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Brussels II *bis*: successes and suggested improvements[°]

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EU Regulation 2201/2003 (Brussels II *bis*) has been in force for ten years. As we celebrate this birthday, the EU legislator has commenced the review procedure. This Article reviews the Regulation critically and suggests improvements. The discussion includes the rules on matrimonial matters and those on parental responsibility. Our suggested improvements take the form of proposed provisions for the legislator.

Keywords: Regulation 2201/2003; Brussels II*bis*; Divorce; Parental Responsibility; Children's Rights; EU Private International Law; Recast

A. Introduction

Brussels II *bis*¹ celebrated its tenth anniversary in 2015 (counting from the date of full application²). This gives us a dual reason to write about the Regulation at this time. First, there has been considerable application by national courts and interpretation by the European Court of Justice. Second, the Regulation is up for renewal,³ which merits thorough reflection.

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¹ 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 [2003] OJ L 338/1.

² 1 March 2005, see Art 72 Brussels II *bis*.

³ Art 65 Brussels II *bis* provides that the Commission had to present a report on the application of the Regulation to the European Parliament, the Council and the European Economic and Social Committee by 1 January 2012. Such report was published on 15 April 2014: COM(2014) 225 final [http://eur-](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0225)

An exhaustive comment on the Regulation is impossible in a journal article.⁴ We will therefore focus on the problem areas of Brussels II *bis*. In this way, we hope to contribute to the debate about its “Recast”.

Brussels II *bis* combines two areas of family law: matrimonial matters and parental responsibility. While the initial Regulation, dating from 2000,⁵ only concerned the parental responsibility of the common children of the divorcing parents, the scope was considerably extended in 2005.⁶ Now parental responsibility is covered in its entirety. This includes parental responsibility for all children, irrespective of the marital status of their parents. Also the civil aspects of international child abduction fall within the ambit of the Regulation.⁷

Brussels II *bis* is a Regulation of international procedure. It only regulates jurisdiction and the recognition and enforcement of judgments and authentic instruments. This does not mean that the EU has been inactive in the field of applicable law. The Rome III Regulation⁸

lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0225&qid=1429803932179&from=EN, accessed 1 November 2015.

⁴ Much commentary exists. See for instance U Magnus and P Mankowski (eds), *Brussels IIbis Regulation* (Sellier, 2012), a commentary of 472 pages (excluding appendices); K Boele-Woelki and C González-Beilfuss, *Brussels IIbis: its impact and application in the Member States* (Intersentia, 2007); F Colienne and S Pfeiff, “Les enlèvements internationaux d’enfants. Convention de la Haye et Règlement Bruxelles IIbis” (2009) *Revue trimestrielle de droit familial* 351-399; S Francq, “La responsabilité parentale en droit international privé. Entrée en vigueur du règlement Bruxelles IIbis et du Code de droit international privé” (2005) *Revue trimestrielle de droit familial* 691.

⁵ Council Regulation (EC) No 1347/2000 of 29 May 2000 on the jurisdiction, recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for joint children [2000] OJ L 160/19.

⁶ On the negotiations of that “Recast”, see K Trimmings, *Child Abduction within the European Union* (Hart Publishing, 2013), 13-24; P McEleavy, “The new child abduction regime in the European Union: Symbiotic relationship or forced partnership?” (2005) *Journal of Private International Law* 5; M Jänterä-Jareborg, “A European family law for cross-border situations – some reflections concerning the Brussels II Regulation and its planned amendments” (2002) *Yearbook of Private International Law*, 67.

⁷ For a criticism of this inclusion in the scope, see M Jänterä-Jareborg *ibid* at 78.

⁸ 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 (Rome III), [2010] OJ L 343/10.

governs the law applicable to divorce in just over half of the Member States.⁹ For the law applicable to parental responsibility, the EU authorized its Member States to ratify the Hague Child Protection Convention.¹⁰ All Member States have in the meantime done so.¹¹ These two instruments on applicable law will not form the subject of the present Article; we will focus only on Brussels II *bis*.

In Part B we will discuss the rules on divorce, legal separation and annulment of marriages. Part C will address parental responsibility. Part D will set out our proposed amendments to the Regulation.

B. Divorce, legal separation and annulment of marriages

Brussels II *bis* provides in its first chapter, first section, rules on jurisdiction and in its third chapter, first section, rules on recognition in “matrimonial matters”. In this part of the Article we will discuss the current state and problems of the rules on jurisdiction, preceded by an analysis of their scope. The rules on recognition of judgments will not be analyzed. A judgment on “divorce, legal separation or marriage annulment” receives *de plano* recognition, i.e. without any procedure, and does not need to be enforced Arts 21-22, 24-27 and 37-39 Brussels II *bis*). These rules pose few problems in practice.¹²

⁹ This is because the Regulation was adopted through the procedure of enhanced cooperation. The participating Member States are Austria, Belgium, Bulgaria, France, Germany, Greece (applicable as of 29 July 2015), Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

¹⁰ Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

¹¹ Italy was the last Member State to ratify, but did so on 30 September 2015. The Convention entered into force in Italy on 1 January 2016. A list of all the Contracting States is available at http://www.hcch.net/index_en.php?act=conventions.status&cid=70 accessed on 20 January 2016.

¹² See COM(2014) 225 (*supra* n 3) 9, where these types of judgments are hardly mentioned in the section concerning recognition and enforcement.

1. Scope of the rules on ‘matrimonial matters’

(a) Substantive scope: matrimonial matters

Although “matrimonial matters” may encompass a vast area of family law, the Regulation is restricted to the question of judgments on “divorce, legal separation or marriage annulment.” It therefore only applies to “the dissolution of matrimonial ties” and does not deal with “issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.”¹³ The Regulation does not provide an answer to any other question relating to the separation of the couple, such as the consequences of the separation on their assets or on maintenance obligations.

When spouses file for divorce, the court will therefore have to determine its jurisdiction on the basis of the Regulation for the divorce claim, but might also have to apply other European instruments or even national private international law to establish jurisdiction for any other (related) claim. In particular the Maintenance Regulation¹⁴ will be pertinent if one of the spouses claims maintenance from the other. This web of applicable jurisdiction rules is attenuated by the fact that the Maintenance Regulation allows the parties to choose the divorce court or the parental responsibility court to rule on maintenance.¹⁵ However, if the divorce and parental responsibility issues are dealt with in different courts, the maintenance claims will also have to be split up: maintenance between spouses can be decided in the

¹³ Art 1(1)(a) Brussels II *bis*; Recital 8 Brussels II *bis*; the Regulation has nevertheless a potentially vast reach. According to the European Commission there are approximately 122 million marriages in the European Union of which 16 million have a cross-border dimension. Each year approximately 1 million divorces take place (COM(2014) 225 *supra* n 3).

¹⁴ Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

¹⁵ *Ibid* Art 3(c) and (d)..

divorce court, but maintenance for the children falls under the competence of the court with jurisdiction over parental responsibility.¹⁶

(b) *Substantive scope: marriage?*

“Matrimonial matters” in Brussels II *bis* thus has to be understood as legal proceedings aimed at the dissolution or the loosening of a couple’s marriage. A question can arise as to the meaning of “marriage”. In particular one might wonder whether same-sex marriages fall within the scope of the Regulation.¹⁷ The Regulation does not provide a definition of “marriage”. In the certificate concerning judgments in matrimonial matters,¹⁸ under the word “*marriage*” the court has to fill in the details of the “wife” and of the “husband”. This can be an indication that Brussels II *bis* is only applicable on the dissolution of a “traditional” marriage. The wording of the certificate is however, in our view, not a decisive argument. At the time of drafting and finalizing the Brussels II Convention in 1998¹⁹ and the first version of the Brussels II Regulation in 2000,²⁰ the right of persons of the same gender to marry was not yet recognized in any EU Member State.²¹ The reform of Brussels II in the early 2000s

¹⁶ Case C-184/14, *A v B* judgment of 16 July 2015 ECLI:EU:C:2015:479.

¹⁷ Among others W Pintens, “Article 1”, in U Magnus and P Mankowski, *Brussels II bis* (Sellier, 2012) 57-59; M Harding, *Conflict of Laws* (Routledge, 2014), 257-258; P Wautelet, “Dissolution d’un mariage entre personnes de même sexe: le for de nécessité comme réponse à l’impossibilité de divorcer?” (case note on CFI Brussels 19 June 2013), (2013) *Tijdschrift voor Internationaal Privaatrecht*, 75; J Verhellen, “Brussel IIbis-Verordening – Huwelijkszaken”, in B Allemeersch and T Kruger (eds), *Handboek Europees Burgerlijk Procesrecht* (Intersentia, 2015) 61; K Boele-Woelki and C Gonzáles Beilfuss, “Impact and Application of the Brussels II bis Regulation: comparative synthesis” in K Boele-Woelki and C Gonzáles Beilfuss (eds), *Brussels II bis: Its Impact and Application in the Member States* (Intersentia, 2007) 29.

¹⁸ According to Art 39 Brussels II *bis* “the competent court or authority of a Member State of origin shall, at the request of any interested party, issue a certificate using the standard form set out in Annex I (judgments in matrimonial matters).” This certificate is required if a party seeks or contests the recognition of a judgment in matrimonial matters, or is applying for a declaration of enforceability of such judgment (Art 37 Brussels II *bis*).

¹⁹ This Convention never entered into force but formed the basis of the first version of the Brussels II Regulation (No 1347/2000; see Recital 6).

²⁰ Regulation 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.

²¹ The first EU Member State to open marriage to persons of the same gender was The Netherlands, in 2001.

(which led to the Recast called Brussels II *bis*) was focused on parental responsibility and not on matrimonial matters.

By the time of the drafting of the Rome III Regulation, the social and legal context had changed.²² The Preamble of Rome III stipulates that “[t]he substantive scope and enacting terms of this Regulation should be consistent with Regulation (EC) No 2201/2003” and that “[p]reliminary questions such as [...] the validity of the marriage [...] should be determined by the conflict-of-laws rules applicable in the participating Member State concerned”.²³ Rome III thus explicitly excludes questions as to “the existence, validity or recognition of marriage”²⁴ and provides that:

“[n]othing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.”²⁵

This limitation was brought about among other things by the lack of consensus on same-sex marriages.²⁶

It follows from these provisions that the notion of “marriage” and the possibility to sever the matrimonial ties under Rome III differ according to the position of each Member

²² Currently nine countries of the European Union allow the conclusion of same-sex marriages: Belgium, Denmark (not bound by Brussels II *bis*), France, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom (except Northern Ireland). Finland has already adopted legislation that enables same-sex marriage, but this will only enter into force in 2017. In Ireland a constitutional referendum in May 2015 saw 62% vote in favour of same-sex marriage.

