

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**



# Cross-border placement of children in the European Union

Committee on Legal Affairs





DIRECTORATE GENERAL FOR INTERNAL POLICIES  
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

# Cross-border placement of children in the European Union

## STUDY

### **Abstract**

This study, commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, explores the range and nature of problems linked to the cross-border placement of children and to the application of article 56 of the Brussels IIa Regulation. Based on an analysis of the practice in 12 Member States and European case law, it identifies a number of shortcomings in the current legislative framework. Looking ahead to the recast of Brussels IIa, the study sets out recommendations to remedy some of the weaknesses, such as clarifying the respective tasks of the Member States involved in cross-border placement cases and facilitating the recognition and enforcement of cross-border placement orders.

## **ABOUT THE PUBLICATION**

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## LIST OF ABBREVIATIONS

- EU** European Union
- TEU** Treaty of the European Union
- TFEU** Treaty on the Functioning of the European Union
- CJEU** Court of Justice of the European Union
- CoE** Council of Europe
- ECHR** European Convention on Human Rights
- ECtHR** European Court of Human Rights
- Brussels IIa** Council Regulation (EC) N°. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) N°. 1347/2000
- HCCH** Hague Conference on Private International Law
- 1980 HC** Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- 1996 HC** 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
- Lagarde report** Explanatory Report on the 1996 Hague Child Protection Convention
- Practical Handbook** Practical Handbook on the Operation of the 1996 Child Protection Convention
- UN** United Nations
- UNCRC** 1989 United Nations Convention on the Rights of the Child
- HSE case** CJEU judgment of 26 April 2012, Health Service Executive (HSE), case C-92/12 PPU, in electronic Reports
- ICJ** International Court of Justice
- PIL** Private International Law
- MS** Member State

## EXECUTIVE SUMMARY

### 1. Aim and Scope of the Study

Cross-border placement in the EU judicial area is an issue of concern - the application of Article 56 of the Brussels IIa Regulation, which is the key EU law provision in the field, is raising some difficulties in EU Member States. This is apparent from the decision of the European Court of Justice in the HSE case and also from some petitions submitted to the European Parliament confirming the existence of concrete obstacles in the placement of children in cross-border situations within the EU judicial area and, therefore, the need to amend the existing legislative framework.

The European Commission report on the application of the Brussels IIa Regulation, which was followed by a public consultation and a more recent study on the assessment of the Regulation, have confirmed that the application of the rules on parental responsibility is still perceived as difficult by the practitioners and the rules on the cross-border placement of children need to be reviewed.

The European Commission is now working on a proposal for the review of the Brussels IIa Regulation. Given difficulties encountered in the adoption of new rules in the field of matrimonial matters, it is likely that priority and specific attention will be granted to the rules on parental responsibility and, therefore, also to the cross-border placement of children.

In this context, the Committee on Legal Affairs of the European Parliament had requested further study on the judicial application of EU family law in the Member States. Given the abundant literature on application of the rules on parental responsibility, the Policy Department on Citizens' Rights and Constitutional Affairs commissioned this study to focus on art. 56 with the purpose of determining the breadth and types of problems connected to the cross-border placement of children in the EU and, then, of providing suggestions for improving the legal framework and overcoming some or possibly all of the identified issues of concern.

### 2. Background and Legal Framework

#### 2.1 The private and public dimensions of placement

**Placement** may be defined as a measure of child protection, which is necessary when a child has no one to look after him/her effectively or when a child needs special support due to a mental or physical illness/deficiency.

The adoption of this measure of protection is, first of all, in the interests of the child himself/herself and it is also in the interests of the parents and of the other family members.

In this light, placement regards relations between individuals and, therefore, may be considered as a matter of "**private law**" or, rather, as a civil matter following the EU autonomous notion provided by art. 81 TFEU.

On the other hand, the placement of a child in a foster family, institution or any other care solution may be defined as a measure of "social" protection and, therefore, as a matter of "**public law**", since it regards the State's relations with private parties or, rather, the State's interference in family life. It is in the interest of the State and the community at large to safeguard the rights of the child and to avoid the adverse effects deriving from the behaviour of minors lacking adequate material and moral care. As a matter of fact, the



placement of a child generally implies the intervention of public authorities and, therefore, there is little doubt on the public law character of placement.

**In this light, placement and, more generally, matters concerning children are relevant examples of the existing and growing interactions between private and public law and, at the same time are confirmations of the weakening of the distinction between private and public law.**

## 2.2 The Cross-border dimension

Placement is also characterized by a **“cross-border” dimension**: the child over whom a specific State (State of origin) has jurisdiction - being the State of the child’s habitual residence or the State where the child is – is sometimes to be placed in care across the border in another State (hosting/host State). **In other terms, the cross-border character derives from the fact that the protection measure at stake is decided by the competent authority of the State of origin, but it is put in practice by the competent authority of the host State within its borders.**

For long time, a uniform regime in the field of protection measures or some form of cooperation among States in this field has been lacking.

With the adoption of the UNCRC, the need of granting special protection and assistance to those children who, for different reasons, could not be allowed to remain in their family environment was expressly considered. Under art. 20 of the UNRCR, States are under a duty to ensure alternative care instruments for children in need of care, such as *«foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children»*. Furthermore, in considering and establishing the best care solution for a vulnerable child, the States shall pay due regard to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.

In this view, art. 21 of the UNCRC expressly states that priority shall be granted to care solutions in the child’s country of origin, such as placement in a foster family, an adoptive family or any other care solution; inter-country adoption should be considered a residual solution. However, art. 21 clearly grants priority to purely “domestic” solutions of care over the only cross-border care solution existing at the time (i.e. inter-country adoption), following the idea that “management” of the protection measures for children is an issue which the State shall preferably solve within its own borders with the help of the protection measures envisaged by its own legal order.

As a matter of fact, the growing interconnections among States together with the growing mobility of persons have made it possible to consider the feasibility of some form of cooperation and mutual trust in the field. In other words, **the cross-border dimension of a care solution has started to be considered as an opportunity: a care solution available in a State other than the child’s State of origin may sometimes better meet the child’s specific and individual needs. The establishment of mechanisms of cooperation in this field has the effect of giving rise to an upward competition among legal order, since the public authorities dealing with issues of placement of children are in the position to select the best care solution satisfying the interests of the child at stake among a variety of solutions.**

## 2.3 Legal framework in force in the EU

The relevant mechanisms of cooperation in force at the global and regional levels are regulated by **art. 33 of the 1996 HC** and by **art. 56 of the Brussels IIa**, respectively. Since all EU MS are parties to the 1996 HC, both texts apply in the EU although Brussels IIa takes precedence in the relations among EU MS. The two regimes remain however

interesting to compare with a view to improving the EU legal framework. Although largely coincident, the study explores how they differ with respect to the scope of application, the procedure outlined and the regime of costs.

### 3. Critical issues

A crucial element in assessing the functioning of cross-border placement within the EU judicial space is the application of art. 56 of Brussels IIa by the EU MS. From the survey on the legal systems of the 12 selected EU MS (Belgium, Bulgaria, the Czech Republic, France, Germany, the United Kingdom, Ireland, Italy, Latvia, Malta, the Netherlands and Spain), some critical aspects regarding the application of art. 56 have emerged.

First of all the fact that **art. 56 applies not only to “pure” cross-border placement** (where the authorities of an EU MS choose to make use of a situation of care existing in and provided by another EU MS), **but also to other forms of placement where the cross-border dimension is less evident** (such as, for example, the placement of German children in structures which are located in other EU MSs, but are run by German citizens) not expressly considered by art. 56 and it sometimes applies also to the cases of unaccompanied and abandoned children.

The practice of the selected Member States also shows that **the notion of placement is not univocal in the EU** and, therefore, **the application of art. 56 is not uniform**. Art. 56 does not generally apply to “voluntary” foster care/placement: when the child is placed with relatives abroad, art. 56 procedure tends to be disregarded in some member States (even if art. 56 does not make a distinction between a foster family where the family is made up of relatives and a foster family “unknown”).

Furthermore, **the survey clearly shows that the placement of the child is very often (if not always) done before authorization/consent**, which therefore is provided retroactively. This is a problem in many respects: first of all, it means that the procedure is not respected; secondly, since the intrinsic function of consent, which is to give the receiving State the chance to consider placement in the light of compliance with domestic laws on migration, is frustrated; finally it seems that to deny consent to a cross-border placement once the child is already physically placed in an institution or a foster family, the solution of care provided has to be very detrimental to the child. **This means that even a somewhat inappropriate solution of care may be approved by the receiving State, contrary to the best interests of the child.**

A relevant problem concerning placement is also the **incompleteness of the information provided by the foreign Central Authorities asking for cross-border placement.**

With regard to the length of the whole placement procedure (i.e. from the request to the receiving State to the actual placement of the child abroad), official data are not available, but the information and data collected in the context of this study tend to show that it is generally completed within one year from the request of placement. Under art. 56, the procedure for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State. As a consequence, the outcome of the placement requires the joint efforts of domestic authorities of different MSs and, therefore, timing can vary greatly depending on the MS involved. **The length is, however, one of the reasons why cross-border placements often take place *ex ante* and, therefore, needs to be considered in the recast of Brussels IIa.**

Connected to the above problems, the survey on domestic application of art. 56 has also shown that **the procedure is not sufficiently clear with regard to the division of tasks among the authorities involved**. More precisely, it is not clear (i) which

information should be provided by the requesting State to the requested State and (ii) which kind of investigation the requested State may put into place.

Lastly, the *exequatur* procedure is necessary for a placement judgment to be enforced. Although it is not only largely disregarded in practice, it is also **perceived as not particularly useful in all those Member States where consent of the Central Authority or of other authorities of public law is necessary.**

#### 4. Conclusions and recommendations

The analysis of the legislative framework as well as the survey on the domestic legal systems confirm the need for a swifter and more efficient procedure for the cross-border placement of children. In light of the upcoming recast of Brussels IIa, the following proposals and recommendations are made.

1. Even though the issue of the structure is not strictly related to art. 56, the adoption of a **new autonomous regulation, devoted exclusively to parental responsibility matters**, would be a relevant improvement: it would provide more coherent and detailed rules on topics, such as cross-border placement, the application of which has proven to be difficult.

##### 4.1 Scope and definitions

2. Given that measures of protection significantly vary from State to State and there is a cross-over between measures having a civil, administrative and criminal nature, **the revision of Brussels IIa should take into account the achievements of the CJEU judgments in A, C and HSE, where a wide notion of civil matters have been adopted.** In particular, **measures involving deprivation of liberty for a specified period, ordered to protect – and not to punish – the child shall be expressly included in the scope of application of the Regulation.**
3. **The term “placement” needs to be clarified.** In this light, it shall be considered (i) whether it shall include also “family arrangements” involving cross-border placement of children shall also be considered and (ii) whether the more comprehensive term of “alternative care” shall be used.
4. Given the EU’s competence in the field of criminal justice and the constraints resulting from a separate legal basis in the field of civil and criminal justice, it is here submitted that **the opportunity of a separate legislative act shall be evaluated as for measures having a purely criminal nature.**
5. Given that all EU MS (Denmark included) are signatories of the 1996 HC, the possible inclusion of *kafalah* as well as to “analogous institutions” within the scope of application of the new regulation shall be evaluated.
6. It is worth considering the **adoption of a uniform definition of “child”** as a person under the age of eighteen for the purposes of the new regulation: it would eliminate possible discrepancies arising from the application of different age limits provided at national levels within the EU; it would align the EU’s definition to the one contained in the 1996 HC and it would extend the protection already provided by the 1980 HC for children under 16 to those under 18 as well. This issue is relevant with specific regard to cross-border placement: many of the children who are placed abroad are approaching full age and, in such cases, placement has the purpose of enhancing their autonomy. Problems, however, may arise where the child is not considered as such in the receiving State. Two possibilities may be evaluated: the

introduction of a general definition of child and the introduction of a definition of child, just for the purposes of cross-border placement.

7. The results of the survey on the domestic application under art. 56, show that placement is sometimes used as a **short-term** solution of care and frequently as a **long-term solution of care**. Whilst short term placement perhaps does not need any further check and therefore, once the consent of the receiving State is obtained, it is possible to close the proceeding, when long term placement is ordered, it is **necessary to provide some form of periodical control/review of the placement**. To this purpose, whilst the authorities of the State of origin still have jurisdiction over the child, the authorities of the receiving State are, of course, in a better position to conduct such an inspection. Cooperation between the authorities involved is therefore necessary. In this light, the **opportunity to modify art. 55** shall be considered **in order to take into express account the necessity of a specific form of cooperation between the authorities of the States involved when long-term placements are at hand**. Beside this, an **express definition of short and long term placement may be provided within the text of art. 56**.

#### 4.2 Reinforcing mutual trust

8. Some **problems in terms of respect of children's rights** and the **quality of the solutions of placement abroad** of children have been pointed out. Both issues are particularly relevant since, on one side, they affect the mutual trust on which cross-border placement is grounded and, therefore, are capable of affecting the functioning of the mechanism of cooperation created by art. 56. On the other side, the lack of respect of the principles enshrined in the above acts may give rise to violations of the fundamental rights of the children, which may be ascertained and sanctioned by the ECtHR. Despite the lack of EU competence in the field of substantial family law, it is possible to recall the attention of the Member States to the respect of the above acts.
9. Mutual trust among the authorities of the States involved may be further enhanced by providing that the authorities of the receiving State where the minor should be placed are in the position to provide the State of origin with adequate quality assurance in relation to the placement. In this view, the opportunity to **create an EU system of accreditation and registration of the forms of alternative care** might be evaluated. It is here suggested **that a role, in this regard, may be played by the Fundamental Rights Agency (FRA)**, which has been conducting research on child protection systems for the European Commission. Another possibility would be for the EU to set up some standards to be followed by Member States in the accreditation and registration.
10. A need arises to know where the cross-border placed children effectively are. In this view, **a specific national register concerning the children placed under art. 56 Brussels IIa may be useful**. The Central Authority of each EU MS may be responsible for creating and maintaining such a register.
11. In the practical application of art. 56, it has been found **that confidential information on the child is exchanged without any protection**. It shall therefore be evaluated whether **to include in the new regulation a general provision establishing the duty to respect confidentiality in all proceedings concerning children** or a more specific provision, within the article regulating cross-border placement, stating that the exchange of information concerning children should be limited to the essential.

#### 4.3 Clarifying the respective tasks of MS and authorities involved

12. When a child is placed under art. 56 for a certain period of time, in an EU country other than the one having jurisdiction by virtue of proximity to the child himself/herself, **problems of jurisdiction** may arise. Such a situation may give rise to the same problems as those in the case where a child moves back and forth between two or more Member States and the time between the two countries is equally divided. Under art. 56 Brussels IIa, **the courts of the State of the child's habitual residence by virtue of their proximity with the child establishes the placement abroad, with the consent of the receiving State, where necessary.** The jurisdiction on the child placed abroad stays in the courts of the State of origin, even if the placement is long-term. The survey on the domestic application of art. 56 Brussels IIa confirms the above interpretation of the rules on jurisdiction: **once the courts of the receiving State have given consent (where necessary), they generally close the procedure and, therefore, have no jurisdiction with regard to the child,** even if – given the placement – they are and will be the authorities which are closer to the child for the duration of the placement. However, **such a solution does not seem fully in compliance with the principles inspiring Brussels IIa, specifically with the principles of the best interests of the child and of proximity.** There are surely cases where the placement of a child in a foreign country does not entail real integration and it might be reasonable to leave the jurisdiction over the child to the courts of the State of origin. However, **when the child's integration in the receiving State is inevitable, it would be perhaps appropriate that the jurisdiction is moved to the latter State.** A need to regulate this "transfer" of jurisdiction arises. It is perhaps reasonable to consider that as for "long term" placements (e.g. placement lasting more than one year) jurisdiction on the adequacy of the solution of care provided shall move to the courts of the receiving Member State, where the child has his/her new habitual residence after the first year.
13. With specific reference to the **procedure** for the placement of a child, the provisions are perceived as not sufficiently specific as regards (i) the authorities involved and the division of roles in the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children and (ii) the obligations arising on the States involved. The survey on the domestic application of art. 56 Brussels IIa shows that all of the selected MSs except Malta ask for consent in case of domestic placement and, consequently, also in case of cross-border placement. It would be interesting to further study this finding in the remaining countries. If confirmed, the possibility of eliminating the simplified mechanism of coordination could be explored.
14. The current review of Brussels IIa should take into account the conclusions of the HSE decision as regards the **definition of authority governed by public law entitled to give the consent.**
15. On the other hand, the **timing** is relevant: **a balance has to be struck between the need,** on the one side, **to act expeditiously** and the **need,** on the other side, **to provide a mechanism of coordination that can grant the authorities involved a real opportunity to deal with the case properly to find the best solution of care for the child.** Difficulties in the communication between the Central Authorities have been experienced, including language barriers and lack of documents to be submitted to the requested Member State as well as lack of clarity on which authority should bear the costs of translation. In order to overcome the problems encountered, the **possibility to provide a term for the receiving**

**State's issue of consent** (e.g. one month from the request of consent for cross-border placement) shall be evaluated. Furthermore, given the special mutual trust existing among EU Member States, the opportunity might be considered to **state that a placement is deemed accepted if one month after the receipt of the request** of cross-border placement from the State of origin, **the receiving State does not expressly oppose it** (tacit consent)

16. It could also be explored whether to introduce a specific reference to art. 20 measures in the correspondent rule of art. 56 of the revised regulation, by virtue of which the State of origin may order the **immediate placement** of the child in the receiving State, in particularly urgent cases, while the deadline for obtaining the consent (or the express refusal) of the receiving State is still pending.
17. It shall be also evaluated whether to **clarify the tasks of the State of origin and those of the receiving State**, which are now unclear and not uniformly perceived by the Member States. As for the **State of origin** asking for placement in another EU Member State, art. 56 does not provide specific obligations. It shall be evaluated whether to **introduce the duty to prepare a report**, similarly to the report requested under art. 33 of the 1996 HC. As for the **receiving State**, its **consent should become a compulsory requirement** and, therefore, shall be extended even to those Member States not asking for consent. This solution increases certainty and uniformity, and also gives the receiving Member State the chance to carry out an independent assessment on the appropriateness of the placement. It is necessary to **clarify what kind of investigation is requested of the receiving State** in order to provide its consent to the cross-border placement. It seems reasonable to infer **that the competent authority is under a duty not to re-examine the reasons for the proposed decision on placement made in the other Member State**. On the other side, the latter should be provided with sufficient information in order to establish that the plan envisaged for the child provides him/her with the same safeguards as a comparable plan for the placement of a child having the citizenship of the receiving State. A rule stating that, provided that some conditions exist, consent to the request of cross-border placement has to be granted and further conditions shall be respected if placement is linked to some form of deprivation of liberty may be introduced at the EU level. Furthermore, in order to expedite the procedure, as mentioned, a specific term might be provided for the authorities of the receiving State to grant consent or to oppose placement (e.g. one month) and, given the detailed description of the requesting State's report, it is perhaps possible to limit the grounds for refusal of consent to the manifest contrast with the best interests of the child and to public order.

#### 4.4 Enforcement

18. Looking at the practice, on one side the need for **enforcement** of cross-border placement orders is remote and, on the other, when such a need arises, the rules on the exequatur procedure in the practice provided by Brussels IIa are largely disregarded. It is here submitted that the recast of Brussels IIa should **extend the abolition of the exequatur to cross-border placement orders under art. 56**.
19. Decisions concerning children and parental responsibility are held *rebus sic stantibus*, i.e. in specific conditions and at a particular moment. Due to a **change in circumstances**, a decision held at a specific moment may subsequently no longer be in the best interests of the child and need to be revised. On the other side, when changes in the circumstances are not as relevant as to require a revision, it may still be necessary to adopt specific measures to better grant protection to the interests of the child. **Brussels IIa, but also the 1996 HC, are silent on these problems.**

In this regard, Regulation 606/2013 on mutual recognition of protective measures in civil matters may be useful: it expressly envisages the **concept of “adjustment”** of a certain order by the authority of the Member State of recognition. More precisely, the competent authority in the Member State of recognition is allowed to adjust the factual elements of the protection order (like, for example, the specific address of the place of work or residence, the distance the perpetrator must keep from the protected person) where such adjustment is necessary for the practical implementation of the order.

20. Despite the absence of any rule in this regard, the **automatic suspension of the enforcement of a registered order concerning the cross-border placement of a child during the time limit for appeal shall be excluded**. It may, therefore, be evaluated whether to **adopt a less strict solution** and provide the domestic court with the discretion to permit, where necessary, the urgent enforcement of the placement order without suspension and, where not, the suspension of the enforcement pending expiry of the relevant appeal period.
21. It shall therefore be evaluated whether to introduce in art. 56 a more detailed regime on the **costs of the procedure**, specifically the possibility for the MSs involved to agree to different **cost-sharing arrangements**.
22. Cross-border placement is aimed at “tailoring” the best solution for a child in need of care among the possible existing solutions in the whole EU context. However, the risk is that the child is not happy with the solution of care and escapes, as happens in purely domestic placement. Due to the cross-border factor, the **risks connected with the escape of child from the solution of care provided are higher than in a purely domestic context**. The authorities of the receiving State are aware of the placement, but they do not have full knowledge of the situation of the child, as do the authorities of the State of origin. Furthermore, as already pointed out, they do not have full jurisdiction over the child, even if it is possible for them to adopt art. 20 measures. The recast of Brussels IIa may be a chance to **strengthen the cooperation among the authorities of the MS involved** also in this regard and, therefore, to provide a mechanism to coordinate the efforts of the different authorities involved. It might therefore be considered whether to integrate the already existing provision under art. 55, by adding **new obligations to cooperate when children run away**.
23. **Further investigation** shall be made on the so called “**spoiled brat camps**” (i.e. camps where difficult children are subjected to harsh discipline) and on the **necessity of EU provisions with regard to *kafalah***.

## INTRODUCTION

### a. The aim and scope of the study

Cross-border placement is an issue of concern: the application of art. 56 of the Brussels IIa Regulation is raising some difficulties in EU Member States. This is apparent from the decision of the European Court of Justice in the *HSE* case and also from some petitions submitted to the European Parliament confirming the existence of concrete obstacles in the placement of children in cross-border situations within the EU judicial area and, therefore, the need to amend the existing legislative framework<sup>1</sup>.

In the report on the application of the Brussels IIa Regulation the European Commission clearly pointed out that the problems arising in applying art. 56 are due to the absence of a uniform procedure enabling a swifter and more efficient application of the provisions on the placement of a child in another Member State<sup>2</sup>. The preliminary assessment on the application of the Regulation, which resulted in the report of the Commission was followed by a public consultation aimed at collecting opinions and information for an overall assessment of the instrument, which was closed on the 18th of July 2014.

A recent study on the assessment of the Regulation has been published on the basis of the same results deriving from the above public consultation<sup>3</sup>. It confirmed that the application of the rules on parental responsibility is still perceived as difficult by the practitioners and the rules on the cross-border placement of children need to be reviewed.

The European Commission is now working on a proposal for the adaptation of the Brussels IIa Regulation and, given past difficulties encountered in the adoption of new rules in the field of matrimonial matters, (recently confirmed by the fact that the two regulations concerning matrimonial property regime<sup>4</sup> and on the property consequences of registered partnership<sup>5</sup> have not been adopted), it is likely that priority and specific attention will be granted to the rules on parental responsibility and, therefore, also to the cross-border placement of children.

Since its entry into force, the Brussels IIa Regulation has proven to be a valid and innovative instrument for the solution of PIL issues concerning children in the EU, thanks to the fundamental changes discussed at the time of its negotiation<sup>6</sup> and to the “pioneering” solutions finally approved and included in the regime now in force (such as the introduction of flexible titles of jurisdiction, grounded on the discretion of the judges and on party autonomy, the abolition of the *exequatur*<sup>7</sup> for decisions concerning the right to visit or the

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<sup>1</sup> See Petition 0564/2012 by Marianne van Eck (Dutch), on administrative problems in connection with obtaining a foster care license in Germany for a Dutch child and Petition No 1352/2014 by Gaby Bailey (German) on the application of Regulation (EC) No 2201/2003 (Brussels IIa).

<sup>2</sup> See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM (2014) 225 final, 15.4.2014. Under art. 65 of the Brussels IIa Regulation, the Commission was under a duty to present a report on the application of the regulation, which may be accompanied, if need be, by proposal for adaptation no later than the 1<sup>st</sup> of January 2012 and every five years after. Similarly recital 29 of the Brussels IIa Regulation states that «*For the proper functioning of this Regulation, the Commission should review its application and propose such amendments as may appear necessary*».

<sup>3</sup> Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report, European Commission, May 2015 available at [http://ec.europa.eu/justice/civil/files/bxl\\_iiia\\_final\\_report\\_evaluation.pdf](http://ec.europa.eu/justice/civil/files/bxl_iiia_final_report_evaluation.pdf)

<sup>4</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 final of 16 March 2011.

<sup>5</sup> Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnership, COM (2011) 127 final of 16 March 2011.

<sup>6</sup> Reference is made to the recast of Regulation n° 1347/2000 (Brussels II), which Brussels IIa repealed. See Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, COM (2001) 505 final, 6.9.2001.

<sup>7</sup> The so called “*exequatur*” is one of the measures still required to enable recognition and enforcement of decisions and of judgments, which, in the light of the principle of mutual recognition of judgments – inspiring the



return of the children after an abduction). Meanwhile, the EU has made significant steps forward both in the field of the protection of the rights of children<sup>8</sup> and in the field of judicial cooperation in civil matters<sup>9</sup>. Therefore, the time has come for some adaptation, starting from the assumption that in matters related to children, it seems easier for the interests of the Member State to converge.

It shall also be considered that, as recently stressed by the Commission in the guidelines of the recently published “EU Justice Agenda for 2020”<sup>14</sup>, it is necessary to focus on codifying existing laws, practices and case-law as a means to enhance the knowledge, understanding and use of EU legislation as well as mutual trust, consistency and legal certainty. This can create a fully functioning European area of justice and, therefore, tackle the challenges of strengthening trust, mobility and growth within the European Union.

The purpose of this study was to determine the breadth and types of problems connected to the cross-border placement of children and to the application of art. 56 of EU Regulation n° 2201/2003 (Brussels IIa), then to provide suggestions for improving the legal framework and overcome some or possibly all of the identified issues of concern.

