ZSUZSA WOPERA

TRENDS IN EUROPEAN FAMILY LAW

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ZSUZSA WOPERA

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The aim of the book series launched by the Ferenc Mádl Institute of Comparative Law under the title "Modern Comparative Law Trends" is to present the global legal challenges of the 21st century and their comparative legal approaches, in a way that is of scientific demand, but also useful for the application of the law. Its volumes offer an international outlook on the development of law, new regulatory models, and the similarities and differences between the various legal systems. The series serves as a compass for international and domestic professionals, legislators, legal practitioners and researchers alike, helping them to understand legal trends and adopt best practices.

TRENDS IN EUROPEAN FAMILY LAW

ZSUZSA WOPERA

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Prof. Dr. Zsuzsa Wopera
Full Professor, Faculty of Law, University of Miskolc

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Reviewers

Adrienn NAGY PhD
Head of Department, Ferenc Mádl Institute of Comparative Law
Associate Professor, Director of Institute, Faculty of Law, University of Miskolc

and

Ildikó BERECZKI PhD
Senior Researcher, Ferenc Mádl Institute of Comparative Law

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Introduction

In recent decades, a number of new trends have emerged in the broadly interpreted European family law.[1] A few examples illustrate what we mean by these trends. Regarding the legal institution of marriage, so-called out of court divorces, the 'dejudicialization' of the divorce are becoming increasingly common in the EU Member States. However, this form of divorce raises serious, sometimes even public policy[2] issues, if the relevant decision has to be recognised in another Member State. If, during such a notary public divorce, the issue of parental responsibility or maintenance for the spouses' children is also resolved, then in addition to the issue of recognition, problems concerning enforcement may also arise.

The expansion of children's rights and the strengthening of child-friendly or, more correctly, child-centered justice can be considered a clear trend in European family law. The European Union and the Council of Europe are making serious efforts to create an international legal framework for child-centred justice, but this trend can also be observed at the level of Member State regulations. At the same time, these legislative processes often provoke elementary opposition from legal practice and law seekers. In this context, it is sufficient to think of EU and Member State regulations concerning the right of the child to express his or her views, which have not reached a point of stability despite the fact that the UN Convention of the Rights of the Child has included this obligation for more than 30 years.

It can therefore be seen from these selected examples that fundamental and profound changes have occurred in the family law regulations of the EU Member States and in the field of cross-border family law matters in recent years, whether it concerns EU law, national legislation or legal practice.

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1 See more: Katharina Boele-Woelki (ed.): Debates in Family Law around the Globe at dawn of the 21st Century. Intersentia, Antwerp-Oxford-Portland 2009. and Masha Antokolskaia (ed.): Convergence and Divergence of Family Law in Europe, Intersentia, Antwerp-Oxford 2007.

2 Some authors consider the dejudicialization of divorces to be a 'burning point' of European family law. See: Elena Bargelli. Reshaping the Boundaries Between ‚Decision' and Party Autonomy. The CJEU on the Extrajudicial Italian Divorce. In: European Papers Vol. 8. 2023.

In this volume, the term "European family law" means the national legislation of the individual Member States on family law situations, the so-called comparative family law. In addition, the category of European family law also includes the norms and case law of the EU governing family law matters in cross-border situations within the framework of judicial cooperation in civil matters. The volume also discusses the recommendations and guidelines of the Council of Europe on child-friendly justice. In addition, reference to the relevant conventions, guidelines, general comments and case law adopted under the supports of the United Nations and the Hague Conference on Private International Law cannot be overlooked.

The volume therefore contains conclusions and proposals based on classical comparative legal research on family law, discusses in detail the main directions of the EU family law legislation with the relevant case law, and its impact on Hungarian family law regulation. The monograph also analyses in detail the impact that the case law of the Court of Justice of the European Union has had or may have on the national family law regulation of the Member States.

The volume therefore seeks to present the dynamic processes that affect the substantive and procedural issues of family law. The volume can also be understood as a thematic collection that analyzes trends in the field of family law, which are interrelated at several points.

The monograph essentially presents the current trends in European family law along three closely related topics. First, we analyze the problems affecting the *institution of marriage* in the EU and Member State legislation and case law. Among these, we address the problem of out-of-court divorces and issues concerning the recognition of foreign marriages in other Member States in the light of the case law developed on the basis of the right to free movement, and we evaluate the conclusions that can be drawn from this case law. In the area of marriage, the analysis of the Rome III Regulation and its practice, adopted within the framework of enhanced cooperation, which entered into force in 2012, cannot be overlooked.

The volume presents in detail the trends in *matters of parental responsibility,* such as the forms and solutions of joint parental custody and shared physical custody in certain EU Member States. In addition, we discuss in

detail the relevant provisions of the Brussels IIb Regulation, which is the cornerstone of EU legislation of cross-border family law matters, primarily from the perspective of its effects on determining trends in European family law. Of particular interest in this context are, for example, the appreciation of children's rights, in particular provisions guaranteeing the participation of the child or the facilitation of the enforcement of decisions in cross-border cases, the development of the case law on privileged decisions or the overriding mechanism in child abduction cases. The volume also addresses mediation, which is particularly preferred by EU and national legislators, and presents its practice and lacks in domestic legal practice.

The third part of the book presents the *joint COE-EU project on child-friendly justice*[3] and analyzes the recommendations adopted within the framework of this project. The monograph examines the two Recommendations adopted in 2025 on the protection of the rights and best interests of the child in parental separation proceedings and care proceedings. In addition, this chapter presents the substantive and procedural rules ensuring the children's rights in the relevant EU legal sources and in Hungarian law.

The author of the volume makes proposals for more effective future legislation in each analyzed area.

This volume is published as part of the Publisher's series entitled "Modern Comparative Law Trends" representing the great influence of the comparative legal research method on the development of European family law.

Budapest, Spring 2026.

3 See more: https://www.coe.int/en/web/children/child-friendly-justice-project

List of Abbreviation

Brussels II Regulation	Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses
Brussels IIa Regulation	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
Brussels IIb Regulation	Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)
CJEU	Court of Justice of the European Union
CPC	Act CXXX of 2016 on the Code of Civil Procedure
CRC	Convention ont he Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Hague Child Abduction Convention	Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
HCCH	Hague Conference on Private International Law

JEA	Act LIII of 1994 of Judicial Enforcement
Maintenance Regulation	Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
Non-contentious Act	Act CXVIII of 2017 on the Rules Applicable to Non-Contentious Civil Proceedings
para.	paragraph
PRA	Parental Responsibility Act – Act LXII of 2021 on international judicial cooperation in matters of parental responsibility
Practice Guide	Practice guide for the application of the Brussels IIb Regulation. Luxembourg. Publications Office of the European Union, 2023
Rome III Regulation	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Chapter I
Definition of European family law

1. Regulatory framework of European family law

With the growing number of international families – estimated at 16 million in 2019[4] – the number of cross-border family law disputes is also continuously increasing, so a crucial question for the spouses, partners, parents, children and grandparents concerned is what procedural and conflict-of-law rules the EU will establish for these disputes in the event of the dissolution or change of an international family relationship. It is important to emphasise that the EU standards discussed in this volume are not only relevant in classic cross-border situations, as even a family law situation that originally had no foreign elements can become one if, for example, the parent exercising parental custody moves abroad with the child and it becomes necessary to recognise and enforce a previous decision made by a Hungarian court in a dispute between Hungarian parents concerning parental custody of a Hungarian child.

It is therefore no extrem to say that, in the field of judicial cooperation in civil matters, family law is one of the areas on which EU law has had the greatest impact in recent decades and which has best transformed, in addition to private international law, certain parts of the civil substantive and procedural law regulations of the Member States.

In 2008, at the dawn of EU legislation on family law, Alegría Borrás already stated that "family law has opened a new chapter in the history of European integration. The EU legislative acts that have emerged in this area in a short period of time have changed the overall picture of the regulation of international private law relating to families in Europe."[5] Other

4 https://ec.europa.eu/commission/presscorner/detail/hu/MEMO_19_3374 (accessed: 2 March 2025)

5 Alegría Borrás: Lights and shadows of Communitarisation of Private International Law: Jurisdiction and Enforcement in Family Matters with regard to relations with third States. In: The External Dimension of EC Private International Law in Family and Succession Matters, eds: Alberto Malatesta, Stefania Bariatti, Fausto Pocar, Cedam, 2008. Padova. 99.

authors have expressed similar views on this field of EU legislation,[6] and the extensive legal interpretation and development activities of the Court of Justice of the European Union (hereinafter: CJEU) in this area should not be overlooked either.

At the same time, there is no doubt that family law is an extremely sensitive area of legislation, where Member States' concerns about sovereignty are also very strong. In this context, it suffices to think of the ongoing debates surrounding the legal institution of marriage. In view of this, the Treaty on the Functioning of the European Union (hereinafter: TFEU) establishes a special legislative procedure for family law matters in the area of judicial cooperation in civil matters. According to Article 81(3) TFEU, 'measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.'[7]

In the context of European family law, EU regulation refers to the EU legal framework governing family law matters with cross-border implications. EU law covers matrimonial matters such as *divorce, annulment and separa-*

6 According to Geert De Baere and Kathleen Gutman "In past literature, European family law was referred to as 'Cinderella' on account of its apparent neglect in comparison to the attention given to other fields of European private law. Yet, at present, European family law could more aptly be called 'Sleeping Beauty', now awakened in full splendour amidst a flurry of initiatives, measures and case law at the European level, not to mention the ongoing scholarly research devoted to this topic that also incorporates events taking place at the national and international levels. Indeed, the extent of recent developments concerning matters related to family law in the European Union (EU), including the entry into force of the Lisbon Treaty, the increasing volume of legislation within the rubric of the Area of Freedom, Security and Justice (AFSJ) and the evolving jurisprudence of the Union courts in various domains, makes the time particularly ripe for renewed reflection on the role of the EU through its various institutions and bodies, particularly that of the European Court of Justice (ECJ or the 'Court'), in this context." See: Geert De Baere and Kathleen Gutman: The impact of the EU and the ECJ on European family law. In: European family law, Volume 1. 2016. 5-48.

https://www.elgaronline.com/downloadpdf/edcollchap/edcoll/9781785363009/9781785363009.00010.pdf (accessed: 12.12.2025)

7 See more: Tóth Barbara: A családjog mint az uniós jogalkotás különös területe. [Family law as a specific area of EU legislation]. In: Miskolci Jogi Szemle: A Miskolci Egyetem Állam- És Jogtudományi Karának Folyóirata, Miskolc, 2025. Vol. 20/2.177-194.

tion, as well as matters relating to *parental responsibility.* In addition, *matters relating to maintenance* arising from a family relationship, parentage, marriage or affinity[8] are *also* subject to EU regulations. With the exception of Denmark, EU standards relating to these family law relationships have entered into force in all Member States.[9]

In contrast, it was in the area of family law that the first enhanced cooperation was established in 2010 with the adoption of Council Regulation (EU) No 1259/2010, which determines the law applicable to divorce and legal separation (hereinafter: Rome III Regulation). In this case, enhanced cooperation took place because unanimity could not be reached even after exhaustive negotiations.[10] The Rome III Regulation is still applied in only 17 Member States.[11] The other Member States determine the law applicable to matrimonial matters based on their own private international law regulations. The Rome III Regulation applies in Hungary. The two regulations regulating the property regimes of spouses and registered partners entered into force in 2016[12] with the participation of even fewer Member States, also within the framework of enhanced cooperation. In my view, a similar fate awaits the draft regulation on matters of parenthood, which is currently being prepared, for which the arguments presented by the Mem-

8 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

9 The Maintenance Regulation also applies in Denmark, with the exception of the provisions of two chapters. See more: Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ 12.06.2009.

10 The legislative process is described in detail in: Wopera Zsuzsa: Az európai családjog kézikönyve [Handbook of European Family Law] HVG-ORAC Publishing House, 2012.

11 Belgium, Bulgaria, Germany, Estonia, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. Other Member States may join at any time. https://eur-lex.europa.eu/HU/legal-content/summary/law-applicable-to-divorce-and-legal-separation.html (12 September 2025)

12 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

ber States are much stronger than the concerns raised in the property regime regulations.[13]

Several years of preparation have gone into the Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood [COM(2022) 695 final], which has reignited ideological debates on family law issues in the context of, as exemplified by the Pancharevo case, which will be discussed in detail later.

It should be noted, however, that European family law is a much broader category than EU law governing family law matters involving several states, which includes, above all, conventions on family law adopted within the framework of *the Hague Conference on Private International Law* and applicable between European states. Examples include the Hague Convention on Child Abduction and the conventions on family law adopted within the framework of the Council of Europe. In my 2012 monograph, I defined what I understand under European family law.[14] This definition is consistent with the approach that is considered accepted in today's foreign

13 See more: Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. COM/2022/695 final. It results from the Commission President von der Leyen's pledge to ensure that 'if you are a parent in one country, you are a parent in every country'. In July 2023, the European Law Institute Project Team developed a Report, in which provisions of the Commission's Proposal are scrutinised and alternative formulations proposed. See more: Enhancing Child Protection: Private International Law on Filiation and the European Commission's Proposal COM/2022/695 https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Enhancing_Child_Protection_Report.pdf

14 See: Wopera Zsuzsa: Az európai családjog kézikönyve [Handbook of European Family Law] HVG-ORAC Publishing House, 2012. 23-26.

scholarly literature.[15] As we mentioned in the introduction, we consider the broad interpretation of European family law to be the guiding principle in this monograph.

The cornerstone of judicial cooperation in family law matters is the Brussels IIa Regulation, which entered into force in 2005.[16] It regulates jurisdiction, recognition, enforcement in matrimonial and parental responsibility matters, as well as the rules applicable in civil matters with cross-border implications in cases of wrongful removal or retention of a child. As a recast of this Regulation, the Brussels IIb Regulation (hereinafter referred to as Brussels IIb Regulation) entered into force on 1 August 2022 in all Member States of the Union except Denmark.[17] However, legislation in the field of family law goes back much further. This process is briefly summarised below.

15 According to Geert De Baere and Kathleen Gutman at present, there appears to be no standard, universal definition of European family law in the scholarly literature and documents issued at the European level. Similarly to other fields of European private law, European family law may essentially be viewed in broad or narrow terms. On the one hand, broadly speaking, European family law may be considered to comprise various sources emanating from the international, European and national levels. Some of these main sources include: (1) international instruments adopted by private and public bodies, such as the United Nations and the Hague Conference on Private International Law; (2) primary and secondary Union law, such as relevant provisions of the Treaties, the Charter of Fundamental Rights of the EU ('Charter') and a wide variety of Union measures adopted by the Union institutions and bodies pursuant to such Treaty provisions; (3) other (extra-EU) European instruments adopted outside the EU but linked thereto, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) adopted under the auspices of the Council of Europe to which all member states are (and in the near future the EU will itself be)11 parties; (4) national rules and principles stemming from the legal systems of the member states (and possibly third States); and (5) comparative materials, often embodying efforts to formulate common rules and principles underpinning the laws of the member states (and possibly third States) on issues of family law, ranging from works of individual jurists to those of academic projects, such as the Commission on European Family Law. In: Geert De Baere and Kathleen Gutman: The impact of the EU and the ECJ on European family law. In: European family law, Volume 1. 2016. 9.

16 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

17 Council Regulation (EU) 2019/1111 of 25 June 2019 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)

2. Main stages of EU legislation on family law disputes

On 28 May 1998, the Member States of the European Communities signed the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters[18] which legal literature referred to as *the Brussels II Convention* after the 1968 Brussels Convention. Similar to the Brussels Convention, this was a so-called 'double treaty', which also contained provisions *on jurisdiction* and *the recognition and enforcement of foreign decisions*. These rules were included in a separate international treaty because the Brussels Convention did not apply to matters relating to personal status. The scope of the 1998 Convention extended to civil proceedings relating to divorce, legal separation or marriage annulment as well as to civil proceedings relating to parental responsibility for the children of both spouses in the aforementioned matrimonial proceedings.

The 1998 Convention did not enter into force because, due to the communitarisation of judicial cooperation in civil matters, it was replaced by a binding and directly applicable EU law, the Council Regulation (EC) No 1347/2000,[19] (hereinafter: Brussels II Regulation), which essentially took over the structure and provisions of the Convention.

The material scope of the Brussels II Regulation was limited to proceedings relating *to divorce, legal separation or marriage annulment*. The Regulation only covered *applications relating to the parental responsibility* of both spouses if they were brought in the course of proceedings for divorce, legal separation or marriage annulment.

In 2000, France submitted a proposal to amend the Regulation, which aimed to extend its scope to all decisions relating to parental responsibility. This initiative led to the repeal of the Brussels II Regulation and the adoption of the Brussels IIa Regulation, which entered into force in 2005 and remained in force for 17 years.

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18 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters. OJ C 221, 16.07.1998. P 0002-0018.

19 Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses OJ L 160, 30 June 2000, 19-29.

In its 2014 report, the European Commission concluded that the Brussels IIa Regulation was *a well-functioning instrument* that had brought significant benefits to citizens. With its comprehensive system of rules on jurisdiction, effective cooperation between central authorities in the Member States, prevention of parallel proceedings and free movement of decisions, the free circulation of public documents and agreements, it has facilitated the settlement of cross-border disputes in matrimonial matters and matters of parental responsibility, which are on the rise. Based on Article 65 of the Brussels IIa Regulation, a final report on policy options for the evaluation and amendment of the Regulation was published in 2015,[20] which states that the number of international couples has been steadily increasing since 2008, as has the number of international divorces.

Based on the experience increased in applying the Brussels IIa Regulation, a proposal for a recast of the Regulation was prepared in 2016[21] and, after years of negotiations, the Council adopted the Brussels IIb Regulation on 25 June 2019.

It is important to highlight that the Brussels IIb Regulation is a recast of the Brussels IIa Regulation and not a new regulation, therefore, where possible and where case-law has supported the positive aspects and durability of the regulation, the Regulation has adopted the provisions of the Brussels IIa Regulation. In view of this, the case law of the CJEU on the interpretation of certain articles of the Brussels IIa Regulation serves as a guideline and can be used as a basis for interpreting certain articles of the Regulation.

20 Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment. Final Report Brussels 2015. https://op.europa.eu/en/publication-detail/-/publication/924728ec-9148-11e8-8bc1-01aa75ed71a1/language-en

21 Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions and measures in matrimonial matters and the matters of parental responsibility, and on international child abduction COM (2016) 411. 30 June 2016.

3. The Brussels IIb Regulation as the cornerstone of European family law

The Regulation covers *matrimonial matters* and *matters of parental responsibility* that have *cross-border implications*. However, the Regulation introduces significant innovations in relation to matters of parental responsibility compared to the previous rules.

The title of the Regulation already refers to its scope covering cases of wrongful removal of children, and it provides more detailed and complex rules than before on cases of wrongful removal or retention of children between Member States.[22] A clear positive aspect of the Regulation is that it integrates the provisions of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: the Hague Child Abduction Convention), supplementing and strengthening the relevant standards in relation to Member States.

During the preparatory phase of the recast process, there was huge expectation for the introduction of a *choice of court by the parties in proceedings relating to divorce and legal separation* and the introduction of *residual jurisdiction* or *forum necessitates* in matrimonial matters.[23] Almost all Member States supported the introduction of the choice of forum and the text developed in the negotiations that were abandoned in 2006 was considered a good starting point.

Several Member States considered that, in addition to choice of court, other amendments would be necessary in order to prevent a "rush to court". This is because the many alternative jurisdictions currently in place leave

22 For more details, see: Kurucz Mária, Czellecz Botond: A határon átnyúló szülői felelősségi és jogellenes gyermekelviteli ügyek új európai uniós szabályozása. [New European Union regulations on cross-border parental responsibility and wrongful removal of children] In: Family Law, 2022, issue 1, 16-20, issue 2, 1-6.

23 A different concept of residual jurisdiction would have been an approach where neither of the spouses is habitually resident in the territory of a Member State and the spouses do not have a common nationality of a Member State. In this situation the courts of a Member State shall have jurisdiction based on the fact that the spouses previously had their habitual residence in the territory of that Member State for at least X (e.g. 2 or 3) years provided that that period did not end more than X (e.g. 2 or 3) years before the court was seised, or either of the spouses has the nationality of that Member State.

room for tactics and the winner is the one who turns to the court first, which does not necessarily lead to the close connection. There were several proposals aimed at establishing a hierarchy of grounds of jurisdiction, in which the habitual residence of the parties would probably be the most important. Several experts suggested the possibility of transfer of jurisdiction in matrimonial matters, similar to cases related to parental responsibility, if the case is not most closely connected with the court first seised.

Providing the option of choice of court would also have been essential because in 80-90% of cases the parties request the dissolution of their marriage by mutual consent. In order to ensure consistency, the relevant provisions of the Maintenance Regulation and the Matrimonial Property Regulation[24] must also be taken into account. If the parties wish to extend the choice of court to additional issues, the best interests of the child must be taken into account, so the forum selection can only be more limited in these aspects.

It is a significant step forward that the Regulation establishes as a general obligation that Member States must ensure that children who are capable of *forming their own views have the opportunity to express those views* in proceedings affecting them. The Regulation strongly emphasizes children's rights, in line with the Convention on the Rights of the Child, adopted in New York on 20 November 1989 (hereinafter: CRC). A new feature of the Brussels IIb Regulation compared to its predecessor is the abolition of the exequatur procedure, which serves to speed up and simplify proceedings.

The Regulation introduces only minor changes compared to its predecessor in the regulation of *matrimonial matters* falling within its scope. This is primarily due to the different approaches of Member States to the institution of marriage. It should be noted that in recent years there have been changes in the legal systems of certain Member States in the area of divorce, which raise new questions of interpretation. One such question concerns *out-of-court divorces* or *private divorces*. In 2022, the CJEU issued its first judg-

24 See more in Hungarian literature: Kriston Edit: Szerződési szabadság a családi vagyonjog klasszikus szerződéseiben. [Freedom of contract in classic contracts of family property law.] Miskolc, Publisher Bíbor 2022.

ment on this subject[25] which sets out clear criteria for the legal assessment of marriages dissolved without court intervention.[26]

It should be noted that, in order to bring Hungarian legislation into line with the Regulation, Act LXII of 2021 on international judicial cooperation in matters of parental responsibility (hereinafter: PRA) entered into force on 1 August 2022, which regulates the legal effects of divorce and annulment of marriage. This Act is considered a milestone in the application of domestic law. The PRA introduced provisions strengthening the expression of the views of a child who has sufficient level of understanding into the Civil Code and the provisions of the Child Protection Act. This also provided for the regulation at the level of law of non-contentious proceedings for the return of children brought to Hungary unlawfully. However, the PRA also placed the interests of the child at the focus of the regulation with its amendments to enforcement proceedings and the enforcement proceedings of Act CXXX of 2016 on the Code of Civil Procedure, which entered into force on January 1, 2018 (hereinafter: CPC).

The application of the Regulation is also supported by the Practice Guide for the Application of the Brussels IIb Regulation (hereinafter: Practice Guide).[27]

Article 100 of the Regulation, which regulates its temporal scope, ensures continuity between the Brussels IIa and Brussels IIb Regulations.[28] Pursuant to Article 100(1) of the Regulation, the Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after 1 August 2022.

This means that the Brussels IIa Regulation will continue to apply to decisions taken before 1 August 2022 and even after that *date*, where the *court of first instance was seised before that date.*

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25 Case C-646/20. Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht and TB.

26 For more information, see: Wopera Zsuzsa: Az uniós jog hatása a családjogi perekre. [The impact of EU law on family law litigation.] In: Balázs Bodzási (ed.): Jogászegyleti Értekezések, Hungarian Lawyers' Association, Budapest, 2024. 335-351.