²³ Recital 10.

²⁴ Art 1(2)(b) Rome III.

²⁵ Art 13 Rome III.

²⁶ The issue of same-sex marriage was the reason for Poland not to join Rome III. See K Boele-Woelki, “For better or for worse: the Europeanization of international divorce law” (2010) *Yearbook of Private International Law* 1 at 12.

State on same-sex marriages. Brussels II *bis* currently does not contain such explicit wording on the exclusion of questions related to the existence of the marriage. Article 1(3), which lists a number of excluded (family law and related) matters, is silent on the existence of the marriage. Such explicit exclusion might have been confusing, because Brussels II *bis* does deal with procedures for the annulment of marriage and thus to a certain degree to the validity of marriage. If the validity or existence of the marriage arises as a preliminary question, Brussels II *bis* provides no answer. The report of the European Commission on the application of Brussels II *bis* is also silent on the issue.²⁷

Are Member States then compelled to recognize the civil status of the spouses that was accrued in another Member State? There is no EU legislation that forces an affirmative answer to this question. However, in other fields, such as company law²⁸ and names,²⁹ the Court of Justice has used principles of EU law (non-discrimination and free movement) to prevent Member States from refusing to recognize a legal situation that was created in another Member State. It has not yet done so for marriage or civil status. To our minds, the current wording of Brussels II *bis* does not prevent the Court from finding an obligation for Member State courts to answer the preliminary question – the existence of the marriage – with due account of the principles of non-discrimination and free movement within the EU. Rome III has made such interpretation impossible for the Court of Justice, as it clearly states that the question of the existence of marriage is a question left to national law and that Member States cannot be forced to recognize a marriage concluded in another Member

²⁷ It does not appear to be mentioned in the extensive public consultation made by the European Commission (<https://ec.europa.eu/eusurvey/publication/BXLIIA>, accessed 30 January 2016).

²⁸ Case C-212/97, *Centros* ECLI:EU:C:1999:126; case C-208/00, *Überseering* ECLI:EU:C:2002:632 ; Case C-167/01, *Inspire Art* ECLI:EU:C:2003:512; Case C-378/10, *VALE* ECLI:EU:C:2012:440. See also J Borg-Barthet, *The Governing Law of Companies in EU Law* (Hart, 2012); M Myske-Nowakowska, *The Role of Choice of Law Rules in Shaping Free Movement of Companies* (Intersentia, 2014).

²⁹ Case C-148/02, *Garcia Avello* ECLI:EU:C:2003:539; Case C-353/06, *Grunkin and Paul* ECLI:EU:C:2008:559 .

State. The Recast of Brussels II *bis* can leave this difficult issue untouched, it can follow the example of Rome III, or it can include a definition of marriage. Under the first option, the *status quo*, Member States that recognize same-sex marriages will apply the rules in Brussels II *bis* when confronted with a divorce claim, as already happens now.³⁰ Member States that refuse to recognize same-sex marriages will continue to do so. It is possible that the Court of Justice will find such refusal to recognize marriages concluded in the EU an infringement to EU law. But this is uncertain.

The second option, following the wording of Rome III, means that Member States are clearly not obliged to recognize same-sex marriages. Member States that already do so, will continue to do so, and for these situations the second option has the same result as the first. Member States that refuse to recognize same-sex marriages are explicitly left to their own devices. This is different from the first option, which provides no explicit safeguard that Member States will never be obliged to recognize same-sex marriages concluded in other Member States.

The third option, which we prefer, opts for an autonomous and all-inclusive notion.³¹ Within the EU, ideally a marriage – whatever the composition – that originates in one Member State should travel freely to the other Member States. We are nevertheless aware that such a solution will be almost impossible to reach on a European Union level.³² Our

³⁰ This approach has already been taken by the Netherlands, see I Curry-Sumner, “Private International Law Aspects of Homosexual Couples: The Netherlands Report” (2007) *European Journal of Comparative Law* 11; in Belgium, some courts have applied Brussels II *bis* to the divorce claim of a same-sex couple without even considering the possible non-applicability of the Regulation: CFI Brussels 19 June 2013 (2013/4) *Tijdschrift@ipr.be* 75; CFI Arlon 20 November 2009 (2012) *Revue trimestrielle de droit familial* 696.

³¹ Also pleading for an autonomous notion, see W Pintens, “Article 1”, in U Magnus and P Mankowski (eds), *Brussels II bis Regulation* (Sellier, 2012) 57-59.

³² The European Commission has raised the question of the recognition of civil status in its Green Paper COM(2010) 747 of 14 December 2012, “Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records”. That this is a sensitive issue is clear when one

proposals in Part C below thus fall back on the second option, the second best in our opinion.

(c) *Personal scope: EU(-based) couples?*

Initially the personal scope of Brussels II *bis* and its predecessor Brussels II raised questions. Does Brussels II *bis* only apply to EU-nationals and couples that are EU-based or does it also apply to spouses without any European Union nationality or residence? What if only one of the partners is EU-based or has the nationality of a Member State?

Brussels II *bis* provides a first answer: the jurisdiction rules have an “*exclusive nature*” in cases where the respondent “(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.”³³ In these cases Brussels II *bis* must apply instead of the Member States' national rules. The domestic rules only come into play when no European Union court has jurisdiction pursuant to the Regulation's jurisdiction rules.³⁴

These rules appeared not to be as clear as they might seem on a first reading. These provisions only focus on the position of the respondent; nothing is said about the applicant.

In the case *Sundelind Lopez* the European Court of Justice had the opportunity to clarify these provisions.³⁵ Mrs Sundelind Lopez, a Swedish national, was married to Mr Lopez

sees that the subsequent Proposal for a Regulation was watered down to only the abolition of formal requirements: COM(2013) 228 of 24 April 2013, “Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012”. See also P Lagarde, “The movement of civil-status records in Europe, and the European Commission’s Proposal of 24 April 2013” (2013-2014) *Yearbook of Private International Law* 1.

³³ Art 6 Brussels II *bis*.

³⁴ Art 7 Brussels II *bis*.

³⁵ Case C-68/07, *Sundelind Lopez v Lopez Lizazo* ECLI:EU:C:2007:740.

Lizazo, a Cuban national. During their marriage, they lived together in France. After the termination of their relationship, Mrs Sundelind Lopez remained in France while Mr Lopez Lizazo returned to Cuba. At the time of the institution of divorce proceedings in Sweden, Mr Lopez Lizazo was therefore neither a national of nor habitually resident in a Member State. At first instance the Swedish court declared that it did not have jurisdiction to hear the divorce case, since according to Article 3 Brussels II *bis* only the French courts would have jurisdiction.³⁶ Such jurisdiction of a court in another EU Member State precluded the Swedish court from using a basis of jurisdiction available in its domestic private international law. The appeal against this decision was dismissed. Before the Supreme Court Mrs Sundelind Lopez submitted that the courts of the Member States do not have exclusive jurisdiction if the respondent does not have his habitual residence in or is not a national of a Member State. Consequently, she stated that domestic law was applicable for the determination of the jurisdiction of the Swedish courts. The Supreme Court posed the following preliminary question to the European Court of Justice:

“Where the respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State, may the case be heard by a court in a Member State which does not have jurisdiction under Article 3 [of Regulation No 2201/2003], even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?”

The Court of Justice responded that:

“where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot

³⁶ Art 3(1)(a), 5th indent Brussels II *bis*.

base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation”.

In the case at hand, the Swedish court should *ex officio* decline jurisdiction since they do not have competence according to the Regulation while the French courts do.³⁷ No reliance on national Swedish law is permitted.

It follows from this case law and the cited provisions that the personal scope of the Regulation is broad. It will not only apply to couples who are both EU-based and/or share a common EU-nationality. It will also apply if (i) only the defendant is a resident or a national of a Member State and even if (ii) this defendant is neither a national nor a resident of a Member State, but the courts of one of the Member States can derive jurisdiction from Brussels II *bis*. This means that the domestic rules on private international law of a Member State will only determine jurisdiction if none of the Brussels II *bis* rules is applicable.

The European Commission, in the previous attempt to amend Brussels II *bis*, proposed to delete Article 6, the provision that refers to the “exclusive nature of jurisdiction”, as it is superfluous and confusing.³⁸ De Boer also complains of the lack of clarity of the current system in the following scenario: the defendant is a national of an EU Member State, the spouses do not have a common nationality and neither the claimant nor the defendant habitually resides in the EU.³⁹ There is no jurisdiction on the basis of the Regulation. The “exclusive nature” of the rules seems to suggest that domestic private

³⁷ Arts 3 and 17 Brussels II *bis*.

³⁸ See COM(2006) 399, “Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters”, at 8. For support of this proposal, see A Borrás, “Grounds of jurisdiction in matrimonial matters: recasting the Brussels IIa Regulation” (2015) *Nederlands Internationaal Privaatrecht* 3 at 7.

³⁹ T De Boer, “What we should not expect from a recast of the Brussels IIbis Regulation” (2015) *Nederlands Internationaal Privaatrecht* 10 at 13.

international law cannot be applied. Should the “residual” rules, i.e. those based on domestic law, not be available here?

In our opinion the personal scope of the Regulation could be formulated in an even broader way, so as to eliminate this difficult delineation between European and national rules. It is possible to model the ambit of Brussels II *bis* on the Maintenance Regulation⁴⁰ or on the Succession Regulation:⁴¹ the Recast of Brussels II *bis* could exclude any application of or reference to the domestic rules on private international law and thus create a “universal” reach. This means that *either* the courts of a Member State have jurisdiction in matrimonial matters according to the rules of the Regulation *or* no court in the EU has such jurisdiction. National private international law will no longer have a subsidiary role.

If such route is pursued, the Regulation should contain a *forum necessitatis* for situations where no court in a Member State can assume jurisdiction.⁴² In exceptional cases – (1) if no ground for jurisdiction is found in the Regulation and (2) proceedings cannot reasonably be brought or conducted or would be impossible in a third State and (3) there is a sufficient connection with the Member State of the court seized – the court seized can declare itself competent to hear the case. Such a *forum necessitatis* would prevent the spouses from being confronted with a denial of justice.⁴³ It is even feasible to install a *forum necessitatis* in matrimonial matters, if a European Union same-sex couple cannot, on the basis of the Regulation, find a competent court to hear their divorce case since in the courts of the

⁴⁰ Recital 15; Arts 3-6 Maintenance Regulation.

⁴¹ Recital 30; Arts 4-10 Succession Regulation.

⁴² See also A Borrás, *supra* n 38, at 8.