#### b. Working methodology

To this aim, it was necessary to gather information on the relevant legislation and practice from EU countries.

A group of EU Member States was selected in order to grant as divers a geographical distribution as possible and include Member States that have been admitted in the EU at different times. In this light, the legal systems of the following EU Member States have been considered: Belgium, Bulgaria, the Czech Republic, France, Germany, the United Kingdom, Ireland, Italy, Latvia, Malta, the Netherlands and Spain.

Once the EU Member States were selected, the national experts were found accordingly among academics, lawyers, judges, civil servants of MS having specific expertise in the field of PIL matters concerning children and in the application of Brussels IIa<sup>10</sup>.

Once the research team group was created, the Author of the study prepared a questionnaire<sup>11</sup> which each national expert answered by providing a national report on the application of art. 56<sup>12</sup>.

More precisely, the national experts were requested to provide (i) a statistical assessment of cross-border placement of children in their own country; (ii) a description of the international legislative framework; (iii) a description of the domestic legislative framework; (iv) a description of the relevant practice; (v) the list of the references and (vi) any further information which may have been useful to the purposes of the study.

In collecting the relevant information and data, the national experts availed themselves of the assistance of the national Central Authorities as well as other competent national authorities having experienced some cases of cross-border placement.

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EU's judicial cooperation in civil matters having cross-border implications (art. 81 TFEU) - shall progressively be abolished.

<sup>8</sup> Reference is made, in particular, to the inclusion of the protection of the rights of the children in art. 3 TEU and in art. 24 of the Charter, as well as to the actions taken by the Commission, see in particular Communication from the Commission – Towards an EU strategy on the rights of the child, COM (2006) 0367.

<sup>9</sup> Reference is made specifically to the new legal basis provided by art. 81 TFEU (reference to the internal market softer), to the many EU acts adopted in the field of judicial cooperation in civil matters affecting family relationships (such as Regulation 4/2009, 1259/2012, Directive 2008/52) and to the pioneering solutions adopted in the EU acts concerning family relationships (such as the enhanced cooperation for the adoption of the Rome III Regulation, the introduction of new titles of jurisdiction aimed at granting greater flexibility).

<sup>10</sup> See annex 1.

<sup>11</sup> See annex 2.

<sup>12</sup> National reports are not published, but are available upon request to the editor.

The present study has benefited greatly from the input of the national experts, but its contents reflect the personal view of the Author and that criticism, findings, proposals and recommendations in this study are only the reflection of the author's individual opinion.

Account was taken of legislation and official publications of the EU and the Member States, case law of the courts of the EU and the Member States, and academic legal writing.

### c. Outline of the study

The study is organized into five parts, as follows:

- Part I - The cross border placement of children in the EU context;
- Part II - Critical analysis of the existing legal framework, literature and research on the cross-border placement of children;
- Part III - The relevant European case-law;
- Part IV – The domestic application of art. 56 of the Brussels II a Regulation;
- Part V – Findings, proposals and recommendations.

The first three parts are aimed at explaining the framework around the cross-border placement of children. First, a definition of the notion of “cross-border placement” is provided and second, the existing legal framework is analyzed, by considering the relevant actors and sources of law as well as the relevant CJEU and ECtHR case-law.

The fourth part contains a synthesis of the information collected through the survey on the domestic application of art. 56 in the selected EU Member States by the national experts. It is from these data that the weak points of the existing rules on cross-border placement of children have been pointed out.

On the basis of the analysis of the existing legal framework, as interpreted by the case-law, and of the achievements from the survey, some proposals and recommendations on the improvement of the existing rules have been made in the last part of the study.

# 1. THE CROSS BORDER PLACEMENT OF CHILDREN IN THE EU CONTEXT

## 1.1. The private and public dimension of placement

Placement may be defined as a measure of child protection, which is necessary when a child has no one to look after him/her effectively or when a child needs special support due to a mental or physical illness/deficiency.

The adoption of this measure of protection is, first of all, in the interests of the child himself/herself and it is also in the interests of the parents (even though placement is not linked to matrimonial matters or, in other terms, is to be considered outside and independent of the situations connected with family relationships such as separation, divorce or annulment of marriage) and of the other family members.

In this light, placement regards relations between individuals and, therefore, may be considered as a matter of “private law” or, rather, as a civil matter following the EU autonomous notion provided by art. 81 TFEU.

On the other hand, the placement of a child in a foster family, institution or any other care solution may be defined as a measure of “social” protection<sup>13</sup> and, therefore, as a matter of “public law”, since it regards the State’s relations with private parties or, rather, the State’s interference in family life. It is in the interest of the State and the community at large to safeguard the rights of the child and to avoid the adverse effects deriving from the behaviour of minors lacking adequate material and moral care<sup>14</sup>.

This was also pointed out in a very important decision the ICJ rendered in the Boll case, where the Court stressed with regard to a specific measure of protection granted by Swedish law to a Dutch child that it «*contributes to the protection of the child, but at the same time, and above all, it is designed to protect society against dangers resulting from improper upbringing, inadequate hygiene, or moral corruption of young people*»<sup>15</sup>.

As a matter of fact, the placement of a child generally implies the intervention of the public authorities (both administrative and judicial), which shall try to pursue the same objectives which the exercise of parental responsibility by the parents pursues, i.e. the care, maintenance and education of the child<sup>16</sup>. There is, therefore, little doubt on the public law character of placement.

It has been pointed out that, under this perspective, differences in the way that child protection works in each State are significant and, perhaps, even more noticeable than in a private law context since child protection requires action to be taken by an organ of the State and, depending on that State, there might be greater or fewer resources devoted to this social mission<sup>17</sup>.

<sup>13</sup> The social character/dimension of the placement of children is pointed out by the decision the ICJ rendered in the case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of November 28th, 1958, I.C.J. Reports 1958, at p. 20.

<sup>14</sup> See A. Cannone, *L'affidamento dei minori nel diritto internazionale privato e processuale*, Bari, 2000, p. 17.

<sup>15</sup> See Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of November 28th, 1958, I.C.J. Reports 1958, at p. 69

<sup>16</sup>The “territorial” character of the placement of children has been authoritatively stressed: anytime it requires the intervention of public authorities, placement must be considered a territorial matter to be regulated by national public law, since it deals with the organization and functioning of public activities in the State. See A. Cannone, *L'affidamento dei minori dei minori nel diritto internazionale privato e processuale*, Bari, p. 26.

<sup>17</sup>See H. Setright QC, D. Williams QC, I. Curry-Sumner, M. Gratton and M. Wright, *International Issues in Family Law. The 1996 Hague Convention on the Protection of Children and Brussels IIa*, Bristol, 2015, at p. 195.

Given the above, placement and matters generally concerning children may be considered examples of the existing and growing interaction between private and public law or confirmations of the weakening of the distinction between private and public law<sup>18</sup>.

In the EU context, this is further confirmed in Directive 2008/52 on mediation<sup>19</sup>, which applies to cross-border disputes on civil and commercial matters<sup>20</sup>, with the exclusion of matters regarding rights and obligations which are not at the parties' disposal. Such rights and obligations are particularly common in family law, however, the Directive also makes express reference to the best interests of the child and, therefore, it seems that the aspects related to the exercise of parental responsibility and to the need of the child to keep regular contact with both parents fall within the scope of application of the Directive and within the notion of civil and commercial matters here provided<sup>21</sup>.

## 1.2. The cross-border factor

Placement is also characterized by a "cross-border" dimension: the child over whom a specific State (State of origin) has jurisdiction - being the State of the child's habitual residence or the State where the child is - is sometimes to be placed in care across the border in another State (hosting/host State). In other terms, the cross-border character derives from the fact that the protection measure at stake is decided by the competent authority of the State of origin, but it is put in practice by the competent authority of the host State within its borders.

The 1958 decision rendered by the ICJ in the *Boll* case<sup>22</sup> is a good example to show the cross-border character or international dimension of placement. As is known, the case concerned a Dutch child, Marie Elisabeth Boll, residing in Sweden, in favour of whom the Swedish authorities decided to adopt the regime of protective upbringing, envisaging the guardianship of the father by operation of law, on the one hand and on the other, the guardianship of a person appointed *ad hoc*. A dispute arose between the Netherlands and Sweden on the validity of the Swedish measure of protective upbringing. The Netherlands asked for the termination of the measure claiming it was incompatible with the provision of the 1902 Hague convention on the guardianship of infants. According to this provision it is the national law of the infant (i.e. Dutch law) that is applicable. As a consequence, the Netherlands asked for the termination of the measure. On the other side, Sweden wanted to maintain the measure. The Court found in favour of Sweden and stated that the 1902 Convention was designed to solve the conflict of law issues on guardianship and did not cover the Swedish measure of protective upbringing, which does contribute to the protection of the child, but more importantly, it is designed to protect society against the dangers of improper upbringing, inadequate hygiene or moral corruption of young people.

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<sup>18</sup>As for the general weakening of the above distinction, see R. Michaels, *Globalization and Law: Law Beyond the State*, at p.16, available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5540&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5540&context=faculty_scholarship); with particular reference to child matters, see A. Dutta – A. Schulz, *First cornerstones of the EU rules on cross-border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIA Regulation from C to Health Service Executive*, in *Journal of private international law*, 2014, at 6.

<sup>19</sup>Directive n°.2008/52 of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, in OJ L 136, 24.5.2008, pp. 3-8.

<sup>20</sup>See recital n° 10 «*This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law*».

<sup>21</sup>See L. Carpaneto, *La Direttiva n. 2008/52 sulla mediazione civile e commerciale*, in (edited by) I. Queirolo – A.M. Benedetti, L. Carpaneto, *La tutela dei soggetti deboli tra diritto internazionale, dell'Unione europea e diritto interno*, Rome, 2012, at p. 557-559.

<sup>22</sup>See Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of November 28th, 1958, I.C.J. Reports 1958, at p. 69

In other words, by emphasizing the “public” dimension of protective upbringing, the Court excluded it from the scope of application of the 1902 convention<sup>23</sup>.

The 1958 decision of the ICJ confirms the private/public dichotomy of the protection measures, but at the same time shows the absence of international instruments that could harmonise and/or provide a uniform regime in the field of protection measures or some form of cooperation among States, different from the adoption of a private international law instrument such as the 1902 Hague convention aimed at solving the conflict of laws in the limited field of guardianship.

This trend has not changed significantly in the years following the decision of the ICJ, since the adoption of the UNCRC. One of the imperatives of the above instrument is to grant special protection and assistance to those vulnerable children who, for different reasons, cannot be allowed to remain in their family environment. More precisely, under art. 20 of the UNCRC, States are under a duty to ensure alternative care instruments for those children, such as «foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children». Depending on the environment where the alternative care is provided, it is possible to further distinguish among (i) kinship care, i.e. family-based care within the child’s extended family or with close friends of the family known to the child; (ii) foster care, i.e. placement of a child in the domestic environment of a selected and qualified family other than the child’s own family; (iii) other forms of family-based or family-like care placement; (iv) residential care, i.e. care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short and long term residential care facilities, including group homes; (v) and supervised independent living arrangements for children<sup>24</sup>.

Furthermore, in considering and establishing the best care solution for a vulnerable child, the States shall pay due regard to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.

In this view, art. 21 of the UNCRC expressly states that priority shall be granted to care solutions in the child’s country of origin, such as placement in a foster family, an adoptive family or any other care solution; inter-country adoption should be considered a residual solution<sup>25</sup>. Art. 21 does not expressly mention “cross-border” care solutions other than

<sup>23</sup>For the purposes of this study, the distinction made by the Court between the measure of protection envisaged by the 1902 Convention and the one envisaged by Swedish law is interesting: the Court clearly stated that: «*The 1902 Convention did not seek to define what it meant by guardianship, but there is no doubt that the legal systems, as between which it sought to establish some harmony by prescribing what was the proper law to govern that situation, understood and understand by guardianship an institution the object of which is the protection of the infant: the protection and guidance of his person, the safeguarding of his pecuniary interests and the fulfilling of the functions rendered necessary by his legal incapacity. Guardianship and protective upbringing have certain common purposes. The special feature of the regime of protective upbringing is that it is put into operation only in respect of children who, for reasons inherent in them or for causes external to them, are in an abnormal situation – a situation which, if allowed to continue might give rise to danger going beyond the person of the child. Protective upbringing contributes to the protection of the child, but at the same time, and above all, it is designed to protect society against danger resulting from improper upbringing, inadequate hygiene or moral corruption of young people*».

<sup>24</sup> See the Resolution adopted on 24 of February 2010 by the General Assembly n°. 64/142 “*Guidelines for the Alternative Care of Children*” available at [http://www.unicef.org/protection/alternative\\_care\\_Guidelines-English.pdf](http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf); on the content of the guidelines see further para. 2.1. A similar (non-exhaustive) list is also provided by the Appendix to Resolution (77) 3 on placement of children adopted by the Committee of Ministers on 3 November 1977, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=595111&SecMode=1&DocId=659764&Usage=2>. See *infra*.

<sup>25</sup> Similarly the Resolution adopted on 24 of February 2010 by the General Assembly n° 64/142 “*Guidelines for the Alternative Care of Children*” states at point 11 that the decision concerning alternative care should take full account of the desirability, in principle, of keeping the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life.

inter-country adoption since, at the time of the adoption of the UNCRC (i.e. in 1989), no other specific form of cross-border cooperation in the field of protection of children existed.

But what is relevant to our purpose is that the purely domestic care solutions are granted priority over the only cross-border care solutions existing at the time, i.e. inter-country adoption, following the idea that “management” of the protection measures for children is an issue which the State shall preferably solve within its own borders with the help of the protection measures envisaged by its own legal order.

This approach has necessarily changed. As a matter of fact, the growing interconnections among States and among their legal orders together with the growing mobility of persons<sup>26</sup> have made it possible to consider the feasibility of some form of cooperation and mutual trust in the field. More precisely, it has progressively become clear that in order to protect the best interests of the child, it is necessary to “tailor” the protection measures on the specific and individual needs of the child at stake. In this view, the cross-border dimension of a care solution has started to be considered not as an obstacle but rather as an opportunity, since a care solution available in a State other than the child’s State of origin may sometimes better meet the child’s specific and individual needs.

Therefore, in light of existing forms of cooperation – i.e. through HCCH, the CoE and the EU - specific mechanisms of cross-border placement of children among States have been built. More precisely, in some cases the best way to meet the specific needs of a vulnerable child might be to move him/her from the State of origin (i.e. the State under the jurisdiction of which the child is) and to place him/her in another State (i.e. receiving State) that accepts the solution.

Overcoming national boundaries is, of course, aimed at better protecting the child’s best interests and at protecting the society as a whole against the dangers of improper upbringing, inadequate hygiene or the moral corruption of young people.

The above mentioned forms of cooperation, on one side, reverse art. 21 of UNCR’s perspective: there is no more need to first search for a care solution in the State of origin and, only afterwards, search in another legal order. On the other side, the mechanisms of cross border placement establish an upward competition among legal orders: each legal order envisages measures for the protection of children following its own traditions, policies in family matters, culture and religion<sup>27</sup>. Given the above, it is possible for the public authorities - dealing with issues of placement of children - to select the best care solution satisfying the interests of the child at stake among a variety of solutions.

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<sup>26</sup> This happens *a fortiori* in the EU, thanks to freedom of movement.

<sup>27</sup> Art. 20 UNCRC refers to measures of alternative care and includes foster placement, *kafalah*, adoption and placement in institutions. However, adoption is not generally admitted in States with a legal system influenced by Islam, which rather make use of *kafalah*. Adoption is based on the principle of the imitation of nature and, therefore, creates between the adopter and the adoptee a legal relationship identical to that existing between parent and child, by severing the relationship of the child with his/her family of origin. *Kafalah*, on the other hand, is a different form of legal care, which may be established by a court or by agreement, under which the holder of the right of *kafalah* (called *kafil*) provides for a child and takes care of his/her welfare, education and protection. No severance of the relationship with the family of origin (when known) is provided. Adoption without the consent of the parents is often used in some States (like UK) not in others. Furthermore, beside private law instruments of alternative care, some legal systems also envisage measures of a public nature.

## 2. CRITICAL ANALYSIS OF THE EXISTING LEGAL FRAMEWORK, LITERATURE AND RESEARCH ON THE CROSS-BORDER PLACEMENT OF CHILDREN

### 2.1. Relevant actors and sources in the EU context

Having adopted relevant sources of law in the field of cross-border placement, the **UN** enjoys a preeminent position among the international actors playing a role in the protection of the rights of children. It not only adopted the UNCRC, which provides a general catalogue of fundamental rights of children and establishes important principles with regard to alternative care<sup>28</sup>, but it also adopted (i) the UN Convention on the rights of persons with disabilities<sup>29</sup>, providing for express safeguards<sup>30</sup> and for alternative care<sup>31</sup> for children with disabilities and (ii) the *Guidelines on alternative care*<sup>32</sup>, i.e. a soft law act, aimed at enhancing the implementation of the UNCRC as well as other international instruments regarding the protection and well-being of children deprived of parental care or at risk of being so. The *Guidelines* confirm the importance of the family as «*the fundamental group of society and the natural environment for the growth, well-being and protection of children*» and, therefore, stress the importance of making efforts in order to enable the child to remain in or return to the care of the parents or other close family members. Coherently, the *Guidelines* ask for the adoption of an overall “deinstitutionalization” strategy, proposing residential care as a last resort solution, limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests. In relation to the placement of a child for care abroad, the ratification of (or accession to) the 1996 HC is also recommended<sup>33</sup> to ensure appropriate international cooperation and child protection.

Beside the UN, the other “global” actor is the **HCCH** specifically concerned with the adoption of international conventions aimed at solving problems of private and procedural international law on the assumption that these instruments enable constructive co-existence and co-operation among national family law systems<sup>34</sup>. The cross-border placement of children – not expressly envisaged by the 1902 Convention on guardianship nor by the following 1961 Convention concerning the powers of authorities and the law applicable to the protection of infants– is dealt with by the 1996 HC, which replaces the 1902 and 1961 Conventions<sup>35</sup> and is now in force in all EU countries and many non-EU countries. In the context of the measures of protection for children, it is also worth mentioning the 1993 Hague Convention on protection of children and co-operation in respect of inter-country adoption. The 1993 Convention regulates international adoption and grants the recognition “by operation of law” of this measure within the territories of the

<sup>28</sup>Reference is made to art. 20 and 21 of the UNCRC.

<sup>29</sup>Reference is made to the UN Convention on the rights of persons with disabilities (CRPD), adopted on the 13 of December 2006 and entered into force on 3 of May 2008, ratified by the EU on 23 of December 2012.

<sup>30</sup>See art. 7 of the UN Convention on the rights of persons with disabilities.

<sup>31</sup>See art. 23.5 of the UN Convention on the rights of persons with disabilities.

<sup>32</sup> Resolution adopted on 24 February 2010, by the General Assembly n°. 64/142 “*Guidelines for the Alternative Care of Children*”, available at <http://www.un.org/en/ga/64/resolutions.shtml>

<sup>33</sup>See Resolution adopted on 24 February 2010, by the General Assembly n°. 64/142 “*Guidelines for the Alternative Care of Children*”, at point 139.

<sup>34</sup> Art. 1 of the Statute of the Hague Conference expressly states that its purpose is to work for the progressive unification of the rules of private international law.

<sup>35</sup> Art. 51 of the 1996 HC states that «*In relations between the Contracting States this Convention replaces the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors and the Convention governing the guardianship of minors, signed at The Hague 12 June 1902, without prejudice to the recognition of measures taken under the Convention of 5 October 1961 mentioned above*».

contracting States. What is particularly innovative is the mechanism of coordination between the State of origin and the State of destination (i.e. the State where the adopted child will live), aimed at granting the continuity of the status of the adopted child and, therefore, to avoid limping adoption. According to art. 17 of the Convention, for a decision on the adoption to be taken, three conditions must be satisfied: (i) the Central Authority of the State of origin has to ensure that prospective adoptive parents agree; (ii) the Central Authority of the receiving State has to approve the decision if the law of the State of origin or the Central Authority asks for approval and (iii) the Central Authorities of both States have to agree that the adoption may proceed. Once the procedure is completed<sup>36</sup>, the adoption is certified by a document specifying the terms of the agreement reached. The document is automatically recognized, with no need for a procedure for recognition, enforcement or registration (save the case in which the adoption is manifestly contrary to the public policy of the contracting State where recognition is sought, taking into account the best interest of the child).

Moving from a "global" dimension to a "regional" one, in the European context, the main actors are the EU and the CoE.

The CoE is aimed at achieving *«greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress»*. In this light, the CoE has adopted international conventions, mainly aimed at harmonizing substantial rules of family law<sup>37</sup>. In parallel with the 1996 HC, the CoE adopted the 1996 Convention on the exercise of children's rights<sup>38</sup>, aimed at granting children (under 18 years old) procedural rights with specific reference to proceedings involving parental responsibilities. Art. 7 of the Convention is particularly relevant where it imposes on the courts the duty to act speedily in order to avoid any unnecessary delay and on the contracting States to ensure that the decisions held are rapidly enforced. In this light, art. 7 further states that in urgent cases, the courts *«shall have the power, where appropriate, to take decisions which are immediately enforceable»*. Beside this instrument, it is also worth mentioning the 2003 Convention on contacts concerning children<sup>39</sup>, aimed at establishing uniform principles for issuing contact orders and therefore dealing, even if marginally, with recognition of the order. Art. 15 is significant, in this regard. It states that judicial authorities of a State party called to recognize or declare enforceable a cross-border contact order, are allowed to *«fix or adapt the conditions for its implementation»*, provided that the essential elements of the order are respected. However, neither instrument has been widely ratified, therefore, their relevance – for the purposes of this study – is limited. On the other hand, in assessing the legal framework for the regulation of cross-border placement, particular relevance is to be recognized to the system of protection of human rights and fundamental freedoms provided by the 1950 ECHR as enforced by the ECtHR. Specifically, the role played by ECtHR case-law (mainly) is crucial in that it applies the relevant articles of the ECHR which may come into play – such as art. 6 (right to a fair trial), 8 (right to respect for private and family life) and 14 (prohibition of discrimination). – But also, given the living instrument of the ECHR -

<sup>36</sup>It may happen that under the legislation of a country, adoption is completed after a probationary placement. In this case, the certificate is issued only after the probationary placement is successfully completed. See The Implementation and Operation of the 1993 Hague Inter-country Adoption Convention. Guide to Good Practice, Guide n°. 1, 2008, at p. 118

<sup>37</sup>See N. Lowe, An Evaluation of the Council of Europe's Legal Instruments in the Field of Family Law. Report for the attention of the Committee of Experts of Family Law (CJ-FA), available at [http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20\\_2006\\_%201%20Rev.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-FA%20_2006_%201%20Rev.pdf)

<sup>38</sup>Reference is made to the European Convention on the Exercise of Children's Rights, signed in Strasbourg on the 25 of January 1996, entered into force the 1<sup>st</sup> of July 2000 and ratified by 20 States. Text and status of ratifications are available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160>.

<sup>39</sup>Reference is made to the Convention on Contact concerning children, signed in Strasbourg on the 15 of May 2003, entered into force on the 1<sup>st</sup> of September 2005 and ratified by 9 States. Text and status of ratifications are available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/192>.



the other (national or international) instruments for the protection of human rights and fundamental freedoms<sup>40</sup>.

Another important source of law to be considered is the European Social Charter which the CoE adopted in 1961 and revised in 1996. In art. 17 the Charter expressly requires the State to take all appropriate and necessary measures designed to provide State protection and special aid for children and young people temporarily or definitively deprived of their family's support.

Finally, beside the sources of law mentioned, a significant role is also played by the resolutions (which, after 1979, are called recommendations) of the CoE Committee of Ministers, which are not only useful to understand CoE policy on a specific topic, but are also the starting point for the adoption of binding instruments on the subject. Among them, reference is made to (i) Resolution No. R (77) 33 on the placement of children, recommending to CoE Member States general principles to be followed in the placement of children<sup>41</sup>; (ii) Recommendation (2005) 5 on the rights of children living in residential institutions, which, in confirming that placement in an institution shall be considered as *extrema ratio* and that this care solution shall be aimed at allowing the child to return to his/her own family, expressly states that the order of placement should be adopted after a multidisciplinary evaluation, should be subject to periodical revision and should consider the will of the child.

As for the **EU**, despite the absence of direct competence in family law, the Union is particularly active in this field and specifically, in the protection of children<sup>42</sup>. The Lisbon Treaty expressly introduced among the purposes of the EU promoting the protection of the rights of the child<sup>43</sup>, which are also enshrined in the Charter of fundamental rights of the EU<sup>44</sup>.

The added value of the EU's action in the field of the protection of the rights of children – compared to other international actors - is its "holistic" approach to the issue, which is the direct consequence of its *sui generis* character and of its wide sphere of action<sup>45</sup>.

Among the many acts adopted by the EU in the field of civil judicial cooperation, the main relevant source for the purposes of this study is Regulation no. 2201/2003 (Brussels IIa), as interpreted by CJEU case-law.

Beside the Brussels IIa regime, in the field of recognition of protection measures, reference is to be made to Regulation 606/2013 on the recognition of protective measures in civil

<sup>40</sup>See art. 53 ECHR (Safeguard for existing human rights), «*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party*».

<sup>41</sup>The Resolution does not mention the possibility of a cross-border placement, since at the time of its adoption care solutions were purely domestic. The only reference to the international dimension is made with regard to the recommendation to promote further research on local, national and also international bases on the modes of placement as well as an international exchange of information on problems related to placement, conceived just in its national/domestic dimension. On the contrary, reference is expressly made to "long-term placement" of very young children in residential units and it is recommended that this should be avoided whenever possible and that adoption should be facilitated and encouraged to the greatest possible extent.

<sup>42</sup>Not only by virtue of the exercise of the competence in the field of judicial cooperation in civil matters, but also through the exercise of the competences in the field of free movement of persons, social and, despite the absence of an express competence, also through the EU's action for the protection of human rights. See I. Queirolo, EU law and family relationships. Principles, rules and cases, Roma, 2015, pp. 15-48.

<sup>43</sup>See art. 3 TUE.

<sup>44</sup>See art. 24 of the Charter.

