders and Huber [2014]

CJEU placed a heavy test before each specialized court: in every case they have to question whether centralized jurisdiction is in balance with other justified principle, particularly the proper administration of justice and access to justice.

## IV. CHILD ABDUCTION AS PROTOTYPE FOR CONCENTRATION OF JURISDICTION

### 4.1. Legal background

In settling cross border disputes in family matters concentration of jurisdictions is best established in child abduction area. Its great impact on child abduction regime can best be justified if we acknowledge the nature and function of the Convention on the Civil Aspects of International Child Abduction concluded at the Hague on 25 October 1980 (hereinafter: 1980 Hague Child Abduction Convention). It is not a typical private international law treaty that is enacted to deal with merits in child related cases. I recall to an interesting comparison: it is more like an ambulance car that comes into play in emergency situation, if one of the parents retains or removes the child against the will of the other parent.<sup>15</sup> The return of a child to jurisdiction of his habitual residence prior to wrongful retention or removal is to be ordered by a court of refuge within 6 weeks of the initiation of the return procedure. In exceptional cases court of refuge can decide to refuse a return of a child, but defences to mandatory return must be dealt with extreme caution.<sup>16</sup> To be able to adjudicate child abduction proceedings in terms of rendering a quality decision and in terms of rendering a decision within timeframe of 6 weeks, a judge must have certain knowledge and expertise. If no particular rule exists, such a demanding case file can end up with a first instance judge not even specialized to family matters, a judge that deals with various civil claims or even insolvency at the same time. Such authority cannot perform to serve the child friendly justice. The more judicial or administrative authorities that have jurisdiction, the more scattered the experience will be among the judges concerned and there will be less consistency of legal practice.<sup>17</sup>

<sup>15</sup> N. Lowe, M. Nicholls, M. Everall, *International Movement of Children: Law Practice and Procedure*, Bristol, Jordan Publishing, 2006, p. 196 et.seq.

<sup>16</sup> R. Schuz, *The Hague Child Abduction Convention*, Oxford, Hart Publishing, p. 223-369; Lowe, *International movement of children*, p. 291-370.

<sup>17</sup> The issues, conclusions and and recommendations of LEPCA (Lawyers in Europe on Parental Child Abduction). Centrum Internationale Kinderontvoeringreport 2014, p. 6, <http://www.lepca.eu/uploads/Report%20LEPCA%202014.pdf>, (accessed on 22 October 2015).

In order to present the full picture of child abduction regime in EU, one must explain the function and nature of several rules inserted into Brussels II *bis* regulation.<sup>18</sup> Namely, detailed rules adopted by Regulation are designed to enhance, as regards relations between the Member States, the effectiveness of the arrangements established by the 1980 Hague Convention. These rules remain applicable within the European Union. Article 11(1) of the Brussels II *bis* Regulation sets a rule that if a child is wrongfully removed or retained in another Member State holders of the rights of custody can apply for the child's return to the competent authorities in that State. Such request is based on the 1980 Hague Convention. Room to refuse the return of a child is for the courts of the Member State to which the child has been removed narrowed by the Brussels II *bis* Regulation. Article 11(3) to (5) of the Brussels II *bis* Regulation clearly marks that general rule is the return of the child without delay, and refusal is merely an exception. Court can oppose his or her return in specific, duly justified cases, in particular, if 'there is a grave risk that his or her return would expose the child to physical or psychological harm', as prescribed by Article 13b of the 1980 Child Abduction Convention.<sup>19</sup> Unlike the Convention system, in system of the Brussels II *bis* Regulation where the court concerned opposes return, that does not automatically bring the dispute concerning the return to an end. Namely, „such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention“. As argued by some commentators, judgment refusing the return of a child is to a certain degree only a provisional decision. In the system of Regulation the jurisdiction is retained with the courts of the merits established under Article 8 which would in general have the final word on the parental responsibility issue. In the context of this paper rules that also depart from 1980 Child Abduction Convention system, which are embodied in Article 11 (7)-(8) present a cornerstone of recent CJEU ruling. These rules would be tightly explained later in the paper.