⁴³ See Recital 16 and Art 7 Maintenance Regulation; Recital 31 and Art 11 Succession Regulation.

Member States appointed their marriage is not recognized.⁴⁴ In our view, the above-mentioned conditions should apply with the exception that in this case a ground for jurisdiction is found in the Regulation, but the courts of that/those Member State(s) will not accept jurisdiction.

2. Jurisdiction

(a) Jurisdiction rules

The general jurisdiction rule in matrimonial matters stipulates that a European court has jurisdiction over a claim for divorce, legal separation or marriage annulment if one of the seven non-hierarchical and alternative grounds for jurisdiction is fulfilled.⁴⁵ The seven grounds for jurisdiction can be divided into two categories:

- (1) the habitual residence of (one of) the spouses is in the Member State of the court seized;
- (2) the court seized is that of the Member State of the common nationality of the spouses.

It is also possible to file a counterclaim in the same court if the counterclaim falls within the scope of the Regulation.⁴⁶ Moreover, a court in a Member State that has given a judgment on a legal separation shall maintain its jurisdiction for converting that separation into a divorce, if the law of that Member State so provides and this “*without prejudice to*

⁴⁴ For example, if two men are habitually resident in a Member State where they can and do get married, but after the breakup move back to the Member States of their respective nationalities and neither of those Member States recognizes the marriage, no European Union court can currently assume jurisdiction on the basis of Brussels II *bis*. Member State courts have however used their domestic *forum necessitatis* rules in order to prevent a denial of justice. See I Curry-Sumner, *supra* n 26, at 11.

⁴⁵ Art 3 Brussels II *bis*. This was confirmed in Case C-168/08, *Hadadi (Hadady) v Mesko, married name Hadadi (Hadady)* ECLI:EU:C:2009:474.

⁴⁶ Art 4 Brussels II *bis*.

Article 3".⁴⁷ This jurisdiction is also alternative to the seven already given alternative bases, which remain available.

The Regulation further stipulates that the seized court must examine its jurisdiction of its own motion.⁴⁸ If it does not have jurisdiction and the court of another Member State has jurisdiction by virtue of the Regulation, the seized court shall declare itself incompetent of its own motion. No establishment of jurisdiction by submission is permitted. This means that a court cannot obtain jurisdiction by parties implicitly accepting (i.e. not contesting) such jurisdiction.⁴⁹ The EU legislator consciously provided a wide range of jurisdictional bases for families in crisis.⁵⁰ However, multiple problems have arisen and may arise in applying these jurisdiction rules. First, it is not entirely certain how a court should define "habitual residence" of (one of) the spouses in matrimonial cases. Up to this moment, the European Court of Justice has not yet interpreted the notion for matters of divorce. However, following the case law of the European Court of Justice on the notion of "habitual residence of a child",⁵¹ we may say that it is supposed to have an autonomous and uniform meaning based on it being a factual concept. The court seized can therefore take into account all the circumstances of the case, but cannot resort to its own rules on private international law. The specific interpretation of the "habitual residence of a child" is nevertheless not completely apt at covering the "habitual residence" of (one of) the spouses. The determining factors in the life of an adult are not the same as those of a child: an adult can spend a significant amount of time in one Member State, for example because he works there, but

⁴⁷ Art 5 Brussels II *bis*.

⁴⁸ Art 17 Brussels II *bis*.

⁴⁹ This means that Brussels II *bis* has no rule equivalent to Art 26 Brussels I *bis* (Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1; hereafter: Brussels I *bis*).

⁵⁰ A Borrás, *supra* n 38, at 4.

⁵¹ See *infra* C1a).

still has his or her social life in another Member State. The latter can in such cases be seen as the place where he or she is habitually resident. According to some authors the intent of the adult to have his or her habitual residence in a Member State can thus be taken into account as one of the factual elements.⁵² It is up to the Court of Justice to fine-tune this criterion of “habitual residence”.

Second, the European Court of Justice has had the opportunity to interpret the provision on the common nationality of the spouses.⁵³ According to its case law, the term “nationality” deserves an autonomous and uniform meaning irrespective of domestic law. If the spouses therefore have more than one nationality in common, the court cannot limit its jurisdiction to the “most effective” nationality of both spouses. “On the contrary, the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and the spouses may seize the court of the Member State of their choice.”⁵⁴

Third, by offering seven non-hierarchical and alternative jurisdictional grounds, it is felt that a “rush to court” is induced. Each of the spouses may rush to file his or her claim at the court that will apply the most beneficial divorce and/or matrimonial property law (in his or her view) in order to control the proceedings.⁵⁵ This “rush to court” can prevent an amicable solution between the spouses or deny them the possibility of mediation.⁵⁶

⁵² A Borrás, “Article 3” in U Magnus and P Mankowski, *Brussels II bis* (Sellier, 2012), 57-59; J Verhellen, “Brussel IIbis-Verordening – Huwelijkszaken” in B Allemeersch and T Kruger, *Handboek Europees Burgerlijk Procesrecht* (Intersentia, 2015) 70. See also the guidance on the meaning of “habitual residence” in the EU Succession Regulation which will largely apply to adults, Reg 650/2012 [2012] OJ L201/107, recitals 23 and 24.

⁵³ Art 3(1)(b) Brussels II bis. For the United Kingdom and Ireland, this provision refers to the common “domicile” of the spouses.

⁵⁴ Case C-168/08 supra n 45. In this case each of the spouses held the Hungarian and French nationality.

⁵⁵ If courts in different Member States are seized, Art 19 Brussels II bis is applicable (*lis pendens* and dependent actions). To determine when a court is seized, Art 16 Brussels II bis prescribes the same solution as Art 32 Brussels I bis.

⁵⁶ See www.ceflonline.net (search on “Country Reports by Subject”), accessed 1 November 2015 for the Member States which stimulate amicable solutions in divorce proceedings.

Although Rome III reduces this risk by establishing uniform conflict-of-law rules in the participating States, these rules only apply in 16 of the 28 Member States. According to the public consultation by the European Commission to evaluate the application of Brussels II *bis*, 50% of the respondents think that the ways of identifying the competent court in matrimonial matters should be revised in order to reduce this risk. 78% of those respondents think that this should be done by establishing an order of priority in Article 3 Brussels II *bis*⁵⁷. It is also one of the two main topics on matrimonial matters addressed in the report of the European Commission.⁵⁸

In our opinion an order of priority is not a necessary change. The alternative jurisdictional grounds give the spouses the opportunity to file a claim in the Member State that has the closest connection to their marital life. Moreover, it allows Member States with liberal divorce law to provide a forum to their citizens, even if they live abroad.⁵⁹ Nevertheless, we admit that an order of priority may lead to more legal certainty for the respondent, enabling him or her to predict which court will be competent to hear the case. The order of priority must however not be too rigid. The first rule should still at least provide the alternative fora of the habitual residence of either spouse (for the plaintiff possibly with a time requirement). The subsidiary rule would then be that of the nationality (or domicile) of the parties.⁶⁰ The balance between providing a divorce forum on the one hand and preventing a “rush to court” on the other hand might however be found by other means, such as the possibility for the parties to make a choice of court.

⁵⁷ <https://ec.europa.eu/eusurvey/publication/BXLIIA>, accessed 1 November 2015.

⁵⁸ COM(2014) 225, *supra* n 3) at 5.

⁵⁹ See also A Borrás, *supra* n 38, who states at 7 that it is difficult to envisage a move from alternative rules to a hierarchy.

⁶⁰ This approach is in line with that of the Maintenance Regulation (Arts 3-6) and similar to that of the Succession Regulation (Arts 4 and 10)

(b) *Choice of court*

As already stated, Brussels II *bis* does not allow any submission to jurisdiction. The Regulation provides that the court seized should examine *ex officio* its jurisdiction.⁶¹ The spouses therefore cannot make an implicit choice by simply appearing before the court and not contesting its jurisdiction.

The Regulation does not provide for an explicit choice by the spouses either. Several voices have been raised in favour of allowing party autonomy in matters of divorce.⁶² The report by the European Commission is also favourable to such inclusion.⁶³ This would not only align Brussels II *bis* with the other European Union Regulations in civil matters,⁶⁴ but also complement the autonomy given to the spouses in the Rome III Regulation⁶⁵ to choose the law applicable to their divorce. A choice of court possibility may, according to the European Commission, be especially useful in cases of divorce by mutual consent.⁶⁶

Today no hard numbers are available on the use of party autonomy in family matters.⁶⁷ We are of the opinion that inserting the possibility to make a jurisdiction agreement would however balance any restriction of the now existing seven alternative jurisdictional grounds. Moreover, even if the jurisdictional bases and the hierarchy between

⁶¹ Art 17 Brussels II *bis*.

⁶² A Borrás, *supra* n 38, at 5-6; see also M Fallon, P Kinsch and C Kohler (eds), *Building European Private International Law. Twenty Years' work by GEDIP* (Intersentia, 2011) at 453 (discussions of the Vienna Meeting, 2003 which was more focussed on applicable law) and at 610 (discussions of the Coimbra Meeting, 2006, commenting on the Green Paper by the Commission).

⁶³ COM(2014) 225, *supra* n 3, 5.

⁶⁴ See Art 25 Brussels I *bis*; Art 4 Maintenance Regulation; Art 5 Succession Regulation (Regulation 650/2012 of the European Parliament and of 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).

⁶⁵ See Art 5 Rome III Regulation.

⁶⁶ COM(2014) 225 (n 3) at 5.

⁶⁷ The Belgian Private International Law Code (Art 55) has since 2004 permitted spouses to choose the applicable law in matrimonial matters. Research has shown that not many people use this possibility: J Verhellen, *Het Belgisch Wetboek IPR in familiezaken* (Die Keure, 2012) 186.

them were not amended, a forum choice can benefit the parties as it gives them additional control – predictability and legal certainty – to resolve their dispute and could help to prevent the above-mentioned “rush to court”.⁶⁸

Does this mean that we would opt for an unlimited choice for the spouses? The Maintenance⁶⁹ and Succession Regulations⁷⁰ limit the possibility to choose one's court in family matters to a certain number of courts. Rome III also restricts the legal systems that the spouses may choose.⁷¹ If the European Union legislator opts for a certain restriction, this should at least mirror the possibilities given in Rome III. This means that the spouses should be able to at least opt for:

- the courts of the Member State of their habitual residence, at the time the agreement is concluded;
- the courts of the Member State of their last habitual residence, provided that one of them still resides there at the time of the agreement;
- the courts of the Member State of the nationality of either spouse at the time of the agreement.