27 Practice Guide for the Application of the Brussels IIb Regulation, Luxembourg, Publications Office of the European Union, 2023. https://op.europa.eu/en/publication-detail/-/publication/ff34bda5-ea90-11ed-a05c-01aa75ed71a1

28 This continuity was emphasised by the CJEU in paragraph 59 of its judgment of 15 November 2022 in Case C-646/20 Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht and TB.

Outside Denmark, the Regulation is binding and directly applicable in all EU Member States and takes precedence over national law. It is important to note that, in view of its withdrawal from the European Union, the United Kingdom is not considered a Member State for the purposes of the Regulation.[29]

Our book analyses a significant number of CJEU decisions based on the case law of the Brussels IIa Regulation. These interpretations can also be used as a guide for the Brussels IIb Regulation, as confirmed by the Practice Guide to the Regulation. According to Practice Guide the continuity between the Regulation and the previous instruments in the field of jurisdiction and recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility requires continuity in the interpretation, especially as regards the jurisprudence of the Court of Justice of the EU (CJEU), i.e., the previous case-law in this area remains relevant with regard to the Regulation so long as the Regulation does not legislate otherwise. [30]

29 At the time of the drafting and adoption of the Regulation, the United Kingdom was still a Member State of the EU, which is why there are several references to the United Kingdom in the text of the Regulation, for example in Article 72. As the United Kingdom was no longer a Member State of the EU on 1 August 2022, the date of application of the Regulation, it must be considered a third country for the purposes of the Regulation.

30 Practice Guide for the Application of the Brussels IIb Regulation. European Commission. 2023., 13. https://e-justice.europa.eu/contentPresentation.do?clang=en&idTaxonomy=287

Chapter II
Current issues concerning the concept of marriage

1. Interpretation of the concepts of marriage

Since the entry into force of the Treaty of Amsterdam in particular, the European Union has made considerable efforts to facilitate the situation of persons involved in the dissolution of a significant number of international marriages resulting from the free movement of persons, parental responsibility and maintenance.

It sought to achieve this by ensuring that predictable and foreseeable connecting factors closely related to the family relationship in question are applied in such disputes between EU citizens, both in terms of jurisdiction and applicable law. These efforts have led to considerable results, but today, in the light of several decades of legal practice, problems that significantly affect the application of law are clearly outlined, which are of paramount importance both for future EU legislation and for national law. Among the emerging problems of law application, problems related to the interpretation of the legal institution of marriage rank first.

Currently, in the field of family law in the strict sense, there are several EU norms in force whose application in a given Member State may depend on how the national court interprets certain concepts relevant to family law, which is not conducive to legal certainty and predictability. Among these concepts, marriage is the most problematic. It can be said that interest in this topic has not diminished in recent decades[31] and is likely to remain so

31 See, for example, the latest Hungarian schorarly literature: Virok-Ujlaki Anikó: A házasságkötéshez való jog alapjogi, nemzetközi és uniós jogi megközelítésből – különös tekintettel az azonos nemű párok családjogi jogosítványaira az Európai Unióban. [The right to marry from a fundamental rights, international and EU law perspective – with particular regard to the family law rights of same-sex couples in the European Union.] PhD thesis, Pécs, 2025. https://ajk.pte.hu/sites/ajk.pte.hu/files/file/doktori-iskola/virok-ujlaki-aniko/virok-ujlaki-aniko-muhelyvita-ertekezes.pdf

until the interpretation of the concept governing cross-border marriage matters is settled.

Both the Brussels IIb Regulation and Rome III Regulation focus on the interpretation of the concept of marriage and the interpretation of the concept of spouse, while Regulation 4/2009/EC[32] (hereinafter: Maintenance Regulation) deals with all maintenance obligations arising from a family relationship, parentage, marriage or affinity, so the interpretation of all concepts is of primary importance.[33]

The CJEU has not yet interpreted the concepts of marriage and spouse in relation to EU standards adopted in the field of judicial cooperation in civil matters. However, it has done so in relation to the EU standard adopted in the context of the general framework for equal treatment in employment and occupation, as well as in several cases concerning the interpretation of Articles 20 and 21 TFEU in relation to the right to free movement within the Union. Within the framework of this chapter, we present the CJEU's interpretation of the law in these cases and draw conclusions.

A key question in the interpretation of the concepts is whether the line of reasoning set out in the judgments analysed below has a spillover effect on the area of judicial cooperation in civil matters in relation to the definition of the concept of marriage/spouse. The question arises in principle because it is obviously not possible to distinguish between the exercise of rights deriving from EU citizenship in relation to the exercise of freedom of movement and the determination of Member State jurisdiction in matrimonial matters under the Brussels IIb Regulation, which is usually closely linked to the exercise of the right to free movement. In short, the question is whether,

32 Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

33 Even if, according to recital 25 of the Regulation, 'Recognition in a Member State of a decision relating to maintenance obligations has as its only object to allow the recovery of the maintenance claim determined in the decision. It does not imply the recognition by that Member State of the family relationship, parentage, marriage or affinity underlying the maintenance obligations which gave rise to the decision.' Since the enforcement of maintenance claims may be linked to matters covered by the Brussels IIb Regulation, it may be relevant to define these concepts.'

in the case law of the CJEU, a given interpretation of the law concerning the institution of marriage in relation to a specific directive can be extended to other EU legal norms that fall outside the material and personal scope of that directive. The answer to this question is further complicated when we consider the case law of the European Court of Human Rights (hereinafter: ECtHR) on this subject, which examines the issue from a human rights perspective.

In this chapter, we analyse in detail the relevant judgments and their impact on European and national family law regulations.

1.1. EU legal framework: relevant provisions of the TEU and the TFEU

According to Article 4(2)(j) TFEU, the area of freedom, security and justice falls within the shared competence of the Union and the Member States. According to Article 6(g) TFEU, the Union Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States *in the field of administrative cooperation* (supporting competence).

The Union has competence only in civil matters with cross-border implications (including family law matters) in accordance with Article 81 TFEU, with further specific rules on family law matters set out in paragraph 3.

It should be emphasised that the Union has competence only in cross-border family law matters; the definition of the national regulatory framework for family law remains with the Member States, in accordance with Article 5(2) of the TEU.[34]

Where the Union has competence to take measures to support, coordinate or supplement the actions of Member States, this does not mean that it takes away the existing powers of Member States in these areas. Binding legal acts adopted by the Union in these areas on the basis of the provisions laid down

34 In accordance with the principle of conferral, the Union acts only within the limits of the powers conferred upon it by the Member States in the Treaties for the purpose of achieving the objectives set out in the Treaties. Any powers not conferred upon the Union in the Treaties remain with the Member States.

in the Treaties *shall not result in the harmonisation* of Member States' laws, regulations or administrative provisions. (Article 2(5) TFEU)[35]

This means that in areas not covered by the Union's legislative competence, i.e. matters that do not have a cross-border dimension, Member States retain their legislative competence and legal acts adopted by the Union in a supporting capacity *cannot result in harmonisation of laws*.

In the cases analysed below, national courts often refer to Article 4(2) TEU, according to the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

With the entry into force of the Treaty of Lisbon, the level of protection of fundamental rights has increased significantly compared to the previous catalogue developed in case law, partly because the binding force of the Charter of Fundamental Rights of the European Union has made it an indispensable source of fundamental rights protection, and partly because of the Union's intention to accede to the ECHR.[36]

According to Article 6(1) TEU, the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties. However, it also

35 The principle of subsidiarity is the guiding principle for the exercise of shared competence. Accordingly under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. (Article 5(3)-(4) TEU)

36 See: Szalayné Sándor Erzsébet: Az alapjogok három jogrendszer metszéspontjában [Fundamental rights at the intersection of three legal systems] In: Állam-és Jogtudomány, State and Legal Science, vol. 50, no. 3, 2009, 365-398.

states that the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

This, in conjunction with Article 2(5) of the TFEU, means that the enforcement of the human rights enshrined in the Charter cannot serve as a basis for harmonising the national regulations of Member States.

Article 6(2) TEU refers to another relevant human rights document in addition to the Charter of Fundamental Rights, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), to which the Union has acceded. Such accession shall not affect the Union's competences as defined in the Treaties.

The restrictive provisions cited above make it clear that neither the Charter nor the ECHR in themselves establish new legislative powers for the Union. The second sentence of the cited paragraphs confirms the conviction that a restrictive interpretation of the EU's powers must continue to be ensured.[37]

Foreign scholarly literature also contains strong opinions on the exercise of the Union's powers in relation to fundamental rights. According to *Scheeck*, the Union uses fundamental rights to extend its own powers at the expense of the Member States. Since the EU respects the fundamental rights standards laid down in the ECHR, which all Member States have confirmed by signing the Convention, the CJEU refers to these standards in its decisions, thereby increasing the impact of EU law on Member States. We can therefore say that fundamental rights are the EU's 'trump card' in enforcing the primacy of EU law. Even if we cannot speak of the destruction of national sovereignty, we can at least conclude that this enables the EU to overcome the resistance of Member States' judicial systems to EU policy.[38]

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37 Chronowski Nóra, Drinóczi Tímea, Kocsis Miklós, Zeller Judit: Magyarázat az Európai Unióról szóló Szerződés 6. cikkéhez [Explanation of Article 6 TEU], in: Explanation of the Treaties on European Union and on the Functioning of the European Union 1, Osztovits András (ed.), CompLex Publishing, Budapest, 2011. 74.

38 Laurent Scheeck: The Supranational Diplomacy of the European Courts: A Mutually Reinforcing Relationship? In: Filippo Fontanelli, Giuseppe Martinico (eds.): The ECJ under Siege – New Constitutional Challenges for the ECJ, Amicus Books, The Icfai University Press, India, 2009., 185.

According to Article 6(3) TEU, *fundamental rights*, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The purpose of the cited paragraph 3 is to establish, at a fundamental level, that human rights form part of the the Union's law. There are two points of reference for the scope and content of human rights: the constitutional traditions common to the Member States and the ECHR.[39]

The significance of the reference to the ECHR in paragraph (3) is that, through this provision, the Union remains 'bound' by the rights and freedoms set out in the ECHR until it formally accedes to the ECHR.

The reference to the constitutional traditions of the Member States in paragraph 3 can be regarded as an interpretative framework rather than a provision referring to specific legal norms.[40]

Due to the cases analysed in detail below and the interpretation of the law by the CJEU, Articles 20 and 21(1) TFEU are also relevant.

According to Article 20(1) TFEU Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. (2) Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*: (a) have the right to move and reside freely within the territory of the Member States (...).

According to Article 21(1) TFEU, every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

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39 Chronowski Nóra, Drinóczi Tímea, Kocsis Miklós, Zeller Judit Explanation of Article 6 TEU, in: Explanation of the Treaties on European Union and on the Functioning of the European Union 1, Osztovits András (ed.), CompLex Publishing, Budapest, 2011., 48-49.

40 Chronowski Nóra, Drinóczi Tímea, Kocsis Miklós, Zeller Judit Explanation of Article 6 TEU, in: Explanation of the Treaties on European Union and on the Functioning of the European Union 1, András Osztovits (ed.), CompLex Publishing House, Budapest, 2011., 76-77.

In the following, we examine the impact of legal interpretation by European judicial forums on the development of the content of concepts relevant to the interpretation of EU law.

1.2. The undefined concept of marriage in judicial cooperation in civil matters

As already mentioned in the introduction, in cross-border family law cases, the most serious difficulties in applying the law are still caused by uncertainties regarding certain concepts used by the regulations. The Brussels IIa Regulation was the first to provide broad definitions when it defined one group of family law cases falling within its scope: the concepts applicable in cases related to parental responsibility, breaking away from the meaning and content of these concepts used in the laws of the Member States. At the same time, the Brussels IIa Regulation was silent on the most important issue in the other large group of cases falling within its scope, matrimonial cases: the *concept of marriage*. Its successor, the Brussels IIb Regulation, also follows this codification method.[41]

The Regulation therefore does not define what form of cohabitation it considers to be marriage.[42] The literature was previously unanimous in its view that the concept of marriage covered by the Brussels IIa Regulation should be understood as referring only to monogamous cohabitation between opposite-sex couples, and that the Regulation did not cover same-sex

41 See more: Tóth, Barbara: Marriage in Hungary, In: Edyta Krzysztofik, Magdalena Maksymiuk (eds.) The Impact of the Definition of Marriage on the Legal Solutions in Poland and in Selected Member States, Fundacja Instytut Prawa Ustrojowego and Wydawnictwo Episteme, (2023), 17-31.

42 The definition of "marriage" is not among the definitions of Article 1 of Brussels IIa Regulation despite it being a fundamental term for the entire Regulation. The specification of what is meant by marriage is essential, since it is a "preliminary question" to divorce, separation or matrimonial annulment. The question of whether or not there is a marriage arises in relation to cases such as polygamous marriages, marriages between persons of the same sex, revocable marriages, temporary marriages, marriages between minors, civil unions, registered or unregistered.... In: Ilaria Viarengo, Francesca C. Villata (eds.): Planning the Future of Cross-border Families: a path through coordination, EUFAM'S" Project JUST/2014/JCOO/AG/CIVI/7729 "Civil Justice Programme" of the European Commission. 2018. https://www.aeafa.es/files/noticias/eufams-final-study-v1.0+clauses.pdf

marriages or other registered partnerships. However, this interpretation has changed significantly in recent years,[43] given that an increasing number of EU Member States[44] allow same-sex couples to marry[45] and that recognising such marriages as existing and valid, and dissolving them in another Member State, can pose a serious legal dilemma in some Member States.

The problem is highlighted in the 2015 Evaluation Report on the Brussels IIa Regulation,[46] which states that it is unclear whether the scope of the Regulation extends to same-sex marriages, meaning that the dissolution of same-sex marriages is currently not guaranteed if the couple moves to a Member State that does not recognise such marriages. The expert committee agreed that, due to the political sensitivity of the issue, no decision could be made on extending the scope of the Regulation to same-sex marriages.[47]

Due to the political sensitivity of the issue, the Brussels IIb Regulation left Chapter II on matrimonial matters essentially untouched. EU decision-makers wanted to avoid a situation where differences between Member States on concept of marriage would prevent unanimous decision from being reached, which would have meant the failure of the recast to the Regulation concerning parental responsibility. There was an urgent need to supplement the rules on jurisdiction in matrimonial matters because the Regulation does not allow choice of court agreement on jurisdiction in matrimonial matters. This could result in the court with jurisdiction designated by the Regulation essentially refusing to apply the law applicable under the Rome

43 See, for example: Alegría Borrás: From Brussels II to Brussels II bis and Further, in Brussels II BIS: Its Impact and Application in the Member States (Katharina Boele-Woelki & Cristina González-Beilfuss) Antwerp, Intersentia, 2007., 22. or Ian Curry-Sumner: Uniform patterns regarding same-sex relationships, in: International Law Forum, 2005-7 (3), 9-14.

44 As of January 2025, same-sex couples will be able to marry in the following European Union Member States: Austria, Netherlands, Belgium, Denmark, Germany, Malta, Spain, Sweden, Finland, Portugal, France, Luxembourg, Ireland, Estonia, Greece and Slovenia.

45 See: Szeibert Orsolya: Ami a házasság témájából Európát jelenleg leginkább foglalkoztatja: az azonos nemű partnerek házassága. [What is currently most pressing in Europe in terms of marriage: same-sex marriage] In: Family Law, vol. 11, no. 1, 2013, 38-44.

46 Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final Report, Evaluation, 2015. http://ec.europa.eu/justice/civil/files/bxl_iia_final_report_evaluation.pdf

47 Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final Report, Evaluation, 2015. http://ec.europa.eu/justice/civil/files/bxl_iia_final_report_evaluation.pdf 6-7.

III Regulation and thus refusing to dissolve the marriage on the grounds that the marriage to be dissolved is not considered valid (existing) under the national law of that Member State. This could lead to a situation that is undesirable from the point of view of legal certainty and predictability, in which no court with jurisdiction in a Member State would dissolve the parties' marriage because it is invalid (in Hungarian terminology: non-existent) under national law. This problem could have been solved by the Brussels IIb Regulation if it had allowed for jurisdictional agreements in matrimonial matters, or at least by introducing the so-called *forum necessitatis.* This would have meant that even if all the courts with jurisdiction were located in Member States whose law considers the marriage in question to be invalid (non-existent), there would still have been a so-called *forum necessitatis* that would dissolve the marriage.[48]

However, this unfortunately did not happen.

The Brussels IIa Regulation applies to marriages where at least one of the spouses has their habitual residence in a Member State of the Union or is a national of a Member State, and the case has cross-border implications. This can be inferred from Article 6 of the Regulation.[49]

The Rome III Regulation applies in situations involving a conflict of laws, to divorce and legal separation. [Article 1(1)] The Rome III Regulation consistently uses the term 'spouses', which excludes registered partnerships from its scope but includes same-sex spouses.[50]

The material and personal scope of the Maintenance Regulation may include both maintenance claims arising from cohabitation between persons of the same sex and maintenance claims arising from registered partner-

48 This solution was already on the EU legislative agenda in 2010. See: Council of the European Union 2010/0067. (CNS) JustCiv. 231. http://register.consilium.europa.eu/pdf/hu/10/st17/st17710.hu10.pdf

49 According to Article 6(2) of the Regulation, proceedings may be brought against a spouse who has his or her habitual residence in the territory of a Member State or who is a national of a Member State in another Member State only in accordance with Articles 3, 4 and 5 of the Regulation.

50 The scholarly literature is completely certain on this issue. See, for example, Katharina Boele-Woelki: For Better or for Worse: The Europeanisation of International Divorce Law, in: Yearbook of Private International Law, Vol. XII. 2010. Sellier, Munich 2011., 13.

ships.[51] This can be inferred from recital 11 of the Regulation, which states that 'the scope of this Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity, in order to guarantee equal treatment of all maintenance creditors. For the purposes of this Regulation, the term 'maintenance obligation' should be interpreted autonomously."

This is confirmed by the definitions in Article 2 of the Regulation, which do not impose any restrictions on the type of family relationship from which the maintenance claim must arise.

With regard to the concept of marriage, it is also unclear whether it is possible to interpret marriage autonomously, independently of national rules, within the scope of a regulation, or whether this legal institution can only be interpreted on the basis of national law, even in the case of the recognition of a marriage validly concluded in another Member State. Current practice supports non-autonomous interpretation, with the result that, for example, in the Netherlands, the Brussels IIa Regulation has been applied without hesitation – on the basis of national law – to same-sex marriages, while in other countries, such as Poland and Lithuania, this has not been the case.[52]

The CJEU's 2018 judgment in the Coman case, and in particular the reasoning of the Advocate General, are suitable for clarifying this interpretation of the law.

1.3. Forms of cohabitation in the case law of the CJEU regarding the prohibition of discrimination

In the CJEU's case law, the first judgments concerning forms of cohabitation were delivered in connection with Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The case law on same-sex cohabitation clearly illustrates the

51 We distinguish between the two forms of cohabitation because the law of several Member States allows registered partnerships for both same-sex and opposite-sex couples.

52 Ian Curry-Sumner: Same-sex relationships in Europe: Trends towards tolerance? In: Amsterdam Law Forum, Vol. 3.2. 2011., 55.

development of the CJEU's interpretation of the prohibition of discrimination, from the prohibition of discrimination based on sexual orientation to the prohibition of discrimination based on marital status.

1.3.1. Joined cases C-122/99 and C-125/99 D and Kingdom of Sweden v Council of the European Union

The CJEU first encountered the position that registered partnerships constitute a form of discrimination based on sexual orientation in relation to marriage, and the problems arising from this, in the case of *D and the Kingdom of Sweden v. the Council of the European Union*.[53] The plaintiff in the case, D, who lived in a registered partnership with another man in Sweden, was employed by the Council of the European Union. He wished to claim spousal housing allowance under the Staff Regulations of the European Union Institutions. Since the Staff Regulations used the term 'spouse', the Court had to decide whether a Swedish registered partnership was equivalent to marriage under EU law for the purposes of applying the provisions of the Staff Regulations. D took the view that the term 'married official' used in the Staff Regulations must be interpreted in accordance with the law of the Member States and that the term cannot be given an independent meaning. If a Member State grants registered partners the same rights as spouses, this must also be taken into account when applying the Staff Regulations. In its judgment, the Court made it clear that *registered partnership status is not the same as, nor equivalent to, marital status* for the purposes of applying the Staff Regulations.[54] In his opinion, Advocate General Mischo also pointed out that spouses and registered partners are not comparable because of their civil status, but because of the nature of their cohabitation (relationship), which is heterosexual in one case and homosexual in the other.[55]

53 Judgment of the Court in Joined Cases C-122/99 and C-125/99 D and Kingdom of Sweden v Council of the European Union.

54 Judgment of the Court in Joined Cases C-122/99 and C-125/99 D and Kingdom of Sweden v Council of the European Union. para 51.

55 Opinion of Mischo in Joined Cases C-122/99 and C-125/99. D and Kingdom of Sweden v Council of the European Union para 87.

In view of the decision, the relevant sections of the Staff Regulations were amended in 2004 to allow persons in registered partnerships to benefit from the advantages granted to spouses.

1.3.2. Case C-267/06 Maruko

Some commentators have criticised the CJEU for taking an overly restrictive approach to discrimination based on sexual orientation.[56] The CJEU's rulings clearly reflected the difficulties Member States had in agreeing on the scope of fundamental rights, particularly when it came to national assessments of moral and cultural values.[57]

In the Maruko case[58] the organisation providing social security services (the German theatre workers' insurance institution) did not allow the surviving partner in a registered partnership under German law to receive a widow's pension on the grounds that it was only payable to the surviving spouse but not to surviving partners.

The case raised the question of the applicability of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in particular whether benefits for surviving relatives such as those at issue in the case fall within the scope of the directive, which prohibits discrimination on grounds of sexual orientation.

According to the German court that referred the question, Germany had reformed its legal system since 2001 to allow same-sex couples to formally enter into a lifelong partnership of care and support. However, Germany has not opened up the institution of marriage to such persons, which it continues to reserve exclusively for persons of the opposite sex, but has introduced a separate regime for same-sex couples, that of registered partnerships, the conditions for which it has gradually brought into line with those applicable

56 See e.g.: Mark Bell: *Anti-Discrimination Law and the European Union, Oxford Studies in European Law, Oxford University Press, 2002. 22.*

57 Caroline Sörgjerd: Reconstructing Marriage, The Legal Status of Relationships in Changing Society, Intersentia, European Family Law Series, Cambridge, 2012. 288.

58 Judgment of the Court in Case C-267/06. Tadao Maruko v Versorgungsanstalt der deutschen Bühnen

to marriage. According to the referring court, since the amendments introduced by the Law of 15 December 2004, life partnerships life partnership is to be treated as equivalent to marriage as regards the widow's or widower's pension referred in the case.[59]

In its judgment, the CJEU found that if the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78. The answer to the question must be that the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme. [60]

Contrary to expectations, the Maruko case did not succeed in achieving equal treatment for same-sex persons living in different formations with married persons in terms of the benefits they claim as employees as demonstrated by the Frederic Hay case, in which the French court initiated a preliminary ruling procedure in 2012 and the CJEU delivered its judgment in December 2013.