#### 4.2. Prevalence of concentrated jurisdiction in child abduction matters

Turning to concentration issues in national legislation, even before child abduction convention was enacted several states employed such organization of judiciary. In some contracting states it came along with the implementation of the 1980 Child Abduction Convention,<sup>20</sup> and is one of the aspects of English/Welsh system most applauded by the HCCH community. Considerable number of states enacted the system following the rat-

<sup>18</sup> Explanatory memorandum of the proposal of the Brussels II *bis* Regulation, presented on 3 May 2002 by the Commission [COM(2002) 222 final, OJ 2002 C 203 E, p. 161].

<sup>19</sup> Recital 17 of the Regulation

<sup>20</sup> China (Hong Kong SAR), Finland, South Africa and the United Kingdom (England & Wales and Northern Ireland), in Ph. Lortie, „Introduction. Concentration of jurisdiction under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction“, *The Judges' Newsletter on International Child Protection*, Vol. XX / Summer-Autumn 2013, p. 2-3.



ification of 1980 Child Abduction Convention.<sup>21</sup> However, around 50 states still haven't concentrated jurisdiction to these matters. Currently, out of 93 contracting states less than half have concentrated jurisdictions. Most states have enacted it rather recently, influenced by its positive effects on procedures in child abduction cases.

If we narrow the focus down to European Union, we may see that in majority of European countries, jurisdiction was more or less concentrated in international parental child abduction cases.<sup>22</sup> Most recent example of introduction of concentrated jurisdiction is the Spain<sup>23</sup> whereas Croatia is still among the countries where jurisdiction to child abduction is not concentrated.

Concentration of jurisdiction for child abduction cases is advocated widely: academics and policy are attracting attention on importance and desirability that a concentration of jurisdiction is brought into force in worldwide,<sup>24</sup> but also particularly within EU. European Commission Practice guide on application of 2201/2003 regulation states:

“Although the organisation of courts falls outside the scope of the Regulation, the experiences of Member States which have concentrated jurisdiction to hear cases under the 1980 Hague Convention in a limited number of courts or judges are positive and show an increase in quality and efficiency.”<sup>25</sup>

Concentration of jurisdiction in child abduction matters has been emphasized as particularly desirable regional initiative in Asia-Pacific<sup>26</sup> as well Western Balkans region.<sup>27</sup> The positive experience of several countries that have concentrated jurisdiction over Hague return cases to a limited number of courts and judges has been widely recognised by judges. Concentration of jurisdiction is however scarcely elaborated by doctrine. Lead-

<sup>21</sup> Belgium, Bulgaria, Dominican Republic, France, Germany, Netherlands, Sweden and Switzerland. Lortie, *Introduction. Concentration of jurisdiction*, p. 2-3.

<sup>22</sup> „Cross-border parental child abduction in the European Union, European Parliament - Study for the LIBE Committee“, 2015, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL\\_STU\(2015\)510012\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU(2015)510012_EN.pdf), (accessed on 30 December 2015), pp. 74-75.

<sup>23</sup> Law 15/2015 de Jurisdicción Voluntaria, 2.7.2015. [http://www.jordanpublishing.co.uk/practice-areas/international-family-law/news\\_and\\_comment/child-abduction-specific-legislation-in-spain#.VooxkPn-hDIU](http://www.jordanpublishing.co.uk/practice-areas/international-family-law/news_and_comment/child-abduction-specific-legislation-in-spain#.VooxkPn-hDIU), (accessed on 30 December 2015).

<sup>24</sup> Lortie, *Introduction. Concentration of jurisdiction*, p. 2.

<sup>25</sup> Practice Guide for the application of the Brussels IIa Regulation, p. 50 [http://ec.europa.eu/justice/civil/files/brussels\\_ii\\_practice\\_guide\\_en.pdf](http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf), (accessed on 22 October 2015).

<sup>26</sup> Towards the Well-Being of the Child Through the Hague Child Abduction and Protection of Children Conventions: An Asia Pacific Symposium Macao, China. Thursday 25 to Friday 26 June 2015. HCCH, note 8. [www.hcchconventions-macaosymposium.org/](http://www.hcchconventions-macaosymposium.org/), (accessed on 22 October 2015).