As the Commission stated, the possibilities enumerated in the 2006 proposal for amendment of the Regulation may however serve as a good – and even better – starting point for the discussion:⁷²

“Article 3a: Choice of court by the parties in proceedings relating to divorce and legal separation.

⁶⁸ A Borrás, *supra* n 38, at 6.

⁶⁹ Art 4 Maintenance Regulation.

⁷⁰ Art 5 Succession Regulation.

⁷¹ Art 5 Rome III.

⁷² Art 3(a) of the 2006 Proposal, COM(2006) 399, *supra* n 33.

1. The spouses may agree that a court or the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided they have a substantial connection with that Member State by virtue of the fact that:

1. any of the grounds of jurisdiction listed in Article 3 applies, or
2. it is the place of the spouses' last common habitual residence for a minimum period of three years, or
3. one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States.

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

The proposal thus provides for a choice of court limited to the already existing grounds of jurisdiction in Brussels II *bis*, complemented by the former habitual residence, if none of the spouses still resides there, and by the nationality of each of the spouses.

Although we subscribe to these choices, we are of the opinion that a choice for the courts of the last habitual residence, even if none of the spouses still resides there, should be available irrespective of the duration of the time spent in that Member State. If the spouses have lived (a part of) their married life in a Member State, it is possible that they still have a close connection to that State.

In the end, the question may arise as to the need of any restriction at all. If parties together agree that a court in the EU has competence to resolve their dispute, why should their choice be restricted? We do not believe that a weaker party is protected by limiting the

number of choices available. Real protection is dependent on a system that ensures free choice, ie that neither of the parties were coerced nor coaxed into the choice. Such protection can only be reached by assuring the provision of adequate information by professionals, including civil servants, lawyers and notaries.

Turning to tacit agreement, the issue becomes more difficult. Allowing an unlimited possibility to submit the case to the jurisdiction of the court seized, changes the obligation of courts to examine their jurisdiction *ex officio*.⁷³ Such examination is built in to protect the parties and we are not in favour of taking it out. Therefore, while we would accept that an agreement could be reached orally *in limine litis*, tacit submission should not be inserted in Brussels II *bis*.

C. Parental Responsibility

The area of parental responsibility has produced a large number of cases by the Court of Justice of the EU. Many of these cases have been heard under the speedy procedure, the so-called PPU. The introduction of this procedure was on the one hand crucial to the adequate development of the law combined with the respecting of the rights of children and families. When a national court receives an answer within two months,⁷⁴ the delivery of justice is possible. The Court of Justice should be commended for this efficiency, especially at a time of a proliferation of judicial proceedings.

⁷³ The difficult relationship between the *ex officio* examination by the court and tacit submission is shown by the new para 2 of Art 26 Brussels I *bis*.

⁷⁴ As happened in Case C-498/14PPU, *Bradbrooke v Aleksandrowicz*, ECLI:EU:C:2015:3 where the CJEU judgment was issued on 9 January 2015 in response to a question received on 10 November 2014, based on a Belgian judgment of 7 November 2014.

On the other hand, the many questions posed to the Court have made painstakingly clear how litigious parents can be when it comes to their children. Parallel procedures, provisional measures, return proceedings are all piled on top of each other.

In this part of the Article we will discuss the current jurisdiction rules, the interaction between Brussels II *bis* and the 1996 Hague Child Protection Convention, children's rights concerns, international child abduction, *exequatur* and issues of national procedure. We will not analyze the provisions on the cross-border placement of children.⁷⁵

1. Jurisdiction

(a) Based on the habitual residence of the child

The general jurisdictional rule of Brussels II *bis* refers to the court of the habitual residence of the child.⁷⁶ Such rule ensures proximity between the judge and the situation. If it is necessary to order social investigations, the judge is able to do so.

The Court of Justice has had the opportunity already three times to explain the notion of "habitual residence" with respect to children.⁷⁷ The Court has emphasized the factual nature of the concept and has enlisted a number of factors that can be considered in order to establish such habitual residence. These include the duration, regularity, conditions and reasons for staying in or moving to a particular country, the child's nationality, the school, linguistic knowledge and the family and social relationships of the child.⁷⁸

⁷⁵ On this topic, see J Forcada Miranda, "Revision with respect to the cross-border placement of children" (2015) *Nederlands Internationaal Privaatrecht* 36.

⁷⁶ Art 8 Brussels II *bis*.

⁷⁷ Case C-523/07 A ECLI:EU:C:2009:225; Case C-497/10PPU *Mercredi v Chaffe* ECLI:EU:C:2010:829 and Case C-376/14 C v M ECLI:EU:C:2014:2268.

⁷⁸ Case C-523/07, *supra* n 77, at para 39.

When the habitual residence of an infant is at stake, the Court has used the same factors, but has attached them to the person on whom the infant is dependent.⁷⁹ This can of course cause difficulties in situations where there is a dispute between the parents about whether or not the move amounted to child abduction. The French *Cour de Cassation* followed a different route: it considered the common intention of the parents on where the family were to be established.⁸⁰ The English courts seem to maintain a factual interpretation of habitual residence.⁸¹

This brings us to the important point of balancing objective and subjective factors. Looking at the Court of Justice's list, one finds both subjective and objective elements. Both are relevant. In a later case the Court explained that the fact that the mother knew that she had only precarious permission to take the child to another country was part of the factor of the conditions for the move.⁸² In this case the mother moved to Ireland on the basis of a French court order, but she knew at the time of leaving that the order had been appealed. The Court of Justice, however, refrained from viewing this subjective element as decisive. The national court examining the habitual residence must weigh this against the objective factors such as the child's integration at the new place of stay.⁸³

⁷⁹ Case C-497/10, *supra* n 77, at paras 50-55.

⁸⁰ Fr Cass 26 October 2011 (première chambre civile). See also A Fiorini, "The Habitual Residence and the New Born – A French Perspective" (2012) *International and Comparative Law Quarterly* 530.

⁸¹ A Fiorini, *ibid*, at 533-534.

⁸² Case C-376/14, *supra* n 77, at paras 52 and 55.

⁸³ Case C-376/14, *supra* n 77, at para 56. For an analysis of this case and of the final decision in the Irish courts see P Beaumont and J Holliday, "Recent Developments on the meaning of "habitual residence" in alleged child abduction cases" in M Župan (ed): *Private International Law in the Jurisprudence of European Courts – Family at Focus* (Faculty of Law J.J.Strossmayer University of Osijek, 2015) 39 at 52-57 (also available as Centre for Private International Law, University of Aberdeen Working Paper No 2015/3, http://www.abdn.ac.uk/law/documents/Recent_Developments_on_the_Meaning_of_Habitual_Residence_in_Alleged_Child_Abduction_Cases_.pdf, accessed on 20 January 2016.

The Court of Justice seems to have struck a fair balance, emphasizing the importance of the factual elements. The strength of the connection of the habitual residence is indeed the flexibility it allows to national judges to regard the concrete situation of every child. The legislator should refrain from attempting to include a definition of habitual residence in the Recast of Brussels II *bis*.

(b) Prorogation of jurisdiction

Brussels II *bis* allows parties to choose a forum other than the forum of the habitual residence of the child under particular conditions.⁸⁴ The parents can choose to bring the proceedings concerning parental responsibility to the divorce court⁸⁵ or to another court.⁸⁶ In the latter case it is not required that related proceedings are already pending in that court; the prorogation of jurisdiction on parental responsibility is an independent basis of jurisdiction.⁸⁷

The duration of the prorogation has raised questions. The Court of Justice responded that it is only relevant for a particular procedure. The prorogation ceases when there is a final judgment.⁸⁸ The first reaction to this might be that the Court has come to a logical conclusion. However, the question of when a judgment concerning parental responsibility is “final” is not a simple one. Parental responsibility orders, especially when they concern the residence of and contact with a child, are often susceptible to amendment. The interpretation of “final” is variable according to national procedural law. We will return to the interaction between EU and national procedural law later.

⁸⁴ Art 12 Brussels II *bis*.

⁸⁵ Art 12(1) Brussels II *bis*.

⁸⁶ Art 12(3) Brussels II *bis*.

⁸⁷ The CJEU clarified this in Case C-656/13, *L v M* ECLI:EU:C:2014:2364.

⁸⁸ Case C-436/13, *E v B* ECLI:EU:C:2014:2246 .

Another issue that has arisen, is the relation between the prorogation of jurisdiction and the transfer of jurisdiction. The Court of Justice has not yet ruled on the question whether a chosen court can transfer the case to a court in another Member State. The question was posed, but due to the response to the first question in the case, the Court deemed it unnecessary to respond to it.⁸⁹

(c) Provisional measures

The rule on provisional measures in Brussels II *bis*⁹⁰ is clearer than in the other European Union Regulations in the field of private international law.⁹¹ It contains a clear limitation and a clear end date for the measures. However, what seemed like a good rule, has caused more than its share of problems in its application.

Let us start with the clear limitation: the measures must be “in respect of persons or assets in that State”. While the Court of Justice had to introduce such limitation in the form of a “real connecting link” in the scope of Brussels I,⁹² Brussels II *bis* is clear in its wording. But which “person”? At first glance this seems to refer to the child. This is logical and is in line with the Hague Child Protection Convention, which refers explicitly to the “Contracting State in whose territory the child or property belonging to the child is present”.⁹³ The Court

⁸⁹ Ibid.

⁹⁰ Art 20 Brussels II *bis*. For a discussion of this provision, see M Mellone, “Provisional Measures and the Brussels II*bis* Regulation: an assessment of the status quo in view of future legislative amendments” (2015) *Nederlands Internationaal Privaatrecht* 20.

⁹¹ Compare Art 35 Brussels I *bis*; Art 14 Maintenance Regulation; Art 19 Succession Regulation. These rules merely refer to the provisional and protective measures that are available in the national laws of the Member States. The Court of Justice of the EU has set limits for these rules (see below).

⁹² Case C-391/95, *Van Uden Maritime v Kommanditgesellschaft in Firma Deco-Line* ECLI:EU:C:1998:543.

⁹³ Art 11(1) Hague Child Protection Convention.

of Justice of the EU also found that the provision is applicable when a child stays temporarily or intermittently in a State other than the State of his or her habitual residence.⁹⁴

However, a subsequent judgment by the Court of Justice caused confusion. The Court stated that the “persons” referred to in the provision includes not only the child but also the parents.⁹⁵ This is so because the measures are also aimed at the parents in the sense that they influence their exercise of parental responsibility. This judgment seems to imply that provisional measures can only be granted if all persons involved are present on the territory of the court. The fact that the Court of Justice attempted to limit the possibility to grant provisional measures in this particular case is understandable. The mother had abducted the child after the Italian court (which had jurisdiction as to the substance of the dispute) ordered provisional measures. She then purported to obtain contradictory provisional measures in the state of refuge. Of course this is contrary to the spirit of the Hague Child Abduction Convention⁹⁶ and of Brussels II *bis*. However, the Court also reached the solution of the inadmissibility of provisional measures in this case based on the fact that urgency cannot arise due to the self-created situation of the abduction. When urgency is lacking, provisional measures are not available. If the Court had stopped there, the situation would have been clear.