1.3.3. Case C-267/12 Frédéric Hay

The facts of the six-year-long case of, which attracted considerable media attention, were very similar to those of the Maruko case, except that in this case Frédéric Hay, an employee of Credit Agricole, requested additional leave

59 Judgment of the Court in Case C-267/06. Tadao Maruko v Versorgungsanstalt der deutschen Bühnen paras. 68-69.

60 Judgment of the Court in Case C-267/06. Tadao Maruko v Versorgungsanstalt der deutschen Bühnen paras. 72-73.

and marriage allowance provided for in the company's collective agreement after concluded a PACS with a person of the same sex, which the Credit Agricole refused on the grounds that it was only available to married employees.

On 17 March 2008, Hay brought an action before the Conseil de prud'hommes de Saintes (Labour Tribunal, Saintes) seeking to obtain payment of the marriage bonus, amounting to EUR 2 637.85, and compensation for the days of special leave which he had been refused, in the amount of EUR 879.29. By judgment of 13 October 2008, the Conseil de prud'hommes de Saintes dismissed his action, holding that the bonus granted in the event of marriage is not linked to employment but to marital status and the Civil Code differentiates between marriage and the PACS. It observed, however, that Crédit agricole's national collective agreement had been amended on 10 July 2008 to extend the benefits under that agreement relating to the bonus and leave for marriage to people in a PACS arrangement, but that that extension could not be given retroactive effect. Mr. Hay observes that, under Article 144 of the Civil Code, only persons of different sexes may marry, whereas, under Article 515-1 of the Civil Code, persons of the same sex only have the possibility of concluding a PACS. That provision, read in conjunction with Crédit agricole's national collective agreement, gives rise to a situation where persons of the same sex in a PACS arrangement do not have access to the days of leave and marriage bonus granted to married employees of the company.[61]

As in the Maruko case, this issue was the interpretation of Directive 2000/78. The French court that referred the question essentially wanted to know whether Article 2(2)(a) and (b) of Directive 2000/78 must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry.[62]

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61 Judgment of the Court in Case C-267/12. Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres para 17-20.

62 Judgment of the Court in Case C-267/12. Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres para 25.

The CJEU's response was much more emphatic than in the Maruko case, stating that Member State's rules which restrict benefits in terms of conditions of pay or working conditions to married employees, whereas marriage is legally possible in that Member State only between persons of different sexes, give rise to direct discrimination based on sexual orientation against homosexual permanent employees in a PACS arrangement who are in a comparable situation.[63]

In this case, the CJEU stated that the difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.[64]

The conclusions of the Maruko and Frédéric Hay cases can be summarised as follows: although the situation of married and civil partnership parties (or registered partnerships or PACS) is not the same, benefits for employees cannot be denied on the grounds that the two legal institutions are not the same, if the law of the Member State concerned does not allow marriage between persons of the same sex.

1.4. The interpretation of marriage in the CJEU case law on the right to free movement

The CJEU has analysed the concepts of marriage, spouse and cohabiting partners in detail in the context of the Council Directive 2004/38 on the right of free movement and residence, in addition to the requirement of equal treatment in the field of employment and occupation analysed above. A common feature of these judgments was that the CJEU thoroughly examined Articles 20(1) and 21(1) TFEU in conjunction with Article 4(2) TEU.

63 Judgment of the Court in Case C-267/12. Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres para 41.

64 Judgment of the Court in Case C-267/12. Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres para 44.

1.4.1. Case C-673/16 Coman

On 5 June 2018, the CJEU delivered its judgment in Case C-673/16 Coman[65] in a preliminary ruling procedure. The first request for a preliminary ruling from the Romanian Constitutional Court concerned the concept of spouse under Directive 2004/38.[66]

According to the facts Mr Coman, who holds Romanian and American citizenship, and Mr Hamilton, an American citizen, met in New York in June 2002 and lived there together from May 2005 to May 2009. Mr Coman then took up residence in Brussels (Belgium) in order to work at the European Parliament as a parliamentary assistant, while Mr Hamilton continued to live in New York. They were married in Brussels on 5 November 2010. In December 2012, Mr Coman and Mr Hamilton contacted the Inspectorate to request information on the procedure and conditions under which Mr Hamilton, a non-EU national, in his capacity as member of Mr Coman's family, could obtain the right to reside lawfully in Romania for more than three months. In response to that application, the Romanian authorities indicated that Hamilton could not be considered the 'spouse' of an EU citizen, as Romania does not recognise same-sex marriage. The parties lodged an appeal with the Constitutional Court, which led to the present preliminary ruling procedure.

The case essentially concerns the determination, in proceedings before the Constitutional Court, of discrimination on grounds of sexual orientation in the context of the exercise of the right to free movement within the European Union. The questions referred concerned whether the concept of spouse under Directive 2004/38 includes the same-sex spouse of an EU citizen who is from a country outside the European Union and with whom the EU citizen has legally married under the laws of an EU Member State other than the host Member State. Member States must ensure that such persons

65 Case C-673/16 Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Naţional pentru Combaterea Discriminării.

66 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. (hereinafter: Directive 2004/38/EC)

are entitled to reside in that Member State as spouses, even if their national legal system does not provide for same-sex marriage.

1.4.1.1. Main findings of the Advocate General's opinion

It should be emphasised that Advocate General Wathelet, who acted in the case, examined the institution of spouse/marriage in a broad context and, in terms of his findings and arguments, went further than what was contained in the judgment in the case.

The Advocate General's opinion made it clear that the legal issue at the heart of the main proceedings is not that of legalisation of marriage between persons of the same sex but that of the freedom of movement of a Union citizen. While Member States are free to provide or not for marriage for persons of the same sex in their internal legal order, the Court has held that a situation governed by rules falling *a priori* within the competence of the Member States may have 'an intrinsic connection with the freedom of movement of a Union citizen which prevents nationals [of third countries] being refused the right of entry and residence in the Member State of residence of that citizen, in order not to interfere with that freedom'. The fact that marriage – in the sense exclusively of the union of a man and a woman – is enshrined in certain national constitutions cannot alter that approach. In fact, if it were to be considered that the concept of marriage relates to national identity in certain Member States (which has not been expressly maintained by any of the Member States having lodged written observations, but only by the Latvian Government at the hearing on 21 November 2017), the obligation to respect that identity, which is set out in Article 4(2) TEU, cannot be construed independently of the obligation of sincere cooperation set out in Article 4(3) TEU. In accordance with that obligation, the Member States are required to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.[67]

The Advocate General made it clear that, according to the settled case law of the CJEU, it follows from the requirement of harmonised application of EU law

67 Opinion of Advocate General Melchior Wathelet delivered on 11 January 2018 in Case C-673/16, paras. 38-40.

and the principle of equality that terms in EU law provisions which without any express reference to the law of the Member States as to their meaning and scope must be interpreted uniformly and independently throughout the Union.

The Advocate General referred to the fact that the ECtHR is inclined to consider that a difference in treatment based solely – *or decisively* – on considerations regarding the applicant's sexual orientation are quite simply unacceptable under the ECHR. It seemed to Advocate General Jääskinen 'to go without saying that the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation [because] it is difficult to imagine what causal relationship could unite that type of discrimination, as grounds, and the protection of marriage, as a positive effect that could derive from it. That development in the right to respect for family life therefore seems to me to lead to an interpretation of 'spouse' that is necessarily independent of the sex of the persons concerned when it is confined to the scope of Directive 2004/38. This interpretation provides the optimum respect for family life guaranteed in Article 7 of the Charter while leaving to Member States the freedom to authorise or not marriage between persons of the same sex. On the other hand, an interpretation to the contrary would amount to a difference in treatment of married couples depending on whether they are of the same sex or of different sexes, since no Member State prohibits heterosexual marriage. Based on se.xual orientation, such a difference in treatment would be unacceptable under Directive 2004/38 and the Charter, as it must be interpreted in the light of the ECHR.[68]

The Advocate General in his opinion emphasized that the literal, contextual and teleological interpretations of the term 'spouse' used in Article 2(2)(a) of Directive 2004/38 lead to giving it an autonomous definition independent of sexual orientation. First of all, it is a requirement of the uniform application of EU law and of the principle of equal treatment that the terms of a provision of EU law that has not been defined and that makes no express reference to the law of the Member States for the purpose of determining its meaning and scope should be given uniform autonomous interpretation throughout the European Union. If the structure of Article 2(2) of Directive 2004/38, in conjunction with Article 3(2)(b) of that directive, requires the

68 Opinion of Advocate General Melchior Wathelet delivered on 11 January 2018 in Case C-673/16, paras. 65-67.

concept of 'spouse' to be associated with marriage, the legislature deliberately chose, moreover, to use a neutral term, without further detail. Both the development of European society – which is reflected in the number of Member States whose legislation permits marriage between persons of the same sex and in the current definition of family life in Article 7 of the Charter – and the objectives of Directive 2004/38 – facilitating the free movement of Union citizens while respecting their sexual orientation – lead to the concept of 'spouse' being interpreted independently of sexual orientation.[69]

1.4.1.2. The judgment

It is also clear from the findings in the Advocate General's Opinion that in this case, the CJEU did not interpret the concept of spouse in the context of the application of EU law adopted in the framework of judicial cooperation in civil matters. Its scope was clearly limited to Directive 2004/38.[70]

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69 Opinion of Advocate General Melchior Wathelet delivered on 11 January 2018 in Case C-673/16, paras. 77-80.

70 It should be noted that the CJEU has already resorted to the instrument of comparative legal interpretation in the application of Regulation 1612/68 and in the context of the concept of marriage in EU law in Case 59/85, Netherlands v. Ann Florence Reed, delivered on 17 April 1986, and in Joined Cases 122/99 P & C-125/99 P, D & Sweden v. Council, 2001 E.C.R. I-4319. The CJEU, examining the different definitions of the concept of marriage by the Member States, concluded that in order to determine the common (EU) meaning of a legal concept, it is not sufficient to consider the legal solution of a Member State alone, but that the social dynamics shaping Community (Union) law as a whole must also be taken into account. (See paragraph 13 of judgment 59/85: "any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community [now Union], not merely one Member State." The CJEU, in joined cases 122/99 P & C-125/99, also examined the relevant legal definitions of the Member States in relation to the legal institution of marriage and concluded that, due to the diversity of concepts, a single EU definition of the concept of marriage cannot be given and that legal situations different from marriage cannot be treated in the same way as marriage. See paragraphs 34-36 of judgment 122/99 P & C-125/99: "according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex. It is clear, however, that apart from their great diversity, such arrangements for registering relationships between couples not previously recognized in law are regarded in the Member States concerned as being distinct from marriage. In such circumstances the Community judiciary cannot interpret the Staff Regulation in such a way that legal situations distinct from marriage are treated in the same way as marriage." In: Traser Julianna: Az alkalmazott összehasonlító jogi kutatásmódszertan gyakorlata az MFI-ben. [The practice of applied comparative legal research methodology in the MFI] In: Fontes Iuris Évf. 10. szám 1-2. 2024., 29.

The CJEU repeatedly held, even if, formally, the referring court has limited its questions to the interpretation of the provisions of Directive 2004/38, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has specifically referred to them in the wording of its questions. According to CJEU it should be noted that, whereas for the purpose of determining whether a partner with whom a Union citizen has contracted a registered partnership on the basis of the legislation of a Member State enjoys the status of 'family member', Article 2(2)(b) of Directive 2004/38 refers to the conditions laid down in the relevant legislation of the Member State to which that citizen intends to move or in which he intends to reside, Article 2(2)(a) of that directive, applicable by analogy in the present case, does not contain any such reference with regard to the concept of 'spouse' within the meaning of the directive. It follows that a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state.[71]

The CJEU finds, in that regard, that the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and, falls within the competence of the Member States. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law. [72]

71 Judgment of the Court in Case C-673/16 Coman and others paras 22; 36.
72 Judgment of the Court in Case C-673/16 Coman and others para 45.

The CJEU has therefore made it clear that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[73]

The CJEU therefore held that, in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.[74]

The CJEU has made it clear that person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States[75] and EU law does not detract from that competence.[76] The Member States are thus free to decide whether or not to allow marriage for persons of the same sex. [77]

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73 Judgment of the Court in Case C-673/16 Coman and others para 44.

74 Judgment of the Court in Case C-673/16 Coman and others para 51.

75 Pursuant to Article 4(1) TEU, any competence not conferred upon the Union in the Treaties remains with the Member States, and, pursuant to Article 5(2) TEU, the Union acts only within the limits of the competences conferred upon it by the Member States in the Treaties, in accordance with the principle of conferral, in order to achieve the objectives set out in the Treaties. Article 9 of the Charter of Fundamental Rights stipulates that the right to marry and found a family must be guaranteed in accordance with the national laws governing the exercise of those rights.

76 See, in this regard, the Garcia Avello judgment of 2 October 2003, paragraph 25; Maruko judgment of 1 April 2008, C-267/06, paragraph 59; Grunkin and Paul judgment of 14 October 2008, C-353/06, paragraph 16.

77 Judgment of the Court in Case C-673/16 Coman and others para 37.

However, the CJEU has also stated that the term 'spouse' used in that provision refers to a person joined to another person by the bonds of marriage. As regards the question whether that term includes a third-country national of the same sex as the Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state, it should be pointed out, first of all, that the term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned.[78]

In summary, the CJEU has held that, within the framework of Directive 2004/38, the concept of 'spouse', which refers to a person who is bound to another person by a matrimonial relationship, is gender-neutral and may therefore include the same-sex spouse of the EU citizen concerned.[79]

The CJEU ruled that, in order to ensure the uniform application of EU law, Member States are required to recognise, solely for the purposes of granting a derived right of residence to a third-country national, a marriage between persons of the same sex that was concluded in another Member State in accordance with its law. However, that obligation cannot

78 Judgment of the Court in Case C-673/16 Coman and others para paras. 34-35.

79 Several authors have pointed out the contradiction in the reasoning contained in the judgment. Martijn van den Brink does not fault the Court's logic here, but he believes that as a response to the Romanian Constitutional Court's main question concerning the interpretation of the term spouse, it is inadequate. The interpretation of that term cannot depend on the consequences for the right to move and reside freely, as the question is precisely whether the Directive intended to allow for variations in the scope of free movement for same-sex spouses, depending on the national laws of the Member States. For example, Article 2(2)(b) of the Directive makes the free movement rights of registered partners of Union citizens dependent on whether national legislation 'treats registered partnerships as equivalent to marriage'. The variations in and restrictions to free movement, depending on the national laws in place, are a direct consequence of the Directive. Certainly, Article 2(2)(a) of the Directive on the spouse of EU citizens makes no reference to national laws, which is why the Court rightly insisted on a uniform definition of the term spouse. However, it does not follow that no variations in free movement in the different states can occur. For example, if it had interpreted the term spouse as covering solely married couples of the opposite sex, it would also have adopted a uniform definition, but one with widely varying consequences, depending on whether the national laws allow for the recognition of same-sex couples. To be clear, I do not argue for a restrictive reading of the term spouse, but the arguments the CJEU put forward do not properly support its decision. In: Van den Brink, Martijn: Is the Reasoning in "Coman" as Good as the Result? VerfBlog, 10 June 2018, https://verfassungsblog.de/is-the-reasoning-in-coman-as-good-as-the-result/, DOI: 10.17176/20180611-100057-0.

affect the institution of marriage in the Member States, since it does not require Member States to provide for the institution of marriage between persons of the same sex in their national law. It is limited to the obligation to recognise marriages concluded in another Member State in accordance with its law, solely for the purposes of exercising the rights conferred on those persons by EU law.

According to the Parris judgment of 24 November 2016 in Case C-443/15, Member States have discretion as to whether or not to introduce same-sex marriage into their legal systems. However, according to case law, Member States are required to respect EU law when exercising their powers, in particular the right to free movement and residence.

György Marinkás highlighted in the Coman case that the questions raised in the case were of particular importance because two exclusive competences conflicted: on the one hand, the rights related to EU citizenship and the free movement of persons, which fall under the exclusive competence of the Union, and on the other hand, family law issues, which fall under the exclusive competence of the Member States and form part of national identity. Marinkás noted that the CJEU had declared its own competence in regulating family law issues in both the Coman case and the Pancharevo case, but nevertheless decided that EU law should take primacy. The author traced this approach back to the arguments of Advocate General Kokott in the Pancharevo case, which will be analysed in detail below.

Marinkás highlighted that, in order to ensure the enforcement of EU law, the Advocates General in the Coman and Pancharevo cases and the CJEU applied a so-called functional approach - clearly based on the principle of effective enforcement. They emphasised that the recognition of a family relationship registered in another country but not recognised by the national law of the EU citizen's Member State of origin can only serve to ensure the exercise of EU law and cannot result in a change in the constitutional rules of the Member States. However, two questions arise in this regard. The first is to what extent this form of mutual recognition - which is important of the Cassis formula by analogy - is valid in the case where - as Advocate General Wathelet also pointed out in his opinion in the Coman case - two exclusive competences conflict. In this regard, it

is necessary to recall that in the Cassis case, there was no such conflict, since the free movement of goods was already a Community competence at the time of the judgment in question. The second question is whether, since EU law directly or indirectly affects national legislation in numerous areas of law, from tax law to family law, this functional approach may not result in a de facto change in national legislation, even if this does not occur de iure.[80]

1.4.2. Case C-490/20 Pancharevo[81]

In the case that was initiated in October 2020, the interpretation of the rights arising from EU citizenship was once again in focus. The case concerned the registration in Bulgaria of a child born from the marriage of a Bulgarian woman and a British woman born in Gibraltar. The couple had been living in Spain since 2015, married in 2018, and wanted to register their child, born in December 2019 given the child's Bulgarian nationality. The competent Bulgarian authority refused this, on the one hand, on the grounds that the Bulgarian member of the couple did not prove that the child was her parent. On the other hand, the reason for the refusal was that they did not have a birth certificate form that allowed two mothers to be listed, and therefore granting the request would be contrary to Bulgarian public policy, which does not recognise same-sex marriage.

The significance of the case is heightened by the fact that, unlike the Coman case, the interpretation of the rights of the parent exercising parental custody over the child and the issue of parental status have already been raised in this case, so the legal interpretation given in this case may have an impact not only on the interpretation of the concept of marriage/spouse but also on the concept of parental responsibility and parental custody in the Brussels IIb Regulation. The legal interpretation given in the case is also

80 Marinkás György: Gondolatok az uniós jog elsőbbsége és a tagállamok nemzeti identitása közötti kapcsolatról az EUB ún. "Pancharevo" ítéletének tükrében. [Thoughts on the relationship between the primacy of EU law and the national identity of Member States in light of the CJEU's "Pancharevo" judgment] In: In: Jog-Állam-Politika, Law-State-Politics 2023/2, 31-32.

81 Judgment of the Court in Case C-490/20. V.M.A. v Stolichna obshtina, rayon „Pancharevo".

relevant from the point of view of ongoing legislation in matters related to parentage.[82]

It is relevant to the case that Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 , is already in force. According to Article 2(1) this Regulation applies to public documents issued by the authorities of a Member State in accordance with its national law which have to be presented to the authorities of another Member State and the primary purpose of which is to establish one or more of the following facts: (a) birth. The Regulation applies, when such documents are to be presented to the authorities of another Member State. According to recital 7 of that regulation, this Regulation should not oblige Member States to issue public documents that do not exist under their national law. The questions referred for a preliminary ruling, which should be examined together, essentially seek to ascertain whether EU law requires a Member State to issue a birth certificate in accordance with the rules of its national law.

By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether EU law obliges a Member State to issue a birth certificate, in order for an identity document to be obtained according to the legislation of that State, for a child, a national of that Member State, whose birth in another Member State is attested by a birth certificate that has been drawn up by the authorities of that other Member State in accordance with the national law of that other State, and which designates, as the mothers of that child, a national of the first of those Member States and her wife, without specifying which of the two women gave birth to that child.

82 COM/2022/695 final. The draft provides for the introduction of a non-mandatory European Certificate of Parentage. This uniform certificate is being introduced specifically to facilitate the recognition of parentage within the Union, as it is issued for use in another Member State. This uniform certificate is specifically designed to facilitate the recognition of parentage within the Union, as it is issued for use in another Member State. The certificate must be issued in the Member State where parentage has been established in accordance with the applicable law and whose courts had jurisdiction in the case, according to the proposal.

If the answer is in the affirmative, the referring court asks whether EU law requires such a certificate to state, in the same way as the certificate drawn up by the authorities of the Member State in which the child was born, the names of those two women in their capacity as mothers.[83]

The question raised in the case was whether Article 4(2) TEU could justify the refusal by the Bulgarian authorities to issue a birth certificate for the child and, consequently, an identity card or passport for that child.

The CJEU found that the child had EU citizenship by virtue of her Bulgarian nationality. The rights recognised by Article 21(1) TFEU for nationals of Member States enjoy under Article 21(1) TFEU include the right to lead a normal family life, together with their family members, both in their host Member State and in the Member State of which they are nationals when they return to the territory of that Member State.[84]

1.4.2.1. Relevant findings of the Advocate General's Opinion[85]

Advocate General Kokott pointed out that the CJEU had occasion to specify in that context that 'family members' are in any event those mentioned in Article 2(2) of Directive 2004/38. That provision refers inter alia to the 'spouse' of a Union citizen (Article 2(2)(a)) and his or her 'direct descendants' [Article 2(2)(c)]. If the same-sex spouse of a Union citizen with whom that citizen has validly entered into a marriage pursuant to the legislation of a Member State is not classified as a 'family member' on the ground that the law of another Member State does not provide for that possibility, this would risk a variation in the rights deriving from Article 21(1) TFEU from one Member State to another, depending on the provisions of their national law. For the same reason, the CJEU has held that the concept of a 'direct descendant' must be interpreted uniformly throughout the European Union.

83 Judgment of the Court in Case C-490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo" para 36.

84 Judgment of the Court in Case C-490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo" para 47.

85 Opinion of Advocate General Kokott delivered on 15 April 2021 in Case 490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo".

In the present case, it is established that both the applicant in the main proceedings and her wife have validly acquired the status of parent of the child under Spanish law and that they also lead an effective family life with their daughter in Spain.[86]

The Advocate General recalled that there is no consensus within the European Union on the prerequisites for access to the fundamental institutions of family law. National rules governing marriage (or divorce) and parentage (or even reproduction) define the family relationships which are at the heart of this field. In the case of, for example, divorce, insurmountable conceptual differences were found during the drafting of a regulation on the law applicable to that institution, leading to the failure of the Commission's legislative initiative and the implementation of enhanced cooperation in its place. As regards marriage, only 13 of the 27 EU Member States have, at the present time, extended that institution to same-sex couples. Moreover, of those 13 Member States, only some provide for the 'automatic' parenthood of the wife of the biological mother of a child. On account of those differences, Regulation 2016/1191 simplifying the requirements for presenting certain public documents attesting, inter alia, birth, marriage, divorce and parenthood reiterates several times that it does not change the substantive law in that area or the obligations to recognise the legal effects relating to such a document. In that context, the Court has previously implicitly recognised that the rules governing marriage form part of national identity within the meaning of Article 4(2) TEU.[87]

The Advocate General concluded that however, the reliance on national identity cannot justify the refusal to recognise the family relationships, as established on the Spanish birth certificate, for the sole purpose of exercising the rights conferred on the applicant in the main proceedings by secondary EU law on the free movement of citizens, such as Directive 2004/38 and Regulation No 492/2011.[88]

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86 Opinion of Advocate General Kokott delivered on 15 April 2021 in Case 490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo" para 61.

87 Opinion of Advocate General Kokott delivered on 15 April 2021 in Case 490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo" paras 75-76.

88 Opinion of Advocate General Kokott delivered on 15 April 2021 in Case 490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo" para 134.