<sup>27</sup> M. Župan, (ed./ur.), *Private International Law in the Jurisprudence of European Courts – Family at Focus / Međunarodno privatno pravo u praksi europskih sudova – obitelj u fokusu*, Osijek, Faculty of Law J. J. Strossmayer University of Osijek, 2015. at: <http://www.pravos.unios.hr/katedra-medunarodnog-privatnog-prava/recent-updates>, (accessed on 15 December 2015).

ing readings on Child abduction cases advocate concentration of jurisdiction, but do not provide for a broader discussion.<sup>28</sup>

### 4.3. Judicial specialization in child abduction matters

Concentration can lead to new level of specialization.<sup>29</sup> Such specialization would entail that within court designated to adjudicate child abduction matters another concentration is proceeded and only one or more specialised judges are responsible for child abduction cases.<sup>30</sup>

In order to further explore the matter of concentration of jurisdiction in child abduction, especially the cost and benefits of such approach, it is necessary to first explain its interrelation to judicial specialization which is regularly implied in the idea of concentration of jurisdiction. Thereby, there are two aspects of judicial specialization which need to be taken into account. Firstly, in Member States there is no coherent approach to judicial specialization, and while in some Member States there is a low level of judicial specialization (Czech Republic, Denmark, Estonia, the Netherlands) in other there is a large number of specialized courts which are different in nature (Belgium, Finland, Germany).<sup>31</sup> This illustrates the difference in attitudes of national legislators towards judicial specialization. Secondly, although there is a customary perception of specialization as division of work between courts into several branches of jurisdiction that have separate appellate instances and form a separate pyramid of hierarchical institutions (jurisdictional specialization; judicial specialization in narrow sense), there are several other categories of specialization that need to be considered. A possibility for the parties to have their disputes decided by specialized judges may be provided within a 'specialized' court but also within a separate division or unit within a 'generalist' court. Since parties are unaware of the internal division because they are only required to approach the territorially competent court, and the distribution of cases will be done internally, this category of specialization could be considered to be *internal* specialization. When different skills, approaches and competences of judges are taken into account when assigning disputes to judges, it is a case of *personal* specialization. *Procedural* specialization occurs if special methods or ways of solving disputes which are regulated or prescribed by law are used in order to resolve a case by different specialized courts or judges.<sup>32</sup>

<sup>28</sup> Schuz, The Hague Child Abduction Convention, p. 39.

<sup>29</sup> Bulgaria, Germany, Israel, South Africa and the United Kingdom (England & Wales and Northern Ireland)).

<sup>30</sup> E. Silvestri, „Judicial Specialization: In Search of the ‘Right’ Judge for Each Case?“ *Russian Law Journal* Volume II, Issue 4, 2014., p. 167.

<sup>31</sup> See Uzelac, Alan, Mixed Blessing, of Judicial Specialisation: The Devil is in the Detail, *Russian Law Journal*, Volume II, Issue 4, 2014., p. 146-164, at p. 151.

<sup>32</sup> See Uzelac, p. 148-149.

Different approaches towards specialization in national legal systems lead to different expectations in terms of the fashion in which justice will be administrated. Also, depending on whether specialization implies only internal, procedural or personal specialization or even a combination of several categories it will bring different results in achieving ability of the courts to deal with complex and delicate cases (such as cross-border family matters) in efficient and expeditious manner.

In this sense, it should be noted that in relation to concentration of jurisdiction judicial specialization obviously cannot be understood unambiguously as entrusting specialist judges with adjudicating disputes within a particular court or a limited number of courts. Having that in mind, along with other costs and benefits of concentration of jurisdiction, divergences caused by differences in approach towards judicial specialization in national legal systems of the Member States should be expected. Thereby, the main obstacles to a more coherent approach towards judicial specialization in Member States are caused by the inability to detect a common set of criteria which must be followed in the choice of judges and their respective virtues and values as well as matters to which specialization should be applied.<sup>33</sup>

#### 4.4. Cost and benefit of concentrated jurisdictions

Principal advantages of concentration of jurisdiction in child abduction can be divided to several categories:<sup>34</sup>

- advantages for court system
  - clear system of jurisdiction is established
  - efficient case management is introduced
  - reviews of performance are facilitated
- advantages for policy principles of Hague Child Abduction Conventions
  - expeditors return procedure has positive effects to main operational principles of the Convention

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<sup>33</sup> See Silvestri, p. 167.