The strict interpretation of “persons” obviates the very purpose of the rule, namely to protect children in urgent situations.⁹⁷ At times when children need urgent care or are in the middle of a family conflict, all holders of parental responsibility are not necessarily

⁹⁴ Case C-523/07, *supra* n 77, at para 48.

⁹⁵ Case C-403/09PPU *Detiček v Sgueglia* ECLI:EU:C:2009:810 paras 50-52.

⁹⁶ Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, http://www.hcch.net/index_en.php?act=conventions.text&cid=24, accessed 1 November 2015.

⁹⁷ See also D van Iterson, *Ouderlijke verantwoordelijkheid en kindbescherming* (Maklu, 2011), 127-128; M Pertegás Sender, “Article 20” in U Magnus and P Mankowski (eds), *Brussels IIbis Regulation* (Sellier, 2012) 255.

present in the same State. Advocate General Sharpston has in an Opinion expressed the view that the interpretation that the child and the persons exercising parental responsibility must be present in the State granting the provisional measures, is wrong.⁹⁸ This problem should be clarified in the Recast of Brussels II *bis*.

The next issue that arose with respect to provisional measures is the existence of parallel proceedings. The Court of Justice ruled that the *lis pendens* rule does not apply when the case in one court concerns the substance of the dispute and the case in another Member State concerns provisional measures.⁹⁹ This complies with the principle that the court must consider the object of the measures asked.¹⁰⁰

The final issue that has also caused some disagreement, is that of the cross-border enforceability of provisional measures. Brussels II *bis* does not explicitly exclude the cross-border enforceability of such measures. The Court of Justice found that provisional measures granted by the national court that does not have jurisdiction as to the substance of the dispute do not qualify for cross-border enforceability under the Regulation. This interpretation provides a neat division of tasks. If the matter is urgent, a court other than the court with jurisdiction can take measures, but these measures only have a territorial reach under the Regulation.¹⁰¹

The difficulty with the judgment is that a court where enforcement is requested, is obliged to examine the basis of jurisdiction of a foreign court. Such examination is not

⁹⁸ Case C-256/09, *Purrucker v Vallés Pérez I* ECLI:EU:C:2010:296 , para 147.

⁹⁹ Case C-296/10, *Purrucker v Vallés Pérez II* ECLI:EU:C:2010:665.

¹⁰⁰ See for instance Case C-39/02, *Maersk Olie & Gas A/S v de Haan and de Boer* ECLI:EU:C:2004:615 on Brussels I.

¹⁰¹ Recognition and enforcement remain possible under other international instruments or national law; see Case C-256/09, *Purrucker v Vallés Pérez I* ECLI:EU:C:2010:437, para 92.

normally required. If the legislator accepts the interpretation by the Court of Justice, then Member State courts should explicitly mention the basis of their competence.

2. The interaction between Brussels II bis and the 1996 Hague Convention

It took far too long, but the Hague Child Protection Convention of 1996 is now in force in all EU Member States.¹⁰²

The Convention contains rules on jurisdiction, applicable law, recognition and enforcement, and on cooperation (eg by central authorities). As Brussels II *bis* is silent on the matter of applicable law, the rules of the Convention apply.¹⁰³ The fact that the European Union chose the route of “reverse subsidiarity”¹⁰⁴ is laudable. Practitioners and judges have a much simpler life if legislation is the same for intra-EU and other international disputes. Moreover, many of the rules in Brussels II *bis* have been inspired by or modelled on the Convention.¹⁰⁵ The two instruments have a similar approach. Like Brussels II *bis*, the Convention uses the child’s habitual residence as its main criterion.

¹⁰² For a complete list of the more than 40 Contracting States, see http://www.hcch.net/index_en.php?act=conventions.status&cid=70, accessed 1 November 2015.

¹⁰³ It might be useful to include an explicit reference to the applicable law rules of the Child Protection Convention in Brussels II *bis*, even if only for purposes of clarity. See H van Loon, “The Brussels IIa Regulation: towards a review?” in European Parliament, DG for Internal Policies (Policy Department Citizens’ Rights and Constitutional Affairs), “Cross-Border Activities in the EU – Making Life Easier for Citizens” (Workshop for the JURI Committee, 2015) at 200.

¹⁰⁴ See P Beaumont, “International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity” (2009) *Rechts Zeitschrift* 509.

¹⁰⁵ See for instance Art 15 Brussels II *bis* which is based on Arts 8 and 9 of the 1996 Convention. The 1996 Convention was negotiated at the same time as the predecessor of Brussels II and II *bis*, the Convention, drawn up on the basis of Art 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 (see the Explanatory Report by A Borrás [1998] OJ C221/27). The latter Convention never entered into force, as the European Community (as it then was) obtained competence in the area of judicial cooperation in civil matters with the entry into force of the Treaty of Amsterdam on 1 May 1999. The Convention was transformed to the so-called Brussels II Regulation (Reg 1347/2000).

(a) Recognition and enforcement and cooperation

In the matters of recognition and enforcement and of cooperation, the delineation between Brussels II *bis* and the Convention is simple: when two EU Member States are involved, Brussels II *bis* takes precedence. For instance, when a judgment from Germany has to be recognized in Ireland, Brussels II *bis* applies.¹⁰⁶ At this stage it does not matter whether the German court had jurisdiction on the basis of Brussels II *bis* or on the basis of the Convention. When the German judgment has to be recognized in Switzerland, a non-EU party to the Convention, the Convention applies. Similarly, when a Swiss judgment has to be recognized in Germany, the Convention applies.

(b) Jurisdiction and the transfer of jurisdiction

However, the matter is more complicated in the area of jurisdiction and the transfer of jurisdiction.¹⁰⁷ The rule is that when the child has his or her habitual residence in the EU, Brussels II *bis* takes precedence.¹⁰⁸ Conversely, when the child has his or her habitual residence in a non-EU State party to the 1996 Convention, this Convention determines the jurisdiction rules. If the child is habitually resident in a third State not Party to the 1996 Convention, Brussels II *bis* prevails.¹⁰⁹ The Regulation extends the international jurisdiction when the child is not habitually resident in the EU, but is present on the territory of a Member State.¹¹⁰ Residually the Regulation refers to the bases of jurisdiction in the national

¹⁰⁶ Art 61(b) Brussels II *bis* and Art 52 Hague Child Protection Convention.

¹⁰⁷ See also T de Boer *supra* n 39, stating at 12: “Over the years I have noticed that international and European lawmakers do not seem to be very familiar with the way conventions or regulations should be demarcated from each other and from national sources of law, so as to enable practitioners to determine by which set of rules a legal issue must be solved if there is a choice between various alternatives.”

¹⁰⁸ Art 61(a) Brussels II *bis* and Art 52 Hague Child Protection Convention. See also the Explanatory Report by P Lagarde to the Child Protection Convention, <https://assets.hcch.net/upload/expl34.pdf>, accessed 20 January 2016 at 601-603, giving the context of the negotiations in the Hague while the EU Member States foresaw the possibility of legislating in the same area and wanted to safeguard their future instrument.

¹⁰⁹ D van Iterson, *supra* n 97, at 93.

¹¹⁰ Art 13 Brussels II *bis*.

laws of the Member States.¹¹¹ These provisions can only be used when the child is habitually resident neither in the EU nor on the territory of a State Party to the Child Protection Convention.

The real difficulties arise with respect to the prorogation of jurisdiction, time limitations to jurisdiction and the transfer of jurisdiction. We will now turn to these three difficulties.

The first is prorogation: both Brussels II *bis* and the Child Protection Convention contain the possibility for parties (most often the parents) to agree to bring the proceedings in a particular State.¹¹² However, the provisions differ quite substantially. The possibility of prorogation is much narrower under the Child Protection Convention than under Brussels II *bis*. Under the Convention prorogation is only possible to the divorce court and it is required that one of the parents has his or her habitual residence in the State of the court. Brussels II *bis* allows prorogation also in proceedings independent of divorce.¹¹³ Moreover, there is no requirement of habitual residence. Where the prorogation is not for the divorce court, the requirement is that the child should have a “substantial connection” to the Member State of the court.

In light of these differences, knowing which of the rules to apply is important. The scope rule remains the habitual residence of the child. In other words, if the child is habitually resident in the EU and the parents wish to litigate at a court in another EU Member State, Brussels II *bis* applies. If the child is habitually resident in a non-EU State that is party to the Child Protection Convention, the prorogation of a court (even if in the EU)

¹¹¹ Art 14 Brussels II *bis*.

¹¹² Art 12 Brussels II *bis* and Art 10 Hague Child Protection Convention.

¹¹³ Art 12(3) Brussels II *bis*.

depends on the Convention. The prorogation of an EU court when the child is habitually resident in a third State that is not Party to the Convention, falls under Brussels II *bis*.¹¹⁴

When the child is habitually resident in the EU but the parents agree to litigate at a Hague Convention State Party outside the EU, a conflict might arise. Let us assume that two Swiss nationals are married. They lived together in Germany, where their two children were born. When marital difficulties arise, the father moves back to Switzerland. The mother wants to introduce divorce proceedings in Switzerland.¹¹⁵ The parents agree that they will submit their dispute about the parental responsibility for the children to the same court. According to the Child Protection Convention such prorogation is valid. The father subsequently changes his mind and submits the dispute about parental responsibility to the German court. This court will apply the Regulation as the children are habitually resident in the EU, which means that the Regulation takes precedence. This conflict should be solved by clear wording in the Recast of Brussels II *bis*.

Second, time limitations to jurisdiction pose a similar problem. Under Brussels II *bis* jurisdiction is determined at the time the court of first instance is seized.¹¹⁶ Such jurisdiction perpetuates (called the principle of *perpetuatio fori*),¹¹⁷ also to the appeal level.¹¹⁸ The Child Protection Convention, however, provides that jurisdiction ceases when the child lawfully

¹¹⁴ This is confirmed by Art 12(4) which contains a specific reference to such cases.

¹¹⁵ On the basis of Art 59(1)(a) of the Swiss Code on Private International Law (Federal Act of 18 December 1987).

¹¹⁶ Art 8 Brussels II *bis*.