<sup>45</sup>This clearly comes from the Communication from the Commission: Towards an EU Strategy on the Rights of the Child, COM (2006) 367 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52006DC0367> as well as from the previous Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child, Brussels, 15.2.2011, COM (2011) 60 final, available at [http://ec.europa.eu/justice/policies/children/docs/com\\_2011\\_60\\_en.pdf](http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf).

matters<sup>46</sup>. The latter expressly excludes the measures falling within Brussels IIa<sup>47</sup> from its own scope of application and aims at not interfering with the functioning of the Brussels IIa Regulation<sup>48</sup>. Whilst the relationships between Regulation 606/2013 and Brussels IIa is not clear as far as protective measures in matrimonial matters are concerned, there seems to be little doubt that decisions on parental responsibility matters (including those judgments which forbid the non-custodial parent to contact the child except at certain times or in the presence of a social worker) shall continue to be regulated by the latter<sup>49</sup>.

## 2.2. The specific rules on the cross-border placement of children

### 2.2.1. The relationship between the 1996 HC and Brussels IIa

The legal instruments listed in the previous paragraph form the general framework granting children protection in the EU context at a substantial and a PIL level. Looking more in detail on the specific regime of cross-border placement, reference has to be made to (i) articles 33 and 23 of the 1996 HC and (ii) articles 56 and 23 of Brussels IIa<sup>50</sup>.

Brussels IIa's regime applies only to intra-European cross-border placements and, therefore, to placements starting from an EU Member State to another EU Member State (Denmark excluded)<sup>51</sup>. For extra-European cross-border placements (i.e. placement of children involving an EU Member State<sup>52</sup>, Denmark included, and a non-EU Member State or two non-EU Member States), the relevant rules of the 1996 HC apply anytime the two countries involved are State parties of the Convention itself<sup>53</sup>.

Cross-border placements where the State of origin is an EU Member State and the receiving State is neither an EU Member State nor a 1996 HC signatory are not covered by the two above mentioned instruments. Therefore, given the lack of other instruments providing uniform PIL rules on this topic, national rules shall eventually apply in these residual cases.

In the context of the existing relationship between the two instruments, Brussels IIa is to a great extent inspired by 1996 HC. In this light, CJEU case-law in relation to the application and interpretation of the Brussels IIa regime also helps to understand the 1996 HC. On the other hand, the 1996 HC supplements the provisions of the Brussels IIa Regulation, by virtue of the provisions on applicable law.

In relation to their respective scope of application, whilst Brussels IIa emphasizes the notion of "parental responsibility"<sup>54</sup>, the 1996 HC focuses on the notion of "measures of protection". Despite this, the material scope of application of the two instruments is largely convergent, with the relevant exception of the proceedings relating to the taking into care

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<sup>46</sup>Reference is made to Regulation n°. 606/2013 of 12 June 2013 on the mutual recognition of protection measures in civil matters, in OJ 2013, L 181/4.

<sup>47</sup> See art. 2.3 of Brussels IIa.

<sup>48</sup> See recital 11 of Brussels IIa.

<sup>49</sup>See M. Bogdan, Some reflections on the scope of application of EU Regulation No. 606/2013 on mutual recognition of protection measures in civil matters, in Yearbook of Private International Law, Vol. 16, 2014-2015, pp. 405-410, at 410.

<sup>50</sup> It is worth pointing out that in the acts preceding the Brussels IIa (i.e. the 1998 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Council Regulation n°. 1347/2000 of 29 May 2000 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children) no rule on cross-border placement was provided. See, on this point, F. Forcada Miranda, *Revision with respect to the cross-border placement of children*, in Dutch Journal of Private International Law, 2015, at p. 37.

<sup>51</sup>See, respectively, art. 61 of Brussels IIa and the "disconnection" clause of the 1996 HC under art. 52. On this topic, see A. Schulz, *The New Brussels II Regulation and the Hague Conventions of 1980 and 1996*, in International Family Law, 2004, p. 22

<sup>52</sup>The 1996 HC is now ratified by (and in force in) all EU Member States.

<sup>53</sup>Beside the 28 EU Member States, the other State Parties are: Albania, Armenia, Australia, Ecuador, Georgia, Monaco, Montenegro, Morocco, the Russian Federation, Serbia, Switzerland, Ukraine and Uruguay.

<sup>54</sup>See recital n° 5 of Brussels IIa, expressly including the measures of protection in the scope of application of Brussels IIa.

of the child by *kafalah* or a corresponding institution and the official supervision of childcare by a person who is responsible for the child. These measures are expressly listed as matters falling within the scope of application of the 1996 Hague Convention<sup>55</sup>, but not as matters covered by Brussels IIa<sup>56</sup>.

With specific reference to the cross-border placement of children, both instruments envisage a mechanism of coordination between the State of origin, adopting the decision of placement, and the receiving State. The two mechanisms are analogous: the few existing differences are justified by the fact that the 1996 HC is an instrument with global appeal, establishing cooperation among States of very different geographical areas, whilst Brussels IIa's regime benefits from the mutual trust among EU Member States.

In order to strengthen the mechanism of coordination, both instruments expressly deny the recognition and execution of cross-border placement orders when the above-mentioned coordination mechanism has not been followed.

### 2.2.2. The mechanisms of coordination in force at the "global" and "regional" level

The mechanisms of cooperation in force with regard to the cross-border placement of children at the "global" and "regional" levels are regulated by art. 33 of the 1996 HC and by art.56 of the Brussels IIa, respectively. The wording of the two rules is not coincident, as it clearly appears from the table below.

<b>Art. 33 of the 1996 HC</b> [in the Lagarde report headed "transborder placements"]	<b>Art. 56 of the Brussels IIa</b> "Placement of a child in another Member State"
<p>1. If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by <i>kafalah</i> or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.</p> <p>2. The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.</p>	<p>1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.</p> <p>2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.</p> <p>3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.</p> <p>4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another</p>

<sup>55</sup> See art. 3 of the 1996 HC providing a non-exhaustive list of matters covered by the Convention

<sup>56</sup> See art. 1 of the Brussels IIa.

	Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.
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The two regimes, although largely coincident, differ from each other in three different respects: (i) the scope of application; (ii) the procedure outlined and (iii) the regime of costs.

#### (i) The scope of application

In relation to the scope of application, it shall be firstly considered that the 1996 HC provides an autonomous definition of child: art. 2 states that the Convention applies to children from the moment of their birth until they reach the age of 18.

A definition is not provided by Brussels IIa: art. 2 provides a list of definitions, but the term child is not included. The Regulation is therefore applicable to children under parental responsibility, who are under the age of majority, which each Member State autonomously fixes<sup>57</sup>. In practice, reference to national law does not make a big difference, since nearly all Member States fix the age of majority at eighteen<sup>58</sup>.

Both regimes apply to the cross-border placement of children in institutional care or with a foster family and do not apply to different kinds of placement, such as placement preparatory to adoption or placement following a criminal offence.

However, art. 33 of the 1996 HC – coherently with art. 20 of the UNCRC - has a wider scope of application, since it extends to «*the provision of care by kafalah and to analogous institutions*»<sup>59</sup>. This extension is coherent with the will of giving rise to an instrument for the protection of children which could be “globally” appealing, including for countries of Islamic tradition<sup>60</sup>.

On the contrary, Brussels IIa contemplates just the cross-border placement of children in institutional care or with a foster family and does not extend to other kinds of institutions for the protection of the child.

Since the 1996 HC was the first source of inspiration for Brussels IIa, at the moment of the entry into force of the latter the thesis of the implied inclusion of *kafalah* within the scope of application of the Regulation was advanced<sup>61</sup>; but it was not followed, as proven by the case-law<sup>62</sup>.

A further issue is whether both regimes may extend to the measures of protection establishing that the child should reside in another State (either an EU Member State as per art. 56 of the Brussels IIa Regulation or a Contracting Party of the Convention as per art. 33 1996 HC) with extended family members, for example grandparents or aunts/uncles

<sup>57</sup>This seems to be the correct interpretation of the notion of child within the Brussels II a Regulation, also according to the general guidance provided by the Practice guide for the application of the new Brussels II Regulation with regard to parental responsibility issues (at p. 8).

<sup>58</sup>See W. Pintens, Art. 1, in U. Magnus – P. Mankowski (eds.), *Brussels IIbis Regulation*, Munich, 2012, p. 75.

<sup>59</sup>With regard to *kafalah*, the Explanatory Report clarifies that *kafalah* is a measure of protection that differs from adoption, since it does not produce an effect on the parent-child relationship: the child benefiting from this measure of protection does not become a member of the family of the *kafil*. See Explanatory Report, p. 547, para 23.

<sup>60</sup>See N. Lowe – M. Nicholls QC, *The 1996 Hague Convention on the Protection of Children*, at p. 27.

<sup>61</sup>See I. Rauscher, *Parental Responsibility Cases under the new Council Regulation "Brussels II A"*, in *The European Legal Forum*, 2005, pp. 35-47 at p. 38

<sup>62</sup>N. Lowe – M. Nicholls, *The 1996 Hague Convention on the protection of the children*, p. 27

(i.e. kinship placement). Neither Brussels IIa nor the 1996 HC provide for a definitive answer to this issue.

In the 1996 HC, however, this issue is expressly considered in the Practical Handbook at point 13.37, where reference is made to Working Document n° 59 submitted by the Netherlands, suggesting that «*whenever the child's placement outside its family of origin involves its removal to another Contracting State, a procedure similar to that provided for by the Convention of 29 May 1993, should be followed*». However, this suggestion implies the existence of a common uniform definition of what a family of origin is, which is nowadays very difficult to achieve even in the EU context.

In 2011, during the works of the Special Commission in the Hague context, the issue was further examined<sup>63</sup>. Some experts were of the view that applying art. 33 to those situations would have created unnecessary hurdles when placing children with relatives in other States. Other experts expressed concern that, should those measures fall outside art. 33, there would be no obligatory safeguards in place to ensure that the State where the child is placed is aware in advance of the child's relocation to that State and to ensure that matters such as immigration issues or access to public services have been considered and resolved in advance of the child's move. It has been further pointed out that the relevant public authorities in the receiving State may remain unaware of important matters such as the background of the child and the nature of the placement, matters which may necessitate the ongoing monitoring of the child's situation<sup>64</sup>.

As seen in the Practical Handbook, there is no settled practice on the issue of art. 33 of the 1996 HC.

As seen in the national reports of the selected EU Member States<sup>65</sup>, it seems that art. 56 is generally applied to the placement of children with relatives, such as grandparents or aunts/uncles.

## (ii) The procedure

Under the 1996 HC, art. 33 regulates the only procedure for obligatory consultation provided by the Convention<sup>66</sup>. It is a three-stage procedure:

In the first stage, once cross-border placement is determined to be the best solution to meet the needs of a specific child, the State of origin shall prepare a "report". Whilst art. 33 itself does not say anything on the content of this document, the Explanatory Report clarifies that it shall provide information on the child's situation and on the reasons for the proposed placement or provision of care.

In the second stage, the State of origin has to start the consultation by transmitting the report to the Central Authority or to any other competent authority of the receiving State. At this stage, the receiving State has the power to review the decision. The State of Origin and the receiving State may also establish in advance the conditions under which the child will stay in the receiving State, with specific regard to that State's immigration laws. The two States may even agree how to share the costs involved in carrying out the placement measure.

<sup>63</sup> The Special Commission is a body, set up by the Secretary General, in which all of the Member States of the Hague Conference on private international law, are invited to participate and which work on the practical operation of the 1980 Hague Child Abduction Convention and of the 1996 Hague Child Protection Convention. The conclusions and recommendation made by the Special Commission at the end of the 2011 meeting are available here <https://www.hcch.net/en/publications-and-studies/details4/?pid=6224>.

<sup>64</sup> See Practical Handbook on the Operation of the 1996 Hague Child protection Convention, 2014, at para 13.38. The Practical Handbook is available at the following address: <https://assets.hcch.net/upload/handbook34en.pdf>

<sup>65</sup> See *infra* Part IV.

<sup>66</sup> See Explanatory Report on the 1996 Hague Child Protection Convention, at 593, para 143. The Explanatory report is available at the following address: <https://www.hcch.net/en/publications-and-studies/details4/?pid=2943>

The third and final stage is subject to the condition that the receiving State gives its consent on cross-border placement or on the provision of care established. Once consent is obtained, the State of origin adopts the decision. The provision under art. 33 ends with the imperative of «*taking into account the child's best interests*», which seems to refer in particular to the adoption of the decision by the State of origin, even if – as pointed out by the preamble of the Convention – the imperative is followed with regard to any action by the States.

In the EU context, art. 56 envisages two different mechanisms of coordination among EU Member States, the application of which depends on the specific features of the domestic law of the receiving State.

More precisely a simplified mechanism of coordination is applied vis-à-vis those receiving EU Member States, where the procedures for “domestic” cases of child placement in foster families do not require the public authority’s intervention. Under art. 56 such States are *de facto* under a duty to treat cross-border placements as domestic ones. They are not entitled to ask for any intervention by a public authority and, therefore, are not entitled to exercise any form of consent or approval. The State of origin is under a duty to simply inform the receiving State of the placement of the child within the latter’s borders. This procedure is clearly coherent with the principle of mutual trust among EU Member States, but, on the other side, it does not give the receiving State the opportunity (i) to examine whether the cross-border solution is appropriate in the specific case at hand and whether the solution is able to really protect the child’s best interests and (ii) to genuinely evaluate its own reception capacity at the moment of the placement.

A more articulated mechanism of coordination is to be applied anytime the domestic legislation of the receiving EU Member State envisages some form of intervention of public authorities in domestic cases of placement of children in institutions or in foster families. Following the principle under which cross-border placement should be treated like domestic placement, art. 56 foresees a specific two-stage procedure. More precisely, the State of origin is under a duty: first to consult the Central authority or other competent authority of the receiving Member State and second to obtain the consent before adopting the placement order.

**This procedure is similar to the one outlined by art. 33 of the 1996 HC, the main difference being that the latter asks the State of origin to provide a report on the situation of the child to the receiving State. In the EU context such a document is not required: the “consultation” under art. 56 is not subject to any formal requirement, nor is the final “consent” of the receiving State.**

In practice, what generally happens<sup>67</sup> is that the State of origin sends the Central Authority of the receiving State a written request under art. 56, which may be more or less detailed, but which provides information on the situation of the child and on the appropriate care solution envisaged. The Central Authorities of the receiving Member State send the request to the competent judicial authorities who by virtue of the social assistants start a sort of investigation on the solution adopted and write a report for the attention of the judicial authority which finally gives consent by virtue of a decision, which closes the procedure of coordination.

### (iii) The costs

Brussels IIa does not expressly tackle the issue of costs related to the cross-border placement of children among EU State Members. Within the rules of Chapter IV devoted to the cooperation among Central Authorities on parental responsibility issues, the only

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<sup>67</sup>See part IV for more detailed information on the different practices followed by the EU Member States.

reference to the costs is provided by art. 57, titled “Working method”. This rule expressly states that the assistance the Central Authorities provide in matters regarding cooperation on cases specific to parental responsibility, including the cross-border placement of children under art. 56, shall be free of charge and that each Central Authority shall bear its own costs.

The 1996 HC provides a more detailed regime, which – similarly to what happens in the EU context - is applicable to the different mechanisms of cooperation envisaged by the Convention itself, including cross-border placement procedures.

Art. 38 of the 1996 HC states the general rule under which the Central Authorities and other public authorities of Contracting States shall bear their own costs in carrying out the mechanisms of cooperation provided by the Convention<sup>68</sup>. With regard to this rule, the Explanatory Report clarifies that it applies just to the administrative authorities of the Contracting States and not to the courts. As a consequence, court costs, the costs of proceedings and particularly of lawyers are not to be shared by the States involved. Rather, they will share the *«the costs of implementation of the measures taken in another State, in particular placement measures»*<sup>69</sup>. The latter costs are therefore to be shared between the States involved and shall not be charged only to the State that ordered the measure<sup>70</sup>.

The above general rule shall apply *«without prejudice to the possibility of imposing reasonable charges to the provision of services»*. This means that the State which has to bear costs for the provision of specific services - such as locating a child or delivering information or certificates – retains the power to charge them to the cooperating State, provided that this is done in a reasonable way<sup>71</sup>.

Art. 38 of the 1996 HC also envisages the possibility for the Contracting States to enter into agreements concerning the allocation of charges.

### 2.2.3. The recognition and enforcement of cross-border placement orders at the “global” and “regional” level

As seen in the table below, the rules on recognition and enforcement of the 1996 HC and Brussels IIa are very similar; no relevant differences arise.

<b>Art. 23 of the 1996 HC</b>	<b>Art. 23 of the Brussels IIa</b> “Grounds of non-recognition for judgments relating to parental responsibility”
1. The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States. 2. Recognition may however be refused: (...)	1. A judgment relating to parental responsibility shall not be recognised: (...)           (g) if the procedure laid down in Article 56 has not been complied with.

<sup>68</sup>More precisely, art. 38 states as follows: *«1. Without prejudice to the possibility of imposing reasonable charges to the provision of services, the Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter. 2. Any contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges»*.

<sup>69</sup>As pointed out in the Explanatory report, at p. 595, para. 152, in addition to the costs for cross-border placement, the States involved must also share the fixed costs of the functioning of the authorities, the costs of correspondence and transmissions, seeking out diverse information, localizing a child and organizing mediation or settlement agreements.

<sup>70</sup>The proposal of charging the costs of the placement measures just to the State which ordered the measure (i.e. State of origin) and not to the State which implemented it (receiving State), made during the negotiation of the 1996 HC, was rejected (Work doc. n°. 116) On this point, see Explanatory Report, at p. 595, para. 152, note 67.

<sup>71</sup>In this regard, the Explanatory Report states as follows: *«The terms employed let one think that this imposition may be a request for reimbursement of costs already incurred, or a request for provision of funds even before the service is furnished, either of which request would have to be formulated with a certain amount of moderation»*.

f) if the procedure provided in Article 33 has not been complied with.	
<b>Art. 26 of the 1996 HC</b>	<b>Art. 28 Enforceable judgments</b>
<p>1. If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.</p> <p>2. Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.</p> <p>3. The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.</p>	<p>1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.</p> <p>2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.</p>
<b>Art. 27</b>	<b>Art. 30 Procedure</b>
Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.	<p>1. The procedure for making the application shall be governed by the law of the Member State of enforcement. (...)</p>
<b>Art. 28 of the 1996 HC</b>	<b>Article 31 Decision of the court</b>
Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.	<p>1. The court applied to shall give its decision without delay. Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application.</p> <p>2. The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.</p> <p>3. Under no circumstances may a judgment be reviewed as to its substance.</p>

**The 1996 HC has been very innovative in introducing the automatic recognition of the measures of protection of children: art. 23 of 1996 HC deals with the “recognition by operation of law”** in order to establish that it is not necessary to start proceedings for a measure of protection to be recognized in the requested State (which, in the case of cross-border placement, is the receiving State) and, therefore, to produce its effect there.

Automatic recognition seems to be further enhanced by the wording of art. 23 of 1996 HC (2), where the refusal of recognition on the grounds of non-recognition is “permitted” but not mandatory<sup>72</sup>. Art. 23 (2) of the 1996 HC establishes that recognition “may” be refused

<sup>72</sup>The wording of art. 23 of Brussels IIa (and, more generally, the corresponding rule of other EU PIL instruments envisaging grounds of non-recognition) is stricter in providing that the judgment “shall not” be recognized.



in some cases, among which the case of non-compliance with the consultation procedure laid down by art. 33 of the 1996 HC is expressly envisaged.

It shall be further pointed out that the recognition by operation of law is sufficient in all cases where the measure is voluntarily complied with and there is no opposition. This seems to be the ordinary situation in the majority of (if not all) the cases where the measure of protection is the cross-border placement of the child. However, if there is some opposition (as, might happen, for example, in the case where one of the parents does not agree with the solution of cross-border placement), it is necessary to go through the general enforcement procedure under art. 26, 27 and 28 of the 1996 HC.

No significant differences characterize the regime for the recognition and execution of the cross-border placement of children provided in Brussels IIa. In this regard, it is worth pointing out that, **given the relationship between Brussels IIa and the 1996 HC, the rules on the recognition and execution of Brussels IIa apply with regard to any decision issued by the courts of a Member State, even if the child concerned lives in a third State which is a Contracting party of the 1996 HC**<sup>73</sup>.

The peculiar character of the EU's rules in the field of parental responsibility lays not on the regime on recognition, but on the **abolition of the exequatur** provided for the decisions regarding the rights to visit and the return of the child after abduction. **This regime, which is the expression of the highest level of mutual trust among EU Member States, is however not applicable to the decisions ordering the cross-border placement of children.**

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<sup>73</sup>This is necessary in order to ensure the creation of the common judicial area, where all the decisions issued by the competent courts of the EU Member States are recognized and enforced under a common set of rules. See Practice Guide, 2014 edition at 89-90.

### 3. THE RELEVANT CASE-LAW

#### 3.1. Introduction

The analysis of the relevant legal framework in the field of cross-border placement of children, as outlined in Part 2 of the present study, also requires specific consideration of the achievement of the case-law of the European Courts. As is known, the CJEU – by virtue of its exclusive power to interpret EU law – has the relevant function of granting the uniform application of the European *acquis*. With specific reference to all matters concerning children, including their cross-border placement, **the specific urgent procedure**<sup>74</sup> is capable of ensuring the delivery of the judgment without undue delay. **This relevant procedure is, of course, an added value of the EU legal system, of which the State parties of the 1996 HC indirectly benefit**<sup>75</sup>, since CJEU case-law clarifies **the meaning of notions or provisions which are the same in the EU as in the Hague context**<sup>76</sup>.

Beside CJEU case law, due consideration shall be paid to ECtHR case-law, which ascertains if human rights have been violated, including the right to family life protected by art. 8 ECHR (as well as by art. 7 of the EU Charter of Fundamental Rights). It is worth pointing out that, contrary to what happens in the EU context, **the general procedure before the ECtHR is not quick and no specific procedural devices aimed at speeding up the proceedings concerning minors are envisaged**. This has been particularly harmful in international child abduction cases<sup>77</sup>, but the time factor – which is of course relevant in all cases concerning children – is also *a fortiori* relevant in the case of cross-border placement where the adoption of the measure of protection is urgent in the large majority of cases.

#### 3.2. CJEU Case-Law

CJEU case law dealing specifically with art. 56 of Brussels IIa and therefore with the cross-border placement of children is limited to the decision taken in the *HSE* case<sup>78</sup>. However, a wider analysis of the Court's decisions in cases regarding the application of Brussels IIa's rules on parental responsibility is helpful to identify issues which might be considered in the recast and which may also affect the functioning of art. 56<sup>79</sup>.

<sup>74</sup> Reference is made to the so-called "*procédure préliminaire d'urgence*" (PPU), provided for in art. 107 ff. of the Rules of Procedure, in OJ L265/1, 29.9.2012.

<sup>75</sup> See Opinion A.G. Kokott, 29 January 2009, *Health Service Executive v. S.C.F. and A.C.*, Case C-92/12 PPU, in Electronic Reports, para. 23.

<sup>76</sup> Furthermore, after the Treaty of Lisbon, every court in a Member State can refer questions to the Court under art. 267 TFEU (the restriction to courts of last instance in the field of judicial cooperation in civil matters provided by art. 68 of the old TEC has been eliminated).

<sup>77</sup> On the delays with regard to child abduction proceedings and also with regard to the problem of a possible "European torpedo", see R. Schulz, *The Hague Child Abduction Convention. A critical analysis*, Oxford, 2013, at 28.

<sup>78</sup> CJEU, judgment of 26 April 2012, *Health Service Executive v. S.C. and A.C.*, case C-92/12 PPU, in the electronic Reports of Cases.

<sup>79</sup> In this view, among the relevant case-law on parental responsibility issues, the decisions concerning specific issues not affecting (even indirectly) the topic of cross-border placement have not been considered. Reference is made, in particular, to the case-law on the EU child abduction regime. For the purposes of this study, the following CJEU judgments are relevant: 2 November 2007, *C*, case C-435/06, in ECR I-10141; 2 April 2009, *A*, case C-523/07, in ECR I-2805; 23 December 2009, *Detiček*, case C-403/09 PPU, ECR I-12193; 1 July 2010, *Povse*, case C-211/10, in ECR I-6669; 15 July 2010, *Purrucker I*, C-256/09, ECR I-7349; 5 October 2010, *McB*, C-400/10, ECR I-11163; 9 November 2010, *Purrucker II*, C-296/10, ECR I-11163; 22 December 2010, *Aguirre Zarraga*, case C-497/10 PPU, ECR I-14247; 22 December 2010, *Mercredi*, case C-497/10 PPU, ECR I-14309; 26 April 2012, *Health Service Executive* (HSE), case C-92/12 PPU, in electronic Reports; 1<sup>st</sup> of October 2014, *E. v. B*, C-436/13, in electronic Reports; 16 July 2015, *Marie Matoušková*, C-404/14, in electronic Reports; 16 of July 2015, *A. v. B.*, C-184/14, in electronic Reports; 9 September 2015, *Christophe Bohex v. Ingrid Wiertz*, C-4/14, in electronic Reports; 6 October 2015, *David Bradbrooke v. Anna Aleksandrowicz*, C-498/14 PPU, in electronic Reports; 21 October 2015, *Vasilka Ivanova Gogova v. Ilija Dimitrov Iliev*, C-215/15, in electronic Reports; 19 November 2015,

### 3.2.1. The leading judgment rendered in the HSE case

The case concerned a girl, having her habitual residence in Ireland, who had been placed in many foster families and care institutions and was later placed under the care of the Health Service Executive (hereinafter HSE) until she became an adult. Given her specific protection needs and her desire to be close to her mother (residing in England), the HSE requested the Irish High Courts to give (i) provisional and protective measures under art. 20 of Brussels IIa concerning the placement of the minor in England and, at the same time (ii) an order that the minor should remain in that secure care institution, where she could receive the care and treatment she might need, including – if necessary – the use of reasonable force (since the girl had attempted suicide and no institution in Ireland was deemed to offer adequate protection). The High Court obtained the consent of the Central Authority for England and Wales and urgently ordered to transfer the minor to England (without having applied for the issue of a declaration of enforceability of the placement order). This case gave the CJEU the chance to clarify many aspects of the procedure in art. 56.