<sup>34</sup> P. Beaumont, P. McEleavy, *The Hague Convention on International Child Abduction*, Oxford, Oxford University Press, 1999, p. 260; Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part II – IMPLEMENTING MEASURES, Hague Conference on Private International Law 2003; J. Yokoyama, „A Japanese Implementation Bill for the 1980 Child Abduction Convention“, in *A Commitment to Private International Law. Essays in honour of Hans van Loon / Un engagement au service du droit international privé. Mélanges en l'honneur de Hans van Loon*, Permanent Bureau of the HCCH, Intersentia, 2013, p. 664; Schuz, *The Hague Child Abduction Convention* op.cit. p. 39.

- advantages to adjudication process
  - elimination of any confusion as to the competent court and the law applicable
  - improvement in relation to the quality of the decisions;
  - accumulation of experience among the judges concerned;
  - creation of a high level of interdisciplinary understanding of Convention objectives (particularly distinction from custody proceedings)
  - child-friendly justice
  - improvement in relation to duration of the proceedings;
  - mitigation against delay;
  - consistency of practice by judges and lawyers
  - consistency and coherency in the case law
  - enhanced legal certainty
  - development of mutual confidence
    - people have greater confidence in trusting justice and its institutions
    - between judges and authorities in different legal systems
  - facilitates judicial liaison.

Main disadvantages are:

- not always practical for geographical reasons (particularly large countries);
- encounters problems with enforcement,<sup>35</sup> that can be various:
  - if there is a specialised enforcement court the possible benefits of a concentration of jurisdiction at the enforcement stage should be balanced against the advantages of proximity of the enforcement court to the place of enforcement (enforcement court has to be close to the scene of enforcement-location of a child, thus selection of appropriate measure of enforcement is facilitated and cooperation and surveillance of local enforcement officers is assured).
  - if a concentration of jurisdiction at the level of the courts is not supplemented by a concentration of competence at the level of the

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<sup>35</sup> Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement, <https://www.hcch.net/en/news-archive/details/?varevent=201>, (accessed on 30 December 2015), p. 11-13.

- a) enforcement officers, problems may encounter as working routines which have developed between a court and the competent local enforcement officers may differ from one district to another;
  - b) other professionals involved in enforcement (e.g., child protection authorities), problems may encounter. Therefore it is advisable that even concentration of child protection authority is introduced.
- in both above mentioned situations co-operation between new partners is established only for one particular case; communication should be clearly and explicitly prescribed or agreed; benefit can be that there are no personal contacts that could deprive professionalism of handling the case – particularly having in mind the sensitives of return procedure.

#### 4.5. Challenging concentration of jurisdiction in child abduction matter – CJEU in *Bradbrook v. Aleksandrowicz*<sup>36</sup>

CJEU was asked by Cour d'appel de Bruxelles (Belgium) to give a preliminary ruling to clarify the interpretation of Article 11(7) and (8) in relation to assigning jurisdiction to a specialist court to consider a child abduction case, even though another court of the same Member State is already seized in parental responsibility proceedings to the merits. In order to understand the cases at hand as well as the decision of the CJEU it is necessary to state the facts of the cases.

The father is an English national who lives in Belgium. The mother is a Polish national who lives in Poland, where she gave birth to their child. Subsequently mother and a child moved to Belgium, but only the mother has a parental responsibility, she lived with a child while the father had regular contacts with the child. Mother and a child went to Poland for holidays, and remained there, whereas father applied to a juvenile court seeking custody over the child, as well as for prohibition of leaving Belgium. First instance court retained the custody with the mother, and contacts with the father. Father appealed the decision, but also initiated return of a child through Hague Child Abduction procedure, along the Regulation 2201/2003. Polish court reached the conclusion that the child had its habitual residence in Belgium, but the Polish judge issued a decision of non-return in accordance to Article 13 of the Hague Convention. This Polish decision was transmitted to the Belgian authorities in accordance to 11(6) of the Regulation 2201/2003. In accordance to Belgian law the case file was allocated to a family Court of First Instance, and after the entry into force of the new law (*Loi de 30 juillet portant la creation d'un tribunal de la famille et de la jeunesse*) the case was reallocated to the pertinent specialized Court.