¹¹⁷ D van Iterson, *supra* n 97, at 95-103; S Rutten, “*Perpetuatio fori* in ouderlijk gezagskwesties” (2005) *Nederlands Internationaal Privaatrecht* 11.

¹¹⁸ See for instance two decisions of the Antwerp Court of Appeal in which it ruled that it retained jurisdiction even though the children had moved to The Netherlands in the meantime and lived there at the time when the appeal was instituted: CA Antwerp, *VJ v GS*, 15 June 2011 (English summary available at <http://www.eurprocedure.be/cases/2011-06-15.html>) and CA Antwerp *LM v VDZJB*, 23 December 2011 (English summary available at <http://www.eurprocedure.be/cases/2011-12-23.html>). The court ruled in both cases that it had jurisdiction because the court of first instance had jurisdiction. It then used Art 15 to transfer the jurisdiction to a Dutch court.

moves to another Contracting State.¹¹⁹ The lack of coordination between these rules is problematic. Staying with Germany and Switzerland as the example but departing from forum selection, let us assume that after proceedings were instituted in Germany, the place of the children's habitual residence, they move to Switzerland and become habitually resident there. Under Brussels II *bis* the German courts retain jurisdiction; under the Child Protection Convention, the Swiss courts obtain jurisdiction over the same children so that there is a duplication of proceedings. Applying the *lis pendens* rule¹²⁰ of the Child Protection Convention does not seem possible. That rule applies if both courts have jurisdiction on the basis of the Convention, but the German courts have lost jurisdiction according to the Convention. At the same time, the German courts have retained jurisdiction according to the Regulation, both for purposes of jurisdiction and for purposes of disconnection, it seems to us.

The converse situation, where the children move from Switzerland to Germany after proceedings have been instituted in Switzerland, is easier. The Swiss courts then lose jurisdiction when the children become habitually resident in Germany. The German courts can obtain jurisdiction on the basis of Brussels II *bis*.¹²¹

The way out of this conundrum is an alignment of the Recast of Brussels II *bis* with the Child Protection Convention. In other words, when a child moves from an EU Member State to a Child Protection Convention State outside the EU, jurisdiction should lie with the court at the place of the new habitual residence. If the child moves from the EU to a third

¹¹⁹ Art 5(2) Child Protection Convention.

¹²⁰ Art 13 Child Protection Convention.

¹²¹ See also D van Iterson, *supra* n 97, at 95-103.

State where the Child Protection Convention does not apply, or from such a State to the EU, there is no continuing jurisdiction and Brussels II *bis* will prevail.

The third problem of coordination between the instruments in the field of jurisdiction, similar to the previous two, is the transfer of jurisdiction. Both Brussels II *bis* and the Hague Child Protection Convention contain the possibility for a court with jurisdiction to transfer the case to a court better placed to hear it.¹²² This can be done on the initiative of either of the courts or on the initiative of one of the parties. The Child Protection Convention does not explicitly refer to the possibility for a party to take the initiative, but of course a party can request the court to consider transfer. The mechanisms are similar and are based on the common law concept of *forum non conveniens*.¹²³ The Child Protection Convention is explicit about the fact that the mechanism can only be used when jurisdiction is based on the habitual residence of the child or the presence of the child. Brussels II *bis* does not contain this specification. This led to a question of interpretation at the Court of Justice of the EU about the relation between prorogation and transfer of jurisdiction.¹²⁴ The Court, however, did not respond to the question of whether a chosen court can transfer its jurisdiction.¹²⁵

According to the disconnection rules, Brussels II *bis* applies when the child is habitually resident in the EU. Strictly speaking this means that when a case is brought at a German court because that is the place of the habitual residence of the child, the transfer mechanism can only be used to other courts in the EU. If the German court wishes to transfer the case to

¹²² Art 15 Brussels II *bis* and Arts 8 and 9 Child Protection Convention.

¹²³ See Explanatory Report by P Lagarde, *supra* n 108, at 561 (para 55).

¹²⁴ Case C-436/13, *E v B* ECLI:EU:C:2014:2246 .

¹²⁵ The second question in Case C-436/13, *ibid*, was: "Does Article 15 of [Regulation No 2201/2003] allow the courts of a Member State to transfer a jurisdiction in circumstances where there are no current proceedings concerning the child?" Because of the response given to the first question (see above), the Court considered it unnecessary in this case to respond to this second question.

a court in a State party to the Child Protection Convention but outside the EU (such as Switzerland), transfer is not possible. The Swiss courts cannot gain jurisdiction on the basis of a Brussels II *bis* transfer. The German court is bound to apply Brussels II *bis* because it prevails over the Hague Child Protection Convention. Surely that cannot be right. Therefore, a clarification is needed also for this situation. EU courts should be permitted to use the transfer mechanism also towards States Party to the Hague Convention outside the EU.

3. Children's rights

All EU Member States are party to the UN Children's Rights Convention.¹²⁶ The Charter of Fundamental Rights of the EU also includes children's rights.¹²⁷ In the judicial space that the EU has become, these rights are worthy of full respect and protection.¹²⁸ Children can no longer be seen as incidental happenings of the free movement of their parents, but must be regarded as the bearers of rights. Brussels II *bis* on its face takes a child-friendly approach, using wording such as "parental responsibility" rather than "parental authority" and referring to the best interests of children.

(a) The best interests of the child

The term "best interests of the child" is used in different senses, depriving it of sensible meaning. This magical term provides the basis of the jurisdiction rules, but at the same time also the basis for its exceptions.¹²⁹ This confusion should be rectified by a rephrasing of the Recitals. It should be clear that the best interests of the child are paramount and that they do not necessarily coincide with the criterion of proximity.

¹²⁶ Adopted on 20 November 1989.

¹²⁷ Art 24 Charter of Fundamental Rights of the EU.

¹²⁸ See COM(2011) 60 final: "Communication from the European Commission to the European Parliament, the Council, etc of 15 February 2011, An EU Agenda for the Rights of the Child"; H Stalford, *Children and the European Union* (Hart Publishing, 2012) at 28-30.

¹²⁹ See the references in Recitals 12 and 13; Arts 12, 15 and 23 Brussels II *bis*. See also H Stalford, *ibid*, at 100-104.

To make the Regulation's commitment clear, a stronger and more credible approach would be to refer explicitly to the EU Charter and to the Children's Rights Convention.¹³⁰ This would have the effect that the "best interests of the child" would have to be interpreted in accordance with that Convention and the commentary it has produced.¹³¹

The European Court of Human Rights has issued a number of judgments on the application by domestic courts of the Child Abduction Convention,¹³² and even on the application of the child abduction provisions of Brussels II *bis*.¹³³ The Court has maintained that fundamental rights must be respected in child abduction cases. National courts may not simply consider the general interests of children, but the interests of each child must be examined concretely. The *Neulinger* judgment (Grand Chamber) seemed to make a rapid return impossible, as the Court required an in-depth examination of the situation of the child. This led to criticism.¹³⁴

The Grand Chamber of the Court nuanced the *Neulinger* judgment in *X v Latvia*, explaining that the Child Abduction Convention and the European Convention on Human Rights can co-exist.¹³⁵ What is required is for the court considering the return to consider the grounds for

¹³⁰ According to Art 3 of the Children's Rights Convention the best interests of the child shall be a primary consideration in all actions concerning the child.

¹³¹ See for instance Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> (see General Comments), accessed 1 November 2015. This General Comment contains a non-exhaustive list of criteria for considering the interests of the child (at 13-21).

¹³² Such as ECtHR *Neulinger and Shuruk v. Switzerland* (Grand Chamber), no. 41618/07, 6 July 2010; *Raban v. Romania*, no. 25437/08, 26 October 2010; *B. v. Belgium*, no. 4320/11, 10 July 2012; *X. v. Latvia* (Grand Chamber), no. 27853/09, 26 November 2013. See also P Beaumont, K Trimmings, L Walker and J Holliday, "Child abduction: recent jurisprudence of the European Court of Human Rights" (2015) *International and Comparative Law Quarterly* 39.

¹³³ ECtHR *Šneerson and Campanella v. Italy*, no. 14737/09, 12 July 2011.

¹³⁴ See for instance P Beaumont and L Walker, "Shifting the Balance Achieved by the Abduction Convention: the Contrasting Approaches of the European Court of Human Rights and the European Court of Justice" (2011) *Journal of Private International Law* 231 at 236-237.

¹³⁵ *X v. Latvia*, *supra* n 132, at para 106.

refusal in light of the interests of the particular child. This includes an examination of the issues raised by the parties, giving the child the opportunity to be heard, and acting expeditiously.¹³⁶ This is no easy task for national judges, and whether they will succeed remains to be seen.

(b) The Right of the child to be given the opportunity to be heard

According to the Preamble of Brussels II *bis* the hearing of the child plays an important role in the application of the Regulation, although the Regulation does not intend to modify national procedures.¹³⁷ The Regulation refers to this right in various articles.¹³⁸

In fact all Member States should be concerned with respecting the right of the child to be heard under the EU Charter and under the Children's Rights Convention. The child has the right to express his or her views freely in all matters affecting him or her.¹³⁹ This right applies to all children capable of forming a view. The child further has the right that that view must be given due weight, in accordance with the age and maturity of the child. Brussels II *bis* should place more emphasis on children's rights.

First, the provision on child abduction obliges the court considering the return to give the child the opportunity to be heard "unless this appears inappropriate having regard to his or her age or degree of maturity."¹⁴⁰ The wording is stronger than that of Hague Child Abduction Convention, which merely provides a ground for refusal if the child objects to return and "and has attained an age and degree of maturity at which it is appropriate to take

¹³⁶ The European Court of Human Rights has reiterated the obligation upon national courts to act expeditiously in the recent case of *Adžić v. Croatia*, no. 22643/14, 12 March 2015.

¹³⁷ Recital 19 Brussels II *bis*.

¹³⁸ See Arts 11(2), 23b), 41(2)(b) and 42(2)(a) Brussels II *bis*.

¹³⁹ Art 12 Children's Rights Convention. For a detailed discussion of this provision and its application, see A Parkes, *Children and International Human Rights Law. The Right of the Child to be Heard* (Routledge, 2013).