In her Opinion, the Advocate General concluded that Article 21(1) TFEU must be interpreted as meaning that that Member State also may not refuse, on the same ground, to recognise the family relationships between that child and the two women designated as her parents on the birth certificate issued by the Member State of residence for the purpose of exercising the rights conferred on that child by secondary EU law on the free movement of citizen

Article 21(1) TFEU must be interpreted as meaning that a Member State may not refuse to recognise the family relationships, established on the birth certificate issued by another Member State, between one of its nationals, her wife and their child for the purpose of exercising the rights conferred on that national by secondary EU law on the free movement of citizens, on the ground that the domestic law of that woman's Member State of origin does not provide for either the institution of marriage between persons of the same sex or for the maternity of the wife of the biological mother of a child. This applies irrespective of whether the national of that Member State is or is not the biological or legal mother of that child under the law of her Member State of origin and the nationality of the child.

Reliance on national identity within the meaning of Article 4(2) TEU may justify the refusal to recognise that a married couple of two women are the parents of a child, as established on the birth certificate issued by the child's Member State of residence, for the purpose of drawing up a birth certificate in the child's Member State of origin or the Member State of origin of one of those two women, determining the parentage of that child for the purposes of the family law of that Member State.[89]

It should be noted, that EU law imposes only an obligation on the Bulgarian authorities to achieve a result in that regard, namely, to issue an identity document which allows the child to travel with each of her parents individually. It is for the domestic legal order of the Member State to lay down the detailed rules in order to attain that objective.[90]

89 Opinion of Advocate General Kokott delivered on 15 April 2021 in Case 490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo" para 170.

90 Opinion of Advocate General Kokott delivered on 15 April 2021 in Case 490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo" para 165.

1.4.2.2. The judgment

The CJEU pointed out that the obligation for a Member State to issue an identity card or a passport to a child who is a national of that Member State, who was born in another Member State and whose birth certificate issued by the authorities of that other Member State designates as the child's parents two persons of the same sex, and, moreover, to recognise the parent-child relationship between that child and each of those two persons in the context of the child's exercise of her rights under Article 21 TFEU and secondary legislation relating thereto, does not undermine the national identity or pose a threat to the public policy of that Member State.

Such an obligation does not require the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents.[91]

An indisputable merit of the judgment is that it linked the issues to be examined in the case to the requirements set out in the relevant articles of the UN Convention on the Rights of the Child, as clearly indicated in several points of the decision.

The right to respect for family life, as stated in Article 7 of the Charter, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter. Since Article 24 of the Charter, as the Explanations relating to the Charter of Fundamental Rights note, represents the integration into EU law of the principal rights of the child referred to in the Convention on the rights of the child, which has been ratified by all the Member States, it is necessary, when interpreting that article, to take due account of the provisions of that convention.

In particular, Article 2 of that convention establishes, for the child, the principle of non-discrimination, which requires that that child is to be guar-

91 Judgment of the Court in Case C-490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo" paras 56-57.

anteed the rights set forth in that convention, which include in Article 7 the right to be registered immediately after birth, the right to a name and the right to acquire a nationality, without discrimination against the child in that regard, including discrimination on the basis of the sexual orientation of the child's parents.

In those circumstances, it would be contrary to the fundamental rights which are guaranteed to the child under Articles 7 and 24 of the Charter for her to be deprived of the relationship with one of her parents when exercising her right to move and reside freely within the territory of the Member States or for her exercise of that right to be made impossible or excessively difficult in practice on the ground that her parents are of the same sex. [92]

Despite the CJEU's decision, the Bulgarian court did not comply with it, arguing that the child concerned in the case was not a Bulgarian citizen, because her descent from her Bulgarian mother had not been proven.[93]

92 Judgment of the Court in Case C-490/20. V.M.A. v Stolichna obshtina, rayon "Pancharevo" para 69.

93 See more: Helga Luku: The Supreme Administrative Court of Bulgaria's final decision in the Pancharevo case: Bulgaria is not obliged to issue identity documents for baby S.D.K.A. as she is not Bulgarian (but presumably Spanish) In: 22 May 2023 Conflicts of Laws. net

According to the post on 1 March 2023, the Supreme Administrative Court of the Republic of Bulgaria issued its final decision no. 2185, 01.03.2023 in the Pancharevo case. After an appeal from the mayor of the Pancharevo district, the Supreme Administrative Court of Bulgaria ruled that the decision of the court of first instance, following the judgment of the Court of Justice of the European Union (CJEU) in this case, is "valid and admissible, but incorrect". It stated that the child is not Bulgarian due to the lack of maternal ties between the child and the Bulgarian mother, and thus there is no obligation for the Bulgarian authorities to issue a birth certificate. On the basis of the decision of the CJEU in the Pancharevo case, the referring court, i.e. the Administrative Court of the City of Sofia, obliged the authorities of the Pancharevo district to draw up the birth certificate of S.D.K.A., indicating two women as her parents. The mayor of the Pancharevo district then filed an appeal to the Supreme Administrative Court of Bulgaria, contending that the decision is inadmissible and incorrect. Based on its considerations, the Supreme Court held that the decision of the court of first instance is "valid and admissible but incorrect". Its rationale is premised on several arguments. Firstly, it referred to Article 8 of the Bulgarian Citizenship Law, which provides that a Bulgarian citizen by origin is everybody of whom at least one of the parents is a Bulgarian citizen. In the present case, the Supreme Court deemed it crucial to ascertain the presence of the biological link of the child, S.D.K.A., with the Bulgarian mother, V.M.A. Thus, it referred to Article 60 of the Bulgarian Family Code, according to which maternal origin shall be established by birth; this means that the child's mother is the woman who gave birth to the child, including in cases of assisted reproduction. Therefore, the Supreme Court proclaimed in its ruling that the Bulgarian authorities could not determine whether the child was a Bulgarian citizen since the applicant refused to provide information about

1.4.3. Case C-713/23 Trojan

As discussed in detail above, a fundamental issue affecting the effectiveness of the civil justice area and the legal certainty of EU citizens is the recognition in one Member State of a marriage that is not considered a marriage under the law of that Member State. This problem typically arises when a marriage between same-sex couples is recognised in a Member State that does not consider this form of cohabitation to be a marriage.

On 25 November 2025, the CJEU delivered its judgment in *Case C-713/23 Jakub Cupriak-Trojan, Mateusz Trojan v Wojewoda Mazowiecki*, in which it further interpreted the legal institution of marriage, building on its previous findings in the Coman and Pancarevo cases.

Compared to the Coman case, there was a significant difference in that the case involved two EU citizens, which the CJEU considered to be of central importance in assessing the relevant circumstances of the case.[94]

In the case, the CJEU first of all clarified that, despite the fact that the request for a preliminary ruling, like in the Coman case, sought to exam-

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the child's biological mother. Consequently, the authorities could not issue a birth certificate and register the child's civil status. Furthermore, in a written defence presented to the court of first instance by the legal representative of V.M.A., it was provided that S.D.K.A. was born to K.D.K., the British mother, and the British authorities had also refused to issue a passport to the child, as she was not a British citizen. The Supreme Administrative Court of Bulgaria ruled that the child is not a Bulgarian citizen, and the conclusion of the CJEU that the child is a Bulgarian citizen and thus falls within the scope of EU law (Articles 20 and 21 TFEU and Article 4 of Directive 2004/38/EC) is inaccurate. According to the Supreme Court's legal reasoning, these provisions do not establish a right to claim the granting of Bulgarian citizenship, and Union citizenship is a prerequisite for enjoying free movement rights. In these circumstances, the Supreme Administrative Court of Bulgaria held that the refusal to issue a birth certificate does not result in the deprivation of citizenship or the violation of the child's best interests. It referred to the law of the host country, Spain. Article 17 of the Spanish Civil Code of 24 July 1889 provides that Spanish citizens by origin are persons born in Spain. https://conflictoflaws.net/2023/the-supreme-administrative-court-of-bulgarias-final-decision-in-the-pancharevo-case-bulgaria-is-not-obliged-to-issue-identity-documents-for-baby-s-d-k-a-as-she-is-not-bulgarian-but-presuma/

The applicability of Spanish law was expressly confirmed by the Spanish Government during the hearing at the CJEU, provided in paragraph 53 of Advocate General Kokott's Opinion, stating that if the child could claim neither Bulgarian nor UK nationality, she would be entitled to claim Spanish nationality. Thus, the Supreme Court ruled that the child is Spanish and averted the risk of leaving the child stateless.

94 See: Judgment of the Court in Case C-713/23. Trojan and Others paras 39,40,46.

ine the recognition of a marriage between two persons of the same sex in another Member State in the context of the right to free movement and its restrictions, this was not actually the focus here.

According to the facts of the case, J. Cupriak-Trojan, a Polish-German dual national, and M. Trojan, a Polish national, were married in Berlin on 6 June 2018. At the time of the request for a preliminary ruling, they were in Germany but wished to travel to Poland and reside there as spouses. At the request of the interested party, the competent Polish registry office registered the change of name of J. Cupriak, who took his spouse's surname. The parties then requested that the marriage certificate issued in Germany be entered in the Polish civil registry, which was refused by the registry office in Warsaw on the grounds that Polish law does not provide for marriage between persons of the same sex and therefore the registration of such a foreign marriage certificate would be contrary to the fundamental principles enshrined in the legal system of the Republic of Poland.

The case was brought before the Supreme Administrative Court, the referring court, following an application for review by the parties concerned. The parties concerned argued that the non-recognition of their marriage constituted a disproportionate restriction on their right to move and reside freely within the territory of the Member States, since their marital status was assessed differently in Poland and Germany. This would deter them from exercising their right to move freely, or even prevent them from doing so. More specifically, the possibility that they would live in two different marital statuses, namely as married persons in Germany and as single persons in Poland, and would not be able to lead the same private and family life in Poland as they did in Germany. This could in turn deter them from residing in the territory of the Republic of Poland.

The CJEU noted, first of all, that although the question referred for a preliminary ruling concerns Articles 20 and 21 TFEU, read in the light of the Charter and Article 2(2) of Directive 2004/38. However, the dispute in the main proceedings concerns the request made by the spouses at issue in the main proceedings to have their marriage certificate that was issued in Germany transcribed in the Polish civil register in order to have their status as married persons recognised in Poland, which is the Member State of which

they are nationals. The subject matter of that dispute does not, therefore, come within the scope of that directive, which governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he or she is a national.

The CJEU found that the Polish court was essentially seeking to ascertain whether Article 20 and Article 21(1) TFEU, read in the light of Article 7 and Article 21(1) of the Charter, must be interpreted as precluding legislation of a Member State, which, on the ground that the law of that Member State does not authorise marriage between persons of the same sex, does not permit the recognition of a marriage between two same-sex nationals of that Member State lawfully concluded in the exercise of their freedom to move and reside within another Member State, in which they have created or strengthened a family life, or the transcription for that purpose of the marriage certificate in the civil register of the first Member State.[95]

Referring back to the Coman judgment, the CJEU stated that it follows from the CJEU's case law that a measure is proportionate if, in addition to being suitable for achieving the objective pursued, it does not go beyond what is necessary to achieve that objective. It emphasised that the obligation on the Member State of origin to recognise a marriage concluded between Union citizens of the same sex in the host Member State in the exercise of their freedom to move and reside, in order to enable them to return to the Member State of which they are nationals and to pursue their family life there, benefiting from their marital status legally established in the host Member State, does not undermine the institution of marriage in the Member State of origin, which is defined by national law and, comes within the competence of the Member States. It does not entail, for the Member State of origin, the obligation to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to guarantee the recognition of such marriages, concluded in the host Member State in accordance with the law of that State, for the purpose of enabling such citizens to exercise the rights they enjoy under EU law.

This does not entail any obligation for that Member State to provide for the institution of marriage between persons of the same sex in its nation-

95 Judgment of the Court in Case C-713/23. Trojan and Others Judgment paras 37-38.

al law. It is limited to the obligation to recognise marriages concluded in another Member State in accordance with its law, solely for the purpose of enabling those persons to exercise their rights under EU law. This obligation to recognise marriages does not undermine national identity or pose a threat to the public policy of the Member State of origin public policy in the Member State of origin.[96]

In its judgment, the CJEU referred to the case law of the European Court of Human Rights (ECtHR).[97] It stated that is apparent from the case-law of the European Court of Human Rights that the relationship of a homosexual couple may come within the notion of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple in the same situation.

The CJEU referred to the fact that the European Court of Human Rights has held that Article 8 ECHR imposes on the Member States a positive obligation to establish a legal framework providing for the legal recognition and protection of same-sex couples and that the Republic of Poland has failed to comply with that obligation, which has resulted in the inability of the persons concerned to regulate fundamental aspects of their private and family life. As regards persons of the same sex who have legally entered into a marriage abroad, that court has found, inter alia, that, by refusing to register that marriage under any form, the Polish authorities have left those persons in a legal vacuum and have not provided for the core needs of recognition and protection of same-sex couples in a stable relationship. That court has thus held that none of the public-interest grounds put forward by the Polish Government prevails over those persons' interest in having their respective relationships adequately recognised and protected by law.[98]

The CJEU ruled that it is for a Member State which does not authorise marriage between persons of the same sex to establish appropriate procedures

96 Judgment of the Court in Case C-713/23. Trojan and Others Judgment paras 56,61,62.

97 ECtHR, 12 December 2023, Przybyszewska and Others v. Poland, CE:ECHR:2023:1212JUD001145417, §§ 113, 123 and 124; ECtHR, 19 September 2024, Formela and Others v. Poland, CE:ECHR:2024:0919JUD005882812, §§ 20, 25, 26 and 29; and ECtHR, 24 April 2025, Andersen v. Poland, CE:ECHR:2025:0424JUD005366220, §§ 11 and 14 to 19.

98 Judgment of the Court in Case C-713/23. Trojan and Others paras 65-66.

for the recognition of such a marriage where it has been entered into by two Union citizens when exercising their freedom of movement and residence in accordance with the law of the host Member State. In its judgment, the CJEU made it clear that Article 20 and Article 21(1) TFEU, read in the light of Article 7 and Article 21(1) of the Charter, must be interpreted as precluding legislation of a Member State which, on the ground that the law of that Member State does not allow marriage between persons of the same sex, does not permit the recognition of a marriage between two same-sex nationals of that Member State concluded lawfully in the exercise of their freedom to move and reside within another Member State, in which they have created or strengthened a family life, or the transcription for that purpose of the marriage certificate in the civil register of the first Member State, where that transcription is the only means provided for by that Member State for such recognition.[99]

According to Ildikó Bereczki, the Advocate General – and later the CJEU – shifted the question to the area of national (procedural) law and sought a way to reconcile national and EU law in this delicate situation. At the end of the process, the balance was decided in favour of the primacy of EU law, since in his view, the legal effects of the latter can only be ensured through civil registration, which he sees as a positive obligation arising from EU law. The CJEU draws this conclusion along the lines of its case law on identity and legal ties legally acquired in another Member State, as ensuring continuity with it. It is important that the Advocate General assesses the complete lack of recognition of the legal tie as a restriction on the right of free movement and residence enshrined in Article 21(1) TFEU and, by referring to this, formulates a legal basis for the "limitation" of the Member State's otherwise recognised national competence, i.e. for "interference" in the area of national law. It is also important to point out that in the present case, the critical element is not actually the recognition itself - since the Advocate General treats this as quasi-evidence, limited to the exercise of rights existing under EU law - but the implementation of the civil registration in circumstances where national law does not allow or prohibits this. The motion is also particularly noteworthy from the perspective that it concerns rights that are

99 Judgment of the Court in Case C-713/23. Trojan and Others paras 68-77.

due to a Member State's own citizen under both national law and EU law, and the Advocate General is trying to calibrate it accordingly.[100]

With regard to the different regulations affecting Member States in the Trojan case, the question arises as to whether, if the law of a Member State recognises registered partnerships between persons of the same sex that have legal effects similar to those of marriage, can a marriage contracted abroad be recognised and registered as a registered partnership in that country? In Hungarian case law, there was an example where a Hungarian court obliged the Hungarian authority to register a marriage concluded in Belgium between a Hungarian and an American citizen as a registered partnership in Hungary.[101]

The judgment clearly goes beyond the Coman decision, because it imposes a registration obligation on marriages abroad, taking into account the right of EU citizens to free movement.

Bereczki Ildikó points out that this creates a gap in the relevant private international law regulations of the Member State concerned, and in the given - limited - circle, in the context of the free movement of persons, it overrides or eliminates it through the related EU recognition mechanism. Incidentally, the obligation of recognition that can be deduced from the case law of the CJEU also implies that a given Member State cannot claim that the conditions specified in its own international conflict-of-laws rules are met, but must disregard them in relation to an EU citizen - who is usually also its own national - and must instead enforce the concept of recognition of EU law as interpreted by the CJEU.[102]

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100 Bereczki Ildikó: Párkapcsolatok jogrendek metszéspontjában - házasságkötés transznacionális elismerése a Trojan ügy margóján. [Relationships at the intersection of legal systems – transnational recognition of marriage in the Trojan case.] In: EU Law Online Journal. 2025/2. https://uj.jogtar.hu/#doc/db/561/id/A2500203.EUO/ It should be noted that this study was prepared before the judgment in the case was handed down, based on the opinion of the Advocate General. However, its findings are fully consistent with the judgment.

101 See Budapest Administrative and Labour Court, judgment No. 27.K.32.541/2016/6, dated 25 April 2017.

102 Bereczki Ildikó: Párkapcsolatok jogrendek metszéspontjában - házasságkötés transznacionális elismerése a Trojan ügy margóján. [Relationships at the intersection of legal systems – transnational recognition of marriage in the Trojan case.] In: EU Law Online Journal. 2025/2. https://uj.jogtar.hu/#doc/db/561/id/A2500203.EUO/

1.5. Conclusions based on the analyzed CJEU case law

The relationship between family law and human rights has been a popular topic in foreign literature[103] for many years. According to several authors, the ECtHR, which interprets the ECHR, plays a central role in the harmonisation of family law in Europe.[104]

At the same time, different positions have emerged regarding whether a "common European standard" can be defined by approaching individual family law institutions on a human rights basis, such as the right to marry, to found a family, the right to protect family life, and the prohibition of discrimination, which can be used as a basis for defining the legal institution of marriage.[105] A further question is whether the constantly developing jurisprudence developed by European judicial forums, which interprets the right to marry and to right to found a family in an increasingly expansive manner and is increasingly open to different forms of cohabitation and their equality, can serve as a guideline for these legal institutions in the area of judicial cooperation in civil matters.[106]

The scholarly literature agrees that the ECtHR has implemented a dynamic and evolving interpretation of the ECHR in relation to the concept of family rights. In its jurisprudence, it has also taken into account factors that fell outside the Convention and has taken into account that the provisions of the Convention must be assessed in the light of the conditions at the time of in-

103 See, for example: Dagmar Coester-Waltjen: Human Rights and Harmonisation of Family Law in Europe, in: European Challenges in Contemporary Family Law, (Katharina Boele-Woelki and Tone Sverdup eds.) Intersentia, Antwerp, Oslo, Portland, 2008., 3-17. or Peter De Cruz: Family Law, Sex and Society: A Comparative Study of Family Law, Taylor and Francis e-Library, 2010.

104 Katharina Boele-Woelki: European Challenges in Contemporary Family Law: Some Final Observations, in: European Challenges in Contemporary Family Law, (Katharina Boele-Woelki and Tone Sverdup eds.) Intersentia, Antwerp, Oslo, Portland, 2008., 415.

105 See in this regard: Caroline Sörgjerd: Reconstructing Marriage, The Legal Status of Relationships in Changing Society, Intersentia, European Family Law Series, Cambridge, 2012., 310.

106 Marie-Therese Meulders-Klein: Towards a European Civil Code on Family Law? Ends and Means in Perspectives for the Unification and Harmonisation of Family Law in Europe / ed. by Katharina Boele-Woelki, 105-118.

terpretation.[107] This is an important consideration because the Convention was codified more than 70 years ago and there have been radical changes in forms of cohabitation since then.

Legal literature points out that the harmonisation of family law is strengthened by the decisions of the ECtHR interpreting the rights guaranteed in the Convention autonomously. These appear as positive obligations towards the Member States and increase the importance of European standards in order to limit the discretion of the Member States regarding the content of these rights.[108]

Another key player in the development of European family law is the European Union, which since its operation, in addition to the founding treaties, has adopted numerous legal sources that have affected the situation of EU citizens in relation to marriage, cohabitation and family formation, and the CJEU, which interpreted the provisions of relevant EU norms and, with its legal interpretation activities, has also had a significant impact on the family law situation of EU citizens.

The Charter of Fundamental Rights, which was elevated to the status of primary law in 2009, is of particular importance in EU law. Based on the provisions of the ECHR, it modernises and updates them with regard to the protection of private and family life, family rights relating to marriage and starting a family, etc.

It is clear from the arguments set out in the judgments analysed above that the CJEU is interpreting the obligations of Member States relating to the legal institution of marriage in an increasingly broad manner. Nevertheless, in all its judgments, the CJEU refers to the fact that the regulation of matters relating to personal status falls within the competence of the Member States.

The question is whether these interpretations can have an effect beyond

107 Masha Antokolskaia: Harmonisation of Family Law in Europe: A Historical Perspective, Intersentia, Antwerp, 2006., 262., and Caroline Sörgjerd: Reconstructing Marriage, The Legal Status of Relationships in Changing Society, Intersentia, European Family Law Series, Cambridge, 2012., 308.

108 Bea Verschraegen: The Right to Private and Family Life, the Right to Marry and Found a Family, and the Prohibition of Discrimination. In: Legal Recognition of Same-Sex Relationships in Europe, National, Cross-Border and European Perspectives (Katharina Boel-Woelki and Angelika Fuchs, eds.), Intersentia, European Family Law Series, Cambridge, 2012., 260.

the personal and material scope of the EU regulation interpreted in the given preliminary ruling procedure.

It is important to note that the CJEU itself has already stated in its judgment in the Coman case that the concept of marriage, which is to be interpreted in a gender-neutral and autonomous manner, is limited exclusively to Directive 2004/38 and does not extend to other EU norms.[109]

This means that the analyzed CJEU judgments do not create a *de iure* obligation to be applied in other EU norms beyond Directive 2004/38, nor to adapt the national rules of the Member States to this legal interpretation regarding the legal institution of marriage. But in practice, they may still have such an effect *de facto*.[110] According to Marinkás, this is why we can see "integration by stealth". In his article, he presents in detail the ECtHR decisions that founded the Coman and Pancharevo cases and those from which the logic of the Coman-Pancharevo argument cannot be deduced.[111]

The provisions of the EU treaties referred to are clear. The CJEU's interpretation of the law cannot be extended to an EU norm that was not the subject of the preliminary ruling procedure in the cases cited, yet there has been a shift since the Coman case. In agreement with Marinkás, it can be concluded that the opinion of Advocate General Wathelet in the Coman case differed significantly from the case law of the ECtHR and the CJEU at that time, as he

109 See more: Baiba Rudevska: The "Coman" Case (C-673/16): Some reflections from the point of view of private international law. In: Conflicts of Laws.net 2 July 2018. https://conflictoflaws.net/2018/the-coman-case-c-673-16-some-reflections-from-the-point-of-view-of-private-international-law/

110 Marinkás highlights that the process of aligning national law practice with EU law has begun following the Coman judgment. Following the 2018 Coman judgment, the Bulgarian Supreme Administrative Court (Varhoven Administrativen Sad) decided, in order to comply with the country's obligations under EU law, that the Australian member of a same-sex couple of French and Australian origin is considered a spouse within the meaning of Directive 2004/38/EC. In its decision of 2 December 2019, the Polish Supreme Administrative Court (Naczelny Sad Administracyjny, NSA) adopted a decision in line with the functional approach introduced by the Coman case law in a case concerning the registration in Poland of a foreign birth certificate indicating two same-sex parents. Although the decision is binding on Polish administrative bodies, some authors doubt that in practice the processing of similar applications will be so smooth. In: György Marinkás: Thoughts on the relationship between the primacy of EU law and the national identity of Member States in light of the CJEU's so-called "Pancharevo" judgment. In: Law-State-Politics 2023/2. 34.