<sup>36</sup> Case C-498/14 PPU *Bradbrooke* [2015]

At that moment parallel proceedings occurred, as the second instance court procedure was pending in the first custody case to which father has appealed. Belgian court of appeal which was seized by a father in the child return application asked the CJEU to clarify whether Article 11(7) and (8) shall be interpreted as precluding the possibility that a Member State favours the specialization of courts in cases of parental abduction to the procedure set forth in the same provisions, even when a court or a tribunal has already been seized of substantive proceedings relating to parental responsibility.

Details of the legal background of the case follow. Relevant Articles 11(6) – (8) of Brussels II *bis* Regulation serve in situations of child abduction within EU. These rules upgrade the system introduced by Hague Child Abduction Convention, and aim to foster the child abduction return mechanism among Member States. Provision sets that if a judge of a Member State delivers a non-return decision pursuant to Article 13 of Hague Child Abduction Convention, a copy of that decision must be sent to the authority competent to decide upon the case or to the central authority where the child was habitually resident immediately before being wrongfully removed or retained. Receiving court or central authority must notify the parties of such decision and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification. Upon such submission that court can still review the case and hinder a final ruling on custody of the child. Pursuant to Article 11(8) such judgement on merits overrules the non-return order of a refugee court, moreover, such judgement is automatically enforceable according to Article 42.

At present case, the internal rule on specialization with concentrated jurisdiction led to uncertainty in application of the Regulation. Therefore, the first question for the CJEU is whether a Member State is permitted to opt for a specialisation of courts which are to have jurisdiction in that regard, even where proceedings of which the subject-matter is parental responsibility with respect to the child who has been wrongfully removed are already pending before another court of that State. The other question was whether the national law that is removing, from the court seized of proceedings on the substance of parental responsibility jurisdiction to give judgment on the custody of the child, despite the fact that this court has jurisdiction under the Regulation, is compatible with the Regulation.

The mere referring court is keen to accept the interpretation that national rules present an obstacle to smooth application of the Regulation, whereas both the Belgian Government, Commission and the Advocate General (hereinafter AG) Jääskinen supported the contrary argument.

As previously stated by CJEU in the context of Brussels Convention,<sup>37</sup> and later in the context of child abduction under Regulation Brussels II *bis*: “Even if the object of the

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<sup>37</sup> Case C-365/88 Hagan [1990] ECR I-1845, paragraphs 19 and 20; Case C-68/93 Shevill and Others [1995] ECR I-415, paragraph 36 and Case C-159/02 Turner [2004] ECR I-3565, paragraph 29.

Regulation is not to unify the rules of substantive law and of procedure of the different Member States, it is nevertheless important that the application of those national rules does not prejudice its useful effect”.<sup>38</sup> In order to put these two sides into balance, and to answer the questions put before the CJEU, AG Jääskinen takes a closer look to provision of the Regulation and conducts it’s a teleological interpretation. Article 11(6) states there is an obligation to inform ‘the court with jurisdiction or the central authority in the Member State where the child was habitually resident’ and to send immediately a copy of that order and copies of all relevant documents, all ‘as determined by national law’. AG Jääskinen states:

“Given the wording of Article 11(6), which does not have as one of its objectives the identification of which court, among those situated within the territory to the Member State where the child was habitually resident, ought to receive the information referred to in that provision, I consider that there can be scarcely any doubt that each Member State has the option of designating, by adopting a domestic rule concerning jurisdiction, the national court which is to be the recipient.”<sup>39</sup>