¹⁴⁰ Art 11(2) Brussels II *bis*. This approach is echoed in Art 42(2)(a) of the Regulation. Art 41(2)(c) on the enforcement of access rights uses the same wording.

account of its views.”¹⁴¹ In the drafters’ view, this provision was necessary for strong-willed 15-year-olds.¹⁴² Although an improvement, the rule as stated in Brussels II *bis* still potentially infringes the right guaranteed by the Children’s Rights Convention. A judge cannot decide not to hear the child because he or she is insufficiently mature. The judge must hear the child and only when considering the weight that must be given to the child’s views can he or she consider the child’s age and degree of maturity.¹⁴³

Second, when using the fact that the child had not been given the opportunity to be heard as a ground to refuse recognition, Brussels II *bis*’s test is whether the failure to grant such opportunity was “in violation of fundamental principles of procedure of the Member State in which recognition is sought.”¹⁴⁴ This test seems overly-prudent in the protection of national procedural autonomy. The test should rather be whether there was a violation of the Children’s Rights Convention. Such reference would confirm what should be the case already: the same standards of children’s rights apply all over the EU. Moreover, it would assist in converging the laws of Member States. This does not mean that national procedural rules on how, and by whom the child is heard must be changed. Merely the standard should be set straight.

Third, the certificates that Brussels II *bis* introduced requests the judge to confirm that the child has been given the opportunity to be heard. However, this question is open to interpretation. This was made abundantly clear by the facts in the case of *Aguirre Zarraga v*

¹⁴¹ Art 13 para 2 Hague Child Abduction Convention.

¹⁴² See the Explanatory Report to the Hague Child Abduction Convention by E Pérez-Vera, <http://www.hcch.net/upload/expl28.pdf>, accessed 1 November 2015 at 433.

¹⁴³ See Committee on the Rights of the Child, *General Comment No. 12 (2009) on the right of the child to be heard*, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> (see General Comments), accessed 1 November 2015 at 9.

¹⁴⁴ Art 23(b) Brussels II *bis*.

Pelz.¹⁴⁵ In this case the child and the mother were in Germany (where the mother had abducted the child to). The Spanish court had to consider the return of the child in a second chance procedure (discussed in more detail below). The court invited the mother to attend the hearing with the child so that she could be heard. However, there were criminal proceedings pending against the mother in Spain and without the assurance that she would not be arrested, she was not prepared to travel to Spain. In addition, she wanted the assurance that the child could return to Germany with her after the hearing, which was not granted either in light of the custody situation in Spain. She suggested that the child be heard via video conference, but the court refused this possibility. Was this child given the opportunity to be heard? The Spanish court thought that she was. The mother of course disagreed with this interpretation. The law should require that the certificate be formulated more clearly.¹⁴⁶ Moreover, the certificate should be served with the judgment, in order to fully inform the counter-party of the state of affairs.

4. *International Child Abduction*

Brussels II *bis* enhances the goals of the Hague Child Abduction Convention in several ways. Some of the mechanisms work well, while others cause nothing other than increased litigation followed by stalemate. The good parts of the enhancement include: the obligation to give the child the opportunity to be heard (although this can be improved, as discussed above); the obligation to respect the six-week period; the obligation to see whether the risk for the child upon return can be addressed in the State of his or her former habitual residence, and giving the applicant in the return proceedings the opportunity to be heard.¹⁴⁷

¹⁴⁵ Case C-491/10PPU ECLI:EU:C:2010:828 .

¹⁴⁶ See Part D of this Article.

¹⁴⁷ Art 11(2)-(5) Brussels II *bis*.

Some of these enhancements, such as the obligation to attempt having the risk addressed in the State of the former habitual residence, are in line with the *good practices* identified by the Hague Conference on Private International Law.¹⁴⁸

However, Brussels II *bis* has also introduced a second-chance procedure (also called the “overrule procedure”¹⁴⁹) for situations in which the return of the child was refused by the court of the State of refuge.¹⁵⁰ This procedure flies in the face of mutual trust: even though a court in a Member State has decided that the child must not return, the legislator wants another court to reassess the case.¹⁵¹ Moreover, the availability of the second-chance procedure depends on the basis on which return was refused. If the return was refused because the court considered that the child was habitually resident in its State rather than in the State to which return is sought,¹⁵² there is no second chance. The same is true if return was refused because the abduction took place more than a year prior to the institution of proceedings and the child is settled in the new environment.¹⁵³ No second chance either if the return was refused on the basis of fundamental rights concerns.¹⁵⁴

The second chance procedure is available if the return was based on the much-used Article 13 defences.¹⁵⁵ These are that the left-behind parent was not actually exercising his

¹⁴⁸ See the Conclusions of the various *Special Commissions*, as well as the Hague Conference’s Guides to Good Practice on the Child Abduction Convention, available from the HCCH Abduction homepage, <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction> accessed 20 January 2016.

¹⁴⁹ I Curry-Sumner, “The Revision of Brussels II *bis*” (2015) *Nederlands Internationaal Privaatrecht* 1.

¹⁵⁰ Art 11(6)-(8) Brussels II *bis*.

¹⁵¹ For a different view, see L Carpaneto, “In-depth consideration of family life v. immediate return of the child in child abduction proceedings within the EU” (2014) *Rivista di diritto internazionale privato e processuale* 931 at 943 and following.

¹⁵² Art 3 Hague Child Abduction Convention.

¹⁵³ Art 12 Hague Child Abduction Convention.

¹⁵⁴ Art 20 Hague Child Abduction Convention.

¹⁵⁵ On the use of the defences, see N Lowe, “A Statistical Analysis of Applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Overall Report”, Preliminary Document No 3, Part I on International Child Abduction (2006),

or her custody rights, that he or she had consented in the removal or subsequently acquiesced, that there is a grave risk of psychological or physical harm to the child if returned, and that the child objects to return and is of a sufficient age and maturity that the judge must take account of his or her views.

The first problem is that it is not uncommon that a refusal is based on more than one ground. In these circumstances it is unclear whether the second chance procedure is available or not. The second problem is that the second chance procedure takes up more time. Brussels II *bis* does not even provide a time limit in which this procedure must be completed. Third, the extra procedure potentially increases the conflict in the family. It increases the stress on the entire family and especially the child. Fourth, if we take children's rights seriously, as we have advocated above, it is inconceivable to listen to the child only the second time he or she says something.

Our proposal is to abolish the second chance procedure and return to the delicate balance struck by the Hague Child Abduction Convention.¹⁵⁶ This will recover the same treatment of abducted children whether in or outside the EU. It will reiterate the approach of reverse subsidiarity.

https://assets.hcch.net/upload/wop/abd_pd03e1_2007.pdf, at 37, accessed 20 January 2016; and N Lowe, "A statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the civil aspects of international child abduction* Part I – global report" Preliminary Document No 8a (2011) <https://assets.hcch.net/upload/wop/abduct2011pd08ae.pdf> at 28, accessed 20 January 2016

¹⁵⁶ See also I Curry-Sumner, *supra* n 149.

5. *Exequatur and its abolition*

Currently Brussels II *bis* has abolished exequatur for two situations. The first is for “rights of access”.¹⁵⁷ The second is for the return order subsequent to the second chance procedure.¹⁵⁸

For the first situation, the question arises as to what exactly “rights of access” entail. The term has in many legal systems been replaced by more child-friendly phrases, such as “contact” or “secondary residence”. When one then turns to Brussels II *bis* for a definition, one finds that “the term rights of access shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time.” This words “shall include” indicate that this is not a comprehensive definition; other arrangements may also be included. It is for instance unclear whether a situation where a child spends an equal amount of time in two Member States (with two parents living close to the border) falls within the category. Moreover, residence and contact are often taken up in the same judgment. Even if they are not, it would be strange to enforce measures on access before enforcing residence orders.¹⁵⁹

It would therefore make sense to choose one approach for all judgments concerning parental responsibility. The political agenda is in favour of the abolition of *exequatur*.¹⁶⁰ If the legislators choose this route, there should be clear safeguards in order to guarantee the

¹⁵⁷ Art 41 Brussels II *bis*.

¹⁵⁸ Art 42 Brussels II *bis*.

¹⁵⁹ See J M Scott, “A question of trust? Recognition and enforcement of judgments” (2015) *Nederlands Internationaal Privaatrecht* 27 at 28.

¹⁶⁰ This is in line with the general approach of the EU legislator. See COM(2014) 225, *supra* n 3, 9; Council of the European Union, “The Stockholm Programme - An open and secure Europe serving and protecting the citizen” of 2 December 2009, at paras 3.1.2 and 3.3.2.

rights of the child.¹⁶¹ At the very least, the Brussels I *bis* should be used. Under that Regulation, the person against whom enforcement is sought may request the refusal of enforcement in the requested State on a limited number of grounds.¹⁶²

For the second chance procedure, the abolition of *exequatur* has raised many questions and seems not to work well in practice.¹⁶³ As we have explained above, we believe that the second chance procedure should be abolished altogether. However, if this result were not attainable in the context where unanimity in the Council is required, we would also argue here in favour of additional safeguards. First, the certificate should be served on the party (parent) refusing to return the child. The certificate must contain clear language, so as to avoid the disagreements that have arisen in the case law. If the certificate is false, the party contesting enforcement should have access to a court in the State of enforcement.

It seems to make much more sense to abolish *exequatur* for the initial return order, ie the order by the State of refuge. In the normal course of the proceedings, this will be a national enforcement: the return order is given by a court in the State in which the child is present. However, in a free-movement zone such as the EU, it is easy for an unwilling parent to move across another border. Rather than requiring a declaration of enforceability in such a case, the effects of the return order should automatically follow the disobeying parent. (If the return order is still appealable, such appeal would have to be brought in the original State of refuge, according to the principle of *perpetuatio fori*.)

¹⁶¹ J M Scott, *supra* n 159, states at 27: "Measures designed to promote the best interests of children can backfire and cause damage if enforcement is inadequate."

¹⁶² Art 46 Brussels I *bis*.

¹⁶³ The Centre for Private International Law of the University of Aberdeen is conducting more research on this issue funded by the Nuffield Foundation: see <http://www.nuffieldfoundation.org/conflicts-eu-courts-child-abduction> and <http://www.abdn.ac.uk/law/research/conflicts-of-eu-courts-on-child-abduction-417.php> accessed on 20 January 2016.

6. National procedure must not be influenced

One of the questions that the Recast of Brussels II *bis* raises is the extent to which national procedural law should be harmonized. We believe that such process should not be undertaken in an instrument on a particular topic. Fragmenting the procedural laws, each of which has a coherent logic, is not a good idea.

However, the European Union legislator has a useful role to play in the setting of certain minimum standards.¹⁶⁴ Such standards should not be set out in the Recast of Brussels II *bis* itself. The EU legislators should use the appropriate legal instrument, which in this case is a directive.¹⁶⁵ This legal instrument places the obligation on Member States to transpose the standards into their national law of civil procedure. It also places a sanction in the case of non-compliance.¹⁶⁶

Minimum standards that should be incorporated include:

- a) All parental responsibility proceedings must be speedy. It makes no sense to have a quick return and then have the proceedings as to the substance of the dispute drag on for months, or even years in some cases.
- b) For child abduction cases, there should be a concentration of jurisdiction in one or several courts per Member State.¹⁶⁷ This enables speedier proceedings as know-how is centralized. Whether one or several courts should have this jurisdiction, depends on the specifics of each Member State.