First of all, **the CJEU confirmed the approach already adopted in the decisions rendered in the C<sup>80</sup> and A<sup>81</sup> cases and stated that the concept of placement in institutional care must be interpreted as covering placement in a secure care institution.** This is for two reasons: this interpretation (i) is the only one able to grant protection to very vulnerable children<sup>82</sup> and (ii) is not contrary to the wording of the Regulation<sup>83</sup>.

Secondly, it has been clarified that **the consent under art. 56.2 shall be given (i) *ex ante* the making of the judgment of child placement; (ii) by a competent authority governed by public law (which shall be identified easily).** It has also been pointed out that in circumstances like those of the main proceedings, where it is uncertain whether consent has been validly given, an irregularity may be corrected to ensure that the requirement of consent has been fully complied with.

Thirdly, on the very delicate issue of whether the *exequatur* procedure shall be followed for a placement order to be effective, **the CJEU stated that for the proper functioning of the Regulation, the placement order needs to be declared enforceable and, therefore, the exequatur is necessary.** Whilst consent under art. 56 is aimed at eliminating the obstacles to cross-border placement, the *exequatur* procedure is aimed at making it possible to permit enforcement of an order in secure institutional care. However, given the possible delays of the *exequatur* procedure and the necessity to protect the best interests of the child, **the Court also pointed out that (i) in order not to deprive the Regulation of its effectiveness, the decision of the court of the requested State on an application for a declaration of enforceability must be taken with particular expedition and (ii) appeals brought against the decision of the court of the requested State must have a suspending effect<sup>84</sup>.** Moreover, recourse to art. 20 – recognizing the power of the courts of a Member State to adopt provisional and protective measures in respect of persons or assets in that State when the court of another Member

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*P. v. Q.*, C-455/15 PPU, in electronic Reports. See also A. Dutta – A. Schulz, *First Cornerstones of the EU Rules on Cross-border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive*, in *Journal of Private International Law*, 2014, pp. 1-40.

<sup>80</sup>See CJEU judgment of 2 November 2007, C, case C-435/06, para. 51.

<sup>81</sup>See CJEU judgment of 2 April 2009, A, case C-523/07, para 29.

<sup>82</sup>*Ibidem*, para. 64.

<sup>83</sup>Among the matters expressly excluded from its scope of application, Brussels IIa envisages just the “measures taken as a result of criminal offences committed by children” (i.e. measures of detention of a child imposed as punishment for the commission of a criminal offence). Placement accompanied by measures involving deprivation of liberty for a specified period, ordered to protect (and not to punish) the child, shall therefore be included in the scope of application of the Regulation. See CJEU judgment of 2 April 2009, A, case C-523/07, para. 65.

<sup>84</sup>See para. 129.

State has jurisdiction as to the substance of the matter - **is possible** (even if the provision is interpreted strictly).

Finally, with regard to the issue of **extending the period of placement, the Court stated the principle under which each new placement order requires a new declaration of enforceability**. However, the Court also stated that, **when it is necessary to extend placement, the court ordering it may contemplate an order for a suitable period of time, in order to (i) eliminate the disadvantages associated with a series of declarations of enforceability of short duration and (ii) to examine at closely spaced intervals, whether it is appropriate, within the period covered by the declaration of enforceability, to review the placement order**.

### 3.2.2. On the scope of application of Brussels IIa

As mentioned above - similarly to the ICJ's decision in the *Boll* case with regard to the scope of application of the 1902 Hague convention, specifically on its possible extension to measures of a "public nature" - after the entry into force of Brussels IIa the CJEU was soon called to interpret the notion of civil matters and its delimitation in regards to public law. **The test followed is to consider the impact of the protection measure at hand on parental responsibility<sup>85</sup>, irrespectively of the fact that the *lex fori* qualifies it as a public law measure.**

Recently, the above approach has been further confirmed in relation to a case where the Court was called to clarify the scope of application of the Brussels IIa vis-à-vis Regulation n° 650/2012 on succession<sup>86</sup> and Regulation n° 44/2001 (now Regulation n° 1215/2012)<sup>87</sup>

More precisely, looking at the impact of the measure of protection at hand (i.e. the appointment of a guardian on behalf of a minor with limited legal capacity), the CJEU concluded that the approval of an agreement on the sharing of an estate by the appointed guardian, even if it was requested in a succession proceeding, is still to be qualified as a protective measure relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of art. 1.1 lett. b and 2 lett. 2 of Regulation n° 2201/2003<sup>88</sup>. The Court further confirmed this interpretation by making reference to the Lagarde report on the 1996 HC, stating that successions are in principle excluded from the convention itself, but when « **the legislation governing the right to succession provides for the intervention of the legal representative of the child heir, that representative must be designated in accordance with the rules of the convention, since such a situation falls within the area of parental responsibility**»<sup>89</sup>.

In a following decision, the CJEU stated that penalty payments - imposed in a judgment, given in another Member State, concerning rights of custody and rights of access in order

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<sup>85</sup>See CJEU judgment of 2 November 2007, *C*, case C-435/06, at para 51; CJEU judgment of, 2 April 2009, *A*, case C-523/07, at para 26 and CJEU judgment of 26 April 2012, *Health Service Executive* (HSE), case C-92/12 PPU, at para 63. See also A. Dutta – A. Schulz, *First Cornerstones of the EU Rules on Cross-border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive*, at 5.

<sup>86</sup>Regulation (EU) No. 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, in OJ 201, 27.7.2012, pp. 107-134.

<sup>87</sup>Reference is made to the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L012, 16.1.2001, pp. 1-23 (so-called Brussels I Regulation), which is now replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, pp. 1-32.

<sup>88</sup>See CJEU judgment of 16 July 2015, *Marie Matoušková*, C-404/14, at para 28-31.

<sup>89</sup>*Ibidem* at para 32.

to ensure that the holder of the rights of custody complies with those rights of access and, therefore, ancillary to the exercise of those rights – are not subject to Regulation n°. 44/2001, but to Brussels IIa, even though the latter Regulation does not include any rule concerning payment: «*the fact that that issue was not addressed during the drafting of those regulations is not a ground for inferring that the intention of the EU legislature was to exclude the enforcement of penalty payments from their scope*». As a consequence of this reasoning, the CJEU concluded that the penalty, inasmuch as it contributes to bringing about compliance with judgments given in relation to rights of access, pertains to the objective of effectiveness pursued by Brussels IIa<sup>90</sup>.

The above approach was further confirmed in a very recent decision, where the CJEU was called to verify whether an action in which one parent asked the court to remedy the lack of agreement of the other parent to their child travelling outside his Member State of residence and a passport being issued in the child's name was within the material scope of Regulation n° 2201/2003. This holds even though the decision in that action will have to be taken into account by the authorities of the Member State of which the child is a national in the administrative procedure for the issue of that passport. Once having assessed that the action regarding parental responsibility falls within the scope *ratione materiae* of Brussels IIa and is not one of the subjects excluded the Court concluded that Brussels IIa shall apply, even though that application relates to a specific decision concerning a child and not to all the conditions of the exercise of parental responsibility<sup>91</sup>.

### 3.2.3. On the rules on jurisdiction and the key notion of habitual residence

Art. 56 expressly states that the courts having jurisdiction under art. 8 to 15 are to be considered the courts of the State of origin having jurisdiction to order cross-border placement. As is known, the system of grounds of jurisdiction provided by art. 8 to 15 (i) is focused on the notion of the child's habitual residence, since it satisfies the need for proximity and the child's best interests<sup>92</sup> as well as (ii) being very flexible.

As for the notion of habitual residence, the CJEU has clarified that it corresponds to the place which reflects some degree of integration by the child in a social and family environment and also that it has to be established by the domestic courts, on the basis of all circumstances specific to each case. In this view, beside the physical presence of the child, the relevant factors to be considered are (i) that the presence is not temporary or intermittent; (ii) that the residence of the child reflects some degree of integration in a social and family environment, such as the duration, regularity, conditions and reasons to live within the borders of a Member State, the family's move to that State, the child's nationality, the conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State.

Furthermore, as for newborn children, specific attention shall be paid to the social and family environment of the people on whom the child is dependent and, therefore, in cases of children looked after by the mother, it is necessary to assess the mother's integration into her social and family environment (i.e. reasons for the move to another Member State, languages known to the mother, her geographic and family origins).

The Court has also stressed the importance of the intentions of the person concerned, being necessary to consider where the person plans to establish his/her centre of interests<sup>93</sup>.

<sup>90</sup>See CJEU judgment of 9 September 2015, *Christophe Bohex v. Ingrid Wiertz*, C-4/14, para 46.

<sup>91</sup>See CJEU judgment of 21 October 2015, *Vasilka Ivanova Gogova v. Ilia Dimitrov Iliev*, C-215/15, para 29-32.

<sup>92</sup>See recital 12 of Brussels IIa.

<sup>93</sup>See CJEU judgment of 22 December 2010, *Mercredi*, case C-497/10 PPU, para 51.

As for the other titles of jurisdiction, in relation to art. 12 the CJEU has stressed that the possibility under art. 12.3 of prorogation of jurisdiction is an exception to the criterion of proximity and, therefore, has to be interpreted strictly<sup>94</sup>. The Court has further clarified that this prorogation may be applied «*without it being necessary for those proceedings to be related to other proceedings already pending before the court in whose favor the prorogation of jurisdiction is sought*»<sup>95</sup>. As a consequence, the possibility to prorogate jurisdiction in art. 56 in favour of the courts dealing with proceedings for separation/divorce or annulment of marriage is conditioned to the pending of the latter proceedings. This is, however, not necessary for the prorogation in favour of the courts of the child's nationality as well as of the habitual residence of one of the holders of parental responsibility, provided by art. 12.3.

The CJEU has also stressed that it is important for the holders of parental responsibility to come to a real agreement on prorogation<sup>96</sup> and for the prorogation of jurisdiction to be in accordance with the best interests of the child<sup>97</sup>.

As for the application of art. 15, allowing in exceptional circumstances for the transfer of a case to a judge better placed to decide, specific guidance on its application as a title of jurisdiction for cases regarding the cross-border placement of children will be soon provided by the CJEU. It is now pending a preliminary ruling procedure regarding art. 15's application to public law care proceedings<sup>98</sup>.

#### 3.2.4. On art. 20 of Brussels IIa

Art. 20 of Brussels IIa is likely to play a relevant role in art. 56 proceedings: it deals with jurisdiction in case of emergency and provides that in urgent cases the courts of a Member State may take provisional and protective measures available under the *lex fori* regarding persons and assets in that State, which will cease to apply when the court having jurisdiction as to the substance of the matter has taken the measures.

The principles stated in CJEU case-law are particularly relevant on this rule. As for the scope of application of the rule, the Court has pointed out that, given the express reference to persons and assets, art. 20 goes beyond the scope of application of Brussels IIa<sup>99</sup>.

The Court has further clarified that (i) an emergency situation shall be evaluated with regard to the position of the minor and the impossibility of starting a proceeding on parental responsibility issues before the competent court, (ii) art. 20 shall be interpreted as not allowing a Member State court to take provisional measures in matters of parental responsibility that grant custody of a child who is in that Member State to one parent where another Member State court, which has jurisdiction as to the substance in the dispute has already delivered a judgment provisionally giving custody of the child to the other parent and that judgment has been declared enforceable in the former Member State; (iii) the

<sup>94</sup>See CJEU judgment of 21 October 2015, *Vasilka Ivanova Gogova v. Ilia Dimitrov Iliev*, C-215/15, para. 41.

<sup>95</sup>See CJEU judgment of 12 November 2014, *L. v. M.*, case C-656/13, para. 45.

<sup>96</sup>*Ibidem*, para. 56-57, where the Court points out that this agreement cannot exist when one court is seised on the initiative of one of the parties of the proceedings and another party brings other proceeding before the same court at a later date and that other parties, on taking the first step required in the first proceedings, plead the lack of jurisdiction of the court seised. Similarly, in the following decision rendered in the case *Vasilka Ivanova Gogova v. Ilia Dimitrov Iliev*, para 42 the Court excluded the existence of a valid acceptance of jurisdiction in the case of an absent defendant on whom the document instituting the proceedings had not been served and who was unaware of the proceedings that had commenced.

<sup>97</sup>*Ibidem*, para 58.

<sup>98</sup>See *Child and Family Agency (CAFA) v. J.D.*, case C-428/15. The case concerns a mother who wanted to move beyond the reach of the social services of her home State and thereafter give birth to her child in another jurisdiction with a social service system she considered more favorable.

<sup>99</sup>See CJEU judgment of 15 July 2010, *Purrucker I*, C-256/09, para. 86. In favour of the CJEU's position, see F. Mosconi – C. Campiglio, *Diritto internazionale private e processuale*, Milan, 2013, p. 118. For a different opinion, see M. Pertegas Sender, Art. 20, in U. Magnus – P. Mankowski (eds.), *The Brussels IIbis Regulation*, Munich, 2012, p. 250.

provisional measures under art. 20 have a territorial impact; they, therefore, shall not be considered decisions under Brussels IIa and shall not circulate or be recognized under the latter's regime; (iv) the mechanism of *lis pendens* under art. 19 does not apply when the first court is seized for the adoption of provisional measures under art. 20<sup>100</sup>.

Lastly, with reference to the lack of specific mechanisms for the transfer of jurisdiction from the court taking provisional measures under art. 20 to the court having jurisdiction, the CJEU has stated that the national court which has taken provisional measures is required to inform another Member State court having jurisdiction, directly or through the central authority designated under art. 53.

With reference to cross-border placement, art. 20's measures might be adopted at two different stages of the proceedings under art. 56

At the very beginning of art. 56 (i.e. when the need for cross-border placement has been ascertained in the State of origin and the request to the receiving State has been made) it should be possible, in cases of exceptional urgency, such as the *HSE* case<sup>101</sup>, for the courts of the State of origin to "provisionally" place the child in an institution or foster family of another Member State.

On the other hand, in the last stage of art. 56's procedure, it should be possible for the courts of the receiving State to adopt art. 20's measures until the exequatur procedure is concluded<sup>102</sup>.

In other terms, art. 20's measures may be used as a device to overcome the difficulties deriving from the fact that art. 56's procedure is not able to provide rapid solutions in emergency cases.

In the *HSE* case, the CJEU – on the one side - acknowledged the fact that an order under art. 20 was made by the courts of the receiving State imposing provisional and protective measures needed to effect placement for the protection of the child until the end of the enforcement procedure<sup>103</sup>. However, on the other side, it confirmed that art. 20, being an exception to the system of jurisdiction laid down by the Regulation, must be interpreted strictly<sup>104</sup>.

### 3.2.5. On recognition and enforcement

Brussels IIa at the time of its adoption pioneered the abolition of exequatur for decisions on the right to visit and on the return of the child (under art. 11.8). In general, the CJEU's approach has been very sensitive in defending the principle of mutual trust and, therefore, in promoting the recognition and enforcement of judgments in the field of parental responsibility. This approach was confirmed not only in respect of an order in alleged violation of the right of the child to be heard<sup>105</sup>, but also in a 2010 case where it was contended that the rules on jurisdiction were not respected. In the latter case, the Court stressed the principle under which only **«a manifest breach, having regard to the best interests of the child, of a rule regarded to be essential in the legal order of a**

<sup>100</sup>See CJEU 9 November 2010, *Purrucker II*, C-296/10, para 70-72.

<sup>101</sup>See CJEU judgment of 26 April 2012, *Health Service Executive* (HSE), case C-92/12 PPU, para 95.

<sup>102</sup>See view of Adv. Gen. Kokott, delivered on 28 March 2012, in the case C-92/12 PPU, *Health Service Executive* (HSE), para. 88-104.

<sup>103</sup>See CJEU judgment of 26 April 2012, *Health Service Executive* (HSE), para. 130-132. For domestic case-law applying art. 20 as the legal basis for adoption of provisional order on the placement of children, see Cour de Cassation, ch. Civ., 8 July 2010, 09-66.406 and Cour d'appel de Poitiers, ch. Civ., 16 April 2009, 09/00356.

<sup>104</sup>See CJEU judgment of 26 April 2012, *Health Service Executive* (HSE), para. 130; CJEU 23 December 2009, *Detiček*, case C-403/09 PPU, para 38.

<sup>105</sup>See CJEU judgment 22 December 2010, *Aguirre Zarraga*, case C-491/10 PPU, para. 69-73.

**Member State or of a right recognized to be fundamental within that legal order may justify the non-recognition of a decision»<sup>106</sup>.**

This rigorous interpretation of the rules on recognition and enforcement may, however, give rise to problems when the decision held may no longer be in the child's best interests due to a change in the circumstances. Further guidance on this very issue is going to be provided: a case is now pending where the Court has to establish whether an application for amendment of the State of origin's judgment on custody rights, which is to be declared enforceable, may determine a stay of proceedings for non-recognition or for a declaration of enforceability by the appellate court under art. 35<sup>107</sup>. This might be relevant in the case of the cross-border placement of children. Due to a change of circumstances, it might be necessary for an amendment of the placement order to be lodged in the Member State of origin.

### 3.2.6. On the principles inspiring Brussels IIa

From the above analysis, the approach followed by the CJEU with regard to the application of the specific provisions of Brussels IIa seems quite clear, where it promotes cross-border cooperation in civil matters by following hermeneutic paths that work to ensure the free movement of decisions in the European judicial space. However, in its case-law, the CJEU has also had the chance to confirm the importance of more general principles that inspire the Brussels IIa and therefore shall be taken into account in interpreting its provisions. Reference is made to the child's best interests and to the principle of effectiveness.

**The CJEU has recognized that a real obligation to consider the best interests of the child<sup>108</sup>, which is considered as a "driver" in the interpretation and application of the rules on jurisdiction of the Brussels IIa derives from art. 24 of the Charter.** In the light of the best interests of the child, the CJEU has stated that (i) an application for maintenance in respect of children is ancillary to proceeding in matters of parental responsibility (and not concerning the status of persons)<sup>109</sup> and, also, that (ii) in order to safeguard this principle, it is possible to review a prorogation of jurisdiction under art. 12.3<sup>110</sup>.

**As a corollary of this principle, the child shall be recognized the right to be heard, which, as pointed out by the Court, is not an absolute right, but if the court decides it is necessary, it must offer the child a genuine and effective opportunity to express his/her views<sup>111</sup>.** In this view, domestic courts shall use all means available to them under national law as well as specific instruments of international judicial cooperation, including, when appropriate those envisaged by Regulation n° 1206/2001<sup>112</sup> (such as the use of videoconferences and teleconferences, envisaged by art. 10 of the latter Regulation)

**On the other hand, the CJEU has frequently recalled the principle of effectiveness as a limit to be respected by the States.** More precisely, the Court has clearly pointed out that it is not the aim of the Brussels IIa Regulation to unify the substantive and

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<sup>106</sup>See CJEU judgment 19 November 2015, *P. v. Q.*, C-455/15 PPU, para 39. Following the above principle, the Court excluded that an alleged breach of art. 15 by one Member State court may allow another Member State court to review the jurisdiction of that court just because art. 24, prohibiting any review of the jurisdiction of the Member State of origin, does not expressly mention art. 15 (but only to art. 8 to 14).

<sup>107</sup> See request for a preliminary ruling lodged on 21 September 2015 in the case *R v. S and T* (case C-492/15).

<sup>108</sup> See CJEU judgment of 5 October 2010, *McB*, C-400/10, para 60.

<sup>109</sup> See CJEU judgment of 16 of July 2015, *A. v. B.*, C-184/14, para 37, 45 and 47.

<sup>110</sup> See CJEU judgment of 1<sup>st</sup> of October 2014, *E. v. B.*, C-436/13, para 48-49.

<sup>111</sup> See CJEU judgment of 22 December 2010, *Aguirre Zarraga*, case C-491/10 PPU, para 66.

<sup>112</sup> Reference is made to the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters, in OJ L174, 27.6.2001, pp. 1-24. See Recital 20 of Brussels IIa.



procedural rule of law in the various Member States; however, the application of such national rules must not impair the effectiveness of the regulation's provisions<sup>113</sup>.

The above principles have been recently confirmed by the CJEU, with regard to a case where it was asked to ascertain whether art. 11.7 and 11.8 of Brussels IIa have to be interpreted as precluding a Member State from allocating the jurisdiction to examine questions related to return or custody of a child to a specialised court in the context of the procedure laid down by the above provisions. In this case, the CJEU stated that it is a matter of choice by Member States to determine the national court having jurisdiction to examine questions of return or custody, the only existing limits being (i) the respect of the principle of effectiveness and, therefore, the State's choice as regards jurisdictional competence (which in the case at stake was the choice of allocating jurisdiction to a specialised court having specific technical skills) shall not impair the *effet utile* of the Regulation, (ii) the respect of the child's fundamental rights as stated in art. 24 of the Charter and (iii) with specific reference to the case at stake, the respect of the objective of expedition<sup>114</sup>.

### 3.3. ECtHR Case Law

In the context of the system of protection of human rights made by the ECHR as applied by the ECtHR, there are many decisions that are relevant to the topic of the present study<sup>115</sup>. Whilst CJEU case-law is mainly focused on the functioning of the procedural rules of Brussels IIa, ECtHR case law also considers the application of the rules of Brussels IIa, but under the specific perspective of the respect of fundamental rights as protected by the ECHR and by other relevant instruments for the protection of human rights<sup>116</sup>.

Given the importance recognized by both EU and CoE law to family relationships and for the child not to be deprived of contact with his/her parents, ECtHR case-law is particularly interesting in that it strikes a balance – on a case by case basis - between the right of the child to stay with his/her family and the need to ensure that the child is protected from harm. This role is particularly relevant since perceptions as to the appropriateness of the intervention of public authorities in the care of children vary from one State to another, depending on different factors such as traditions related to the role of the family, State intervention in family affairs and the availability of resources for public measures in this particular area. Even if it is for the national authorities – given the proximity with the children and the people concerned – to take decisions on regulating the public care of children and the rights of parents whose children have been taken into care, it is for the ECtHR to review the decision taken by those authorities in the exercise of their power and of the appreciation they enjoy under the Convention.

Other than the decisions regarding Brussels IIa, the case-law dealing with substantive and procedural matters related to the placement of children in alternative care is here considered.

<sup>113</sup>See CJEU judgment of 11 July 2008, *Rinau*, C-195/08, para. 82 and CJEU judgment of 11 July 2008, *Povse*, C-195/08 PPU, para. 78. On the principle of effectiveness, see S.M. Carbone, *Principio di effettività e diritto comunitario*, Naples, 2009.

<sup>114</sup> See judgment of 6 October 2015, *David Bradbrooke c. Anna Aleksandrowicz*, C-498/14 PPU, para 49-54.

<sup>115</sup>See also *Olsson v. Sweden* (n°. 1), 24 March 1988, n°. 10465/83; *Eriksson v. Sweden*, 22 June 1989, n° .11373/85; *McMichael v. United Kingdom*, 24 February 1995, n° 16424/90; *Scozzari and Giunta v. Italy*, 13 July 2000, n°. 39221/98 and 41963/98; *K. and T. v. Finland*, 12 July 2001 n° 25702/94; *Kutzner v. Germany*, 21 February 2002 n° .46544/99; *R.K. and A.K. v. United Kingdom*, 30 September 2008, n° .38000/05; *Y.C. v. United Kingdom*, 13 March 2012, n° 4547/10; *Levin v. Sweden*, n°. 35141/06, 15 of March, 2012; *B. v. Romania* (n° 2), 19 February 2013, n° 1285/03; *R.M.S. v. Spain*, 18 June 2013n° 28775/12; *T. v. Czech Republic*, 17 July 2014, n° . 19315/11; *K.A. v. Finland*, 14 January 2003, n° .27751/95; *M. and M. v. Croatia*, 3 December 2015, n° .10161/13.

<sup>116</sup>On the interpretation of the ECHR as a "*living instrument*" in light of other treaties of international law, see art. 53 of the ECHR.

### 3.3.1. ECtHR Case Law on Brussels IIa

ECtHR case-law considering the application of the rules of Brussels IIa under the specific perspective of the respect for fundamental rights as protected by the ECHR is mainly focused on the specific EU child abduction regime (incorporating the 1980 Hague Convention on the civil aspects of international child abduction)<sup>117</sup>

More precisely, the ECtHR has found that violations of art. 8 arise when the State does not conduct an in-depth examination of the entire family situation in child abduction cases (taking into account factors of a factual, emotional, psychological, material and medical nature) and does not assess, in light of the above examination, the respective interests of the people involved<sup>118</sup>.

The above "in depth-examination" test may be criticised as inappropriate in child abduction proceedings, due to their specific nature and their urgent character, and since this type of investigation could prejudice the proper functioning of art. 11.8 of Brussels IIa<sup>119</sup>. That said, for the purposes of this study, it is a helpful parameter for an assessment of the situation of children in search of care and, therefore, for the evaluation of the best care solution, including cross-border placement under art. 56.

On the other hand, the ECtHR have also found violations of art. 6 and/or of art. 8 ECHR with regard to child abduction proceedings (under the 1980 Hague Conventions and under the EU regime)<sup>120</sup> exceeding a reasonable time.

### 3.3.2. The decisions dealing with substantive matters related to the placement of children in alternative care

It is a well-established principle in ECtHR case law that parents' and children's mutual enjoyment of each other's company constitutes a fundamental element of family life and, therefore, domestic measures jeopardizing this enjoyment amount to interference with the right to family life.

Thus, a child's placement in alternative care has to be compatible with art. 8 ECHR (as well as with art. 7 of the EU Charter of fundamental rights). In this view, placement (i) has to be in accordance with the law; (ii) has to pursue a legitimate aim such as the protection of the child's best interests and (iii) has to be considered «*necessary in a democratic society*», meaning that the national authorities establishing the placement have to provide relevant and sufficient reasons to support the measure used to pursue the relevant goal.

**In protecting the right to family life, the ECtHR has repeatedly stated the principle according to which children placed in alternative care retain the right to maintain contact with both parents.** In ECtHR case-law, mutual contact between the parents and the child is considered a fundamental part of family life under art. 8 ECHR. Furthermore, the protective measure of alternative care should be temporary in nature and, therefore, the maintenance of the family relationship is key to granting the return of the child in his/her own family<sup>121</sup>.

Therefore, whilst States (i.e. the competent national authorities), enjoy a wide margin of appreciation when taking the initial decision to separate children from their parents, a

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<sup>117</sup>See recital 17 of Regulation No 2201/2003.