Concern raised by the referring court is whether the national rules that allow different courts to rule on these matters is justified by the Regulation, as they advocate that according to the first clause of Article 11(7) the notification procedure is required ‘[u]nless the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties’, which they find reaffirmed in the recital 18 of the preamble to the Regulation: ‘unless the court in [the Member State where the child was habitually resident immediately before the wrongful removal or retention] has been seized, this court, or the central authority, should notify the parties’. Referring court argues that the EU legislature wanted to maintain the jurisdiction of a court in that Member State which was in the position of being already seized of a dispute that relates to parental responsibility of a wrongfully retained child, in accordance with the general rule of *perpetuatio fori*. Several relevant academic sources<sup>40</sup> as well as European Commission Practice Guide<sup>41</sup> supports such interpretation. AG remains with rather vague ground in its explanation on the wording of Article 11(7)

<sup>38</sup> Case C-195/08 PPU *Rinau* [2008] and case C-211/10 PPU *Povse* [2010]

<sup>39</sup> AG Jääskinen opinion [44].

<sup>40</sup> P. McElevy, „The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?“, *Journal of Private International Law*, No 1, 2005, p. 30; U. Magnus, P. Mankowski (eds.) *Brussels II bis Regulation*, Munich, Sellier European Law Publishers, 2012, p. 142 et seq.

<sup>41</sup> ‘If a court in the Member State of origin has previously issued a judgment concerning the child in question, the documents shall in principle be transmitted to that court. In the absence of a judgment, the information shall be sent to the court which is competent according to the law of that Member State’. Practice guide, p. 58.

and prior seizing of a court. Even though AG was previously in favour of a more general wording of Article 11(7), here he argues that „the qualification in recital 18 relates to the prior seizing not of any court whatsoever of the Member State where the child was habitually resident, without any distinction, but of a specific court, namely that court which has jurisdiction in that Member State to receive the file relating to the non-return order“.<sup>42</sup>

However, the position taken he defences arguing that these provisions are a qualification that is to be read differently, not merely by grammatical interpretation of the law, but rather in conjunction to other CJEU rulings.<sup>43</sup> CJEU judicature to this field is founded on protection of fundamental rights of the child, its best interest principle deriving from UN CRC convention and what is reaffirmed with Article 24(2) and (3) of the Charter of Fundamental Rights of the European Union (hereinafter Charter). Best interest of a child is further envisaged by the Regulation rules aiming to enhance prompt and efficient procedures in child related matters. Several rules are in the context of child abduction serving that principle. Firstly, rule of Article 11(3) set a six weeks after the application is lodged for the court seized of an application for return to issue a decision. Secondly, rule of Article 11(6) requires the notification on the non-return decision done within one month of the date of the non-return order. Thirdly, Article 11(7) sets a new timeframe for the parties to make submissions within three months of the date of receiving the information on non-return order.

However, these rules are indefinite while making a reference to the provisions of „national law“: they do not speak of the construction of national judicial system. Concretely, Article 11(6) as regards the communication of information on the non-return order to the *competent authorities* in the Member State where the child was habitually resident, as well as Article 11(7) as regards the requirements pertaining to the notification of that information to the parties and the invitation to the parties to make submissions *to the court having jurisdiction*. These rules are indefinite in comparison to the wording of Maintenance Regulation which refers to „*the court for the place where the creditor is habitually resident*“. These facts are by AG opinion sufficient to justify that the Brussels II *bis* regulation leaves it up to the Member State to allocate the action to competent authority of its preference.<sup>44</sup>

If one acknowledges that Member States are free to enact national rules on specialization, it remains to question if in this particular case such national rules are impairing the effectiveness of the Regulation. As far as Belgian rules to adjudicate the child abduction cases are concerned, their aim may not be considered inconsistent with the Regulation

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<sup>42</sup> AG Jääskinen opinion [61].

<sup>43</sup> AG Jääskinen opinion [52].

<sup>44</sup> AG Jääskinen opinion [58].



aims.<sup>45</sup> Ever since its enactment in 1998 when an emergency procedure as in summary proceedings is introduced, and its revision in 2007 when specialisation of judges and a concentration of jurisdiction is introduced, such rules aim to reinforce the 1980 Child Abduction regime.