111 See Marinkás, op. cit. 35-47.

justified the functional extension of EU law in a matter concerning the principle of 'portability of personal status', he justified the functional extension of the applicability of EU law in a matter which, under the founding treaties, falls within the exclusive competence of the Member States. This legal position was also adopted by the CJEU and incorporated into its case law in its judgment in the Coman case.[112]

It can be presumed from the CJEU legal interpretations that they cannot have an effect beyond the given case, but the court initiating the preliminary ruling procedure is bound by the legal interpretation given in the case. However, the aftermath of the Bulgarian Pancherevo judgment shows that the Bulgarian courts did not act on the basis of the CJEU legal interpretation and did not close the case accordingly.[113]

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112 Marinkás, op. cit. 59.

113 Helga Luku asks the question in her post, is the decision of the Supreme Administrative Court of Bulgaria in conformity with EU law interpretation? In light of the ruling of the CJEU on the Pancharevo case, certain aspects might have required further scrutiny and more attention from the Supreme Court. Paragraph 68 of the Pancharevo judgment provides: "A child, being a minor, whose status as a Union citizen is not established and whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same sex, one of whom is a Union citizen, must be considered, by all Member States, a direct descendant of that Union citizen within the meaning of Directive 2004/38 for the purposes of the exercise of the rights conferred in Article 21(1) TFEU and the secondary legislation relating thereto."
According to this paragraph, it can be inferred that Bulgaria and other Member States must recognise a child with at least one Union citizen parent as a direct descendant of that Union citizen. This paragraph has important implications as regards the establishment of the parent-child relationship. The CJEU, in its case law (C-129/18 SM v Entry Clearance Officer), has firmly established that the term "direct descendant" should be construed broadly, encompassing both biological and legal parent-child relationships. Hence, as a family member of the Bulgarian mother, according to Article 2 (2)(c) of Directive 2004/38, baby S.D.K.A. should enjoy free movement and residence rights as a family member of a Union citizen. In its decision, however, the Supreme Administrative Court of Bulgaria did not conform to the CJEU's expansive understanding of the parent-child relationship. Therefore, its persistence in relying on its national law to establish parenthood exclusively on the basis of biological ties appears to contradict the interpretation of EU law by the CJEU.
The Supreme Administrative Court of Bulgaria seems relieved to discover that the child probably has Spanish nationality. It can be doubted, however, at what conclusion the court would have arrived if the child were not recognised as Spanish under Spanish nationality laws, especially considering that the child was not granted nationality under UK legislation either. In such a scenario, the Supreme Court might have explored alternative outcomes to prevent the child from becoming stateless and to ensure that the child's best interests are always protected. In: Helga Luku: The Supreme Administrative Court of Bulgaria's final decision in the Pancharevo case: Bulgaria is not obliged to issue identity documents for

The question is to what extent such a reversal of a binding legal interpretation, which had the best interests of the minor child involved in the case as a primary consideration, is acceptable in the European Judicial Area and to what extent does it undermine trust in the judicial system of the Member States.

2. The Rome III Regulation in practice

2.1. Preliminary remarks

The process of drafting the Rome III Regulation and some of its provisions are perfect examples of where the differing interpretations of marriage by Member States and the approach taken to assessing marriages contracted in another Member State can lead. This approach, which emphasises national sovereignty, was also evident in the two regulations governing the property regimes of spouses and registered partners, [114] which were also adopted only through enhanced cooperation. Similar debates arise in matters of Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood [COM(2022) 695 final].[115]

The Rome III Regulation entered into force on 21 June 2012. It is appropriate to evaluate the practice of the Regulation and the case law of CJEU in 2026. It should be noted that the CJEU has so far provided extremely limited legal interpretations in the absence of any requests for preliminary rulings.

baby S.D.K.A. as she is not Bulgarian (but presumably Spanish) In: 22 May 2023 Conflicts of Laws. net https://conflictoflaws.net/2023/the-supreme-administrative-court-of-bulgarias-final-decision-in-the-pancharevo-case-bulgaria-is-not-obliged-to-issue-identity-documents-for-baby-s-d-k-a-as-she-is-not-bulgarian-but-presuma/

114 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

115 https://eur-lex.europa.eu/legal-content/HU/ALL/?uri=CELEX:52022PC0695

In essence, only one case, C-249/19, has produced an actual legal interpretation affecting the fundamental principles of the Rome III Regulation, including the exception rule.

2.2. Problems faced in cross-border matrimonial cases

The alternative rules on jurisdiction laid down in Article 3 of the Brussels IIa Regulation, which contains the same regulatory solution as the Brussels IIb Regulation, and the rule on lis pendens, which gives priority to the court first seised to conduct the proceedings, may encourage the parties to bring proceedings before a court where they can expect the most favourable outcome for them in relation to both the subject matter of the proceedings and ancillary issues.

The alternative jurisdiction rules of the regulation led to a forum race in matrimonial matters, which encouraged the parties to "rush to court". This resulted in the court in a matrimonial case applying a substantive law to which the parties (or one of the spouses) had no close connection.[116]

The Brussels IIa Regulation did not contain any rules on the law applicable to matrimonial matters. Once proceedings for divorce or legal separation had been brought before a court in a Member State, the applicable law was determined by that State's private international law rules. There were and still are significant differences between national conflict-of-law rules. In 2010, 20 of the 27 Member States determined the law applicable to matrimonial matters on the basis of a combination of different connecting factors, such as nationality, common residence, etc., while 7 Member States applied the lex fori.

116 This also happened in the Hadadi case, where the husband returned to Hungary of his common nationality with his wife, to initiate divorce proceedings - despite the fact that they had lived in France for more than twenty years - in order to avoid the application of French divorce law in their divorce proceedings, which would have allowed the dissolution of the marriage on grounds of fault, contrary to Hungarian substantive family law.

2.3. The dead end of the Rome III proposal

The Proposal for Council regulation completed in 2006[117] sought to amend and supplement the provisions of the Brussels IIa Regulation that had been the subject of the most criticism: in the field of alternative jurisdiction and the absence of applicable law.

Despite diplomatic negotiations and mediation regarding the proposal, it became clear by the summer of 2008 that due to the serious opposition of some Member States - such as the United Kingdom and Sweden - the unanimity necessary to adopt the proposal was not there, and that it could not realistically be expected in the near future. Therefore, two options emerged: the introduction of enhanced cooperation,[118] which had not been an example in the history of the Union, or the rejection of the Proposal. A significant turning point came in 2008-2009, with tangible results emerging in March 2010.

2.3.1. The chance of enhanced cooperation

In January 2009, ten Member States submitted a request to the Commission indicating their intention to establish enhanced cooperation in the area of the law applicable to matrimonial matters and inviting the Commission to submit a proposal to the Council to that effect. One Member State, Greece, subsequently withdrew its request.

As a result, Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [COM(2010) 104 final] was presented in March 2010. [COM (2010) 104.] On 12 July 2010, the Council authorised the establishment of enhanced cooperation.[119]

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117 Proposal for a Council Regulation of 17 July 2007 amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters [COM(2006) 399 final.

118 Under Article 20 of the Treaty on European Union, the Council may adopt a decision authorising enhanced cooperation only as a last resort, after it has established that the objectives of the cooperation cannot be achieved by the Union as a whole within a reasonable period, and if at least nine Member States participate.

119 Council Decision 2010/405/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 189/12, 22.7.2010.

This proposal was adopted by the Council on 20 December 2010, as Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation). By then, additional Member States had joined the Regulation, so that it would initially apply to 14 Member States[120] and to 17 Member States[121] by 2026.

The Rome III Regulation essentially leaves it to the spouses to choose the law applicable to their divorce or legal separation proceedings, which can only be a substantive law with which the spouses have a close connection, e.g. the law of their habitual residence or nationality, but it also determines which Member State's substantive law will apply in the absence of a choice of law by the parties, regardless of which Member State's court the action was brought before.

This regulation promotes legal certainty and predictability, but it cannot completely eliminate *forum shopping*, given that Member States not participating in enhanced cooperation can continue to determine the applicable law according to their own national conflict-of-law rules. For example, if spouses can choose between Swedish and Hungarian courts, Swedish law will apply exclusively to divorce proceedings initiated in Sweden, whereas if proceedings are initiated in Hungary, the parties may choose the applicable law even during the proceedings, and in the absence of such a choice, the law of several Member States may be applicable, taking into account the order of priority set out in Article 8 of the Rome III Regulation, e.g. the law of their habitual residence or their common nationality. The individual articles of the Regulation are analysed in detail below.

2.3.2. Reasons for not participating in enhanced cooperation

It is interesting to briefly mention the reasons for the absence of the 10 Member States from enhanced cooperation. The reasons are analysed in de-

120 Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. It is worth noting that Malta joined the enhanced cooperation in 2010, even though its substantive law did not yet allow for the dissolution of marriage at that time.

121 Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

tail by Katharina Boele-Woelki in her 2011 study.[122] She points out that however, the application of foreign divorce law was and still is unacceptable for some Member States. They favour as a basic rule the application of the lex fori. The United Kingdom, Ireland and Cyprus are the most well-known countries which have adopted this approach, due to the common law tradition that a competent court always applies its own law. From the outset, however, it was clear that the United Kingdom and Ireland would not participate in Rome III, since under the Treaty of Amsterdam they have retained the right not to opt into instruments that are inconsistent with English or Irish law. Instead, Sweden and Finland took the lead. They passionately objected to the proposed conflict of law rules. In these jurisdictions, the right to divorce is considered a fundamental right. As a result, in those Member States "a spouse should be free to end a marriage without risking time-consuming or costly proceedings," and it has been stated that the "basically unlimited right to divorce is also an important issue of equality between men and women." The Netherlands also belongs to the group of lex fori countries, but for a different reason. During the last 30 years, case law has shown that under the existing statute Dutch law has been applied in the vast majority of cases. Therefore, the Bill in 2009 providing for Book 10 of the Dutch Civil Code regulating private international law applies the lex fori unless a common national law is designated by both parties or such a designation by one party is not contested by the other. As a result, the Dutch decision not to participate in the enhanced cooperation was easily made. The other six non-participating Member States also decided not to take part in Rome III, for varying reasons. In the Czech Republic, a political decision "against Europe" was taken despite the position of Czech specialists in private international law, who supported the cooperation. The Czech Republic is likely to follow the experience of the participating countries and may eventually reconsider its position. Estonia also did not favour enhanced cooperation, since it would create a precedent within the framework of cross-border civil cooperation and its implications were not thoroughly analyzed. However, Estonia might join in at a later stage. In contrast, Lithuanian family policy – supported by the ruling conservative party

122 Katharina Boele-Woelki: For Better or for Worse: The Europeanisation of International Divorce Law, in: Yearbook of Private International Law, Vol. XII. 2010. Sellier, Munich 2011. 1-27.

and the influential Catholic Church – prescribes that the legal regulation of family relationships should be the exclusive area of national law. Poland also made a political decision, fearing that Rome III would allow same-sex couples to obtain a divorce in Poland. Apparently, the Polish delegation overlooked the fact that this precise concern was later addressed in one of the provisions. Slovakia rejected enhanced cooperation for many reasons. First, it believes that the enhanced cooperation mechanism should not be used for private international law. Second, it feared that fault-based divorces would become applicable through backdoor methods. Third, the rules on legal separation cannot be applied in Slovakia since the institution does not exist. And finally, Slovakia still considers divorce to be a "State controlled" institution, which is irreconcilable with the notion of party autonomy. Greece initially joined the group of countries requesting enhanced cooperation. Yet, due to its drastic cost-cutting measures in 2009 caused Greece to dissolve all advisory commissions without justification and revoke its request.[123] Later Greece also joined the Regulation.

According to other authors, the main reason, why the other Member States are not participating in Rome III, is because they do not wish to apply foreign law. Firstly, because they oppose the difficulties and expenses created by the application of foreign law in general and, secondly, because they have objections against the possible content of the applicable foreign law, either because they do not wish to hinder divorce or – on the contrary – because they wish to support the institution of marriage and do not accept a legal regulation that is more liberal than their own law.[124]

2.4. Material, personal and territorial scope of the Rome III Regulation

According to Article 1(1) of Rome III, the Regulation shall apply to divorce and legal separation in situations involving a conflict of laws. The rules of

123 Katharina Boele-Woelki: For Better or for Worse: The Europeanisation of International Divorce Law, in: Yearbook of Private International Law, Vol. XII. 2010. Sellier, Munich 2011., 26-28.

124 Līga Stikāne: What Effect Does European Private International Law on Cross-border Divorce Have on National Family Laws and International Obligations of the Member States? In: Athens Journal of Law - Volume 5, Issue 4., 435-456

the Regulation on applicable law therefore apply exclusively to situations of an international nature, thereby fulfilling the requirement of 'cross-border implicatitions' laid down in Article 81(3) of the Treaty on the Functioning of the European Union.

However, assessing whether a matrimonial matter has cross-border implications is by no means straightforward. Katharina Boele-Woelki also addresses her cited study, analysing whether any international aspects which occurred during the marriage must also be taken into account. Suppose the wife is German and the husband is Dutch at the time of the marriage. During the marriage, the husband opts for German nationality and, as a result, loses his Dutch nationality. The spouses live in Germany and request a divorce in Germany. Are the connections with Germany at the time the court is seized the only connections taken into account (internal relationship), or should other relevant connecting factors during the marriage also be considered? It is reasonable that the answer to the latter question should be in the affirmative, since the spouses could have made a choice for Dutch law to apply to an eventual divorce at the moment the husband still had Dutch nationality. Such a choice of law must be recognized by the courts in Germany according to Article 5. This means that the Regulation also applies if during the marriage one of the spouses had a foreign nationality or his/her habitual residence in a country other than the one where the divorce proceedings are commenced.[125]

According to Article 1(2) of the Regulation, its scope does not extend to the legal capacity of natural persons, the existence, validity or annulment of the marriage, even if these arise merely as a preliminary question within the context of divorce or legal separation proceedings. Notwithstanding the aforementioned paragraph, Article 13 of the Regulation nevertheless allows the courts of a participating Member State to examine the validity/invalidity of the marriage in question on the basis of their own national law. (See below for details.)

Furthermore, the Regulation does not cover the property consequences of divorce or separation, the name of the spouses, issues relating to parental

125 Katharina Boele-Woelki: For Better or for Worse: The Europeanisation of International Divorce Law, in: Yearbook of Private International Law, Vol. XII. 2010. Sellier, Munich 2011., 29.

responsibility, maintenance obligations or other additional matters relating to divorce.

With regard to the personal scope of the Regulation, it should be noted that, since the Regulation refers to 'spouses', this includes same-sex spouses but excludes registered partners. In this regard, some authors note that it is very possible that in the future, when giving an autonomous interpretation of the term 'marriage' as used in Brussels II bis and Rome III, the ECJ in its judgment may indicate that the term 'marriage' as used in Brussels II bis and Rome III includes same-sex marriages too. This will lead to all the Member States applying Brussels II bis and Rome III being forced to recognise cross-border same-sex marriages celebrated abroad and to carry out cross-border same-sex divorces. This in turn may lead to those Member States, which at present do not allow same-sex marriages, being indirectly forced to legalise same-sex marriages in their substantive family laws.[126]

In order to clearly define the territorial scope of the Regulation, Article 3 specifies that, for the purposes of the Regulation, 'participating Member State' means any Member State participating in enhanced cooperation on the law applicable to divorce and legal separation.

2.5. Universal application of the Regulation

The universal application of the Regulation means that, through the application of uniform conflict-of-law rules, the law designated by the Regulation must be applied even if it does not refer to the law of a Member State participating in enhanced cooperation.

This means that the law applicable to divorce or legal separation may be

1) the law of a Member State participating in enhanced cooperation,
2) the law of an EU Member State not participating in enhanced cooperation, or
3) the law of a state that is not a member of the European Union.

126 Līga Stikāne: What Effect Does European Private International Law on Cross-border Divorce Have on National Family Laws and International Obligations of the Member States? In: Athens Journal of Law - Volume 5, Issue 4., 435-456

In my opinion, the rule of universal application of the Regulation was included in EU law because of multicultural Europe, but it also carries risks that can only be eliminated by the public policy in the Regulation, if the law applicable to the dissolution of the marriage is, for example, not in line with the provisions of the Charter of Fundamental Rights because it applies discriminatory rules based on the gender of the spouses.

Where the law of another Member State is applicable, the European Judicial Network in civil and commercial matters can assist courts in obtaining information on the content of foreign law. At the same time, there are fundamental obstacles to obtaining information on the law of non-EU Member States, which calls into question the feasibility and practicality of spouses making an informed choice of law.

A similar rule on universal application is contained in Article 2 of the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations in family matters.

2.6. Choice of the applicable law by the parties

In order to strengthen the autonomy of the parties, the Regulation favours the choice of the law applicable to the divorce and legal separation of spouses because, as stated in recital 15, the increasing mobility of European citizens and legal certainty also require this flexible approach on the part of the legislator.

Recital 18 of the Regulation emphasises that the he informed choice of both spouses is a basic principle of this Regulation. Each spouse should know exactly what are the legal and social implications of the choice of applicable law. The possibility of choosing the applicable law by common agreement should be without prejudice to the rights of, and equal opportunities for, the two spouses. Hence judges in the participating Member States should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded.

Depending on when the spouses choose the applicable law, two, three or four options are available.

I. If the choice of law is made *at the time of the marriage* or shortly thereafter, e.g. in a marriage contract, they can choose between the following two laws:

– the law of their habitual residence (Article 5(1)(a)) or

– the law of the nationality of one of them (Article 5(1)(c)).

II. If the choice of law is made *during the marriage*, they can choose between three laws: the two laws mentioned in the previous point or the law of their last habitual residence, provided that one of them still resides there (Article 5(1)(b));

III. If they agree on the choice of law *at the end of the marriage*, they can choose from four possible laws: the three laws mentioned in the previous points or the law of the country of the court hearing the case, the *lex fori* (Article 5(1)(d)).[127]

Katharina Boele-Woelki emphasises the importance of *the time element* when she points out that, for example, the law chosen by the parties at the time of their marriage, e.g. based on their place of residence at that time, may no longer have any close connection to the spouses after a few years or decades. From this point of view, it would be more practical to reach an agreement at the end of the marriage, but by then the deterioration of the relationship between the parties may make this impossible.[128]

The *nationality connecting factor* [Article 5(1)(c)] may pose a further problem in terms of choice of law, as the Regulation does not address the issue of dual nationality. In the Hadadi case, the CJEU interpreted the effect of dual nationality on jurisdiction and found that, in the case of multiple nationalities of the parties, even on the basis of additional criteria, it is not possible to determine which of the parties' nationalities represents a more close connection for the purposes of determining the court with jurisdiction, and therefore no order of precedence can be established between the nationalities.[129]

127 Katharina Boele-Woelki: For Better or for Worse op. cit., 30.
128 Katharina Boele-Woelki: For Better or for Worse op. cit., 30.
129 See details on this in connection with the Hadadi case.

However, according to Katharina Boele-Woelki, a distinction must be made between jurisdiction and applicable law when assessing dual nationality, because while jurisdiction may be based on the formal nationality of the parties (as in the Hadadi case), in the case of applicable law, the law of the more effective nationality must be applied. With regard to the issue of dual nationality, recital 22 of the Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union.

The reference to national law raises doubts because, in the Hadadi case, the CJEU already faced problems arising from the national interpretation of dual citizenship by certain Member States,[130] which did not facilitate a solution to the case in accordance with EU law.

A further requirement relating to the law chosen by the spouses is that it must be consistent with the fundamental rights recognised in the Treaties and in the Charter of Fundamental Rights of the European Union.

The agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized.

2.7. Material and formal validity of the choice of law agreement

Articles 6 and 7 of the Regulation set out the requirements of the Regulation concerning the material and formal validity of the choice of law agreement.

According to recital 19, the rules on substantive and formal validity had to be established in such a way as to facilitate an informed choice by the spouses and to respect their consent in order to ensure legal certainty and their right to justice.

With regard to *material validity*, the existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law

130 Under French law, persons with multiple nationalities who also have French nationality are to be treated as if they only had French nationality, disregarding the fact that they also have one or more other nationalities. Opinion of Advocate General Julianna Kokott in Case C-168/08. László Hadadi (Hadady) v Csilla Márta Mesko (Hadady) para 33.

which would govern it under this Regulation if the agreement or term were valid. (Art 6)

With regard to *formal validity*, it was necessary to introduce certain safeguards to ensure that the spouses are aware of the consequences of their choice. The agreement referred shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. However, if the law of the participating Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for this type of agreement, those requirements shall apply. If the spouses are habitually resident in different participating Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. If only one of the spouses is habitually resident in a participating Member State at the time the agreement is concluded and that State lays down additional formal requirements for this type of agreement, those requirements shall apply. (Article 7)

2.8. Law applicable in the absence of a choice of law

Where no applicable law is chosen, and with a view to guaranteeing legal certainty and predictability and preventing a situation from arising in which one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he considers more favourable to his own interests, this Regulation should introduce harmonised conflict-of-laws rules on the basis of a scale of successive connecting factors based on the existence of a close connection between the spouses and the law concerned. Such connecting factors should be chosen so as to ensure that proceedings relating to divorce or legal separation are governed by a law with which the spouses have a close connection.[131] Article 8 of the Regulation determines the applicable law in order to achieve these objectives.

131 Recital (21).

In the absence of a choice of law, the main connecting factor for the applicable law is where the spouses are habitually resident at the time the court is seized; the other connecting factors may only be applied in the absence of this.

Since this rule is based primarily on the spouses' habitual residence, or their last common habitual residence if one of them still resides there, in the vast majority of cases the law of the country of the court seised will apply (but not always, e.g. if one of the spouses returns to their country of origin and brings proceedings there under the rules laid down by the Brussels IIa Regulation. The cases in which foreign law applies are therefore limited.[132]

Thirdly, the nationality connecting factor only allows the law of the parties' common nationality to be applied, but, like Article 3 of the Brussels IIa Regulation, it does not address the issue of dual or multiple nationality.

2.9. *Lex fori* as the 'necessarily' applicable law

Article 10 of the Regulation also covers cases where neither the law chosen by the parties nor the law applicable in the absence of a choice of law provides for divorce. According to Article 10 where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the *forum* shall apply.

From the reference to the gender of the spouse in Article 10, we can also conclude that the Regulation does not only refer to marriages between persons of different sexes. However, recital 24 stated that in certain situations, such as where the applicable law makes no provision for divorce or where it does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the court seized should nevertheless apply. This, however, should be without prejudice to the public policy.

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132 COM (2010) 105.

2.9.1. Interpretation of Article 10 in case law of CJEU

In 2020, the CJEU delivered its judgment in Case C-249/19 JE v KF, which focused on the interpretation of lex fori as the law that must be applied. The case concerned the interpretation of Article 10(1) of the Regulation.

The legal dispute arose in connection with the dissolution of the marriage in Romania of two Romanian nationals who had been living in Italy for a long time.