<sup>118</sup>Reference is made to the case of *Sneerson and Campanella v. Italy*, 12 July 2011, n°. 14737/09; *X. v. Latvia*, 26 November 2013, n°. 27853/09; *Karrer v. Romania*, 21 February 2012, n°. 16965/10.

<sup>119</sup>For references to the literature and the relevant case-law on this issue, see L. Carpaneto, *In-depth consideration of family life v. immediate return of the child in abduction proceedings within the EU*, in *Rivista di diritto internazionale privato e processuale*, 2014, pp. 931-958.

<sup>120</sup>As for an application of the above principles to a case falling within the scope of application of the 1980 Hague Convention, see, *inter alia*, *H.N. v. Poland*, 13 December 2015, n°. 77710/01. As for a case falling within the EU's regime, see *M.A. v. Austria*, 15 January 2015, n°. 4097/13.

<sup>121</sup>See *Olsson v. Sweden* (n° 1), 24 March 1988; *Eriksson v. Sweden*, 22 June 1989

stricter scrutiny is called for regarding further limitations, such as restrictions on parental rights of access and legal safeguards designed to secure the effective protection of the right of parents and children to family life. This is the case, since further limitations pose the risk that family relations between a young child and one or both parents would be effectively curtailed. Therefore, **the margin of appreciation decreases with the amount of time children are separated from their parents so State authorities should ground their decisions to maintain separation upon strong and imperative reasons**<sup>122</sup>. In this regard, on the basis of children's negative reactions and, therefore, in order to protect their best interests, restrictions on the rights of mothers to maintain contact with their children have been considered proportionate to the legitimate aim pursued and within the margin of domestic appreciation<sup>123</sup>.

On the other hand, in its case-law the ECtHR also stresses the importance of a positive obligation deriving from art. 8 ECHR on the States to take the necessary measures to support both parents and families and to protect children against potential abuse. In this light, **inaction on the part of the competent authorities which led to the total impossibility of reuniting has been considered by the ECtHR as amounting to a violation of art. 8 ECHR**<sup>124</sup>. Similarly, Member States, under art. 8 ECHR, are under the positive obligation to show an adequate degree of prudence and vigilance in the delicate situations concerning the placement of children in institutions. **Consequently, a violation of art. 8 ECHR is to be found in cases of "perpetuous orders", or in those cases in which relevant negative factors (such as the lack of vigilance of social services and the negative influence of people responsible for the children in the institution) determine an irreversible separation of children from their parents**<sup>125</sup>.

### 3.3.3. The decisions dealing with procedural matters related to the placement of children in alternative care

The decision to place a child in alternative care shall also respect specific procedural safeguards in order to avoid any possible violation of the fundamental rights of the child and of the parents or other holders of parental responsibility.

In this view, the decision-making process – both at the judicial and administrative level – which ends with the adoption of measures interfering with family life need to respect the interests protected by art. 8 ECHR, among which a preeminent position is to be granted to the best interests of the child<sup>126</sup>.

The ECtHR generally recognizes that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care, but also that a stricter scrutiny is called for regarding any further limitations, such as limitations on parental rights and access<sup>127</sup>.

First of all, it is necessary that every decision concerning the placement of a child in alternative care is taken with the involvement of the parents to a sufficient degree to give them the chance to adequately protect their own interests in the procedure. In this light,

<sup>122</sup>See *Y.C. v. United Kingdom*, 13 March 2012, para. 137; see also *K. and T. v. Finland*, 12 July 2001, para. 151

<sup>123</sup>See *Levin v. Sweden*, 15 March 2012, paras. 57 and 69,

<sup>124</sup>See *R.M.S. v. Spain*, 18 June 2013, - concerning a case where the mother had been separated from her daughter solely for economic reasons, and the child had initially been placed in children's homes - where here the ECtHR pointed out that in the case at hand the national administrative authorities should have had considered other less dramatic measures first, and only then taken the child into care, also in light of the fact that the social authorities' role is precisely to help people in trouble, to provide them with guidance and to advise them on matters such as the different types of benefits available (such as the possibility of obtaining social housing and other means of covering their difficulties).

<sup>125</sup>See *Scozzari and Giunta v. Italy*, 13 July 2000, para. 211-215, op. cit.

<sup>126</sup>See *Ignaccolo – Zenide v. Romania*, 25 January 2000, n°. 31679/96.

<sup>127</sup>See *Kutzner v. Germany*, 21 February 2002.

the parents have the right to be kept informed about developments and to participate in taking decisions concerning their children<sup>128</sup>.

In the case *B v. Romania*, for example, the children of a mother diagnosed with paranoid schizophrenia were placed in a care home. The Court found that the mother could not take part to the decision-making process, since she had not been granted the help of a lawyer or a guardian *ad litem* to represent her. Furthermore, the situation of the applicant and that of the children had been examined only twice in twelve years. The Court concluded that a violation of art. 8 ECHR occurred, since the mother's interests in the decision-making process concerning the children's placement into care had not been adequately protected<sup>129</sup>.

In another case, the ECtHR stated that the mistaken, professional assessment of a situation giving rise to a decision of placement of children in a children's home does not amount to a violation of art. 8 ECHR<sup>130</sup>, since the placement decision shall be assessed in light of the situation presented to the domestic authorities.

On the other hand, the ECtHR has emphasised that a decision to place a child in care after hearing expert psychological and psychiatric opinions as well as taking into account the wishes of the child is in compliance with art. 8. But in the same decision, the ECtHR also criticised the lack of the competent authorities' oversight of the decision taken by the child's residential institution to deny contact with the child's father and stated that, given that these decisions ultimately reduced the chances of family reunification, a violation of art. 8 ECHR arose in that case<sup>131</sup>.

**With specific reference to the right of the child to be heard in proceedings concerning placement, the ECtHR's approach is to recognize that it is a requirement implicit in art. 8, but, that it would be going too far to say that domestic courts are always required to hear the child in court.** This issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned<sup>132</sup>. In this light, it is for domestic courts exercising their margin of appreciation, to decide how and when to hear a child.

On the other hand, having regard to art. 12 of the UNCRC (and also to point 32 of General comment n°. 12 of the Committee on the Rights of the Child), in any judicial or administrative proceedings affecting children's rights under art. 8 ECHR, children able to form their own views have the right to be heard and express these views. Accordingly, in a case regarding the right of a divorced couple's daughter who had not been allowed to express her views on which parent should take care of her during the custody proceedings (lasting more than four years), **the ECtHR stressed with reference to art. 12 UNCRC that in any judicial or administrative proceedings affecting children's rights under art.8 ECHR, «it cannot be said that children capable of forming their own views were sufficiently involved in the decision-making process if they were not**

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<sup>128</sup>See *McMichael v. UK*, 24 February 1995, where the ECtHR found that (i) a violation of art. 6 occurred due to failure of disclosure to one of the applicants of social reports and other confidential documents, which has been considered as capable of affecting her ability not only to influence the outcome of the children's hearing but also to assess prospects of making an appeal and also that (ii) a violation of art. 8 ECHR occurred due to the same conduct *vis-à-vis* both parents.

<sup>129</sup>See *B. v. Romania* (N° 2), 19 February 2013.

<sup>130</sup>See also *R.K. and A.K. v. United Kingdom*, 30 September 2008; *B.B. and F.B. v. Germany*, 14 June 2013, application nos. 18734/09 and 9424/11. In the latter case, the parallel decision to withdraw the parental authorities taken on the same mistaken assessment, without relying on the different statements from medical professionals submitted by the parents amount to a violation of art. 8.

<sup>131</sup>See *T. v. Czech Republic*, 17 July 2014.

<sup>132</sup>In this regard, with reference to the contacts of a three years child (five at the time of the decision) with her parents, see *Sahin v. Germany*, n° 30943/96, 8 July 2003, para. 73.

**provided with the opportunity to be heard and thus express their views» and found that the failure amounted to a violation of art. 8<sup>133</sup>.**

Furthermore, the ECtHR points out the importance of the time factor in all proceedings concerning children, including placement proceedings: the excessive length of child care proceedings may, therefore, amount to a violation of art. 6 ECHR<sup>134</sup>.

It is worth mentioning **a decision of the ECtHR on the issue of recognition of a protection measure (*kafalah*) not envisaged in the legal order where it was sought<sup>135</sup>**. More precisely, the Court had to establish whether the French courts' rejection of an application to transform *kafalah* into a full adoption, made by a woman entitled to the legal care of an Algerian child, amounted to a violation of art. 8 ECHR. The Court found that, under the French legal order, it was possible to adopt a minor who was born and habitually resident in France or one having acquired French citizenship, whilst it was not possible to transform *kafalah* into adoption. In light of the above, **the Court stated that no violation of art. 8 ECHR arose in the case, since – by gradually obviating the prohibition of adoption – the State put in action the positive obligation deriving from art. 8 ECHR by trying to encourage the integration of children of foreign origin in the respect of cultural pluralism.**

In the end, it shall be also mentioned the ECtHR's case-law on the so-called "forced adoption" or "adoption without parental consent", given the frequent use that the public authorities make of the above mechanism mainly in the UK in care proceedings involving non-nationals and the impact that such a practice may have with regard to art. 56 Brussels IIa procedures<sup>136</sup>. **In two decisions<sup>137</sup>, the ECtHR did not find any violation of art. 8 ECHR in the decisions of the English courts placing the children for adoption without the consent of the parents, after an accurate assessment of the situation of the children at hand.**

<sup>133</sup>See *M. and M. v. Croatia*, 3 December 2015, para. 181.

<sup>134</sup>See *E.P. v. Italy*, 16 November 1999, application no. 31227/86

<sup>135</sup>See *Harroudj v. France*, 4 January 2013, application no. 43631/09.

<sup>136</sup>See *infra* part IV.

<sup>137</sup>See *Y.C. v. United Kingdom*, 24 September 2012, application n°. 4547/10 and *R. and H. v. United Kingdom*, 15 September 2009, application n°. 35348/06. On this topic, see R. Lamont – C. Fenton-Glynn, *Cross-Border Public Care and Adoption Proceedings in the European Union*, in *Journal of Social Welfare and Family Law*, 2016, at

## 4. THE APPLICATION OF ART. 56 OF THE BRUSSELS IIA REGULATION BY THE MEMBER STATES

### 4.1. Introduction

A crucial element in assessing the functioning of cross-border placement within the EU judicial space is the application of art. 56 of Brussels IIA by the national authorities. The investigation on the legal systems of the 12 selected EU Member States<sup>138</sup> have provided interesting information on (i) the number of cross-border placements of children made in the most recent years; (ii) the countries particularly interested by the cross-border placements of children, both as States of origin and as receiving States; (iii) the most critical aspects of the procedure envisaged by art. 56 and the problems encountered in its application.

The statistical information on the cross-border placements, when available, cover just recent years: none of the selected MSs collected statistical information from the entry into force of the Brussels IIA (i.e. from 1st of August 2004 and, for "new" MS, from the date of acquisition of their EU membership); some of them started to collect information from 2008 (like, for instance, Belgium, Germany and Spain) and the majority of them in very recent years. In some cases, the information collected in one MS do not match with those collected in another MS (as, for instance, in the case of Ireland and United Kingdom). It appears that the German Central Authority is the only one which has made the statistic information available to the public in its official website; as for the Central Authorities of other selected MSs no statistics are publicly available and, therefore, national experts have made formal enquiries to the competent authorities.

Member State	Number of art. 56 Brussels IIA's cases from 2008 to 2015	Incoming cases	Outgoing cases
Belgium	133	74	59
Bulgaria	6	5	1
Czech Republic	187	117	70
France	56	52	4
Germany	929	73	856
Ireland	102	27	75 (to UK)
Italy	89	83	3
Latvia	37	-	37
Malta	8	8	
The Netherlands	28	20	8
Spain	151	146	5
The United Kingdom (England and Wales)	57	-	-

The survey of the domestic legal systems shows that cross-border placements are a relevant and growing phenomenon. In the selected countries, many children every year are placed in another EU Member State and their number grows year by year.

<sup>138</sup>Belgium, Bulgaria, the Czech Republic, France, Germany, the United Kingdom, Ireland, Italy, Latvia, Malta, the Netherlands and Spain.

This might be an index that courts and other competent authorities governed by public law, once acknowledged the efficacy of the mechanism, become more willing to make recourse to it and to possibly place the child in foster families or institutions that might be more adequate for the child, taking into account all the elements, origins of the child included.

This part of the study is divided into two sections: the first (para 4.2.) provides a brief description of the application of art. 56 Brussels IIa in the selected Member States is provided and the second (para 4.3.) points out the critical points of the existing EU rules on cross-border placements.

## **4.2. The domestic application of art. 56 Brussels IIa in select Member States: the key features**

### **4.2.1. Belgium**

Belgium is one of the Member States that started to collect data few years after the entry into force of Brussels IIa. The number of cases in which the application of art. 56 Brussels IIa has been sought amounts to 104<sup>139</sup> (from 2008 to 2015), among which the majority (68) are incoming cases from Germany (see *infra*).

No specific court procedure is envisaged in order to implement art. 56.

The placement procedure is generally very fast with regard to placements from Germany: its length may vary from a minimum of one day to a maximum of one month. In case of placements from other Member States, the average duration of the placement procedure is from four to five months. According to the authorities of the Community, the duration of a case depends on the specific elements of the case, such as whether an inspection of the foster family is required.

As it happens in the other selected Member States, consent is generally provided after the child is placed in the receiving State (i.e. *ex post* consent).

A unique feature of the Belgian legal order is that there is a system in place to accredit private institutions where children may be placed and also to select and to supervise the host families for placements in foster families. Such a system applies also to cross-border placement (no separate accreditation is foreseen).

Furthermore, it is worth pointing out that when a child is placed in a foster family on the basis of voluntary youth assistance, the parents and the child – if he/she is over 12 years old – have to agree and the competent authority is the notary. This solution of care should possibly not be considered placement for the purposes of art. 56.

### **4.2.2. Bulgaria**

Unfortunately no reliable statistical data on the application of art. 56 are available for this Country. The Ministry of Justice, asked in the frame of this study, provided information about six cases connected with art. 56, all of which concern EU Member States and are, therefore, intra-EU cases (and none of them was finished at the time when the Ministry of Justice was asked).

In Bulgaria there are no specific rules devoted to the cross-border placement of children: the Child Protection Act provides rules also on placement of children, which are applied to

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<sup>139</sup>Except one case of cross-border placement of a child from Belgium to Cameroon, all the cases considered fall within the application of Brussels IIa. Also in the light of the fact that the 1996 HC only entered into force in Belgium on 1<sup>st</sup> of September 2014, there are no cases falling within the latter's scope of application.

purely domestic placements as well as to transnational ones<sup>140</sup>. However, under Bulgarian law, the consent of the national authorities on placement is necessary.

With reference to the practice, it shall be first mentioned that there is case-law establishing the international jurisdiction of Bulgarian courts on the basis of art. 15 Brussels IIa, with reference to a case concerning two children previously living in the United Kingdom, who were placed in a foster family and who were transferred to Bulgaria once the period of placement elapsed<sup>141</sup>.

With specific reference to the existing art. 56 cases, one case concerned the decision of a Bulgarian court to place two children in a specialized institution in Poland. Art. 56 was not applied correctly, since the placement of the child was carried out in the end on the basis of a judgment held by the Polish court (and not by the Bulgarian one).

The remaining five cases concerned the requests of placing children from Germany and Austria in Bulgaria. More precisely, the measure of protection requested by German and Austrian authorities was the placement for pedagogical and phonological treatment in Bulgaria. The Bulgarian Ministry of Justice did not provide consent, since (i) the protective measures were not known in Bulgaria; (ii) the measures were requested not by a court authority, but by the private companies who had to execute them; (iii) at the time of the request, the protective measures had already been imposed and executed, contrary to the wording of art. 56 and, finally, (iv) the children had no link with Bulgaria.

#### 4.2.3. Czech Republic

Statistics on the cross-border placements of children have been collected by the Czech Central Authority (i.e. the Office for International Legal Protection of Children) in the years from 2011 to 2015. 187 art. 56 cases have been dealt with, among which 117 are incoming cases and 70 are outgoing cases.

The average length of cross-border placement varies from a couple of months to almost a year; however, the placement may be faster if there is a serious danger to the child: in such cases, the court may decide on preliminary ruling within a week or even within 24 hours. The decision on the merits of the case can take a couple of months.

No specific rules for cross-border placement are provided. The Czech civil code does not distinguish between national and transnational placement. However, the consent of the Office for International Legal Protection of Children is necessary. One of the conditions necessary to place a child in foster care is that the foster parent resides within the boundaries of the Czech Republic. On the other hand, an analogous territorial restriction is not envisaged for institutional care. As a consequence, a Czech court may decide to place a child in a foreign institution<sup>142</sup>. It shall be also pointed out that diplomatic authorities (i.e. consular officers) are often involved in cases of unaccompanied foreign minors.

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<sup>140</sup>In the context of the Child Protection Act, it is worth mentioning some rules and principles which might be relevant for the purposes of this study. Reference is made to: (i) the notion of "foster family", which encompasses two spouses but also a single person; (ii) the list of persons who are not allowed to be candidates for foster family (art. 32); (iii) the right of the foster family as well as of the family of relatives and of friends the right to express their opinion before the taking of the decision referring to a change of the child protection measure (art. 34); (iv) the express provision listing also police protection measures, affecting the liberty of the child (art. 39); (v) a rule devoted to the disappeared children, stating that the actions for the searching of those children shall be undertaken immediately (art. 42). Furthermore, with specific reference to the participation of the child in procedures, art. 15 states that the hearing of the child is compulsory when he/she is older than 10 years, except if this would harm his/her interest.

<sup>141</sup>Reference is made to the judgment n°. 244 of 19 July 2013 in civil case n°. 385/2013 of the District Court, Lovetch.

<sup>142</sup>See articles from 953 to 975 of the Czech civil code, the English version of which is available at the official website of the Ministry of Justice at the following address: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>.



The typical art. 56 case regards a child born in the territory of the Czech Republic from a mother, having the nationality of a neighbouring Member State (such as for example Slovakia). The mother either leaves the child and disappears or has no suitable conditions for the care of the child. In such cases, the Czech social services shall contact the Embassy of the State of which the child is a national following the relevant rules of the 1963 Vienna Convention on Consular Relations. In addition, Social services generally start court proceedings on custody. The Czech court has to judge the best interests of the child and considers whether the child may be placed with relatives within the boundaries of the Czech Republic or whether the child should be “returned” to the State of his/her nationality. If the State of the child’s nationality wishes the “return” or “repatriation” of the child and there are other reasons for such a decision (e.g. the parents or relatives of the child are living in that State), the court informs the Czech Central Authority, which then asks the competent authority of the potentially receiving State for consent under Art. 56 of Brussels IIa. Once consent is granted, it is forwarded to the court, which orders the placement of the child in the State of the child’s nationality.

#### 4.2.4. France

Statistical data are available for the years 2013, 2014 and 2015. In the period of time considered, the Directorate for judicial protection of the youth (*Direction de la protection judiciaire de la jeunesse* (DPJJ)) has worked on 56 cases of cross-border child placements, among which 4 are outgoing cases, whilst the other 52 are incoming cases. The majority of the children placed within the French boundaries come from Germany, followed by Austria, Spain, Portugal, Lithuania, Poland and Belgium. In the French legal order, there has been only one cross-border placement falling within the scope of application of the 1996 HC.

As regards the length of the procedure, no precise information are available, since the children are often placed when the DPJJ receives the request for placement with no notice about the effective conclusion of a placement proceeding. However, the average length is estimated in one year.

Art. 56 procedure has to be dealt in court and it follows the rules provided for domestic placement of children. It is worth pointing out that the duration of the placement shall not exceed two years; however, it is possible to ask for an extension.

Beside the general rules on placement, the specific implementation of art. 56 in the French legal order has been carried out by virtue of the *Circulaire du Garde des Sceaux* n° CIV/03/05<sup>143</sup>.

#### 4.2.5. Germany

The German Central Authority has collected data since 2009. Germany is the Member State which makes most use of art. 56 and, in general, of cross-border placement. Statistical data confirm the above assumption: in 2009 only 22 cases were reported; the number progressively grew to 147 in 2010; 168 in 2011; 178 in 2012 and 251 in 2013. A slow decrease was registered in 2014 with 194 cases.

The majority of cross-border placements are (i) outgoing cases, meaning that German children are placed in other countries and are (ii) intra-EU, meaning that the children are placed in other EU countries.

As for the length of the placement procedure (from the request to the actual placement), no official data are available. However, given that under art. 56 «the procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State» and that the majority of the cases are “outgoing”, the length of

<sup>143</sup>The text of the Circulaire is available at: <http://jafbase.fr/docUE/CirculaireBruxelles2bis.pdf>.

the procedure largely depends on the practice and legal framework of the receiving Member State and, therefore, may greatly vary.

A specific act (IFLPA)<sup>144</sup> implementing the Brussels IIa Regulation<sup>145</sup> provides a very detailed regime: division 8 of the IFLPA specifically deals with cross-border placement: under art. 46 consent for placement is necessary and under art. 45 it shall be granted by the supra-local agency responsible for the public youth welfare service in the area where the child shall be placed.

#### 4.2.6. Ireland

Even if official statistical data on the application of art. 56 are not available for this Country, the information have been collected on the basis of publicly available case-law and by cross referring to statistical material obtained from the United Kingdom.

There have been 102 art. 56 placement cases with Ireland, 74% of which involve Irish children being placed in the United Kingdom for the purposes of specialized treatment, not available in Ireland.

The Child and Family Agency – formerly the Health Service Executive – is the Irish agency responsible for child protection and, given the uncertainty as to the modalities of such placements and whether they fell within the scope of Brussels IIa, led to the *procédure préliminaire d'urgence* (PPU)<sup>146</sup> ruling in the *HSE* case. Following the CJEU ruling and subsequent domestic ruling on the application of art. 56, the placement of Irish children in specialist units in England, often involving a deprivation of liberty, has worked smoothly. Recently, the courts have dealt with the problem of extending placements where individual concerned has turned 18 and, therefore, turned to be adults<sup>147</sup>. Specific measures of protection for adults are provided by the Hague Convention on the International Protection of Adults<sup>148</sup>, which is now in force in the UK, but has not been ratified by Ireland.

#### 4.2.7. Italy

The statistical data, available from 2009 to 2015, shows that there have been 89 cross-border placements of children, all within the EU judicial area<sup>149</sup>. Among these: (i) 80 are incoming cases from Germany; the others were 6 incoming cases (3 from UK, 1 from Austria and 2 from Lithuania) and just 3 were outgoing cases (1 to UK, 1 to Poland and 1 to Romania). All outgoing cases turned out to be placements of children with their relatives (grandparents and aunts/uncles) in another Member State.

In 40 cases (out of 89) the children were already placed within the Italian boundaries when the request for consent to placement came to the knowledge of the Italian authorities. In the majority of the cases, children are placed in families.

The placement of German children in Italy is characterized by specific features. First of all, the request for placement comes to the Italian Central Authority directly from the German Social Service. It often happens that children are placed in families having German origins,

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<sup>144</sup>An English accessible translation of the legislative act is available at the following address: [https://www.gesetze-im-internet.de/englisch\\_intfamrvlg/index.html](https://www.gesetze-im-internet.de/englisch_intfamrvlg/index.html)

<sup>145</sup>As well as the 1996 HC, 1980 HC and the 1980 Luxembourg convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children.

<sup>146</sup> See *supra* at ft 74.

<sup>147</sup>See Re PA [2015] EWCOP 38.

<sup>148</sup>Reference is made to the Convention of 13 January 2000 on the International Protection of Adults, entered into force on 1st of January 2009. Text and status table are available at the following address: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>

<sup>149</sup>The 1996 HC has entered into force in Italy only on the 1st of January 2016.

who speak only German, the reason being the need of the children concerned to be isolated and therefore to avoid any external relation<sup>150</sup>.

On the other hand, it also happens that the solution of care selected by the German authorities is the placement in Italian families, the reason lying in the fact that (i) the Italian legal order offers the possibility to place the children in small cities/villages and on the fact that (ii) the Italian families offer “open communication” both internally and externally and also because (iii) it appears as “a functional unit, stable, reliable and responsible, where a simple and clear code of conduct exists”. Furthermore, the Italian language is easy to learn.

The length of the procedure through which the Italian authorities consent to placement is at most one year; this does, however, not affect the placement, since in the large majority of cases, the child is placed in Italy before the request is received by the competent Italian authorities.

A problem encountered in practice is the lack of uniformity in applying art. 56: consent is sometimes provided by virtue of a court decision, but there are also cases where consent is provided not by a court, but by the public procurator alone.

#### 4.2.8. Latvia

The statistical data, available from 2009 to 2015, show that there have been 37 outgoing cross-border placements and that the foreign countries involved were Germany, Ireland and United Kingdom. Despite the absence of official data and also of a specific instrument to ensure that cases concerning cross-border placement of children are dealt with expeditiously or in reasonable time, the procedure is quite quick: six months is the average length.

The Latvian legal system is characterized by the presence of many bilateral agreements on legal assistance and legal relations in civil, family and criminal matters (which are now in force with Belarus, Estonia, Kyrgyzstan, Lithuania, Moldova, Poland, Russian Federation, Ukraine, Uzbekistan), which are directly applied. However, the 37 cross-border placement cases mentioned have all arisen within the EU judicial area and, therefore, have fallen within the scope of application of art. 56 of Brussels IIa.

Under Latvian law, the concept of “foster family” refers to providing short-term care, it does not include other forms of placements with relatives, such as care or placement based on kinship of friends. On the other hand, the concept of placement does not only include placement in an institution or in a foster family, but also placement in guardianship, where the guardians usually are relatives of the child. The latter is the most common form of placement in Latvia.

#### 4.2.9. Malta

The Malta Central Authority is aware of eight cases of cross-border placement of children, all of which concerned foreign children who have been placed in Malta.

In the first case, the procedure under art. 56 was not applied. The decision made by the courts of the United Kingdom stating that the child had to be placed in Malta with his grandparents had been recognized by the Maltese court. The recognition proceeding lasted eight weeks<sup>151</sup>.

<sup>150</sup>It shall be also pointed out that the placement of German children is concentrated in specific areas: from statistical data available, it clearly appears that the children are often placed in the central area of Italy. The court of the city of Perugia, in the period from 2009 to 2015, has dealt with 25 cases out of 80.