Further concern relating to national law relates to compatibility of the legislation of the Member States on concurrent proceedings to particular requirements of expedition and effectiveness imposed by the Regulation. As in the present case, court of the merits which was first seized had to stay its proceedings and wait until the specialized court ruled on the child abduction matters. It derives that for the purpose of effectiveness and best interest of a child it would be reasonable to allow the court first seized to proceed also in the child abduction matters, as that court has already reached evidences and has relevant information on the relationship of the child with both parents, parental abilities, habits of the parents, material circumstances of the case in general.

CJEU rendered a decision on the conformity of specialized courts with the Regulation 2201/2003 on 9th January 2015. CJEU states that provision of Article 11(7) does not aim to determine the exact national competent authority. Court considers it to be a technical provision that determines the modalities of notification of the non-return decision.<sup>46</sup> CJEU held that Regulation 2201/2003 is not intended either to modify or to harmonize Member States' substantial and procedural rules, but they remain regulated by national legal sources. Still, CJEU emphasized that national provisions cannot undermine the regulation's *effet utile*, which is particularly directed towards conformity with the fundamental rights of the child, as prescribed in particular with Article 24 of the Charter of Fundamental Rights of the European Union. Effects of Article 24 are particularly directed towards the right of a child to maintain personal relationships and direct contact with each parent and obligation to ensure the case is dealt with expeditiously. In the end, as long as promptness of procedure in adjudicating child abduction cases is not jeopardized, such specialization of a court cannot be contrary to *effet utile* of the Regulation.

“In the light of the foregoing, the answer to the question referred is that Article 11(7) and (8) of the Regulation must be interpreted as not precluding, as a general rule, a Member State from allocating to a specialised court the jurisdiction to examine questions of return or custody with respect to a child in the context of the procedure set out in those provisions, even where proceedings on the substance of parental responsibility with respect to the child have already, separately, been brought before a court or tribunal.”<sup>47</sup>

<sup>45</sup> M. De Hemptinne, „Belgium“, in Concentration of jurisdiction under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction“, special edition of *The Judges' Newsletter on International Child Protection*, Vol. XX / Summer-Autumn 2013, p. 5-6.

<sup>46</sup> *Bradbrooke v Aleksandrowicz* [46].

<sup>47</sup> *Ibid*, [54].

## V. CONCLUDING REMARKS

Although internal organization of judiciary is not in domain of EU competence nor its regulatory activity, national rules on jurisdiction can be decisive for implementation of EU *acquis*. When child abduction cases are at stake, it has been advocated by academics and international organizations that concentration of jurisdiction is preferable. By definition, concentration of jurisdiction means that within certain national jurisdiction a particular court or a limited number of courts can deal with child abduction matters. Such structure of adjudication can lead to new level of specialization, which would entail that within court designated to adjudicate child abduction matters another concentration is proceeded and only one or more specialised judges are responsible for handling such cases. As advocated by doctrine, the quality of decisions and the efficiency in the disposition of cases are the two virtues of a specialized judiciary. Cost-benefit analyses of concentrated jurisdiction can be done on its most employed prototype - child abduction cases. As presented in the paper, detailed list of *pro* is far beyond the list of *contra*. List of the benefits of concentration and specialization, as well as positive experience of concentrated jurisdictions that manage to deal child abduction cases within defined timeframe of 6 weeks are in support this CJEU ruling. However, this case file, along with AG opinion, reflects the difficulties of handling cases in EU civil justice area. Closer inspection reveals that despite the fact that European Commission advocates concentration of jurisdiction, guidance prescribed by the same Commission may not always be consistent to national rules. The case at hand reaffirms that synergy of such national rules with EU rules is needed. This case file emphasizes that CJEU employs the fundamental human rights, particularly the children's rights prescribed by the Charter, to support the idea it finds worthy justification.

This CJEU ruling reaffirms the standing that it is a matter of the national procedural law of a Member State to assign a specialist court jurisdiction to consider parental child abduction issues. Moreover, in context of the provisions of Article 11(7)-(8), as long as any rules established in relation to the allocation of jurisdiction to the specialist court were consistent with the operation and effectiveness of Brussels II *bis*. Despite rather simple standing instruction, CJEU prescribes an "operation and effectiveness test" before any national system with concentrated jurisdiction.