¹⁶⁴ The European Commission has already referred to this possibility: COM(2014) 225, *supra* n 3, at 15.

¹⁶⁵ The adoption of a Directive is possible on the basis of Arts 228 and 289 of the Treaty on the Functioning of the EU. Art 81 does not depart from this aspect of the general rule.

¹⁶⁶ See Arts 258 and 260 of the Treaty on the Functioning of the EU.

¹⁶⁷ See Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures*, https://assets.hcch.net/upload/abdguide2_e.pdf accessed 20 January 2016, Para 5, p 28 *et seq.*

- c) For child abduction cases, there should be a limitation to the right of appeal. It should not be possible to appeal a return order more than once.¹⁶⁸

D. Proposed amendments to the Regulation

It is clear from the analysis above that a number of provisions are up for change. In the following overview, we wish to set out possible and even necessary amendments to the Regulation. These are nevertheless only first steps in altering the Regulation; we do not pretend to have covered the entire scope of the Recast.¹⁶⁹

A first set of amendments are addressed at the Recast of Brussels II *bis*. Our suggested amendments are underlined.

1. Recital 8:

As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the validity of the marriage, the grounds for divorce, property consequences of the marriage or any other ancillary measures.

If a marriage is valid according to the conflict-of-laws rules applicable in the Member State of the court seised, this court must determine its jurisdiction in matrimonial matters on the basis of the Regulation.¹⁷⁰

¹⁶⁸ A good example in this sense is the legislation in the Netherlands, which allows an appeal to the court of appeal, but no further than that (Art 13(7)-(8) of the *Uitvoeringswet internationale kinderopvoering* of 2 May 1990, as amended). This is also in line with the Hague Conference's Guide to Good Practice on Implementing Measures, *ibid*, Para 6.6, p 36-37.

¹⁶⁹ For example, the question remains how the scope of Brussels II *bis* should be delineated with respect to other European Union Regulations, such as the Maintenance Regulation, the Succession Regulation or even the proposed Regulations on matrimonial property. We also did not discuss whether the EU legislators should opt for two individual instruments: one on matrimonial matters and one on parental responsibility.

¹⁷⁰ We thus propose aligning Brussels II *bis* to Rome III, although we are in favour of an autonomous notion of "marriage". This is done because we believe that striking an agreement between the Member States on this subject will be impossible.

Insert Recital 8bis:

In order to ensure that the courts of all Member States may, on the same grounds, exercise jurisdiction in matrimonial matters, this Regulation should list exhaustively the grounds on which jurisdiction in the European Union may be exercised. No reference is to be made to national rules on private international law.

In order to remedy, in particular, situations of denial of justice, this Regulation should provide a *forum necessitatis* allowing a court of a Member State, on an exceptional basis, to rule on a claim for divorce, legal separation or annulment of a marriage which is closely connected with a third State or a Member State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State or the Member State in question, for example because of civil war or the non-recognition of the marriage, or when a party cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on *forum necessitatis* should, however, be exercised only if the case has a sufficient connection with the Member State of the court seised.

2. Insert Recital 11bis:

The bases of jurisdiction for matters of parental responsibility in this Regulation should be interpreted in the light of the principle of the best interests of the child.

Any reference to the “best interests of the child” in this Regulation shall be interpreted in light of Article 24 of the Charter of Fundamental Rights of the European Union and the UN Convention on the Rights of the Child.

3. Recital 12:

The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are founded upon ~~shaped in the light of the best interests of the child, in particular on the criterion of proximity. Therefore, the child's habitual residence is used as the general basis of jurisdiction. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility. In some instances other principles may require a departure from the general basis of jurisdiction, such as an agreement by holders of parental responsibility. Such departure should only be permitted when the child's best interests are served.~~

4. Recital 13

In exceptional cases, the court of the habitual residence may not be the most appropriate court to hear the case. ~~In the interest of the child, t~~ This Regulation therefore allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

5. Recital 19:

The hearing of the child in conformity with Article 24(1) of the Charter of Fundamental Rights of the EU and Article 12 of the UN Convention on the Rights of the Child, plays an important role in the application of this Regulation ~~although this instrument is not intended to modify national procedures applicable.~~

6. Article 1(3):

This Regulation shall not apply to:

- i. the existence, validity or recognition of a marriage;
- ii. the legal capacity of natural persons;
- iii. the name of the spouses;
- iv. the property consequences of the divorce, legal separation or marriage annulment;

(a) (...)

7. Insert Article 3*bis*

Choice of court:

Option 1:

- 1. The spouses may agree at any time that a court in a Member State shall have exclusive jurisdiction over divorce or separation proceedings between them.

Option 2:¹⁷¹

- 1. The spouses may agree that any of the following courts of a Member State is to have jurisdiction in a proceeding between them relating to matrimonial matters:¹⁷²

a) any of the courts which have jurisdiction on the grounds listed in Article 3,

or

b) the court of the Member State of the spouses' last common habitual residence, if none of them still resides there, or

¹⁷¹ As explained, we are of the opinion that a restriction in possibilities for the choice of court is unnecessary. Nevertheless, we have drafted options for unlimited and limited choices.

¹⁷² This provision is modelled on the Proposal in COM(2006) 399, *supra* n 38. However, we agree with A Borrás that a reference to a "substantial connection" is unnecessary, as the bases for the choice are listed exhaustively, *supra* n 38, at 6.

c) the court of the Member State of which at least one of the spouses is a national or, in the case of the United Kingdom and Ireland, has his or her 'domicile'.

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

8. Articles 6 and 7: delete

9. Insert new Article 6:

Forum necessitatis

Where no court of a Member State is able to exercise jurisdiction under this Regulation,¹⁷³ the courts of a Member State may, on an exceptional basis, rule on the matrimonial matters if proceedings cannot reasonably be brought or conducted or would be impossible in a third State or a Member State with which the case is closely connected.

The case must have a sufficient connection with the Member State of the court seised.

10. Article 8:

¹⁷³ This phrase refers to the situation where the court with jurisdiction is in a Member State that does not recognize the marriage.

Insert: Subject to Article 10, in case of a change of the child's habitual residence, even during the proceedings, to another EU Member State or to a Contracting State of the Hague Convention of 19 October 1996, the courts of the State of the new habitual residence shall have jurisdiction and the jurisdiction of the courts of the former habitual residence shall cease to exist.

11. Article 11(2):

When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings if the child is capable of forming his or her own views. The judge shall give due weight to the child's views in accordance with his or her age and maturity ~~unless this appears inappropriate having regard to his or her age or degree of maturity.~~

12. Article 11(6) – (8)

Option 1: delete

Option 2: amend Article 11(6):

If a court has issued an order on non-return pursuant to Article 13(1)b) of the 1980 Hague Convention, the court must...

13. Article 20:

In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures:

- i) regarding divorce, in respect of a spouse, or
- ii) regarding parental responsibility in respect of a child ~~persons~~ or assets

in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

When assessing its jurisdiction to grant measures regarding parental responsibility, the court must take the best interests of the child into consideration.

14. Article 23(b):

A judgment relating to parental responsibility shall not be recognized: ...

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation ~~of fundamental principles of procedure of the Member State in which recognition is sought~~ of Article 24 of the Charter of Fundamental Rights of the EU or Article 12 of the UN Convention on the Rights of the Child;

15. Article 41(2)(c):

The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if: ...

(c) the child was given an opportunity to be heard in accordance with Article 12 of the UN Convention on the Rights of the Child ~~, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.~~

16. Article 42(2)(a):

The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard in accordance with Article 12 of the UN Convention on the Rights of the Child , ~~unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;~~

17. Article 61(a):

As concerns the relation with the 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, this Regulation shall apply:

(a) where the child concerned has his or her habitual residence on the territory of a Member State subject to the following:

- i. Where the parties agree to the jurisdiction of a court in a State Party to the Hague Convention of 19 October 1996 in which this Regulation does not apply, Article 10 of that Convention shall take precedence over this Regulation;
- ii. With respect to the transfer of jurisdiction between a court in the EU and a court in a State Party to the Hague Convention of 19 October 1996 in which this Regulation does not apply, Articles 8 and 9 of that Convention shall take precedence over this Regulation.

18. Certificate in Annex III:

~~(11) The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity~~

Child 1 was heard: Yes/no.

If no, reason:

Child 2 was heard: Yes/no.

If no, reason:

Child 3 was heard: Yes/no.

If no, reason:

Child 4 was heard: Yes/no.

If no, reason:

Child 5 was heard: Yes/no.

If no, reason:

19. Certificate in Annex IV:

~~(11) The children were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity~~

Child 1 was heard: Yes/no.

If no, reason:

Child 2 was heard: Yes/no.

If no, reason:

Child 3 was heard: Yes/no.

If no, reason:

Child 4 was heard: Yes/no.

If no, reason: _____

Child 5 was heard: Yes/no.

If no, reason: _____

A second set of provisions should be enacted in a Directive. The purpose of these provisions is the better operation of national procedural law in the light of Brussels II *bis*:

1. Member States shall concentrate jurisdiction for orders for the return of abducted children under Article 11(1)-(5) of [Regulation Brussels II bis Recast] to preferably one but no more than eight courts per Member State.
2. There shall be no more than one appeal possible against judgments ordering or refusing return based on Article 11(1)-(5) of [Regulation Brussels II bis Recast].
3. In cases of parental responsibility, national courts must explicitly mention the basis of their competence (especially in the case of provisional measures) in the judgment.

E. Conclusion

Brussels II *bis*, as applicable in matrimonial matters and matters of parental responsibility, is a useful European Union instrument on international procedure that deals with the private aspects of citizens' lives: their failed marriages and their children. As the Regulation is celebrating its tenth anniversary and as there is a Recast on the way, we thought it useful to not only set out its main rules but also draw attention to the rules ready for an amendment.

We have thus outlined the possible and desired changes. By doing so, we hope to have given the reader a further insight into its application and interpretation.

Our proposals are ambitious in some respects. That is our prerogative as commentators. However, we realise that reaching unanimity between 27 Member States in the domain of international family law is no easy task. We do believe, together with Professor Borrás, that where no unanimity can be reached, it is better to maintain the current rules for all Member States (except Denmark) than to create different rules for some through the enhanced cooperation mechanism.¹⁷⁴

¹⁷⁴ A Borrás, *supra* n 38, at 6 and 9.