<sup>151</sup>See *Maria Lowell v. X*, 15 May 2014, case n°. 224/2014, Civil Court, First Hall.

The other seven cases concern German children, who had first been placed in Malta and after the placement the competent German authorities notified to the Maltese Central Authority of decisions<sup>152</sup>. Since all the cases are of a voluntary nature (that is to say that the parents voluntarily gave care and custody to - or retained shared care and custody with - a third party), no consent was required. Under Maltese law, when a parent voluntarily transfers custody from one person to another, no public authority has to be involved. However, in such cases, it is necessary that, when a minor lives away from his/her parents or close relatives, the person providing care informs the Director of Social Services, who, then, has the right to inspect the home where the child is living. If this duty to inform is not fulfilled, criminal punishment is foreseen.

The Malta Central Authority, in some cases, has been notified about the placement after the arrival of the child in Malta, whilst in other cases it has been notified *ex ante*, in compliance with art. 56.

#### 4.2.10. The Netherlands

It appears that there have been 28 cases dealt with, among which 8 are outgoing cases and 20 are incoming. All, except one, are intra-EU cases and, therefore, fall within the scope of application of Brussels IIa. Among the latter ones, 12 are cases concerning German children placed in the Netherlands.

As pointed out in the National report, the number of cases with Morocco is likely to grow and, as a consequence, art. 33 of the 1996 HC is likely to be applied more frequently<sup>153</sup>.

As for incoming placements, Dutch law requires the consent of the competent domestic authorities. More precisely, the judicial authorities have the competence to determine whether a child protection measure should be issued, whilst the certified Dutch institutions have the authority to determine with which family the child should live or to which institution the child should be assigned and also have the power to execute the protection measure<sup>154</sup>.

As for outgoing placements, art. 9 of the International Child Protection Act states that the Dutch Central Authority has to provide the foreign Central Authority or other competent authority with a detailed and reasoned request, together with a report on the child.

#### 4.2.11. Spain

Statistical data have been collected since 2008. In the Spanish legal order, the number of cross-border placements dealt with under art. 56 since 2008 is 151, among which 140 concern Germany<sup>155</sup>. Within the 140 cases concerning Germany, 112 are incoming cases (i.e. placements of German children in Spain, mainly in South of Spain, Canary Islands, Balears and Valencia). Two different solutions are adopted in practice: (i) German children are, in some cases, placed in institutions with German rules managed by German people;

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<sup>152</sup>The mentioned cases concern children of an age between 13 and 17 years old. In some cases, the child's care and custody is shared between different persons (and, among them, there are also Maltese citizens); in other case, a German child lives with a German citizen in Malta. However, in all cases a German national is involved.

<sup>153</sup>In the National report concerning the Netherlands, Prof. I. Curry-Sumner has pointed out that the practice with Morocco is also interesting because such procedures often relate also to the *kafalah*. As a consequence, placement in this context also raise a host of associated problems and concerns, as many of these placements ultimately lead in the Netherlands to adoption order being made, thus resulting in alternative adoption procedures.

<sup>154</sup>In case of cross-border placement of children, it is however difficult to understand to what extent the certified institutions may be deemed to be involved in the execution: whilst it is clear that they are involved in the placement, it is difficult to understand whether it is for the Dutch courts pronouncing the declaration of enforceability to make the necessary adaptation/integration in order to execute the measure in the Dutch legal order. In this light, also the costs of the placement and foster care services is an issue to be solved.

<sup>155</sup>Beside the above intra-EU cases, only one case concerning a placement of children from Argentina in an extended family living in Spain has been registered.

(ii) in other cases, they are placed into foster families, made up by German nationals who are supervised by German authorities under German rules.

The Spanish legal order asks for the consent of the Spanish authorities before placement. However, in the majority of cases the consent is requested when the child is already placed within the Spanish borders. In some cases, the request of consent is made a couple of weeks before placement and, as a consequence, the placement is made without the previous consent of the Spanish authorities. The average length of art. 56 procedure is estimated to be more than one year. This is often due to the need of the Spanish authorities to receive more information on the placement (i.e. duration, existence of an express consent from the parents or from the institution, the conditions of placement).

The other placements, concerning children coming from Member States other than Germany, are often placements with relatives (such as grandparents, aunts, uncles) living in Spain. In such cases, consent is usually requested in advance.

On 17 July 2012 an agreement has been adopted among all the autonomous communities, the Ministry of Justice (Central Authority under art. 56 Brussels IIa) and the Ministry of Social Service, Health and Equality in order to solve the problems emerging from ongoing placements and also to provide common rules for future placements.

In relation to *ante* 2012 placements, it was established that timely collection of information on ongoing placements was necessary, together with a check on the situation of the children involved.

As for *post* 2012 placements, it has been stated that (i) the consent/permission of the Spanish authorities for cross-border placements is mandatory and has to be requested before the child is placed; (ii) the Spanish authorities shall be adequately informed about the placement in order to be able to express their consent; (iii) following the findings of the HSE judgment, for the foreign decision to be enforced in the Spanish legal order it is necessary to follow the exequatur procedure under Brussels IIa; (iv) only once the Spanish authority has declared the decision executive, can the placement of the child take place.

The above guidelines, even though not binding, are particularly useful to provide some harmonisation in the procedures followed in the different autonomous communities of Spain.

#### 4.2.12. United Kingdom (England and Wales)

The data collected by Children and Families Across Borders (CFAB)<sup>156</sup> show that in 2015 the number of cross-border placements amounts to 124, among which 57 fall within art. 56 and 67 fall outside the scope of application of Brussels IIa. From the reported case law, since 2012, 40 cases were dealt with by courts.

The data also show that the current average length for all public law care proceedings (from application to first valid disposal) in England and Wales is 28 weeks<sup>157</sup>.

Specific rules for cross-border placement under art. 56 Brussels IIa (and under art. 33 1996 HC) are envisaged and soft law guidelines have been adopted in order to help the competent local authorities as well as professionals working in this field<sup>158</sup>.

<sup>156</sup>It is the UK branch of the International Social Service (ISS), which is an international federation of interconnected NGOs and partners, founded in 1924, aimed at promoting child protection and welfare and assisting children and families confronted with complex social problems as a result of migration.

<sup>157</sup>See Family Court Statistics, available at the following address:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/486167/family-court-statistics-july-september-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486167/family-court-statistics-july-september-2015.pdf)

<sup>158</sup>Reference is made, in particular, to two instruments: (i) Departmental advice for local authorities, social workers, service managers and children's services lawyers, available at

In the UK, the problem concerning the treatment of unaccompanied/abandoned children and of children exposed to harm is a relevant and growing one. The protection of children in the above mentioned conditions is generally treated in public care cases.

Given that the UK is one of the few EU Member States regularly recurring to “forced” or “non-consensual” adoption, it happens that care cases come across issues surrounding non-consensual adoption and, specifically, with issues concerning the application of art. 15 Brussels IIa<sup>159</sup>.

More precisely, the courts deal with the problem of applying the rules on non-consensual adoption or transferring the case to the State of nationality of the children considered by virtue of the transfer mechanism under art. 15 Brussels IIa. In the latter case, since the children need a specific solution of care, the English courts often start an art. 56 proceeding by asking for the consent of the receiving State on the cross-border placement.

### 4.3. The critical points of the existing EU rules on cross-border placements

The questionnaire used to collect information from the selected Member States required the national experts to point out the critical points of the existing EU rules on cross-border placements, which are hereby considered.

#### 4.3.1. One rule for different situations

The survey on the domestic application of art. 56 shows that very different forms of cross-border placements fall within art. 56.

Following a literal interpretation of art. 56, it seems to be aimed at covering “**pure**” **cross-border placements**, where the authorities of an EU Member State choose to make use of a solution of care existing in and provided by another EU Member State. An example is the case of the German children who are placed in Italian families, given the specific features of the Italian family and of the Italian context.

However, practice shows that, beside this first situation, there are different kinds of cross-border placement falling under art. 56.

More precisely, the second kind of cross-border placement is the one where the child is placed abroad, within the boundaries of another EU Member State, but the **solution of care envisaged comes from the State of origin**. An example is the case of German children placed in a German solution of care (i.e. institution or foster family), where German nationals take care of the children and where no contact with the community of the receiving State is envisaged in the pedagogical program. In this case, specific problems arise. More precisely, as pointed out in the national report concerning Belgium, the German authorities remain responsible, for instance, to maintain contacts with schools, which can be a source of problems, since the school staff are faced with a void of parental contact.

Furthermore, it appears that under German law it is possible to register a child at more than one address (i.e. multiple registration), but this is not the case for other States (for example Belgium) where only one official address is possible.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/280834/The\\_1996\\_Hague\\_Convention.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/280834/The_1996_Hague_Convention.pdf)

and (ii) Handling Cross-Border Child Protection Cases – A “Key Steps” Guide for Local Authorities, Health Boards and NHS Trust in Wales, available at <http://gov.wales/docs/dhss/publications/121101hagueen.pdf>

<sup>159</sup> More precisely, when the English courts face the situation of abandoned children or children being in a situation of harm (such for example the Roma children), they have to evaluate whether to place the child for adoption in the UK (and therefore severing his/her ties with the Member State of origin) or whether to invoke the transfer mechanism under art. 15 so that jurisdiction can be assumed by the local authorities of the Member State of origin, with the consequence that an art. 56 request shall be also made.

A third kind of placement is the **cross-border placement of a mixed nature**: the solution of care provided in the receiving Member States that also features the cooperation of nationals of the State of origin. This is what happens, for example, in Malta, where in some cases German children are placed in institutions where there is a German national beside the Maltese nationals.

Beside the above three categories of cross-border placements, two further specific situations where art. 56 Brussels IIa plays a relevant role have been highlighted in the survey: the first is the case of Roma children (or any unaccompanied children) in the United Kingdom<sup>160</sup> and the second is the case of abandoned children in the Czech Republic<sup>161</sup>. In both cases, the competent authorities of the UK and the Czech Republic try to find the best solution for the children in need of care in the State the child (or the relatives of the child) comes from or of which the child has nationality.

Given the proximity of the potentially receiving Member State, among other things, the Czech authorities directly propose a solution of care to the latter State for children who have been abandoned within the Czech boundaries. UK courts, however, are faced with the dilemma of making use of “domestic” forced adoption or transferring the jurisdiction over the child to the more appropriate court of his/her State of origin. In this context, art. 56 is a parallel procedure, which seems to complement the transfer of jurisdiction.

The above case-law highlights a problem in the actual wording of art. 56: the rule gives the court of the EU Member State having jurisdiction over the child the power to propose placement in an institution or foster care to the authorities of another receiving EU Member State. However, as in the above case-law, it may happen that the “requested” Member State has a particular connection with the child and, for this reason, is in the position to find and propose an adequate solution of care for the child.

**The opportunity to expand the scope of art. 56 should perhaps be considered in order to give also to the authorities of a Member State other than that having active jurisdiction over the child, the power to call for the placement of a child within its jurisdiction.**

Children in need of protection would greatly benefit from this “two-way” process. Furthermore, such a developed form of cooperation among national authorities goes along with the principle of mutual trust on which art 56 is grounded and which the EU is willing to further develop in order to strengthen the area of Freedom, Security and Justice.

#### 4.3.2. Forms of placement excluded from art. 56 procedure

With specific reference to the notion of placement, the practice of the selected Member States shows that for some forms of placement art. 56 is not applied.

Reference is made, first of all, to “voluntary” foster care/placement. For example, in the Maltese legal order, art. 56 is not applied when the child is placed with relatives, with the agreement of the persons exercising parental responsibility over him/her.

Similarly, in Belgium it seems that private agreements on placement of children, registered by a notary, do not fall within art. 56.

Furthermore, when the child is placed with relatives abroad, it is not clear whether art. 56 procedure shall be applied (even if art. 56 does not make a distinction between a foster family where the family is made up of relatives and a foster family “unknown”).

**It derives that the notion of placement is not univocal in the EU and, therefore, the application of art. 56 is not uniform. The possibility to introduce a clearer**

<sup>160</sup> See *supra* at para 4.1.12.

<sup>161</sup> See *supra* at para 4.1.3.

**definition of what placement is should perhaps be evaluated for the purposes of art. 56.**

#### 4.3.3. Length of the procedure

Official data on the length of the whole placement procedure (i.e. from the request to the receiving State to the actual placement of the child abroad) are not available, but the information and data collected in the context of this study tends to show that it is generally completed within one year from the request of placement.

As for the German national reports, it seems that the length of the procedure is a problem in particular for what concerns outgoing cases. The reason lies in the fact that, under art. 56, the procedure for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State. As a consequence, the outcome of the placement requires the joint efforts of domestic authorities of different MS and, therefore, timing can vary greatly depending on the MS involved.

**The length is, however, one of the reasons why cross-border placements often take place ex ante, i.e. before the requested MS consents to them and, therefore, needs to be considered in the recast of Brussels IIa.**

#### 4.3.4. Placement done ante consent (i.e. retroactive authorization) without adequate information from the State of origin

**The survey clearly shows that the placement of the child is (if not always) very often done before authorization/consent, which therefore is provided retroactively.**

This is a problem in many respects: first of all, it means that procedure is not respected; secondly, since the intrinsic function of consent, which is to give the receiving State the chance to consider placement in the light of compliance with domestic laws on migration, is frustrated; finally it seems that to deny consent to a cross-border placement once the child is already physically placed in an institution or a foster family, the solution of care provided has to be very detrimental to the child. This means that even a somewhat inappropriate solution of care may be approved by the receiving State, contrary to the best interests of the child.

As pointed out in the national report concerning Belgium, the Flemish community would be in favor of sanctioning the cases where the procedure is not followed.

**A further relevant problem concerning placement (which has been pointed out at the domestic level among the weak points of the existing regime) is the incompleteness of the information provided by the foreign Central Authorities asking for cross-border placement.**

#### 4.3.5. Unclear division of tasks (and financial obligations) among the actors involved

**Connected to the above problems, the survey on domestic application of art. 56 has also shown that the procedure is not sufficiently clear with regard to the division of tasks among the authorities involved. More precisely, it is not clear which information should be provided by the requesting State to the requested State and it is not clear which kind of investigation the requested State may put into place.**

Given the absence of specific provisions devoted to the division of costs in art. 56 provisions, the financial obligations arising from cross-border placement are perceived by the selected States as insufficiently clear.



The above problems are also aggravated by the fact that there are many different authorities dealing with art. 56 procedures.

More precisely, at the domestic level, the problem of the co-existence of different authorities involved is particularly relevant for example in the Italian legal order. In some regions of Italy, consent is provided by the court (i.e. the *Tribunale per i minorenni*), in others consent is provided not by the court as a whole but by the public procurator alone (i.e. *pubblico ministero*). In fact, this difference seems not to affect the “investigation” on placement conditions nor the length of the procedure for consent. It is however disappointing that, in the same legal order, there is such a relevant lack of uniformity.

#### 4.3.6. Problems with regard to the exequatur

The exequatur procedure - following the wording of the relevant rules of Brussels IIa and the interpretation of the CJEU in the HSE – is necessary for a placement judgment to be enforced. Although it is not only largely disregarded in practice, it is also perceived as not particularly useful in all those Member States where consent of the Central authority or of other authorities of public law is necessary.

## 5. CONCLUSIONS AND RECOMMENDATIONS

### 5.1. Introduction

As seen specifically in the *HSE* judgment and confirmed by the results of the survey on the domestic application of art. 56 of Brussels IIa in the selected Member States (hereinafter “the survey”)<sup>162</sup>, the need – pointed out by the Commission - for «*a uniform procedure enabling a swifter and more efficient application of the provisions on the placement of a child in another Member States*» is confirmed<sup>163</sup>.

In light of the next recast of Brussels IIa, this part of the study is aimed at (i) pointing out the most relevant issues deriving from the existing legislative framework as applied in practice and at (ii) proposing or recommending possible solutions to overcome the problems encountered in the cross-border placement of children.

### 5.2. Structure of Brussels IIA

Brussels IIa is a “twice” double regulation: it covers two private international law issues (i.e. jurisdiction and recognition and enforcement of judgments) and two different and autonomous subjects (i.e. matrimonial matters and parental responsibility). However, the rules on parental responsibility are structurally autonomous from those on matrimonial matters<sup>164</sup>.

Even though the issue of the structure is not strictly related to art. 56, it is here submitted that the adoption of a new autonomous regulation, devoted exclusively to parental responsibility matters, would be a relevant improvement.

The next recast will be an important chance to discuss and revise the regime on parental responsibility in order to cover issues which are not dealt with (e.g. the applicable law) and also to provide more coherent and detailed rules on topics, such as cross-border placement, the application of which has proven to be difficult.

In this light, as mentioned in the introduction<sup>165</sup>, it shall be also considered that the Member State's interests are likely to be more easily convergent on parental responsibility issues than in matrimonial ones and, therefore, the revision of the parental responsibility side of the regulation is likely to be more successful.

The adoption of an autonomous regulation devoted exclusively to parental responsibility issues is recommended.

### 5.3. Scope of application

#### 5.3.1. The nature of protection measures (of civil, criminal or administrative law)

As confirmed by the information collected from the survey and as seen in the CJEU and ECtHR case-law, measures of protection significantly vary from State to State and there is a cross-over between measures having a civil, administrative and criminal nature.

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<sup>162</sup> See Part IV.

<sup>163</sup> See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM (2014) 225 final, 15.4.2014. From the public consultation made by the European Commission, it seems that the rules of the Regulation on cross-border placement do not work in a sufficient manner. This has been highlighted by the majority of the respondents (60%, i.e. 85 out of 141).

<sup>164</sup> Apart from a few connections existing among the rules on jurisdiction (as for example art. 12) the two sets of rules are independent and therefore separable.

<sup>165</sup> See *supra* at p. 9.

The CJEU's approach is clearly oriented to follow a wide interpretation of the autonomous notion of "civil law matters", capable of including all measures, independently of their public law nature, having the purpose to grant protection to children. As a consequence, measures of a hybrid nature – such as placement in a secure care institution, where the child receives care and treatment, including measures involving the use of reasonable force, as considered in the *HSE* case<sup>166</sup> - may be included.

Therefore, given the importance of granting children in need of specific forms of care the possibility to have an enforceable placement order which may benefit from protection throughout the EU, the opportunity should be evaluated to provide a legal framework which addresses the recognition of all kinds of placement orders, irrespectively of whether they are civil, criminal or administrative in nature, provided that the measures are aimed at protecting (and not punishing) children.

In this view, the revision of Brussels IIa should take into account the achievements of the CJEU judgments in *A*, *C* and *HSE*. Reference is made in particular to the achievements of the *HSE* ruling with regard to the inclusion of institution in the scope of application, including also deprivation of liberty of children in need of protection.

In this light, two minor changes are hereby proposed, not giving rise to any automatic extension of the scope of application of the Regulation, since they do not affect the exclusion of the measures taken as a result of criminal offences committed by children under art. 1.3 lett. g. of the Regulation.

It is recommended to introduce a recital taking the CJEU case-law achievements expressly into account with regard to the inclusion of measures including the deprivation of liberty of the children in need of protection in the scope of application of the Regulation.

**Recital (...) Placement accompanied by measures involving deprivation of liberty for a specified period, ordered to protect - and not to punish - the child, shall be included in the scope of application of the Regulation.**

It is also suggested to provide further clarification on the subjects included in as well as excluded from the scope of application of Brussels IIa.

Article 1 Scope

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(d) the placement of the child in a foster family or in institutional care, **as well as placement accompanied by measures involving deprivation of liberty for a specified period, ordered to protect the child;**

3. This Regulation shall not apply to:

(g) measures to punish children, taken as a result of criminal offences committed by children.

It is here submitted that both proposals could be helpful for a more coherent interpretation and application of the EU rules in this field and, in aligning the Brussels IIa's content with that of 1996HC, contributes to greater coherence in the whole legislative framework regarding the measures for protecting children.

The opportunity to take an express position with regard to "family arrangements" involving cross-border placement of children shall also be considered.

It has been pointed out that when family arrangements are of a private nature they should not be considered as falling within art. 33 of the 1996 HC<sup>167</sup> and a similar reasoning might

<sup>166</sup> See *supra* para. 3.2.1.

<sup>167</sup> *Ibidem*, at 36.

be extended to art. 56 Brussels IIa. Similarly, the national report concerning Belgium points out that “voluntary foster care” should possibly not be considered placement.

In the HSE case, the Irish and German governments argued that the exequatur procedure should not be required as long as the child and the holder of parental responsibility agree with the measure. In other terms, both governments, recognizing the specific relevance of the voluntary character of placement, tend to exclude those agreements from the scope of application of the rules concerning the exequatur. Such a position should be taken into consideration in establishing whether family arrangements or voluntary foster care should fall within the scope of application of Brussels IIa. The opportunity of a survey on the role of “family agreements” establishing a regime of alternative care in the domestic legal orders of EU MSs may be evaluated.

On the other hand, it has also been stressed that the term “placement” needs to be clarified, since it varies among countries and, therefore, it has been proposed to use the more comprehensive term “alternative care”, which includes foster care, as well as residential care and other types of arrangements providing a child with support and care<sup>168</sup>.

The term **placement** shall be clarified:

- it shall be evaluated whether and, in the affirmative, which sort of **family arrangements** may be considered as placement (e.g. the family arrangements establishing the cross-border placement of children with relatives) and therefore as falling within the scope of application of Brussels IIa;
- the opportunity of replacing the term “placement” with the more comprehensive term “**alternative care**” shall be considered.

In addition to the above, given the achievement of the Treaty of Lisbon with regard to the EU’s competence in the field of criminal justice and the constraints resulting from a separate legal basis in the field of civil and criminal justice, it is here submitted that the opportunity of a separate legislative act shall be evaluated as for measures having a purely criminal nature. The above solution has been followed in the field of protection measures, where two mutually exclusive legislative acts that are intended to be complementary have been adopted: the already mentioned Regulation 606/2013<sup>169</sup> and Directive 2011/99/EU on the European protection order<sup>170</sup>.

The adoption of an *ad hoc* EU act aimed at providing some harmonized rules on measures of protection concerning children of a purely criminal nature (i.e. aimed at punishing children) and, therefore, outside the scope of application of Brussels IIa shall be considered.

#### 5.3.1.1. *Kafalah* and analogous institutions

All EU MS, Denmark included, are signatories of the 1996 HC, which is now in force in all EU countries. *Kafalah* is expressly included in the scope of application of the 1996 HC as a form of alternative care and, therefore, as a protective measure for children. The possible inclusion of *kafalah* shall be evaluated within the scope of application of the revised

<sup>168</sup>Ibidem, at 40.

<sup>169</sup>See para 2.1.

<sup>170</sup>Reference is made to the Directive 2011/99/EU of the European Parliament and of the Council of 12 December 2011 on the European protection order, in OJ L 338, 21.12.2011, pp. 2-18.

regulation. The opportunity of empirical surveys exploring the necessity of EU provisions in this regard shall be considered.

With a view to aligning the revised new regulation to the 1996 HC and, also, to encompass all possible measures of protection (except for those of a purely criminal nature), the possibility of making express reference to “analogous institutions” might be also evaluated.

In light of the above, it is hereby submitted that the rule concerning the scope of application of the Regulation shall be integrated accordingly.

The express inclusion of the term “*kafalah and analogous institutions*” included in art. 1.2 lett. (d) shall be evaluated.

Art. 1 Scope

2. The matters referred to in paragraph 1(b) may deal with:

(d) the placement of the child in a foster family or in institutional care (...) as well as **with kafalah and analogous institutions**

#### 5.3.1.2. Child

It is worth considering the adoption of a uniform definition of “child” as a person under the age of eighteen for the purposes of the new regulation. Such a definition might be useful, since (i) it would eliminate possible discrepancies arising from the application of different age limits provided at national levels within the EU (e.g. a child of 17 might be subject to the rules of the regulation under Italian law and not under Scottish law); (ii) it would align the EU’s definition to the one contained in the 1996 HC (whose conflict of law rules may “complete” the EU regime on parental responsibility) and (iii) it would extend the protection already provided by the 1980 HC for children under 16 to those under 18 as well.

The recent Study published by the European Commission on the assessment of Brussels IIa<sup>171</sup> favors the inclusion of the definition of the term child in the regulation, in order to eliminate the ambiguities arising across the Member States in identifying who is to be considered a child, which may affect the well-being of the child.

This issue is also relevant with specific regard to cross-border placement: as it results from the survey on the domestic application of art. 56<sup>172</sup>, it shall be noted that many of the children who are placed abroad are approaching full age and, in such cases, placement has the purpose of enhancing their autonomy. Problems, however, may arise where the child is not considered as such in the receiving State.

Two possibilities may be evaluated: the introduction of a general definition of child and the introduction of a definition of child, just for the purposes of cross-border placement.

In the first case, it shall be considered whether a definition similar to that adopted in the 1996 HC, where reference is expressly made to the moment of birth<sup>173</sup>, shall be adopted or whether it is better to take inspiration from the definition proposed by the UNCRC, where no reference to birth is made and, therefore, it is possible to extend the definition to

<sup>171</sup>See Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report, May 2015, at p. 8.

<sup>172</sup>See Part IV.

<sup>173</sup>See art. 2. As pointed out in the Explanatory Report, at para 15 p. 545, during the diplomatic session, it has been proposed to delete the phrase «*from the moment of their birth*» with a view to allowing the extension of the Convention also to children which had been merely conceived. However, the proposal was in the end rejected.

children merely conceived, and to adapt it in order to avoid the possible application of different terms of attainment of majority<sup>174</sup>.

In the case of the adoption of a specific definition of child for the purposes of cross-border placements, the above problem does not arise, since cross-border placements can only regard children who have been born.

It is worth considering the opportunity to introduce a general definition of child, to apply to the whole regulation or a definition just for the purposes of cross-border placement:

**A general definition of child**

Article 2 Definitions. For the purposes of this Regulation:

**the term "child " shall refer to a person from the moment of his/her birth until the age of 18.**

**Or the term "child" shall refer to human beings below the age of 18.**

**A definition of child for the purposes of cross-border placement**

Art. 56 **For the purposes of cross-border placement, the term "child" shall refer to a human being below the age of 18.**

### 5.3.2. Placement

#### 5.3.2.1. Length

As pointed out in a recommendation of the CoE, «*the placement should not be longer than necessary and should be subject to periodic review with regard to the child's best interests that should be the primary consideration during his or her placement*». Furthermore, the child should be recognize «*the right to be placed only to meet needs that have been established as imperative on the basis of a multidisciplinary assessment and to have the placement periodically reviewed; in such reviews, alternatives should be sought and the child's views taken into account*»<sup>175</sup>.