The Romanian court hearing the case found that it had jurisdiction to rule on the application for divorce on the basis of the nationality of both spouses referred to in Article 3(1)(b) of the Brussels IIa Regulation. Furthermore, on the basis of Article 8(a) of Rome III Regulation it designated Italian law as the law applicable to the dispute of which it was seised, on the ground that, on the date on which the application for divorce was filed, the habitual residence of the spouses was in Italy. The court held that, under Italian law, an application for divorce made in circumstances such as those of the main proceedings could be filed only if a legal separation of the spouses had previously been established or declared by a court and if at least three years had elapsed between the date of that separation and the date on which the application for divorce was filed with the court. In view of this, the court hearing the case declared the proceedings inadmissible. One of the spouses appealed against the decision, arguing that the application of Italian law was incompatible with Romanian public policy and should therefore be excluded in accordance with Article 12 of the Regulation. JE is of the opinion that, since Italian law is restrictive as regards the conditions required for divorce, Romanian law should apply to the application for divorce.

The Bucharest court then initiated a preliminary ruling procedure. By its question, the referring court asks, whether Article 10 of Rome III Regulation must be interpreted as meaning that the words 'where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce' cover only situations in which the applicable foreign law does not provide for divorce in any form or whether they also include situations in which that law allows divorce, but makes it subject to conditions considered by the court seised to be more restrictive than those laid down by the law of the forum.[133]

133 Judgment of the Court in Case C-249/19. JE v KF para 21.

As a preliminary point, the CJEU stated, that it must be noted that Article 10 of Regulation constitutes an exception to Articles 5 and 8 of that regulation and must, as a derogating provision, be interpreted strictly. As regards the first situation referred to in Article 10 of that regulation, interpretation of which is requested by the referring court, it is clear from the wording of that provision that the law of the forum applies only where the applicable law 'makes no provision for divorce'.[134]

A CJEU stated, it in no way follows from the textual interpretation of that provision that the application of the law of the forum is also possible where the applicable foreign law provides for divorce, but makes it subject to conditions considered to be more restrictive than those laid down by the law of the forum. The CJEU pointed out that the words 'does not provide for divorce' are also used in Article 13 of that regulation, to which recital 26 thereof corresponds, according to which, where that regulation refers to the fact that the law of the participating Member State of which a court is seised does not provide for divorce, it should be interpreted as meaning that the law of that Member State 'makes no provision for divorce'. Although recital 26 refers to the law of the Member State of which a court is seised, the fact remains that, in so far as that law concerns the meaning of the words 'makes no provision for divorce', the guidance which it provides in that regard is also relevant as regards Article 10 of Regulation. 28 The CJEU referred to that legal separation, which is, moreover, expressly referred to in Article 10 of that regulation, falls, on the same basis as divorce, within the scope of that regulation and forms an integral part of its system and general scheme.[135]

Apart from the fact that it is contrary to the wording of Article 10 of Regulation and incompatible with the context and the scheme of which that provision forms part, an interpretation of that provision according to which the law of the forum applies where the applicable foreign law makes divorce subject to compliance with conditions considered to be more restrictive than those laid down by the law of the forum would also be inconsistent with the objectives pursued by that regulation. Such an interpretation could encourage a spouse applying for divorce to make his or her application to

134 Judgment of the Court in Case C-249/19. JE v KF paras. 23-25.
135 Judgment of the Court in Case C-249/19. JE v KF paras. 26-29.

the court of a Member State whose law makes divorce subject to less restrictive conditions, which court has jurisdiction by virtue of the provisions of Brussels IIa Regulation.[136]

The Court rules that in a situation such as that at issue in the main proceedings, in which the court having jurisdiction considers that the foreign law applicable pursuant to the provisions of Rome III Regulation permits an application for divorce only if that divorce has been preceded by a legal separation of three years, whereas the law of the forum does not lay down any procedural rules in relation to legal separation, that court must nevertheless, since it cannot itself declare such a separation, determine whether the substantive conditions laid down in the applicable foreign law are satisfied and make that finding in the context of the divorce proceedings before it. Having regard to all the foregoing considerations, the answer to the question referred is that Article 10 of Rome III Regulation must be interpreted as meaning that the expression 'where the law applicable by virtue of Article 5 or Article 8 makes no provision for divorce' applies *only to situations in which the applicable foreign law makes no provision for divorce in any form.*[137]

With this judgment, the CJEU prevented a legal interpretation that could undermine the predictability of the application of the Rome III Regulation. Presumably, the Romanian couple involved in the case in question returned to Romania to dissolve their marriage because the divorce would have taken place there on the basis of more favorable substantive law rules. But the Rome III Regulation sought to create rules against such 'forum shopping-style applicable law shopping' practices.

2.10. The public policy clause

The Regulation, as referred to by the spouses in Case C-249/19, left two gaps open for Member States participating in enhanced cooperation. This allows Member State courts to refuse to apply the applicable law prescribed

136 Judgment of the Court in Case C-249/19. JE v KF paras. 31-34.
137 Judgment of the Court in Case C-249/19. JE v KF paras. 43-44.

by the Regulation. These loopholes are the public policy clause and the reference to differences in national law provided for in Article 13.

Article 12 of the Regulation contains the public policy clause, according to which application of a provision of the law designated by virtue of this Regulation *may be refused* only if such application is manifestly incompatible with the public policy of the forum.

The Regulation therefore allows the courts of the participating Member States, in exceptional circumstances and on the basis of considerations of public interest, to disregard a provision of foreign law if its application would be manifestly incompatible with the public policy of the country of the court seised. However, courts may not apply the public policy exception to disregard a provision of the law of another State if this would violate the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination. The term 'manifestly' means that the public policy exception can only be applied in exceptional cases.

The question arises as to whether, if a Member State's divorce law allowing, for example, divorce on the grounds of fault were to be applied, could this serve as a basis for a court hearing the case to find a conflict with public policy and thus refuse to apply the applicable law, if the divorce law of that Member State does not allow divorce on the grounds of fault?

It is to be feared that a positive answer to this question would undermine the success of enhanced cooperation, since even among the Member States participating in enhanced cooperation, the laws of several Member States allow divorce on the grounds of fault, so that the applicable law could often be refused on this basis. At the same time, the problem that arises in this way is extremely complex,[138] the subject of which has been examined in depth by many, and in my opinion, the appropriate decision must always be made in light of the circumstances of the individual case. Article 12 of the Regulation can also be interpreted as meaning that the application of "a provision of the specified law" may also be refused on the grounds of public policy, so that, for example, if French law on divorce is applicable, its provisions on fault-based divorce may be refused.

138 Cf.: Raffai Katalin: Az emberi jogok szerepe a közrend konkretizálásában [The role of human rights in the concretisation of public policy], in: Magyar Jog, 2007/3.

Katharina Boele-Woelki uses the example of a Moroccan couple to illustrate the problem of applying the public policy clause. According to the example, suppose that French courts are invoked to dissolve the marriage of a Moroccan couple. For over two years only one of the spouses has lived in France. According to Article 8 sub. c, Moroccan law should be applied as the law of the common nationality of the spouses. Does Moroccan law belong to the legal systems which violate the principle of equal access to divorce for men and women? Is this to be assessed more generally or in the specific case? With such a sensitive matter involved, some guidance from the Communitarian legislature would have been advisable. Moreover, the non-application of Moroccan law may cause problems for the individual spouses. They cannot remarry in Morocco because a foreign divorce that has not been pronounced according to Moroccan law is not recognized there. Limping relationships are pre-programmed. In our multicultural societies in Europe, these problems should also be adequately addressed.[139] Similar problems may arise from the universal application of Article 4 of the Regulation.

2.11. Reference to differences in national law

After long discussions, Article 13 of the Regulation[140] allows that if the national law of a Member State participating in enhanced cooperation *does not provide for divorce* or *does not recognise the marriage in question as valid,* that Member State cannot be obliged to grant a divorce.

In other words, Article 13 allows for the refusal to apply the law designated by the Regulation in two different situations:

1) if the national law of the court seised does not recognise the institution of divorce, or
2) if the national law of the court seised does not recognise the marriage to be dissolved as valid.

139 Katharina Boele-Woelki: For Better or for Worse op. cit. 19.

140 Art 13. Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.

The first circumstance in Article 13 was included in EU law because of Malta (this is one of the so-called 'Malta clauses'),[141] but the second circumstance is a much more serious exception.

This allows the court of a Member State participating in enhanced cooperation to refuse to apply the law designated under the Regulation, either on the basis of the parties' choice of law or in the absence of such a choice, if its national law does not consider the marriage in question to be valid, e.g. the marriage of same-sex couples.

This latter provision was included in the regulation as a concession to Member States (e.g. Poland, Lithuania) that were hesitant to join enhanced cooperation. These Member States consider it impossible to dissolve a marriage of a same-sex couple, for example, under Spanish law, which is applicable under the regulation. Thus, the courts of these states could have circumvented this decision by citing the fact that such a marriage does not exist under their own national law.

At the same time, it must be emphasised that the validity of a marriage is not to be assessed on the basis of the national law of the court hearing the case, but on the basis of the personal law of the spouses and the law applicable at the place and time of the marriage, which means that a marriage between two persons of the same sex concluded in Spain can only be declared invalid (non-existent) by a Hungarian court on the basis of Article 13 and can only be refused its dissolution on this basis.

It is worth noting that in the November 2010 version of the draft regulation, the European Commission stated that the provision then included in Article 7a was contrary to the objective of enhanced cooperation.[142]

The cherry on the cake is that, according to Article 1(2) (b) of the Regulation, 'This Regulation shall not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings: (b) he existence, validity or recognition of a marriage.

However, in Article 13, it is precisely the validity/existence of the marriage that is examined by the court as a preliminary question, and it does

141 In July 2011, the Maltese Civil Code was supplemented with Subchapter IV (Section 66/A), which allows for the dissolution of marriage from 1 October 2011, supplementing the existing rules on separation.

142 Council of the European Union JustCiv. Note No. 214, 1 December 2010.

not consider the marriage in question to be valid/existence under its own national law.

The inclusion of Article 13 in the Regulation proved to be particularly misguided, as it undoubtedly deterred Finland and Sweden from participating in enhanced cooperation. Sweden's criticism of the Regulation was based on its position that it cannot accept solutions that restrict the possibility of divorce in certain situations.

According to the Swedish position, the right to divorce is a fundamental right, just like the right to choose a spouse. Sweden considered that Article 7a of the November 2010 version of the proposal for a Regulation on enhanced cooperation,[143] now Article 13 of the Regulation in force contained solutions which, in practice, created exceptions limiting the right to divorce for certain groups.[144]

2.12. The Case C-281/15 Soha Sahyouni v Raja Mamisch

On 12 May 2016, in its order in Case C-281/15 Soha Sahyouni v Raja Mamisch, the Court of Justice ruled on how to interpret an application for recognition of a decision taken by a religious court in a third country.

Although the German court that referred the question to the CJEU requested an interpretation of the Rome III Regulation, the CJEU pointed out that the case essentially concerned the interpretation of a procedure excluded from the scope of the Brussels IIa Regulation, and not the Rome III Regulation.[145]

143 Article 7a; Differences in national law. Nothing in this Regulation shall oblige the courts of participating Member States whose law does not provide for divorce or which consider the marriage in question to be invalid for the purposes of divorce proceedings to grant a divorce under this Regulation. JustCiv 213. 17045/10. 26 November 2010. It is also interesting to note that the draft regulation published in March 2010 [COM (2010) 105] did not yet contain this article.

144 Council of the European Union JustCiv. Note No. 214, 1 December 2010.

145 The facts of the case are as follows: R. Mamisch and S. Sahyouni were married on 27 May 1999 in Horns (Syria) within the jurisdiction of a court under Islamic law. R. Mamisch has been a Syrian citizen since birth, but acquired German citizenship by naturalisation in

The CJEU stated, that under Article 53(2) of the Rules of Procedure of the Court, where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings. That provision should be applied in the present case.[146]

The CJEU noted, that the referring court has before it not an application for divorce but an application for recognition of a divorce decision which was made by a religious authority in a third country. It must also be noted that it follows in particular from Articles 1 and 8 of Regulation No 1259/2010 that that regulation, which is the subject matter of the ques-

1977 and has therefore had dual citizenship since that date. S. Sahyouni has been a Syrian citizen since birth, but also acquired German citizenship after her marriage. The spouses lived in Germany until 2003, when they moved to Syria. Due to the civil war in Syria, they returned to Germany for a short period in the summer of 2011, but from February 2012 onwards they lived alternately in Kuwait and Lebanon. During this period, they also stayed in Syria on several occasions. Currently, both parties to the main proceedings are living in Germany again, in different places of residence. On 19 May 2013, R. Mamisch announced that she wished to dissolve her marriage, as her representative had pronounced the dissolution of the marriage before a Syrian religious Sharia court. That court pronounced the dissolution of the marriage on 20 May 2013. On 30 October 2013, Mr Mamisch applied for recognition in Germany of the decision on the dissolution of the marriage taken in Syria. By decision of 5 November 2013, the Oberlandesgericht München (Higher Regional Court, Munich) granted that application and held that the legal conditions for recognition of the divorce decision were met. On 18 February 2014, S. Sahyouni applied for that decision to be set aside and for a declaration that the conditions for recognition of the decision on dissolution of the marriage in question had not been met. The Oberlandesgericht München (Higher Regional Court, Munich) dismissed Mr Sahyouni's application.

That decision emphasised In that decision, it was held that recognition of the divorce was governed by Regulation No 1259/2010, which also applies to private divorces. In the absence of a valid choice of applicable law and a common habitual residence of the spouses in the year preceding the divorce, the applicable law is determined in accordance with Article 8(c) of that regulation. Where both spouses have dual nationality, the decisive factor is their effective nationality within the meaning of national law. At the time of the divorce at issue, their effective nationality was Syrian. It was also noted that public policy within the meaning of Article 12 of Regulation No 1259/2010 did not prevent recognition of the divorce decision at issue. the Oberlandesgericht München (Higher Regional Court, Munich) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling: Does the scope of [Regulation No 1259/2010], as defined in Article 1 of that regulation, also include "private divorce", in this instance one pronounced before a religious court in Syria on the basis of sharia?

146 Order of the Court in Case C-281/15. Soha Sahyouni v Raja Mamisch paras. 16-17.

tions referred, lays down only the rules governing conflicts of applicable laws in matters of divorce and legal separation and does not govern the recognition, in a Member State, of a divorce decision which has already been pronounced. The Brussels IIa Regulation rules governing recognition and enforcement of matrimonial decisions. Nevertheless, it is not applicable to such decisions pronounced in a third country. Given that Brussels IIa Regulation applies only between the Member States, the recognition of a divorce decision delivered in a third country does not fall within the scope of EU law.

In accordance with Article 2, point 4, and Article 21(1) thereof, that regulation is restricted to recognition of decisions delivered by a court of a Member State.

In the case, the order for reference does not contain any element capable of establishing the jurisdiction of the CJEU on the basis of the case-law, since the referring court suggests that Rome III Regulation is applicable to the facts in the main proceedings and merely asserts that 'the President of the Oberlandesgericht München (Higher Regional Court, Munich) held that the divorce's eligibility for recognition [was] governed by Rome III Regulation which also [applied] to private divorces.

In those circumstances, it must be held, on the basis of Article 53(2) of the Rules of Procedure, that it is clear that the Court has no jurisdiction to answer the questions referred by the Oberlandesgericht München (Higher Regional Court, Munich).[147]

2.13. New case before the CJEU on the interpretation of Rome III

In January 2024, in *Case C-61/24 Lindenbaumer DL v PQ*, the German court requested clarification on the interpretation of the criteria for habitual residence in relation to Article 8(a) and (b) of the Rome III Regulation.

The Bundesgerichthof referred the question to the CJEU: which criteria should be used to determine where the spouses are habitually resident within the meaning of Article 8(a) and (b) of the Rome III Regulation?

147 Order of the Court in Case C-281/15. Soha Sahyouni v Raja Mamisch paras. 18-24; 31,33.

In particular:

– does a posting as a diplomat affect or even preclude the assumption of habitual residence in the receiving State,

– must the physical presence of the spouses in a State be of a certain duration before it can be assumed that habitual residence had been established there

– does the establishment of habitual residence require a certain degree of social and family integration in the State in question.

No decision had been reached in the case by the time the manuscript was closed.

3. New European trend: out-of-court divorces

Over the past decade, the laws of an increasing number of EU Member States have made it possible for spouses to request the dissolution of their marriage out of court, before a notary, registrar or other forum that is not considered a court.[148] Member State regulations differ in terms of whether the authority dissolving the marriage must conduct a substantive examination before dissolving the marriage or whether the authority essentially has the function of registering the private law agreement between the parties.[149]

148 See more: Nuria Marchal Escalona: El Divorcio No Judicial en Derecho Internacional Privado. Thomson Reuters Aranzadi, 2022. In this monograph the author analyses the private international law-related problems Spanish notaries face when authorizing a public deed of divorce in cross-border cases. It further deals with the difficulties foreign extrajudicial divorces meet to produce effect in Spain. The study of a per se intricate subject matter becomes even more complex due to the number of legal sources in Spanish private international law in the field. The monograph addresses, in the first place, jurisdiction – international and territorial – to grant a public deed of divorce. At a second stage, it examines the law applicable both to the dissolution of the marriage and to the issues necessarily associated thereto, such as the use of the family home, financial regime of the marriage, or maintenance. Lastly, it deals with the problems foreign non-judicial divorces run into to be effective in Spain. https://eapil.org/2023/02/16/non-judicial-divorce-in-private-international-law/

149 According to Elena Bargelli since the early 21st century many European systems have dejudicialized divorce matters by introducing different types of proceedings involving either

According to Marta Requejo Isidro the tag 'non-judicial divorce' does not refer to a single reality; it rather encompasses a number of ways to getting divorced out of court. The comparison among legal systems allows for the conclusion that the regulation of non-judicial divorce is actually quite diverse, even in neighboring countries. Roughly summarized, three models co-exist currently. In some jurisdictions, the competence for the dissolution of marriage in non-contentious cases is conferred to non-judicial authorities such as civil registrars, notaries or even mayors, in such a way that their intervention has a proper constitutive effect. This would be the case of Spain. In other countries, like France, divorce results from the agreement of the spouses. There, the public authority's role is very limited (Article 229-1st French Civil Code). Finally, the dissolution of the marriage is pronounced by a religious court in Islamic-inspired legal systems, and are considered as 'private divorce'.[150]

Below we present some foreign legislation. These trends in Member States have led to changes in recent years that have brought to light previously unseen problems in the application and interpretation of the law in new areas, which may pose obstacles to international couples wishing to dissolve their marriages.

professionals or administrative authorities or both.This trend not only has changed the relevance traditionally played by spousal status in national family laws; it has also challenged the concepts of "court" and "decision" in EU private international family law and even the rationale behind the general aim of judicial cooperation in civil matters as a keystone of mutual recognition of judgments (art. 81 TFEU). It is not surprising that the dejudicialization trend in these matters has been defined as a "burning point" of Private International Law. In: Elena Bargelli. Reshaping the Boundaries Between ‚Decision' and Party Autonomy. The CJEU on the Extrajudicial Italian Divorce. In: European Papers Vol. 8. 2023.

https://www.europeanpapers.eu/europeanforum/reshaping-boundaries-between-decision-and-party-autonomy#_ftnref2

150 Marta Requejo Isidro: Private International Law of Out-of-Court Divorce. The Spanish Case in a Nutshell. 14 March 2023. https://eapil.org/2023/03/14/private-international-law-of-out-of-court-divorce-the-spanish-case-in-a-nutshell/

One such issue is that of private divorces, known as *out-of-court divorces*.[151] Several Member States of the European Union allow couples to avoid going to court when dissolving their marriage, essentially if the spouses agree to do so. A problem of legal practice may arise when a divorce that has not been granted by a court in one Member State needs to be recognised in another Member State, as well as when decisions on additional matters, e.g. decisions concerning parental responsibility, need to be enforced.

In the vast majority of EU Member States, marriage can only be dissolved by a court, similar to Hungarian law [Civil Code, Section 4:21(1)], i.e. there is no alternative to court proceedings. However, in recent years, the laws of several EU Member States have made it possible for spouses to request the dissolution of their marriage out of court, either before a notary public or another forum.

In the case of private dissolution, the marriage is dissolved not by a court decision but by a private law act, but in most Member States the public authorities usually continue to be involved in private dissolution proceedings, either because the agreement on the dissolution of the marriage can only be concluded before the authorities or because the authorities are required to register it.[152] The solutions in each Member State vary considerably. In some countries, the forum, e.g. the notary, examines its jurisdiction under the Brussels IIa Regulation and makes a decision on that basis, while in other countries the authority in question only has a registration function with regard to the dissolution of the marriage.

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151 The CJEU has previously dealt with the question of what constitutes a non-judicial divorce. In Case C-281/15 between Soha Sahyouni and Raja Mamisch, the CJEU ruled on 12 May 2016 on how to interpret an application for recognition of a decision taken by a religious court in a third country. Although the German court that referred the question to the Court of Justice requested an interpretation of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation), the case concerned the interpretation of Regulation (EU) No 1259/2010. However, as the Court correctly pointed out, it had to interpret a procedure that was excluded from the material scope of the regulation. For more details, see: Wopera Zsuzsa: Az európai családjog gyakorlata [The Practice of European Family Law]. Wolters Kluwer Publisher, Budapest, 2017.

152 See: Malte Kramme: Private Divorce in Light of the Recast of the Brussels IIbis Regulation. In: Zeitschrift für das Privatrecht der Europäischen Union, vol. 18. 2021., 101.

3.1. Certain European models of out-of-court divorces

Since 2014, Italian law has provided two alternative options to avoid going to court. It allows the parties to conclude a negotiation agreement (*convenzione di negociation assistita*) with the assistance of a lawyer. This option is open to married couples who wish to separate or dissolve their marriage by mutual consent, or to terminate the civil legal effects of their marriage, or to modify the conditions of their separation or divorce, even if their children are not yet of legal age, or are of legal age but have a serious disability or are not financially independent. By taking advantage of this option, couples can avoid having to go to court.