Generally speaking, placement may be adopted as a measure of (i) emergency care; (ii) short term care or (iii) long term care.

The results of the survey on the domestic application under art. 56, show that placement is sometimes used as a short term solution of care and frequently as a long term solution of care. The urgent character is inherent with the measure of protection of the child, however, cross-border placement under art. 56 is not generally applied for emergency situations.

It is possible to make a distinction: short term placement perhaps does not need any further check and therefore, once the consent of the receiving State is obtained, it is possible to close the proceeding. On the other hand, when long term placement is ordered<sup>176</sup>, it is necessary to provide some form of periodical control/review of the placement. To this purpose, whilst the authorities of the State of origin still have jurisdiction over the child, the authorities of the receiving State are, of course, in a better position to conduct such an inspection. Cooperation between the authorities involved is therefore necessary (even if – as proposed *infra* – it might be opportune to consider a possible transfer of jurisdiction to the courts of the State where the child is placed).

<sup>174</sup>Art. 1 of the UNCRC states as follows: «*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*».

<sup>175</sup>Recommendation Rec (2005) 5 on the rights of the children living in residential institutions.

<sup>176</sup>Resolution (77) 33 on the placement of children at point 1.6 states that «*Long-term placement of very young children in residential units should be avoided as much as possible; thus adoption in the light of the European Convention on the Adoption of Children should be facilitated and encouraged to the greatest possible extent.*».

It shall be also considered that in the *HSE* case, the CJEU recommended that the Member States make a “long-lasting” placement order to avoid the necessity of extending the length of placement and therefore of starting the procedure aimed at obtaining the consent of the receiving State from the beginning<sup>177</sup>.

It is here submitted that with specific reference to the need to provide some form of control/review of the placement by the authorities of the receiving State, the opportunity to modify art. 55 shall be considered in order to take into express account the necessity of a specific form of cooperation between the authorities of the States involved when long-term placements are at hand. Beside this, an express definition of short and long term placement may be provided within the text of art. 56.

It would be opportune to evaluate the existing differences between short-term and long-term placement and the need for periodical checks on long-term placements. In this light, it is suggested to provide a definition of long-term placement and to provide specific duties of cooperation among the authorities involved.

Art. 55 Cooperation on cases specific to parental responsibility - The central authorities shall cooperate on specific cases upon request from a central authority of another Member State or from a holder of parental responsibility to achieve the purposes of this Regulation. By acting directly or through public authorities or other bodies, they shall take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

(...) (d) provide such information and assistance as is needed by courts to apply Article 56 and, in particular, **provide the necessary assistance in the periodical control of long-term cross-border placements.**

Art. 56 Placement of a child in another Member State

(...) **As for long-term placements (i.e. placements lasting more than one year), the judgment shall expressly establish a periodical control/assessment on the situation of the child to be realized by virtue of the cooperation under art. 55 between the competent authorities of the requesting State and the requested State.**

### 5.3.2.2. Respect of children’s rights and quality assurance

Some problems in terms of respect of children’s rights<sup>178</sup> and the quality of the solutions of placement abroad of children have been pointed out<sup>179</sup>. Both problems have been expressly tackled by different acts, such as (i) art. 20 and 21 of the UNCRC, (ii) the UN Guidelines for the alternative care of children, (iii) the Recommendation of the CoE on the rights of children living in residential institutions<sup>180</sup>.

<sup>177</sup>See *HSE*, para 107. The CJEU’s recommendation is the following: «if necessary, the court ordering the placement may nevertheless consider whether to order the placement initially for a longer period (and this is declared enforceable) and then review at short intervals whether that order should be annulled».

<sup>178</sup>See F. Forcada Miranda, *Revision with respect to the cross-border placement of children*, at 40.

<sup>179</sup>See Petition N° 1352/2014

<sup>180</sup>Reference is made to the Recommendation on the rights of children living in residential institutions, Rec (2005) 5. The Recommendation states that it has to be recognized the right to good quality health care adapted to the needs and well-being of the individual child. In particular, the Committee of Ministers of the CoE recommends to the Member State that the internal organization of the institution should be based on «*the quality and stability of living units, mixed living units, when this is in the best interests of the child; high professional standards of the staff, benefiting from in-service training; adequate salaries for the staff; stability of staff and a sufficient number of staff members; diversified staff, particularly in terms gender; multidisciplinary teamwork and other means of support, including supervision; effective child-centred use of available resources; means and specific training to develop appropriate cooperation with the child’s parents; codes of ethics, describing the standards of practice that*

Both issues are particularly relevant since, on one side, they affect the mutual trust on which cross-border placement is grounded and, therefore, are capable of affecting the functioning of the mechanism of cooperation created by art. 56. On the other side, the lack of respect of the principles enshrined in the above acts may give rise to violations of the fundamental rights of the children, which may be ascertained and sanctioned by the ECtHR.

Despite the lack of EU competence in the field of substantial family law, it is possible to recall the attention of the Member States to the respect of the above acts. In this view, a new recital may be introduced, stating that Member States should respect the principles enshrined in the above acts.

It is further submitted that the problems here considered present some analogies with the Brussels IIa rules on child abduction, specifically with art. 11.4. Art. 11.4 expressly provides that the court of the State where the abducted child has been unlawfully taken (the so-called State of refuge) «*cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return*». This means that - as a consequence of the mutual trust which exists (or should exist)<sup>181</sup> among EU Member States - once the authorities of the country of the child's habitual residence have shown the authorities of the State of refuge that adequate arrangements to secure the protection of the child have been made, the child has to return to that country. Such adequate arrangements are a sort of "quality assurance" of the situation of the child after the return.

Similarly, in the case of cross-border placement, mutual trust among the authorities of the States involved may be further enhanced by providing that the authorities of the receiving State where the minor should be placed (i.e. those who should give consent as provided by the domestic legal system of the majority of the selected EU MS), are in the position to provide the State of origin with adequate quality assurance in relation to the placement.

In this view, the opportunity to create an EU system of accreditation and registration of the forms of alternative care might be evaluated<sup>182</sup>. It is here suggested that a role, in this regard, may be played by the Fundamental Rights Agency (FRA), which conducts research on child protection systems<sup>183</sup>.

Another possibility would be to set up some standards at EU level to be followed by Member States in the accreditation and registration.

On the other hand, the survey on the domestic application of art. 56 shows that in the majority of the cases considered (mainly regarding the cross-border placement of German national children), the solution of placement in the receiving State had already been organized by the authority of the State of origin. In such cases, there is little need for quality assurance on the side of the State of origin. On the other hand, the receiving State might be in need of further information (especially in the case of the above mentioned long-term placements, lasting more than one year, where a check on the conditions of the child placed seems necessary).

Furthermore, in the National report concerning Belgium, it has been expressly pointed out that registering placed children in the Belgian Population Register poses questions: in

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*should be consistent with the UNCRC*». [Please check cross-reference with the first occurrence of this Recommendation, under part 2.]

<sup>181</sup>For example of existing mistrust, see F. Forcada Miranda, *Revision with respect to the cross-border placement of children*, at 40.

<sup>182</sup>See *Ibidem*. See also the National report concerning Belgium, pointing out that a system of accreditation for private institutions where the children may be placed already exist in the Flemish Community (it was created with the Flemish Government Decision of 13 July 1994). As for "host families", such a system does not apply; however, a screening of the above families is made by the authorities.

<sup>183</sup>Reference to the Fundamental Rights Agency (FRA) is made by F. Forcada Miranda, *Revision with respect to the cross-border placement of children*, at 39.



Belgium multiple registration is not admitted and, therefore, it is possible to have just one address. This is of course a problem for the children who are under the jurisdiction of the State of origin and “temporarily” placed in Belgium.

Taking also into account the growth of the phenomenon of cross-border placement and the problems of runaway children<sup>184</sup>, a need arises to know where the cross-border placed children effectively are.

In this view, a specific national register concerning the children placed under art. 56 Brussels IIa may be useful. It is here submitted that the Central Authority of each EU MS may be responsible for creating and maintaining such a register.

The existence of a form of registration of a child in the art. 56’s register might be helpful for the other public authorities, among others, which might have contacts with the child, such as cities.

Such a register would also be useful for a more punctual collection of statistical information. In this light, it would be useful to create a uniform format (e.g. distinguishing between outgoing and ingoing cases, collecting information on the identity of the children and on the characteristics of the solutions of care adopted) to be used by all EU Central Authorities.

As has been pointed out, the collection of data on forms of alternative care (adoption included) is likely to grant a better understanding of child protection mechanisms throughout Europe and the EU is perhaps the only actor with the capacity to play such a role<sup>185</sup>.

The introduction of the following recital is recommended.

**Recital (...) When EU Member States are cooperating in the cross-border placement of children in institutions, with a view to achieving full implementation of the children’s rights, they shall guarantee the respect of the principles enshrined in art. 20 and 21 of the UNCRC, the UN Guidelines for the alternative care of children and the Recommendation of the Committee of Ministers of the Council of Europe on the rights of children living in residential institutions (Rec (2005) 5).**

It is further recommended to consider the opportunity to establish:

- an **EU system of accreditation and registration of the institutions, foster families and other solutions of care**. It is here submitted that such a system would enhance mutual trust among EU MS and would also possibly help to monitor/check long-term placements. The above function may be played by the FRA.
- a national register concerning the children placed under art. 56. Such a register may be created at the EU level (with a uniform format) and each Central Authority may be responsible for its creation and maintenance.

<sup>184</sup> See *infra* para 5.2.4.

<sup>185</sup> See R. Lamont – C. Fenton-Glynn, *Cross-Border Public Care and Adoption Proceedings in the European Union*, in *Journal of Social Welfare and Family Law*, 2016, at 7.

### 5.3.2.3. Confidential obligations

Placement in institutions or foster families involves the analysis of a child's situation by different authorities during the consultation procedure provided by art. 56.

In the practical application of art. 56, it has been found that confidential information on the child is exchanged without any protection<sup>186</sup>.

It shall therefore be evaluated whether to include in the new regulation (*a fortiori* in the case of adoption of a new regulation exclusively devoted to parental responsibility matters) a general provision establishing the duty to respect confidentiality in all proceedings concerning children<sup>187</sup> or a more specific provision, within the article regulating cross-border placement, stating that the exchange of information concerning children should be limited to the essential. It has been proposed that the communication of often highly sensitive psychiatric reports on children should be avoided<sup>188</sup>. It is here submitted, however, that in light of the necessary continuing cooperation between the competent authority of the requesting State and that of the requested State such an absolute ban might be contrary to the best interests of the child. On the contrary, it might be evaluated whether to limit such an exchange of sensitive information to the minimum necessary and to impose a strict respect of the duty of confidentiality.

The relevance of such problems may, however, be reduced in case – as explained *infra* – the possibility is considered to adopt an EU standard form certificate to be issued by the competent authorities of the requesting State, where only the essential information on the child should be provided.

It shall be evaluated whether to introduce a provision:

- a) establishing a general duty for national courts as well as for Central Authorities as to respect confidentiality in all proceedings concerning children;
- or
- b) establishing a specific duty to respect confidentiality in art. 56's proceedings and, in particular, to limit the exchange of information concerning children to the minimum necessary, with particular attention to information regarding health.

### 5.3.2.4. Jurisdiction

In matters of parental responsibility, the rules on jurisdiction are inspired by the principle of the best interests of the child and, in particular, by the principle of proximity<sup>189</sup>. The general rules are the jurisdiction of the courts of the place of habitual residence of the child, but some further flexibility is provided by other heads of jurisdiction. The recourse to the principle of proximity ensures that (i) the child's view can be taken into account without the child having to travel, (ii) procedures relating to the collection of evidence (e.g. situations reports) can be completed as quickly as possible, and (iii) the court has an understanding of the situation in the Member State the child lives in<sup>190</sup>.

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<sup>186</sup> See petition n° 1352/2014, op. cit. at ft. 1.

<sup>187</sup> Art. 55 Brussels IIa already makes only a general reference to respect of the law in matters of personal data protection.

<sup>188</sup> See petition n° 1352/2014, op. cit. at ft. 1.

<sup>189</sup> See recital 12 of Brussels IIa.

<sup>190</sup> See Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report, May 2015, p. 25.

When the procedure under art. 56 Brussels IIa is applied and the child is placed, for a certain period of time, in an EU country other than the one having jurisdiction by virtue of proximity to the child himself/herself, problems of jurisdiction may arise.

Such a situation may give rise to the same problems as those in the case where a child moves back and forth between two or more Member States and the time between the two countries is equally divided<sup>191</sup>.

With regard to the cross-border placement of the child, under art. 56 Brussels IIa, the courts of the State of the child's habitual residence (State of origin or requesting State) by virtue of their proximity with the child (and therefore by virtue of a deep awareness of the needs and conditions of the child, deriving from the fact that it has already instructed enquiry, has heard the parties and has the results of the investigations available in the court file) establishes the placement abroad, with the consent of the receiving State, where necessary.

Under art. 56, the jurisdiction on the child placed abroad stays in the courts of the State of origin (on the basis of the title of jurisdiction originally established), even if the placement is long-term, which is going to last for a considerable amount of time (e.g. more than one year).

The receiving State, however, has the powers and instruments to face difficult solutions: in case of urgency, it may adopt the provisional measures under art. 20 aimed at protecting the person and property of the child.

The survey on the domestic application of art. 56 Brussels IIa confirms the above interpretation of the rules on jurisdiction: once the courts of the receiving State are given consent (where necessary)<sup>192</sup>, they generally close the procedure<sup>193</sup> and, therefore, have no jurisdiction with regard to the child, even if – given the placement – they are and will be the authorities which are closer to the child for the duration of the placement.

However, such a solution does not seem fully in compliance with the principles inspiring Brussels IIa, specifically with the principles of the best interests of the child and of proximity.

Even though there are cases where the placement of a child in a foreign country does not entail real integration, as generally happens in German outgoing cross-border placements, where it might be reasonable to leave the jurisdiction over the child to the courts of the State of origin; when what a "pure" cross-border placement under art. 56 Brussels IIa long term placement takes place, the child's integration in the receiving State is inevitable and, therefore, it would be perhaps appropriate that the jurisdiction moved to the latter State.

A need to regulate this "transfer" of jurisdiction arises.

It is of course possible to make recourse to the other existing flexible grounds of jurisdiction and, in particular, to art. 15 and art. 13.

As for the first, it is possible that jurisdiction is recognized to the State of nationality of the child if this State has a close connection with the child. Such a solution has been expressly considered for the cases of adoption without consent.

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<sup>191</sup> *Ibidem*, at p. 42, footnote 117.

<sup>192</sup> It seems not necessary in Poland and Luxembourg; similarly, no need for consent arises in Malta in case of voluntary placement.

<sup>193</sup> See, in particular, the national report concerning Italy where a distinction is made among art. 56 procedures, where – due to the mutual trust existing among EU Member States – the Italian courts, once the children is placed and the consent is given, close the procedure (by virtue of a "*provvedimento di archiviazione*"); on the contrary, as for cross-border placements of children from or to third States, the Italian courts tend to leave the procedure open.

On the other hand, the courts of the State where the child effectively is (or moves to) may have jurisdiction under art. 13.

However, the recast of the Regulation is perhaps the best chance to consider the possibility of moving the jurisdiction on the child placed from the State of origin to the receiving State, where the child effectively is and stays for some years. In other terms, it seems that the latter State should have jurisdiction over issues concerning the child placed, at least for long-term placement. This solution seems consistent not only with the principle of proximity, enshrined by the rules on jurisdiction of the Regulation, but also with the criteria which the CJEU recommends using in establishing the existence of the habitual residence of a child<sup>194</sup>.

This solution also seems coherent with the existing art. 9 Brussels IIa establishing the jurisdiction of the State of habitual residence in case of licit transfer of the child's habitual residence from one State to another. The "continuing" jurisdiction (*perpetuatio jurisdictionis*) of the child's habitual residence is limited in time and with regard to the object: it shall last three months and shall be limited to the right to visit.

Similarly, as for the continuing jurisdiction of the court of the State of origin (where the child previously had his/her habitual residence), some limits shall be provided. In terms of time, it is perhaps reasonable to consider that "long term" placements (e.g. placement lasting more than one year) shall move to the courts of the receiving Member State, where the child has his/her new habitual residence after the first year the jurisdiction. As for the object, it might be evaluated whether to limit the jurisdiction of the receiving Member State to the check on the adequacy of the solution of care provided.

It is suggested to evaluate the opportunity of introducing a specific rule on the transfer of jurisdiction from the requesting State (i.e. State having jurisdiction under article 8 to 15) to the requested State.

**Art. 56 (...) In case of long-term cross-border placement (i.e. cross-border placement lasting more than one year), the courts of the Member State of origin shall retain full jurisdiction as for the placement during the first one year period following the move to the receiving State. After the first one year period, the courts of the receiving State shall be recognized as having jurisdiction on the placement to check the adequacy of the solution of care provided.**

#### 5.3.2.5. Procedure

The European Commission Study on the assessment of Brussels IIa<sup>195</sup> shows that the rules of the regulation aimed at supporting citizens in cross-border proceedings by Central Authorities do not work properly.

It is here submitted that improving the art. 56 Brussels IIa procedure and abolishing the exequatur for cross-border placement judgments are the **crucial issues** to be considered in the recast. The two issues are strictly linked: the abolition of the exequatur is conditioned to the existence of a mutual trust among the actors involved. This mutual trust needs to be strengthened by virtue of more precise rules on the procedure, clearly envisaging the specific tasks of the authorities of the Member States' involved.

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<sup>194</sup>See CJEU judgment of 2 April 2009, case C-523/07, para. 48 and CJEU judgment 22 December 2010, Mercredi, case C-497/10 PPU, para. 51.

<sup>195</sup>Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report, May 2015, p. 23.

With specific reference to the **procedure** for the placement of a child, the provisions are perceived as not sufficiently specific as regards (i) the authorities involved and the division of roles in the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children and (ii) the obligations arising on the States involved.

As shown in part 2 of the present study, art. 56 Brussels IIa foresees two different mechanisms of coordination. The “simplified” mechanism does not require any public authority to intervene in the receiving Member State, while the “more complex” one asks for the intervention of the public authorities of the receiving Member State, which must first be consulted and second give their consent prior to placement in institutions or foster families.

The survey on the domestic application of art. 56 Brussels IIa shows that all of the selected MSs except Malta ask for consent in case of domestic placement and, consequently, also in case of cross-border placement. It would be interesting to further study this finding in the remaining countries<sup>196</sup>. If confirmed, the possibility of eliminating the simplified mechanism of coordination could be explored. Such a solution would give rise to a uniform procedure of cross-border placement (i.e. the “more complex” mechanism of coordination) and this would, it is here submitted, increase certainty.

With regard to the “more complex” mechanism of coordination, it is here recommended that the current review of Brussels IIa take into account the achievement of the *HSE* decision as regards the definition of authority governed by public law entitled to give the consent.

On the other hand, the **timing** is relevant: a more complex mechanism may be too time consuming, given the absence of specific rules ensuring fast coordination among the authorities involved. This is, of course, deleterious given that placing a child in institutional care or in a foster family is usually a delicate matter and a delay may have serious effects for the child’s level of protection and/or health.

A balance has to be struck between the need, on the one side, to act expeditiously and the need, on the other side, to provide a mechanism of coordination that can grant the authorities involved a real opportunity to deal with the case properly to find the best solution of care for the child.

In this regard, it shall also be considered that difficulties in the communication between the Central Authorities have been experienced, including language barriers and lack of documents to be submitted to the requested Member State as well as lack of clarity on which authority should bear the costs of translation<sup>197</sup>. In order to overcome the problems encountered, it has also been proposed to foresee rules on direct judicial communications, such as those provided in art. 15.6 and 11.6-11.7 of Brussels IIa<sup>198</sup>.

It is here submitted that the possibility to provide a term for the receiving State’s issue of consent (e.g. one month from the request of consent for cross-border placement) shall be evaluated. Furthermore, given the special mutual trust existing among EU Member States, the opportunity might be considered to state that a placement is deemed accepted if one

<sup>196</sup>From the National report concerning Germany (annex n°. 6), it results that, beside Malta, also Luxembourg and Poland do not require any consent for the placement of children.

<sup>197</sup>The Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report, May 2015 has pointed out three specific factors which contribute to delays in international cases (see p. 49), such as (i) the absence of deadline for the Central Authorities to respond to the requests by other Central Authorities; (ii) difficulties in communicating due to language barriers as well as to the lack in making use of electronic means of communication; (iii) absence of uniform guidelines on the types of information to be attached to a case file that is exchanged across borders.

<sup>198</sup>See F. Forcada Miranda, *Revision with respect to the cross-border placement of children*, at 42.

month after the receipt of the request of cross-border placement from the State of origin, the receiving State does not expressly oppose it.

Beside the above "ordinary" procedure, to be applied for short term and long term cross-border placements, it could also be explored whether to introduce a specific reference to art. 20 measures in the correspondent rule of art. 56 of the new regulation, by virtue of which the State of origin may order the immediate placement of the child in the receiving State, in particularly urgent cases, while the deadline for obtaining the consent (or the express refusal) of the receiving State is still pending<sup>199</sup>.

The above mentioned solutions would perhaps overcome some of the problems encountered in the practice, specifically the fact that, in the majority of the cases considered in the survey on domestic application of art. 56 Brussels IIa, placements are carried out before consent is granted, leading to additional problems<sup>200</sup>.

Beside the above amendments, it shall be also evaluated whether **to clarify the tasks of the State of origin and those of the receiving State**, which are now unclear and not uniformly perceived by the Member States (as demonstrated by the different guidelines provided by the national authorities)<sup>201</sup>.

As for the **State of origin** asking for placement in another EU Member State, art. 56 does not provide specific obligations. It shall be evaluated whether to introduce the duty to prepare a report, similarly to the report requested under art. 33 of the 1996 HC.

More precisely, the report shall contain detailed information on:

- (i) the identity of the child (name, surname, date of birth, domicile);
- (ii) the reasons justifying the cross-border placement (reasons which should derive from a sort of multidisciplinary assessment of the situation of the child, as recommended by the CoE guidelines; in this light, see supra the proposal of introducing an ad hoc recital making express reference to the guidelines above);
- (iii) the pedagogical project studied by the competent authorities of the State of origin<sup>202</sup>;
- (iv) the solution of alternative care provided (data regarding the receiving institution or foster family, length of the placement, costs of the placements);

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<sup>199</sup> See, for example, the solution of provisional guardianship adopted in the Netherlands, as described by the Practical Handbook on the 1996 HC at point 13.42.

<sup>200</sup> For example, if a child is placed in a foster family in a different Member State without consent, it is possible that the foster family could not be examined beforehand or that the modalities (e.g. who bears the costs) could not be clarified. This may affect the well-being of the child, because he/she may need to move again or to be sent back.

<sup>201</sup> In the *Advice on Placement of Looked after Children Across Member States of the European Union*, at 7 it is, for example, suggested that the competent authorities of the receiving States should consider the following elements: (i) whether, based on the information provided about the child's needs and circumstances, the placement for the child appears to be appropriate; (ii) the frequency and suitability of arrangements for keeping the plan under review and assessing the ongoing need for the placement; (iii) arrangements to ensure the child has equivalent safeguards to children from their own jurisdiction who are in such placements; (iv) arrangements for family contact (if appropriate) and (v) the planned duration of placement and aftercare arrangements. The Department of Education also suggests the grounds on the basis of which the local authority may refuse their consent to the placement. More precisely, consent may be refused if following scrutiny of information about the child and the child's plan, the authority reaches the view that the proposed placement is unsuitable for the individual child. Examples given for a refusal are that the proposed placement is inappropriate for the child's age, arrangements for review of the plan or for aftercare are not suitable; or because the local authority has information about the quality of the proposed placement indicating its unsuitability in view of any concerns that relate to the care and safety of other children.

<sup>202</sup> Reference to the pedagogic project is made in guidelines of the German community, enclosed in the National report concerning Belgium.

- (v) the position of the parents/family members (in favor of or against the solution of care);
- (vi) the position of the child (in favor of or against the placement), to be expressed any time the child is over 12. As for children under 12, any time the child is deemed to have the capacity to express a position on the solution of care provided;
- (vii) the existence of insurance in the State of origin<sup>203</sup>.

In order to grant uniformity, MS shall be bound to use a standard form for the above report, which shall be enclosed to the Regulation.

As for the **receiving State**, as mentioned, its consent should become a compulsory requirement and, therefore, shall be extended even to those Member States not asking for consent. This solution increases certainty and uniformity, and also gives the receiving Member State the chance to carry out an independent assessment on the appropriateness of the placement.

In light of better identifying the tasks of the receiving State, it is necessary to clarify what kind of investigation is requested of the receiving State in order to provide its consent to the cross-border placement. It seems reasonable to infer that the competent authority is under a duty not to re-examine the reasons for the proposed decision on placement made in the other Member State. On the other side, the latter should be provided with sufficient information in order to establish that the plan envisaged for the child provides him/her with the same safeguards as a comparable plan for the placement of a child having the citizenship of the receiving State<sup>204</sup>.

In this view, art. 45 of the German IFLPA may be a model law, since it states that, provided that some conditions exist, consent to the request of cross-border placement has to be granted and further conditions shall be respected if placement is linked to some form of deprivation of liberty<sup>205</sup>.

A similar rule may be introduced at the EU level; however, it is here submitted that, perhaps, in the next revision of Brussels IIa further improvements shall be made. More precisely:

<sup>203</sup>Such a requirement is, for example, envisaged in the draft of request prepared by the German Community in Belgium for the incoming placements from Germany (enclosed in the national report concerning Belgium).

<sup>204</sup>A similar investigation is envisaged, for example, in the *Advice on placement of looked after children across Member States of the European Union* (2013) provided by the Department of Education of the United Kingdom, available at the following website:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/273975/placement\\_of\\_looked-after\\_children\\_in\\_eu.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/273975/placement_of_looked-after_children_in_eu.pdf)

<sup>205</sup>More precisely, art. 45 states as follows: « (1) Consent to the request should as a rule be granted where 1. carrying out the intended placement in Germany is in the best interests of the child, in particular because he or she has a particular connection with the country, 2. the foreign agency has submitted a report and, to the extent necessary, medical certificates or reports setting out the reasons for the intended placement; 3. the child has been heard in the proceedings abroad, unless this appeared inappropriate on the ground of the child's age or degree of maturity; 4. the consent of the appropriate institution or foster family has been given and there are no reasons telling against such placement; 5. any approval required by the law governing aliens has been given or promised, 6. the issue of assumption of costs has been dealt with. (2) In the case of a placement linked with deprivation of liberty the request shall be refused notwithstanding the conditions set out in subsection (1) where 1. in the requesting State, no court decides on the placement, or 2. on the basis of the notified facts of the case, a placement linked with deprivation of liberty would not be admissible under national law. (3) The foreign agency can be requested to provide supplementary information. (4) Where there is a request for placement of a foreign child, the opinion of the aliens authority shall be obtained. (5) The decision, for which reasons shall be stated, shall also be notified to the Central Authority and to the institution or foster family where the child is to be placed. The decision shall be incontestable».

1. in order to expedite the procedure, as mentioned, a specific term might be provided for the authorities of the receiving State to grant consent or to oppose placement (e.g. one month);
2. given the detailed description of the requesting State's report, it is perhaps possible to avoid reference to all the conditions mentioned in art. 45 of the German IFLPA and, therefore, to limit the grounds for refusal of consent to the manifest contrast with the best interests of the child and to public order<sup>206</sup>.

On the contrary, with reference to measures of placement involving some form of deprivation of liberty, measures which have not been expressly considered in the Brussels IIa, it might be evaluated whether to adopt a rule modeled on art. 45.2 of the German IFLPA.

The procedure of art. 56 is perceived as one of the weakest points for the smooth functioning of the cross-border placement of children. It is recommended that art. 56 is replaced by a rule containing (i) a clearer division of tasks between the authorities of the MS involved; (ii) a term within which consent shall be provided or placement shall be opposed; (iii) specific rules for measures concerning deprivation of liberty; (iii) specific reference to the possibility of making recourse to art. 20 measures.

Art. 56

Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall **first send the central authority or other authority governed by public law in the requested State the standard form provided in Annex X.**

**The central authority or other authority governed by public law in the requested State shall consent to the placement without delay, within one month from the receipt of the report, unless the measure proposed is manifestly contrary to the best interests of the child or to public order.**

**Or**

**Consent to the placement shall be automatically awarded, unless within one month from the receipt of the request from the State of origin, the central authority or other authority governed by public law in the requested State expressly denies consent to the placement/measure proposed being the latter manifestly contrary to the best interests of the child or to public order.**

**In the case of a placement linked with deprivation of liberty the request shall be refused notwithstanding the conditions set out in subsection (1) where 1. in the requesting State, no court decides on the placement, or 2. on the basis of the notified facts of the case, a placement linked with deprivation of liberty would not be admissible under national law.**

**Once the consent of the central authority or other authority governed by public**

<sup>206</sup>*Ibidem*, the Department of Education expressly foresees the grounds on the basis of which the local authority may refuse their consent to the placement. More precisely, consent may be refused if following scrutiny of information about the child and the child's plan, the authority reaches the view that the proposed placement is unsuitable for the individual child. Examples given for a refusal are that the proposed placement is inappropriate for the child's age, arrangements for review of the plan or for aftercare are not suitable; or because the local authority has information about the quality of the proposed placement indicating its unsuitability in view of any concerns that relate to the care and safety of other children.



**law of the receiving State is obtained, the requesting Member State shall issue the placement order and a certificate using the standard form set out in Annex Y (judgment concerning the cross-border placements of children).**

**Once the certified placement order is given to the central authority or other authority having jurisdiction in the receiving State, the State of origin shall place the child in the institution or foster family.**

**In cases of urgency, the State of origin shall adopt provisional measures under art. 20 establishing the placement of the child in the receiving State, whilst waiting to receive the latter's consent (or the latter's express refusal to the placement) and, therefore, to issue the order and duly certify it.**

#### 5.3.2.6. Recognition and enforcement of cross-border placement orders

##### (i) Abolition of the *exequatur*

The problem of the "portability" of the placement order made by the State of origin is relevant. As the Commission has pointed out, it is in some cases difficult for citizens to predict whether or not they need to go through *exequatur* proceedings<sup>207</sup>. Furthermore, the Study on the assessment of Brussels IIa<sup>208</sup>, shows that there is no uniform interpretation of the term "enforcement" and, as a consequence, the Member States have different practices on whether or not judgments require a declaration of enforceability. In the HSE case, the CJEU interpreted the wording of the Brussels IIa and necessarily had to recognize the duty to respect the *exequatur* procedure for the enforcement of cross-placement orders. But, in order not to deprive the Regulation of its effectiveness, has also stated that the decision of the court of the requested Member State on an application for a declaration of enforceability must be made with particular expeditiousness and also that any appeal brought against such a decision must not have a suspense effect.

However, if one looks at the practice as resulting from the survey on the domestic application of art. 56 Brussels IIa, on one side, the need for enforcement of cross-border placement orders is remote and, on the other, when such a need arises, the rules on the *exequatur* procedure in the practice provided by Brussels IIa are largely disregarded.

It is here submitted that the recast of Brussels IIa should extend the abolition of the *exequatur* (already provided for decisions concerning the rights of visit and the return of the child under art. 11.8) to cross-border placement orders under art. 56.

Despite the contrary opinion of Adv. Gen. Kokott (see HSE conclusions para. 58-86), it would be an important improvement in reaching the specific objective of granting smooth recognition and enforcement of judgments, authentic instruments and agreements and would avoid contradictory and unclear situations where the judgment at hand refers to different aspects relating to parental responsibility governed by different procedures. Furthermore, the immediate enforcement of the placement orders would satisfy the different purpose of granting quicker relief to children in need of care.

In light of abolishing the *exequatur*, it is possible to evaluate whether to adopt the Brussels Ia Regulation's mechanism on recognition and execution, which is very similar to the mechanism provided by the 1993 Hague Convention on inter-country adoption. The first one provides for the abolition of the *exequatur*, but leaves open the possibility to block the

<sup>207</sup>See COM (2014) 225, p. 10

<sup>208</sup>See the Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final report, May 2015, p. 30.

movement of decisions in specific cases. The latter envisages a preventive mechanism of cooperation between the States' Central Authorities (of origin and receiving) involved, which enables the decision concerning the adoption to be automatically recognized, once certified, without need of further enforcement or registration. The receiving State may refuse the certified adoption, only if it is manifestly contrary to public policy, taking into account the best interests of the child. A similar public policy exception, tailored on the best interests of the child, may be envisaged.

However, it seems that, having regard to the high level of mutual trust reached in the field of parental responsibility, a more advanced solution should be adopted, i.e. to extend the regime already existing for decisions concerning the exercise of the rights to visit and the return of the child after an abduction under the existing Brussels IIa Regime to cross-border placement orders. As already pointed out, the Brussels IIa makes a relevant step forward with respect to the 1996 HC with regard to the "pioneering" mechanism of the abolition of the exequatur for the decision on the return of abducted children and on access rights. This is the most advanced solution reached in the recognition of measures concerning children, notwithstanding the fact that its application in practice has proven to be difficult, as CJEU and ECtHR case-law show.

A further slightly different and more complex solution may also be considered: the adoption of the specific regime of recognition and enforcement now provided for protection measures in civil matters by the European civil protection Regulation 606/2013 of 12 of June 2013 on mutual recognition of protection measures in civil matters (the so called EU Protection Regulation) From the scope of this regime, protection measures issued between parents and their children are expressly in order to preserve the *acquis* of the Brussels IIa<sup>209</sup>.

Under art. 4 of Regulation 606/2013, a protection measure ordered in one Member State is enforceable in another Member State without any special procedure required. That is, the regulation provides for no requirement for a declaration of enforceability. Such a mechanism is simple and may also be used in the context of placement orders. The person who wants to invoke abroad the protection measure ordered in the Member State of origin, must provide the competent authority in the Member State addressed with a copy of the protection measures, the certificate referred to in art. 5 of the Regulation and, where necessary, a translation of the same. Once the requirements under art. 4 have been fulfilled, the authorities of the requested Member State have to treat the protection measure as if it had been imposed by that Member State and enforce it accordingly. Under art. 12 it is not possible to review the measure as to its substance and under art. 13 the grounds for refusing to recognize or enforce the protection measure are limited. It is important to stress that the effects of recognition are limited to 12 months, even if the Member State of origin decided for a longer period. A further relevant rule is provided: where appropriate the authorities of the requested Member State may "adjust" the factual elements of the protection measure in order to give effect to the protection measure in that Member State (see art. 11.1); such adjustments shall be brought to the notice of the person causing the risk.

If the solution of the straightforward abolition of the exequatur is followed for the judgments concerning the cross-border orders and it is also extended to all the other decisions on parental responsibilities, it is perhaps possible to make use of the general certificate envisaged under annex II.

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<sup>209</sup>Given the variety of protecting measures existing in the EU Member States, just three types of them have been covered by the Regulation. In particular, it applies to measures obliging the perpetrator to refrain from or regulating the following behaviors: (a) entering the place where the protected person resides, works or stays regularly; (b) contacting, in any form, the protected person, including by phone, electronic or ordinary mail, fax or any other means; (c) approaching the protected person closer than a prescribed distance.

This solution would avoid the proliferation of certificates, which, as pointed out in the Study on the assessment of Brussels IIa, is perceived as a problem by EU citizens.

On the other hand, the introduction of a specific certificate for cross-border placement judgments is necessary if the solution of a more cautious abolition of the *exequatur* is followed, given the specific features which the certificate would have.

However, as mentioned, both the above solutions proposing the abolition of the *exequatur* need to be provided together with the strengthening of the preventive cooperation among the States involved. This preventive cooperation is crucial to building the mutual trust necessary to make the decision on placement capable of automatic recognition and enforcement in other EU Member States.

Execution of cross-border placement orders/judgments is a crucial aspect. The survey shows that the rules of Brussels IIa on execution are not applied and, therefore, the statements of the CJEU in the HSE on this point are largely disregarded in practice. It is strongly recommended to consider the abolition of the *exequatur* procedure with regard to decisions concerning cross-border placement. In this light, two possible solutions are hereby proposed.

**straightforward abolition of *exequatur***

Extension of the provisions under section 4 of the Brussels IIa to cross-border placement orders and abolition of the ground of non-recognition of decision provided by art. 23 lett. g).

**Or**

**“more” cautious abolition of *exequatur*, following the terms of Regulation 606/2013**

Adoption of a specific regime of recognition and enforcement now provided for the protection measures in civil matters by European civil protection Regulation 606/2013 (certificate with time limiting effects on recognition; adjustment of factual elements where necessary).

(ii) [Duration of the cross-border placement order and its impact on recognition and enforcement](#)

The duration of placement orders varies considerably, depending on the situation of the child considered as well as the tradition of the State issuing the order. In the HSE case, the Commission and UK government suggested the possibility of consent given in such a way as to encompass any extensions and, in any event, declared enforceable in the requested Member State as if it were a fresh order.

In its judgment, the CJEU stated that it would be better to issue long-lasting cross-border placement orders, in light of avoiding the need to prorogate the placement and, therefore, to start the procedure from the beginning.

This principle is of course functional to purposes of procedural economy, but the most relevant parameter in issuing the length of an order should be the best interests of the child.

A solution which may reconcile the different interests (the best interests of the child as well as procedural economy) could be to adopt the solution provided by Regulation 606/2013, where – on the basis of the divergences existing among Member States with regard to the duration of the protection measures – an innovative concept of recognition has been proposed. For the first time in an EU instrument on mutual recognition the effects of the certificate are limited in time (12 months).

In relation to the duration of cross-border placement orders, it is here submitted that a balance between the purposes of procedural economy (calling for long-lasting orders, aimed at avoiding the starting of a new art. 56 procedure) and the principle of the best interests of the child should be found. In this light, the possibility of a limited in time order (see for example the solution adopted in Regulation 606/2013) shall also be evaluated.

### (iii) Amendment of the placement order

A further problem is that, generally speaking, decisions concerning children and parental responsibility are held *rebus sic stantibus*, i.e. in specific conditions and at a particular moment. Due to a change in circumstances, a decision held at a specific moment may subsequently no longer be in the best interests of the child and need to be revised. On the other side, when changes in the circumstances are not as relevant as to require a revision, it may still be necessary to adoption specific measures to better grant protection to the interests of the child.

Brussels IIa, but also the 1996 HC, are silent on these problems.

In this regard, Regulation 606/2013 may again be useful: it expressly envisages the concept of "adjustment" of a certain order by the authority of the Member State of recognition. More precisely, the competent authority in the Member State of recognition will be allowed to adjust the factual elements of the protection order (like, for example, the specific address of the place of work or residence, the distance the perpetrator must keep from the protected person) where such adjustment is necessary for the practical implementation of the order.

In light of the fact that decisions concerning children are held *rebus sic stantibus*, it is proposed to expressly provide a mechanism of adjustment of cross-border placement orders, where such adjustment is necessary for the practical implementation of the order.

### (iv) The denial of automatic suspension of enforcement of a registered order

In the HSE judgment, the CJEU has stated that, despite the absence of any rule in this regard, the automatic suspension of the enforcement of a registered order concerning the cross-border placement of a child during the time limit for appeal shall be excluded.

It has authoritatively pointed out that this decision may be deleterious for an older child who may wish to appeal.

It may, therefore, be evaluated whether to adopt a less strict solution and provide the domestic court with the discretion to permit, where necessary, the urgent enforcement of the placement order without suspension and, where not, the suspension of the enforcement pending expiry of the relevant appeal period.

This solution has been adopted in the UK legal order, where Family Procedural Rules have been amended. Beside the general rule under which the enforcement of judgments is suspended until the expiration of the term for appeal, a specific rule has been introduced entrusting the court with the power to enforce a judgment before the expiration of the term for appeal «*where urgent enforcement of the judgment is necessary to secure the welfare of the child to whom the judgment relates*».

With reference to the problem of the suspension of the enforcement whilst the term for appeal is pending, it is recommended to reconsider the statement of the CJEU in the HSE in order to better balance the need for immediate enforcement of the cross-border

placement judgment/order with the rights of the (older) child to a fair trial and, therefore, to appeal the judgment/order itself.

### 5.3.3. Costs of the Procedure

Under art. 38 of the 1996 HC, the Central Authorities are allowed to charge reasonable fees corresponding to the demonstrable costs of services provided and contracting States are able to agree upon cost-sharing arrangements.

No specific rule is provided in the Brussels IIa, apart from the general principle that every authority bears its costs. More precisely, art. 57 states that the assistance provided by the Central Authorities pursuant to article 55 shall be free of charge and also that each central authority shall bear its own costs.

However, as for cross-border placement proceedings, beside the Central Authorities, "other authorities governed by public law" may be involved, for example social service assistants. More precisely, in consenting to placement and in monitoring long-term placement, the requested State has to put into place some activities and checks which may give rise to costs.

It shall therefore be evaluated whether to introduce in art. 56 a more detailed regime on the costs of the procedure, specifically the possibility for the MSs involved to agree to different cost-sharing arrangements.

The introduction of a specific regime on costs is proposed.

Art. 56 (...)

**Each central authority or other authority of public law shall bear its own costs. However, the requesting MS and the requested MS are free to enter into an agreement concerning the allocation of charges.**

### 5.3.4. Runaway children

Cross-border placement is aimed at "tailoring" the best solution for a child in need of care among the possible existing solutions in the whole EU context. In this light, cross-border placement may be viewed as one of the best products of the mutual trust among EU MS.

However, as pointed out in some of the national reports, the risk is that the child is not happy with the solution of care and escapes, as happens in purely domestic placement.

Due to the cross-border factor, the risks connected with the escape of child from the solution of care provided are higher than in a purely domestic context. The authorities of the receiving State are aware of the placement, but they do not have full knowledge of the situation of the child, as do the authorities of the State of origin. Furthermore, as already pointed out, they do not have full jurisdiction over the child, even if it is possible for them to adopt art. 20 measures.

The recast of Brussels IIa may be a chance to strengthen the cooperation among the authorities of the MS involved also in this regard and, therefore, to provide a mechanism to coordinate the efforts of the different authorities involved.

It might therefore be considered whether to integrate the already existing provision under art. 55, by adding new obligations to cooperate when children run away<sup>210</sup>.

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<sup>210</sup>As it results from the National report concerning Bulgaria, in the Bulgarian legal order – where no specific provisions devoted to the cross-border placement of children are foreseen – there is a specific provision on "Searching of the disappeared child", stating that the actions for searching of the disappeared child shall be

Given the difficulties arising when children run away in cross-border situations, it is here proposed to introduce specific duties of cooperation on competent authorities on this issue.

Article 55 Cooperation on cases specific to parental responsibility

The Central Authorities shall, upon request from another Member State's Central Authority or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. By acting directly or through public authorities or other bodies, they shall take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

**(...) provide the information and assistance that is needed by the competent authorities in the search of children, escaping from a placement under art. 56**

### 5.3.5. Further investigation

Despite the absence of any reference to a similar phenomenon in the survey, the problem of the so called "spoiled brat camps" (i.e. camps where difficult children are subjected to harsh discipline) has been authoritatively pointed out<sup>211</sup>. Such camps are placed surreptitiously abroad and their legality (in terms of the fundamental rights of children, among other things) is uncertain. Furthermore, this could undermine the mutual trust on which – it is here submitted – the mechanism of cooperation under art. 56 is grounded and, consequently, the functioning of the mechanism itself.

It is here submitted that, in the context of the revision of the rules on cross-border placement, further investigations on these camps existing in the EU, on their functioning as well as their legitimacy, should be conducted.

In the context of the revision of the rules on the cross-border placement of children, it is here submitted that investigations on the phenomenon of so called "spoiled brat camps" should be conducted in order to verify their legitimacy and compliance with EU law.

The opportunity of empirical surveys exploring the necessity of EU provisions with regard to *kafalah* and, in particular, of extending the scope of application of Brussels IIa to *kafalah* shall be considered<sup>212</sup>.

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undertaken immediately (art. 42, chapter 4, Child Protection Act), which applies also to placement having a cross-border character.

See F. Forcada Miranda, *Revision with respect to cross-border placement of children*, at p.36.

<sup>212</sup>See para 5.2.1.1. above.

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## ANNEX 1: THE TEAM

For the purposes of the study, in order to grant as a reasonable a geographical distribution as possible and include Member States that have been admitted in the EU at different times, the legal systems of the following EU Member States have been considered: Belgium, Bulgaria, the Czech Republic, France, Germany, the United Kingdom, Ireland, Italy, Latvia, Malta, the Netherlands and Spain.

Once the EU Member States were selected, national experts were found accordingly among academics, lawyers, judges, civil servants of the MS having specific expertise in the field of PIL matters concerning children and in the application of Brussels IIa.

### **The following experts contributed to the research:**

- Prof. Peter McEleavy (Dundee University), delivered the national reports concerning the United Kingdom and Ireland;
- Prof. Monica Herranz Ballesteros (National Distance Education University – UNED, Spain), delivered the national report concerning Spain;
- Prof. Thalia Kruger and Prof. Frederik Swennen, both members of the Research Group Personal Rights and Property, University of Antwerp, delivered the national report concerning Belgium;
- Prof. Boriana Musseva (Sofia University), delivered the national report concerning Bulgaria;
- Prof. Peter Gjoertler (Riga School of Law), delivered the national report concerning Latvia;
- Prof. Ian Curry-Sumner (University of Amsterdam), delivered the national report concerning the Netherlands;
- Prof. Ruth Farrugia (University of Malta), delivered the national report concerning Malta;
- Dr. Martha Zavadilová (Ministry of Justice of the Czech Republic) and Dr. Markéta Nováková (Central Authority of the Czech Republic), delivered the national report concerning the Czech Republic;
- Dr. Stefano Hempel-Dominelli (University of Genoa), delivered the national report concerning Germany;
- Dr. Francesco Pesce (Researcher University of Genoa), delivered the national report concerning France;
- Dr. Laura Carpaneto (Senior Researcher University of Genoa) delivered the national report concerning Italy.

## ANNEX 2

### QUESTIONNAIRE

**RESPONSE FROM:**

**MEMBER STATE CONCERNED:**

**DATE OF RESPONSE:** [date]

The European Parliament has commissioned Laura Carpaneto to carry out a study on "*Cross-border placement of children – the judicial application of EU family law*".

The purpose of the study is to determine the breadth and types of problems connected to the cross-border placement of children and to the application of art. 56 of EU Regulation n° 2201/2003 (Brussels IIa), then to provide recommendations for improving the legal framework, regarding in part the ongoing recast of Brussels IIa.

In this view, it is necessary to collect and analyze information on the relevant legislation and practice of a group of selected EU Member States: Belgium, Bulgaria, the Czech Republic, France, Germany, the United Kingdom, Ireland, Italy, Latvia, Malta, the Netherlands and Spain.

The selected experts on the national legislation and practice of each of the above mentioned Member States are requested to answer the following questions and to make express indication of the sources cited. To this end, contacts with the Central Authorities under the Brussels IIa Regulation are strongly encouraged.

#### **I. STATISTICAL ASSESSMENT**

1. How many cases concerning the cross-border placement of children have been decided in your Member State since the entry into force of the Brussels IIa Regulation?
2. Among them, how many cases have arisen within the EU judicial area, therefore involving only EU Member States and how many were fully international cases, involving third States (thus falling outside the scope of application of EU law)?
3. Which countries are interested by the cases considered for the cross-border placement of children? Please list the EU Member States on one side and the non-EU (third) States on the other.
4. What is the average length of domestic proceedings related to the cross-border placement of children?

#### **II. INTERNATIONAL LEGISLATIVE FRAMEWORK**

5. What relevant international (multilateral and bilateral) instruments in the field of the cross-border placement of children are in force in your Member State? Please provide a detailed list. What domestic instruments implementing the international conventions ratified by the Member State are at stake? Please provide a detailed list.
6. Are there soft law instruments and/or guidelines in your Member State aimed at better implementing and/or applying the existing international and EU instruments granting protection to children in cases of cross-border placement?

### III. DOMESTIC LEGAL FRAMEWORK

7. What relevant national (substantial and procedural) rules are in force in relation to the cross-border placement of children? Please provide a copy of the relevant provisions or indicate where they may be found. Please also provide a translation in English of the relevant provisions. If this is not possible, give a description of their content.
8. How is the word “placement” translated in the language of your Member State?
9. Under the law of your Member State what does “placement in an institution” mean? In what kind of institution may children be placed?
10. Under the law of your Member State what does “placement in a foster family” mean? Does it also include some form of placement with relatives (i.e. kinship care or placement) and/or with friends?
11. Under the law of your Member State does the term “placement” include other possible forms of care for the child, different from placement in an institution or in a foster family?
12. What judicial, administrative or other authorities are responsible for dealing with the whole procedure of the cross-border placement of children (execution of the relevant foreign decisions included)?
13. Are there services - such as social and psychological assistance, legal advice and representation, and mediation - available in case of the cross-border placement of children? Please describe the existing domestic procedures to follow and measures to apply in case of the cross-border placement of children, particularly the terms and conditions to be fulfilled.
14. Are there means aimed at (or however capable of) granting that the cross-border placement of a child is dealt with expeditiously or in a reasonable time?
15. Please describe the existing domestic procedures for the enforcement of decisions concerning the cross-border placement of children. Are such procedures generally envisaged for the enforcement of decisions in civil matters or specifically provided for the enforcement of decisions concerning children?
16. Are there on-going projects of future legislation on children in general and/or on the placement of children? If so, please provide a description of them and, when possible, a copy of the projects.
17. What are the existing weak points of the rules in force?

### IV. PRACTICE

18. Is there any domestic judgment (*i.e.* a judgment relating to parental responsibility pronounced by a Member State court, whatever the judgment may be called, including a decree, order or decision) applying the Brussels IIa Regulation with specific regard to cases of the cross-border placement of children?
  - If so: 18.1: Please provide a list of them.
  - 18.2 Please provide a short, English-language description of the case and the decision.
  - 18.3 Please provide the text of the decision itself (in the original version and in English if available).

19. Is there any domestic judgment applying the Brussels IIa Regulation in general, but reasonably deemed as having some – direct or indirect - relevance for the analysis of the cross-border placement of children?  
If so: 19.1: Please provide a list of them.  
19.2 Please provide a short, English-language description of the case and the decision.  
19.3 Please provide the text of the decision itself (in the original versions and in English if available)
20. Is there any domestic judgment or measure applying the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (hereinafter 1996 Hague Convention) with specific reference to the cross-border placement of children?  
If so: 20.1: Please provide a list of them.  
20.2 Please provide a short, English-language description of the case and the decision.  
20.3 Please provide the text of the decision itself (in the original versions and in English if available)
21. Is there any domestic judgment or measure on the 1996 Hague Convention in general, but reasonably deemed as having some – direct or indirect – relevance for the analysis of the cross-border placement of children?  
If so: 21.1: Please provide a list of them.  
21.2 Please provide a short, English-language description of the case and the decision.  
21.3 Please provide the text of the decision itself (in the original versions and in English if available)
22. Is there any domestic judgment or measure applying other sources of international law (*i.e.* multilateral or bilateral international instruments as well as sources – as for example resolutions, recommendations – adopted by international actors working in the field of the international protection of children) which may be reasonably deemed as having some – direct or indirect – relevance for the analysis of the cross-border placement of children.  
If so: 22.1: Please provide a list of them.  
22.2 Please provide a short, English-language description of the case and the decision.  
22.3 Please provide the text of the decision itself (in the original versions and in English if available)
23. Has your Member State promoted any public consultation on the cross-border placement of children?

**V. RELEVANT BIBLIOGRAPHIC REFERENCES**

24. Are there any papers/articles in reviews/books/monographs/commentaries published in your Member State specifically dealing with the cross-border placement of children?
25. In your opinion, has the domestic legal literature on the cross-border placement of children informed the decisions taken by your domestic authorities and thus had an important role in the correct application of EU law?

**VI. FURTHER INFORMATION AND COMMENTS**

Please provide any further information or comment that you believe may be useful for the purposes of this study.





## DIRECTORATE-GENERAL FOR INTERNAL POLICIES

# POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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