If the couple does not have minor children or children who are adults but have serious disabilities or are not financially independent, the couple also has the option of concluding an agreement before the registrar (civil registry office) confirming their separation or divorce or terminating the civil law effects of their marriage or amending the conditions of their separation or divorce.[153]

In Portugal, it is also possible to dissolve a marriage by mutual consent in the registry offices, if the application for dissolution of marriage by mutual consent is accompanied by the agreement on the division of the couple's common property, the use of the common marital home, the maintenance of the dependent spouse and the agreement on the exercise of parental responsibility for the children, or a certificate of the court judgment regulating this, if this has been previously decided by a court. [154]

In France, the law of 18 November 2016 on the modernisation of the judiciary allows, as of 1 January 2017, spouses to resolve the dissolution of their marriage by mutual consent and the related additional issues in an out-of-court procedure, except where it becomes necessary to hear a minor

153 Decree Law No. 132 of 12 September 2014, Section 12. https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto-legge:2014-09-12;132!vig=

154 The substantive legal basis for divorce is contained in Código Civil Decreto-Lei n.º 47344. https://dre.pt/dre/legislacao-consolidada/decreto-lei/1966-34509075 According to statistics, 68.7% of marriages in Portugal are dissolved by mutual consent outside of court before the Conservatória do Registo Civil authority. https://www.expatica.com/pt/living/love/getting-a-divorce-in-portugal-1174558/#overview

child. The parties acting with a legal representative conclude an enforceable divorce agreement, which is registered by a notary. In the procedure, both parties must have a legal representative, where the legal representatives prepare the agreement on the dissolution of marriage, which the parties can sign after a 15-day "withdrawal" period, after which the lawyers countersign the document. The agreement must contain the following: the identification data of the spouses and their lawyers, the unanimous declaration of the spouses on the breakdown of their marriage and its consequences. It must provide for the termination of the community of marital property, if it also affects the property according to the real estate register, this must be recorded in a public document before a notary. The agreement must record that the spouses informed their minor child of the possibility of a hearing in court, but the child did not wish to exercise this right. The document recording the agreement is then registered by a notary, thus ensuring its enforceability. The divorce is terminated on the day of registration with the notary. The notary only verifies compliance with the procedural rules in the procedure and notifies the parties if he or she detects a breach of public order. The notary then issues a certificate enabling the former spouses or their lawyer to register the divorce in the civil registry. In such a simplified procedure, a marriage cannot be dissolved if a child who has sufficient level of understanding requests to be heard in accordance with Article 388-1 of the Civil Code. If the child requests to be heard, the lawyers must submit the case to the court so that the judge can hear the child or arrange for him to be heard. In this case, the court will decide on the divorce and on the additional issues. [155]

In Spain the de-judicialisation of the marital relationship took place in Spain by virtue of Law 15/2015 on Voluntary Jurisdiction. The Act empowers notaries to authorise divorce by mutual consent in both domestic and international cases. To this end, the spouses must draw up a regulatory agreement (Article 87 Civil Code). Besides, some material and procedural requirements must be fulfilled: a Spanish notary cannot issue a public deed of divorce if the settlement agreement is detrimental to one of the spouses, nor where there are non-emancipated minors, or minors with judicially modified capacity,

155 https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033418805

who are dependent on the parents (moreover, children living in the family home and lacking an own income must consent to the measures affecting them). A notary is also prevented from dissolving the marriage if the parties do not appear in person before him. In practice, however, this last requirement has been removed by Resolution of 26 January 2021 of the Dirección General de Seguridad Jurídica y Fe Pública allowing for the authorisation of a notarial deed of divorce with the intervention of a special proxy.[156]

In Latvia, a notary may also dissolve a marriage upon the joint application of the spouses, as regulated by the Notaries Act. A notary shall dissolve a marriage if the spouses have agreed on the divorce, do not have any minor children or joint property, or if they have any minor children or joint property, they have agreed in writing on the custody of the minor child, contact, child support and division of joint property. In Estonia, the registry office or a notary may pronounce a divorce if the spouses agree. The legal consequences of a divorce may also be determined in an agreement between the spouses. If the spouses do not reach an agreement on the circumstances of the divorce, there is no possibility of an out-of-court settlement.[157]

3.2. Case C-646/20 – the first CJEU interpretation of out-of-court divorce

On 15 November 2022, the CJEU handed down its first judgment in a case concerning the interpretation of a decision on divorce outside the courts. In *Case C-646/20 Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht and TB*, the subject matter of the proceedings was whether a divorce obtained in Italy by mutual consent of the spouses before a registrar could be registered in the German marriage register without further recognition proceedings.

156 Marta Requejo Isidro: Private International Law of Out-of-Court Divorce. The Spanish Case in a Nutshell. 14 March 2023. https://eapil.org/2023/03/14/private-international-law-of-out-of-court-divorce-the-spanish-case-in-a-nutshell/

157 Information on out-of-court divorce in individual Member States can be found at:

https://e-justice.europa.eu/45/HU/divorce_and_legal_separation?init=true (point 10)

According to legal literature, out-of-court divorce is also possible in Greece, Romania and Slovenia. See: Malte Kramme: Private Divorce in Light of the Recast of the Brussels IIbis Regulation. In: Zeitschrift für das Privatrecht der Europäischen Union, Volume 18. 2021. 3. 101.

The case essentially centred on the legal classification of the decision taken by the authority dissolving the marriage, furthermore the concept of 'judgment', the recognition in a Member State of the dissolution of a marriage agreed in an agreement between spouses and pronounced by a civil registrar of another Member State and the criterion for determining the existence of a 'judgment'.

The German court asked the CJEU for its opinion that in the light of the concept of 'judgment' referred to in Article 21 of the Brussels IIa Regulation, read in conjunction with Article 2(4) of that regulation, the rules laid down by that regulation for the recognition of a decision granting a divorce are applicable in the case of a divorce resulting from an agreement concluded by spouses and pronounced by a Member State's civil registrar in accordance with the laws of that State. It is therefore necessary to determine whether the concept of 'judgment', within the meaning of those provisions of the Brussels IIa Regulation, must be interpreted as covering only acts issued by a court or an authority exercising public powers and which have the effect of creating a new legal situation or whether it also covers private legal acts stemming from the independent will of the parties, adopted without the intervention of a State authority that has the effect of creating a new legal situation, as is the case with the procedure laid down in Italy in Article 12 of Decree-Law No 132/2014.[158]

According to the referring court the Brussels IIa Regulation is based on the premiss that only a divorce granted by a public authority and which has the effect of creating a new legal situation, guarantees the protection of the 'weaker' spouse against the adverse consequences of divorce, since such an authority is thus able to prevent the divorce by exercising its power of review. The same would not be true where the legal basis of the dissolution of the marriage stems from the independent will of the spouses expressed in a private legal act and the involvement of the public authority is confined to warning, clarification, evidence or advice without any power of review as to the substance.[159]

158 Judgment of the Court in Case C-646/20. Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB para 32.

159 Judgment of the Court in Case C-646/20. Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB para 34.

The referring court asks, in essence, whether Article 2(4) of the Brussels IIa Regulation must be interpreted, in particular for the purpose of the application of Article 21(1) of that regulation, as meaning that a divorce decree drawn up by a civil registrar of a Member State, containing a divorce agreement concluded by the spouses and confirmed by them before that registrar in accordance with the conditions laid down by the legislation of that Member State, constitutes a 'judgment' within the meaning of Article 2(4) of that regulation. It must be recalled that, in accordance with the settled case-law of the Court, it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard not only to the wording of that provision but also to the context of the provision and the objective pursued by the legislation of which it forms part. In view of the fact that no provision of the Brussels IIa Regulation, in particular Article 2(4) thereof, makes express reference to the law of the Member States for the purpose of determining the meaning and scope of the term 'judgment' referred to in, inter alia, both that provision and Article 21 of that regulation, it must be held that that term must be given an autonomous and uniform interpretation in EU law.[160]

As regards the concept of 'judgment' within the meaning of Article 2(4) of the Brussels IIa Regulation, it should be noted that, in matrimonial matters, that term covers 'a divorce ... pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision'. The term 'court' is itself defined, in paragraph 1 of that article, as all the 'authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1'. It should also be noted that, under Article 2(3) of the Brussels IIa Regulation, the term 'Member State' covers all Member States. 46 That interpretation of the concept of 'judgment' cannot be invalidated by the fact that no Member State had yet made any provision in its legislation, at the time of the development and

160 Judgment of the Court in Case C-646/20. Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB paras 39-41.

adoption of the Brussels IIa Regulation, for the option for spouses to divorce through extrajudicial means. That interpretation follows directly from the broad and open definitions of the concepts of 'court' and 'judgment' referred to in Article 2(1) and (4) of that regulation, respectively.[161]

The CJEU pointed out that the EU legislature thus made it clear, with a view to ensuring continuity, that divorce agreements, which have been approved by a judicial or extrajudicial authority following a substantive examination carried out in accordance with national laws and procedures, constitute 'judgments' within the meaning of Article 2(4) of the Brussels IIa Regulation and of the provisions of the Brussels IIb Regulation which replaced it, and that it is precisely that substantive examination which distinguishes those judgments from authentic instruments and agreements, within the meaning of those regulations. Therefore, where a competent extrajudicial authority approves, after an examination as to the substance of the matter, a divorce agreement, it is recognised as a 'judgment', in accordance with Article 21 of the Brussels IIa Regulation and Article 30 of the Brussels IIb Regulation, whereas other divorce agreements which have binding legal effects in the Member State of origin are recognised, as the case may be, as authentic instruments or agreements, in accordance with Article 46 of the Brussels IIa Regulation and Article 65 of the Brussels IIb Regulation.[162]

According to CJEU it is in the light of all those considerations that it must be determined whether, in the present case, a divorce decree issued by a civil registrar of a Member State, containing a divorce agreement concluded by the spouses and confirmed by them before that registrar in accordance with the conditions laid down by the national legislation of that Member State, constitutes a 'judgment', within the meaning of Article 2(4) of the Brussels IIa Regulation, for the purpose of the application of Article 21(1) of that regulation. In that regard, it is apparent from the documents before the Court that the civil registrar is, in Italy, a legally established authority which, under the law of that Member State, has jurisdiction to pronounce the divorce in a legally binding manner by recording, in writing, the divorce agreement

161 Judgment of the Court in Case C-646/20. Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB para 50.

162 Judgment of the Court in Case C-646/20. Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB paras 59-60.

drawn up by the spouses, after having carried out an examination within the meaning of paragraph 54 of the present judgment. Under Article 12 of Decree-Law No 132/2014, a civil registrar must obtain, personally and on two occasions, within at least 30 days, the declarations made by each spouse, as a result of which he or she is satisfied that their consent to divorce is valid, free and informed.[163]

The CJEU pointed out, that registrar is to examine the content of the divorce agreement in the light of the legal provisions in force, in that he or she ensures that that agreement relates only to the dissolution or termination of the civil effects of the marriage, to the exclusion of any transfer of assets, and that the spouses do not have minor children or adult children who do not have legal capacity, have a severe disability or are not financially independent with the result that the agreement does not relate to such children.[164]

The CJEU stated, that it is also apparent from Article 12 of Decree-Law No 132/2014 that a civil registrar is not competent to pronounce a divorce if one or more of the conditions laid down in that provision are not met, in particular if that registrar has doubt as to the free and informed nature of the consent of one of the divorcing spouses, if the agreement concerns the transfer of assets or if the spouses have children other than financially independent adult children.[165]

It follows from this interpretation that the distinguishing criterion between a *decision* and an *authentic instrument* and an *agreement* is whether the forum conducting the proceedings carries out a substantive examination in order to establish whether the legal conditions for divorce are met. If so, then such a Member State decision qualifies as a decision under the Regulation, if not, then as an authentic instrument or an agreement.

163 Judgment of the Court in Case C-646/20. Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB paras 62-64.

164 Judgment of the Court in Case C-646/20. Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB para 65.

165 Judgment of the Court in Case C-646/20. Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB para 66.

3.3. Concept of Brussels IIb Regulation on out-of-court divorces

The Brussels IIb Regulation regulates the issues related to the recognition and enforcement of a marriage dissolved abroad, out of court, and any parental responsibility issues regulated therewith, depending on whether it is a *decision*[166] made on such an issue or an *authentic instrument*[167] or *agreement.*[168]

If the decision to dissolve the marriage and the additional matters are considered to be *a decision* in accordance with the criteria set out in the previous point, – because the court had jurisdiction under the Regulation to hear the matrimonial case and, in this particular case, ancillary matters, and conducted a substantive examination during the proceedings – the general provisions of Chapter IV, Section 1 of the Brussels IIa Regulation apply. The Regulation follows the principle of ipso iure recognition, according to which a decision given in a Member State is to be recognised in the other Member States without any special procedure being required, and, due to the abolition of the exequatur procedure, a decision given in a Member State (e.g. on the settlement of parental responsibility) which is enforceable in that Member State is also enforceable in another Member State without the need for a declaration of enforceability.

Article 38 of the Regulation sets out the grounds on which enforcement of a decision must be refused in matrimonial matters. The recognition of a decision relating to a divorce, legal separation or marriage annulment shall be refused (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked.

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166 For the purposes of this Regulation ‚decision' means a decision of a court of a Member State, including a decree, order or judgment, granting divorce, legal separation, or annulment of a marriage, or concerning matters of parental responsibility. Art. 2. (1)

167 'Authentic instrument' means a document which has been formally drawn up or registered as an authentic instrument in any Member State in the matters falling within the scope of this Regulation and the authenticity of which a) relates to the signature and the content of the instrument; and b) has been established by a public authority or other authority empowered for that purpose. The Member States shall communicate those authorities to the Commission in accordance with Article 103. Art. 2 (2) (2).

168 'Agreement' means, for the purposes of Chapter IV, a document which is not an authentic instrument, has been concluded by the parties in the matters falling within the scope of this Regulation and has been registered by a public authority as communicated to the Commission by a Member State in accordance with Article 103 for that purpose. Art 2 (3)

In my opinion, based on the approach of the Regulation, its recitals,[169] and the above-mentioned case law of the CJEU, the fact that the applicant's marriage was dissolved abroad by a non-judicial authority[170] cannot serve as a basis for applying the public policy clause. The CJEU has explained in numerous cases that in civil judicial cooperation between Member States, public policy may be invoked as a ground for refusal in exceptional cases.

If, in addition to the dissolution of the marriage, issues relating to parental custody were also decided by, for example, a notary or registrar, recognition and enforcement may be refused under Articles 39 and 41 of the Regulation, e.g. on the grounds that the decision was taken without the child, who has the capacity to form his or her own views, being given the opportunity to express those views [Article 39(2)].

If the non-judicial body does not carry out an examination of the merits when deciding on divorce and parental responsibility issues, its decision is considered an authentic instrument or agreement under the Regulation and is subject to the provisions of Chapter IV, Section 3 of the Regulation. According to Article 64 of the Regulation, this section applies in matters of divorce, legal separation and parental responsibility to authentic instruments which have been formally drawn up or registered, and to agreements which have been registered, in a Member State assuming jurisdiction under Chapter II of the Regulation. For example, a notary may only give a decision in

169 See Recital 55.

170 It should be noted that, according to recital 14 of the Regulation, according to the case-law of the Court of Justice, the term ‚court' should be given a broad meaning so as to also cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility. Any agreement approved by the court following an examination of the substance in accordance with national law and procedure should be recognised or enforced as a ‚decision'. Other agreements which acquire binding legal effect in the Member State of origin following the formal intervention of a public authority or other authority as communicated to the Commission by a Member State for that purpose should be given effect in other Member States in accordance with the specific provisions on authentic instruments and agreements in this Regulation. This Regulation should not allow free circulation of mere private agreements. However, agreements which are neither a decision nor an authentic instrument, but have been registered by a public authority competent to do so, should circulate. Such public authorities might include notaries registering agreements, even where they are exercising a liberal profession.

relation to children if he has jurisdiction, for example, on the basis of the habitual residence of the children.

This means that the Regulation only allows for the cross-border movement of authentic instruments and agreements if the authority issuing the authentic instrument or registering the authentic instrument or agreement has jurisdiction under Chapter II of the Regulation.

A further condition under Article 65 is that the authentic instrument or agreement must have binding legal effect in the Member State of the original proceedings.

The question may arise as to what extent it matters for recognition and enforcement whether it is a *decision* or an *authentic instrument/agreement*? Despite the fact that several recitals to the Regulation refer to the equivalence of these two forms of decision, there are fundamental differences in several respects. For example, in the case of authentic instruments and agreements, a certificate to be attached to them may not be issued if there are indications that the authentic instrument or agreement is contrary to the best interests of the child (Article 66(3)). Recognition or enforcement of an authentic instrument or agreement in matters of parental responsibility must be refused is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the best interests of the child (Article 68(2)(a)). These criteria are absent from the Regulation in the case of *decisions*.

It is expected that it will have a serious impact on the application of Hungarian law if a Hungarian court will have to decide, for example, on changing parental custody in cases of extrajudicial divorces abroad. In this case, on what basis and how will the court be able to assess a material change of circumstances under Section 4:170. (1) of the Civil Code, if a foreign authority has not conducted a substantive investigation, its decision does not contain a justification or has not sought the opinion of the child with legal capacity?

4. Selected case law of the CJEU on matrimonial matters

In this sub-section, we highlight a few CJEU judgments that address and interpret issues of particular procedural significance in relation to matrimonial matters under the Brussels IIa Regulation and have not been presented previously. Here, too, we note that the CJEU judgments concern the interpretation of certain articles of the Brussels IIa Regulation, but are also fully applicable to the Brussels IIb Regulation.

4.1. Interpretation of jurisdiction based on the applicant's habitual residence from the perspective of discrimination

On 10 February 2022, the CJEU delivered its judgment in Case C-522/20 OE v VY, which raised a very interesting question.[171] In this case, the referring court sought an answer to the question whether the jurisdiction based on the habitual residence of the applicant (plaintiff) as defined in Article 3(a)(v) and (vi) of the Regulation is contrary whether the Regulation, which sets the minimum period of residence in the Member State concerned at six months or one year in order to be eligible to bring an action, regardless of whether the applicant is a national of that Member State, is contrary to the principle of non-discrimination.

The Austrian court that referred the question pointed out that the distinction made in the fifth and sixth indents of Article 3(1)(a) of the Regulation on the basis of the actual length of residence of the person concerned is based solely on the criterion of nationality. The referring court pointed out that there are persons who were born and raised in a Member State but do not have its nationality, and therefore, in its view, that criterion does not reflect a sufficiently significant difference in terms of the integration of the person concerned and the closeness of his or her ties with the Member State concerned. Consequently, it has doubts as to whether the difference in treatment resulting from the provisions of Regulation is compatible with the principle of non-discrimination on grounds of nationality laid down in Article 18 TFEU.

171 Judgment of the Court in Case C-522/20. OE v VY.

The CJEU pointed out that it is apparent from the Court's case-law that the rules on jurisdiction laid down in Article 3 of Brussels IIa regulation including those laid down in the fifth and sixth indents of paragraph 1(a) of that article, seek to ensure a balance between, on the one hand, the mobility of individuals within the European Union, in particular by protecting the rights of the spouse who, after the marriage has broken down, has left the Member State where the couple had their shared residence and, on the other hand, legal certainty, in particular that of the other spouse, by ensuring that there is a real link between the applicant and the Member State whose courts have jurisdiction to give a ruling on the dissolution of the matrimonial ties concerned. In the first situation, although the nationality of the spouse is not sufficient to determine whether the criteria under the sixth indent of Article 3(1)(a) of Regulation are met, it is, nevertheless, already possible to discern that that spouse has a link with that Member State, by reason of the very fact that he or she is a national of that Member State, and that he or she necessarily has institutional and legal ties with the latter and, as a general rule, cultural, linguistic, social, family or property ties. Therefore, such a link may in itself contribute to establishing the real link required between the applicant and the Member State whose courts exercise such jurisdiction.

In the present case, the EU legislature cannot be criticised for having, in part, introduced, as regards the application of the *forum actoris* rule on jurisdiction, a criterion relating to the nationality of the applicant, in order to make it easier to determine whether he or she has a real link with the Member State whose courts exercise jurisdiction to rule on the dissolution of the matrimonial ties concerned, and making the admissibility of the action for the dissolution of the matrimonial ties of the applicant who is a national of that Member State subject to completion of a prior period of residence which is shorter than that required of an applicant who is not a national of that Member State.[172]

The CJEU concluded, that in the light of all the findings above, the answer to the first question is that the principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, must be interpreted as not precluding a situation in which the jurisdiction of the courts of the

172 Judgment of the Court in Case C-522/20. OE v VY. para 40.

Member State in the territory of which the habitual residence of the applicant is located, as provided for in the sixth indent of Article 3(1)(a) of Brussels IIa Regulation is subject to the applicant being resident for a minimum period immediately before making his or her application which is six months shorter than that provided for in the fifth indent of Article 3(1)(a) of that regulation on the ground that the person concerned is a national of that Member State.[173]

4.2. Persons entitled to bring an action: Case C-294/15 Edyta Mikołajczyk and others

Since the regulation of matrimonial matters by EU law began in 1998, the first opinion of the Advocate General was delivered in May 2016, which takes a position on the validity and invalidity of marriages in matrimonial matters falling within the scope of the regulation. What is interesting about this case is that the action was brought by a person other than the spouses, and moreover after the death of one of the spouses concerned. The judgment in the case was delivered on 13 October 2016 and did not differ in substance from the arguments presented in the Advocate General's opinion.[174] The judgment, which has been frequently cited since then, is also authoritative in terms of the interpretation of the personal and material scope of the Regulation in relation to matrimonial matters.

According to Article 1(1)(a) of the Regulation, cited above, the material scope of the Regulation covers 'divorce, legal separation or marriage annulment', while Article 1(3) of the Regulation specifies the cases to which it does not apply, which do not include proceedings for a declaration of nullity. In the case before the CJEU, Advocate General Wathelet, who submitted the Opinion, noted that a substantive decision on the validity or nullity of a marriage can only be answered after it has been established that the Polish courts seised of the main proceedings had jurisdiction. This question is the subject of the request for a preliminary ruling.

173 Judgment of the Court in Case C-522/20. OE v VY. paras 29,31,42.

174 Judgment of the Court in Case C-294/15. Edyta Mikołajczyk v Marie Louise Czarnecka, Stefan Czarnecki.

According to the Polish and Italian governments, which have submitted observations in the case, proceedings relating to the annulment of a marriage following the death of one of the spouses do not fall within the scope of the Regulation, since, at the time of the bringing of such an action, the marriage to which that action relates no longer exists due to the death of one of the spouses. In support of their position, they referred to point 27 of Professor Borrás' explanatory report[175] on the convention[176] approved by the Council on 28 May 1998. According to this report, 'in matrimonial matters, when determining the criteria for jurisdiction, it is not necessary to take into account cases where the validity of the marriage is to be examined in the context of an application for annulment, if one or both spouses are deceased, as this issue does not fall within the scope of the Convention. Such cases arise mainly in connection with questions referred for a preliminary ruling concerning succession. These are governed by the international instruments applicable in this area (...) or by the internal law of the State, if the latter provides for this possibility.

The Advocate General, contrary to the Polish and Italian arguments, considers that the Regulation must apply to all proceedings for the annulment of a marriage, even where one of the spouses has died, irrespective of the possibility that that action may be linked to a dispute over inheritance, as in the main proceedings.

Contrary to what the Polish and Italian Governments claim, that recital does not mean that Brussels IIa Regulation No 2201/2003 is not applicable to actions for marriage annulment where one or both spouses have died. On the contrary, it provides that, as regards this type of action, the regulation is applicable only to matters concerning the dissolution of the matrimonial ties, not to the property consequences of the marriage, such as succession, which is, moreover, expressly excluded from the scope of the regulation under Article 1(3)(f).[177]

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175 Borrás, Alegría: Explanatory Report on Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters by, Professor of Private International Law, University of Barcelona, OJ 16.07.1998.

176 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters. OJ C 221, 16.07.1998. P 0002-0018.

177 Opinion of Advocate General Melchior Wathelet in Case C-294/15. Edyta Mikołajczyk v Marie Louise Czarnecka, Stefan Czarnecki para 32.

The Commission stressed that the wording of Article 1(1)(a) of the Regulation leaves no doubt that that Regulation applies to an action for annulment of a marriage such as that at issue in the main proceedings. That provision clearly defines the material scope, without any reservation or additional condition. Moreover, actions for annulment following the death of a spouse are not among the cases expressly excluded from its scope by Article 1(3) of the Regulation.

Contrary to the Italian Government's argument, the Advocate General pointed out that although the action for annulment at issue in the main proceedings concerns a marriage that has already been dissolved due to the death of one of the spouses, this does not mean that this action does not fall within the scope of the Regulation. Death terminates the marriage *ex nunc*, and the action for annulment results in its termination *ex tunc*, as is the case under Hungarian law. There may therefore be an interest in the subsequent annulment of the marriage on the grounds that it was terminated by the death of one of the spouses.

Like the Italian Government, the Commission takes the view that it would be contrary to the purpose of Regulation No 2201/2003 to interpret the provisions in issue literally, enabling the Polish courts to establish international jurisdiction to adjudicate on an action by a third party for annulment of a marriage celebrated in France. In its view, it is inconceivable that the EU legislature intended the term 'applicant' to refer to third parties in the context of an action for marriage annulment if they have *locus standi* under national law. According to the Commission, the rules on jurisdiction set out in that regulation are designed to protect the interests of the spouses, not those of third parties who might initiate proceedings of that kind. Although such third parties are entitled to bring those actions, they are bound by the rules on jurisdiction established for the benefit of the spouses.[178]

The Advocate General emphasised, with regard to the arguments based on point 27 of Professor Borrás's explanatory report, that not only that the convention to which it was annexed has never entered into force, but also, as the Commission observes, that Professor Borrás gives no reasons to justify that exclusion. Moreover, as the Commission pointed out, the purpose of the Reg-

178 Opinion of Advocate General Melchior Wathelet in Case C-294/15. Edyta Mikołajczyk v Marie Louise Czarnecka, Stefan Czarnecki para 46.

ulation is to ensure a high level of predictability and legal certainty for EU citizens in international matrimonial matters with regard to jurisdiction and the recognition and enforcement of decisions. Excluding actions for annulment of marriage brought after the death of one of the spouses from the scope of this Regulation would therefore be contrary to its spirit and purpose.[179]

On the basis of the reasons set out by the Advocate General, with which I fully agree, actions for annulment of marriage brought after the death of one of the spouses fall within the scope of the Regulation.[180]

In its judgment delivered on 13 October 2016, the CJEU noted, in relation to the wording of Article 1(1)(a) of the Regulation, that this provision covers, among other things, the annulment of marriages in matters falling within the scope of the Regulation. (1)(a) of the Regulation, the CJEU noted that this provision refers, inter alia, to the annulment of marriage in matters covered by the Regulation and does not distinguish between when such an action was brought in relation to the death of one of the spouses or who is entitled to bring such an action before a court. Therefore, if we consider only the wording of that provision, it would appear that an action for annulment of marriage brought after the death of one of the spouses falls within the scope of the Regulation.[181] The Court recalled that Article 1(3) of the Regulation provides an exhaustive list of matters excluded from its scope. However, an action for annulment of a marriage brought by a third party after the death of one of the spouses is not among the matters excluded from the scope of the Regulation by Article 1(3). Furthermore, although it is true that, according to the referring court, E. Mikołajczyk's interest in the proceedings is linked to the legal status of Zdzisława Czarnecka as heir under the will in the main proceedings, that court makes it clear that the dispute concerns only the annulment of the marriage between Marie Louise Czarnecka and S. Czarnecki and therefore cannot fall within the scope of the exclusion in Article 1(3)(f) of the Regulation concerning mat-

179 Opinion of Advocate General Melchior Wathelet in Case C-294/15. Edyta Mikołajczyk v Marie Louise Czarnecka, Stefan Czarnecki para 29.

180 Opinion of Advocate General Melchior Wathelet in Case C-294/15. Edyta Mikołajczyk v Marie Louise Czarnecka, Stefan Czarnecki paras 22-29.

181 Judgment of the Court in Case C-294/15. Edyta Mikołajczyk v Marie Louise Czarnecka, Stefan Czarnecki para 27.

rimonial property regimes and succession. The objective pursued by the Regulation also supports the interpretation of Article 1(1)(a) of the Regulation that an action for annulment of a marriage brought by a third party after the death of one of the spouses falls within the scope of the Regulation. The Court emphasised that the fact that the action for annulment at issue in the main proceedings concerns a marriage that has already been dissolved due to the death of one of the spouses does not mean that that action is excluded from the scope of the Regulation. It is not impossible that a person may still have an interest in having the marriage annulled even after the death of one of the spouses. Although such an interest must be assessed in the light of the applicable national law, there is no reason to deprive a third party who brings an action for annulment of a marriage after the death of one of the spouses of the benefit of the uniform rules on jurisdiction laid down in the Regulation. The Court therefore agreed with the Advocate General's opinion that Article 1(1)(a) of the Regulation must be interpreted as meaning that an action for annulment of a marriage brought by a third party after the death of one of the spouses falls within the scope of the Regulation.[182]

4.3. Interpretation of the habitual residence of the spouse in Case C-289/20 IB v FA

While, in the case of the jurisdiction provisions governing matters of parental responsibility under the Brussels IIa Regulation, the CJEU interpreted the criteria for determining *the habitual residence of a child* [183] shortly after the Regulation entered into force the CJEU has hardly dealt

182 Based on the judgment of the CJEU in Case C-294/15. Edyta Mikołajczyk v Marie Louise Czarnecka, Stefan Czarnecki, paragraphs 29-37.

183 In its judgment in the case of Applicant A, the CJEU first pointed out that, under Article 8 of the Regulation, the child's habitual residence must be determined on the basis of all the circumstances specific to the case. In addition to the child's physical presence in a Member State, other factors must also be taken into account which indicate that this presence is not merely temporary or occasional and that the child's residence involves a certain degree of integration into the social and family environment. Judgment of the Court in Case C-523/07. 'A'.

with the interpretation of the habitual residence of a spouse[184] in matrimonial matters.[185]

Sixteen years after the Brussels IIa Regulation entered into force, on 25 November 2021, the CJEU delivered its judgment in *Case C-289/20 IB v FA*. In this case, the CJEU had to rule on whether Article 3, which governs matrimonial matters, can be interpreted as meaning that a spouse who has lived in two Member States in parallel for a long period of time may have two habitual residences.

In the case, the husband, who is a French national, initiated the dissolution of his marriage with his wife, who is an Irish national, in 2018 in France, where he had worked for more than 7 years before filing the application; he had a permanent job there. He had a registered place of residence in France, where he lived in his father's apartment, but the family also had a holiday home in the country. However, the husband regularly returned home to Ireland, which had served as the family's common residence since 1999. According to the French court at first instance, takes the view that IB's ties with Ireland do not rule out his having ties with France, where, since 2017, he returned every week to work, and finds, like the court of first instance, that for many years IB had in fact two residences, one, a family residence, in Ireland and the other, for professional reasons, in France, with the result that IB's ties to France are, in the view of the referring court, neither occasional nor circumstantial and that, from 15 May 2017 onwards at least, the centre of IB's professional interests has been in France. In that regard, the referring court states, however, that, although it may be considered that IB had established stable and permanent residence in France at least six months before the proceedings were ini-

184 For more details, see: Wopera Zsuzsa: Az európai családjog gyakorlata [The practice of European family law]. Wolters Kluwer Budapest, 2017. https://mersz.hu/wopera-az-europai-csaladjog-gyakorlata// and Wopera Zsuzsa: A szokásos tartózkodási hely meghatározásának kritériumai határon átnyúló házassági és szülői felelősséggel kapcsolatos ügyekben [Criteria for determining habitual residence in cross-border matrimonial and parental responsibility cases.] In: European Law, 13 (2). 1-10. https://real.mtak.hu/40092/

185 It was in Case C-168/08 Hadadi that the CJEU analysed in detail the connecting factor of the common nationality of the spouses. Apart from this, it only addressed the connecting factors for matrimonial matters in general in Case C-294/15 Mikołajczyk. For details on the Hadadi case, see: Wopera Zsuzsa: A Hadadi ügy. A kettős állampolgárság megítélése a házassági perek joghatósági szabályaiban [The Hadadi case. The assessment of dual nationality in the rules of jurisdiction in matrimonial proceedings.] In: JeMa, 2010/1. http://www.jema.hu/article.php?c=36

tiated before the Tribunal de grande instance de Paris (Regional Court, Paris), he nevertheless did not give up his residence in Ireland, where he maintained family ties and where he regularly stayed for personal reasons. The referring court infers from this that the Irish courts and the French courts both have jurisdiction to rule on the divorce of the spouses concerned.[186]

The French court that referred the question asked the CJEU to interpret whether it is apparent from the factual circumstances that one of the spouses divides his or her time between two Member States, is it permissible to conclude, in accordance with and for the purposes of the application of Article 3 of Brussels IIa Regulation, that he or she is habitually resident in two Member States, such that, if the conditions listed in that article are met in two Member States, the courts of those two States have equal jurisdiction to rule on the divorce?

The CJEU emphasised that since the concept of 'habitual residence' reflects essentially a question of fact, it is for the referring court to verify, on the basis of all the factual circumstances specific to the present case, whether the Member State of the national court seised by IB corresponds to the place where the applicant is habitually resident, within the meaning of the sixth indent of Article 3(1)(a) of Regulation.[187]

The CJEU stated that however, to accept that a spouse may be habitually resident in several Member States at the same time would be liable to undermine legal certainty, by making it more difficult to determine in advance which courts have jurisdiction to rule on the dissolution of matrimonial ties and by making it more difficult for the court seised to determine whether it has jurisdiction. As the Advocate General observed, there would then be a risk that international jurisdiction would ultimately be determined, not by the criterion of 'habitual residence', for the purposes of Article 3(1)(a) of Regulation, but by a criterion based on the mere 'de facto' residence of one or other of the spouses, which would infringe that regulation.[188]

The CJEU pointed out that, as is apparent from the documents before the Court, it is common ground that IB, a national of the Member State of the

186 Judgment of the Court in Case C-289/20. IB v FA paraa 19-20.
187 Judgment of the Court in Case C-289/20. IB v FA para 52.
188 Judgment of the Court in Case C-289/20. IB v FA para 46.

national court seised, satisfied the condition – laid down in the sixth indent of Article 3(1)(a) of Regulation – of having resided in that Member State for at least six months immediately before lodging his application for the dissolution of matrimonial ties. It is also established that, since May 2017, IB has been carrying out, on a stable and permanent basis, a professional activity of indefinite duration in France during the week, and that he stays in an apartment there for the purposes of that professional activity recognising that a spouse may have habitual residence in several Member States at the same time would undermine legal certainty by increasing the difficulties in determining in advance which courts have jurisdiction to dissolve the marriage and by making it more difficult for the court seised to verify its own jurisdiction. The CJEU has therefore made it clear that Article 3(1)(a) of Regulation must be interpreted as meaning that a spouse who divides his or her time between two Member States *may have his or her habitual residence in only one of those Member States*, with the result that only the courts of the Member State in which that habitual residence is situated have jurisdiction to rule on the application for the dissolution of matrimonial ties.[189]

4.4. New interpretation of exclusive nature of jurisdiction and residual jurisdiction

Article 6(1) and (3) of the Regulation, following Article 7 of the Brussels IIa Regulation, contain clear rules on when a court may base its jurisdiction on its own rules of jurisdiction, contrary to the Regulation. On the basis of the interpretation of the paragraphs of Article 6 of the Regulation, it is first necessary to examine Articles 3, 4 and 5 of the Regulation in order to determine whether a court of a Member State has jurisdiction under the Regulation. If no Member State has jurisdiction under the Regulation, Article 6(1) on residual jurisdiction applies directly.[190]

189 Judgment of the Court in Case C-289/20 IB v FA paras. 59-62.

190 See more: Alegría Borrás: What about matrimonial matters? In: Recasting the Brussels IIa Regulation Workshop on 8 November 2016. Compilations of Briefing. Policy Department C: Citizens' Rights and Constitutional Affairs European Union Brussels 2016., 79-80.
https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf

The CJEU clarified in *Case C-68/07 Kerstin Sundelind Lopez and Miguel Enrique Lopez Lizazo* that Article 6 of the Regulation must be interpreted as meaning that, where, in divorce proceedings, the defendant is not habitually resident in any Member State or is not a national of any Member State, the courts of a Member State cannot, for the purposes of determining that application, establish their jurisdiction under their national law if the courts of another Member State have jurisdiction under Article 3 of the Regulation.

The CJEU also confirmed the interpretation that can also be deduced from Article 6(3) of the Regulation in the complex factual case *C-501/20 MPA and LCDNMT*, delivered on 1 August 2022. In this case, the Spanish wife and the Portuguese husband worked for years as contract agents of the European Commission, assigned to the EU Delegation in Togo, where they lived after the couple separated, without returning to their home Member State of the EU of which they were nationals. The spouses were married in August 2010 at the Spanish Embassy in Guinea-Bissau and lived in that State from August 2010 to February 2015, before moving to Togo, where they have lived since their separation in July 2018. In March 2019, the wife brought proceedings in Spain for divorce and maintenance, claiming that they had their habitual residence there. He justified this by claiming that, as an accredited EU employee, he had diplomatic status and that his habitual residence, in accordance with Article 40 of the Spanish Civil Code, was not the place where he worked as an EU contract employee but his place of residence before acquiring that status, namely Spain. That was why he brought the proceedings here. The Court did not share the wife's argument and held that the conditions for habitual residence to establish jurisdiction were not met, since the wife had lived for years without interruption in a third State, Togo. The fact that the applicant did not have habitual residence in the Member State of the court seised was sufficient to hold that the Spanish court had no jurisdiction to grant divorce under Article 3 of the Regulation.

The CJEU has made it clear that where no court of a Member State has jurisdiction to rule on an application for the dissolution of matrimonial ties pursuant to Articles 3 to 5 of Regulation No 2201/2003, Article 7 of that regulation, read in conjunction with Article 6 thereof, must be interpreted as meaning that the fact that the respondent in the main proceedings is a na-

tional of a Member State other than that of the court seised prevents the application of the clause relating to residual jurisdiction laid down in Article 7 to establish the jurisdiction of that court without, however, preventing the courts of the Member State of which the respondent is a national from having jurisdiction to hear such an application pursuant to the latter Member State's national rules on jurisdiction.

Where no court of a Member State has jurisdiction to rule on an application relating to parental responsibility pursuant to Articles 8 to 13 of Regulation, Article 14 of that regulation must be interpreted as meaning that the fact that the respondent in the main proceedings is a national of a Member State other than that of the court seised does not preclude the application of the clause relating to residual jurisdiction laid down in Article 14 of that regulation.[191]

According to Section 101(1) of the Act XXVIII of 2017 on Private International Law, in the case specified in Article 6 of the Regulation, a Hungarian court shall have jurisdiction in matrimonial matters if one of the spouses is a Hungarian national.

4.5. Determination the date of seising of a court

The CJEU has interpreted the date of seising of a court in several cases. In *Case C-507/14 P v M*,[192] several proceedings were initiated in parallel in Spain and Portugal, including one that was currently suspended when the other party initiated the proceedings in another Member State. In this case, in addition to the date of initiation of the proceedings, it was also important that the subject matter of the proceedings initiated was not entirely identical, and the CJEU also took a position on the issue of the diligence of the party initiating the proceedings, which is important for the purposes of fulfilling the provisions of Article 17(a) and (b) of the Regulation.

The Court did not find any fault attributable to the party in the fact that one of the parties requested the suspension of the proceedings after the

191 Based on the Judgment of the Court in Case C-501/20 MPA v LCDNMT, para 96.
192 Order of the Court in Case C-507/14 P v M.

application had been lodged, because it saw a chance for an out-of-court, amicable settlement, and then the proceedings were resumed after this had failed. The Court held that Article 16(1)(a) of Brussels IIa Regulation must be interpreted as meaning that a court is deemed to be seised at the time when the document instituting the proceedings or an equivalent document is lodged with that court, even where the proceedings have in the meantime been stayed at the initiative of the applicant who brought them, without those proceedings having been notified to the defendant or that defendant having had knowledge of them or having intervened in them in any way, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent. The CJEU therefore held that the stay of proceedings in relation to the date on which the court of a given Member State is seised does not suspend the proceedings and lis pendens occurs. According to recital 35 of the Regulation, according to the case-law of the Court of Justice, in the case of *lis pendens*, the date on which a mandatory conciliation procedure was lodged before a national conciliation authority should be considered as the date on which a 'court' is deemed to be seised.

The case presented above is similar in many respects to the *Case C-173/16. M. H and M. H.*, in which the CJEU interpreted Article 16(1)(b) of the Brussels IIa Regulation (Article 17(b) of the Brussels IIb Regulation) on the basis of parallel proceedings in two Member States. One spouse brought proceedings for divorce in the United Kingdom, while the other spouse brought proceedings in Ireland. In these legal systems, proceedings are not initiated by the filing of the document instituting the proceedings, but are deemed to be initiated when the registry of the court concerned issues the summons. The law does not require the summons to be served prior to the commencement of the proceedings. The summons is served on the defendant after it has been issued. In its judgment, the CJEU highlighted that that article contains an autonomous definition of the time when a court is deemed to be seised. The EU legislature adopted a uniform concept of the time when a court is seised, which is determined by the performance of a single act, namely, depending on the procedural system under consideration, the lodging of the document instituting the proceedings or the service of that document, but which nevertheless takes into consideration whether the second act was in

fact subsequently performed. Thus, pursuant to Article 16(1)(a) of Regulation, the time when the court is seised is the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent.[193]

The Court made it clear that, it is apparent from the foregoing considerations that, as the referring court has stated, once it has been established which of the two options in Article 16(1)(a) and (b) of Regulation applies, in accordance with the choice made by the Member State concerned, the time when a court was seised may be objectively established solely on the basis of the time, as provided for in the case of the first option under Article 16(1)(a), when the document instituting the proceedings or an equivalent document was lodged with that court, irrespective of any national procedural rule intended to determine when and in what circumstances proceedings are initiated or are considered to be pending, provided that the applicant has not subsequently failed to comply with the condition relating to service of that document on the respondent. Consequently, the answer to the question referred is that Article 16(1)(a) of Regulation must be interpreted to the effect that the 'time when the document instituting the proceedings or an equivalent document is lodged with the court', within the meaning of that provision, is the time when that document is lodged with the court concerned, even if under national law lodging that document does not in itself immediately initiate proceedings.[194]

In paragraph 30 of its order in *Case C-507/14 P v M*, the CJEU stated that Article 17 of the Regulation contains *an autonomous definition of* the date to be regarded as the date on which the court was seised. Recital 38 of the Regulation also makes it clear that, in the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable decisions will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time

193 Judgment of the Court in Case C-173/16 M. H. v M. H. para 25.
194 Judgment of the Court in Case C-173/16 M. H. v M. H. paras 28-29.

when a case is regarded as pending. For the purposes of this Regulation, that time should be defined *autonomously*, independently of the provisions of national procedural law in the Member States. For Hungarian procedural law, this means that under the Hungarian CPC the date of referral to the court would be the date of submission of the statement of claim, and not the date of service of the claim (CPC Section 179).

Chapter III
Trends in parental responsibility matters

1. Preliminary remarks

Within the framework of this chapter, we present in detail the progressive provisions of the Brussels IIb Regulation concerning the matters of parental responsibility, the relevant European case law and the new European trends concerning parental responsibility. In this chapter, our analysis cannot disregard to present the provisions that are at the heart of the innovations of the Brussels IIb Regulation (hereinafter referred to as the Regulation in this chapter), which prioritize the rights of the child and guarantee their application. In this context, we will also detail the Hungarian regulation.

From the perspective of the CJEU case law to be analyzed below, it should be emphasized that the Regulation is a recast of the Brussels IIa Regulation and not a new regulation, so where it was possible and where case law experiences supported the positive aspects and durability of the regulation, the Regulation adopted the provisions of the Brussels IIa Regulation. In view of this, the case law of the CJEU on the interpretation of articles in the field of parental responsibility and child abduction of the Brussels IIa Regulation serves as a guideline and can be used as a basis for interpreting certain articles of the Regulation.

It should be noted that the Regulation contains significantly longer recitals than the Brussels IIa Regulation, which serve as important explanations for the interpretation of certain articles. The application of the Regulation is also facilitated by the Practice Guide, which confirms that the case law of the CJEU on the Brussels IIa Regulation can be used to apply the Regulation.[195]

195 As we cited earlier, according to Practice Guide the continuity between the Regulation and the previous instruments in the field of jurisdiction and recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility requires continuity in the interpretation, especially as regards the jurisprudence of the Court of Justice of the EU (CJEU), i.e., the previous case-law in this area remains relevant with regard to the Regulation so long as the Regulation does not legislate otherwise. Practice Guide for the Application of the Brussels IIb Regulation. 2023.

https://e-justice.europa.eu/contentPresentation.do?clang=en&idTaxonomy=287 13.

As we discussed in the first chapter, the material scope of the Regulation includes, in addition to *matrimonial matters with cross-border implications*, *matters of parental responsibility*. It should be noted that the Regulation introduced significant innovations primarily in matters of parental responsibility, due to the significant differences between Member States regarding the legal institution of marriage, as discussed in the previous chapter. The title of the Regulation already refers to its scope covering cases of child abduction, and it provides more detailed and complex rules in this field.[196]

2. Material scope

Article 1 of the Regulation defines under the heading "Scope" on the one hand the matters that fall within its scope and, on the other hand, those that do not fall within its scope. The civil matters falling within the scope of the Regulation are specified in Article 1(1), according to which the scope of the Regulation includes matrimonial matters and matters of parental responsibility, among matters of personal status. The scope of the Regulation includes family law matters relating to marriage and parental responsibility with an international element.

Recital (2) of the Regulation also indicates that the scope of the Regulation includes "disputes relating to divorce, legal separation and marriage annulment as well as for disputes about parental responsibility with an international element". Although this phrase is not included in Article 1(1) of the Regulation itself, Article 81(3) TFEU clearly indicates that judicial cooperation under Article 81 concerns "measures concerning family law with cross-border implications".

However, Article 1(3) of the Regulation, which is new compared to the Brussels IIa Regulation, states that the Regulation applies to cases wrongful removal or retention of a child concerns more than one Member State.

196 For details, see: Kurucz Mária, Czellecz Botond: A határon átnyúló szülői felelősségi és jogellenes gyermekelviteli ügyek új európai uniós szabályozása [New European Union regulations on cross-border parental responsibility and unlawful child abduction cases.] In: Family Law, 2022, issue 1, 16-20, issue 2. 1-6.

The Practice Guide also highlights that proceedings involving persons habitually resident in a Member State are typically not covered by the Regulation. However, it may be the case that even in such cases a cross-border element may arise, see in this regard the case of lis pendens and pending proceedings under Article 20 of the Regulation. The Guide also highlights that it is not necessary for all cross-border elements to be exclusively related to an EU Member State in order to determine the jurisdiction of the court.[197]

2.1. Interpretation of the concept of civil matters

Article 1(1) of the Regulation makes it clear that the Regulation applies to civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility.

The first question in the context of the application of the Regulation is when a matter is considered to be civil. This question is important because many decisions concerning parental responsibility may fall under public law under national law because they are taken by an administrative authority, e.g. the guardianship authority.

This issue was clarified shortly after the entry into force of the Brussels IIa Regulation, and the direction has been clear ever since. The CJEU has ruled on several occasions on the question of when a case qualifies as "civil" under Article 1 of the Regulation. In *Case C-435/06 C,* a Finnish court submitted a request for a preliminary ruling to the CJEU in 2006, asking whether the concept of civil matters as defined in the Brussels IIa Regulation includes a decision by a Swedish social welfare committee on the taking into care and placement of a child, which is clearly a matter of public law in both Sweden and Finland. decision by a Swedish social welfare committee to take a child into care and place him or her in foster care, which is clearly governed by public law in both Sweden and Finland. In its judgment, the CJEU stated thet since the term civil matters' is to be interpreted with regard to the objectives of Regulation, if decisions on the taking into care and placement of

197 One such case was, for example, Case C-68/07 Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo, where the husband was a Cuban national. Judgment of the Court in Case C-400/10 PPU J. McB. v L.E.

a child, which in some Member States are governed by public law, were for that reason alone to be excluded from the scope of that regulation, the very purpose of mutual recognition and enforcement of decisions in matters of parental responsibility would clearly be compromised. In that context, it should be noted that it is apparent from Articles 1(1) and 2(1) of Regulation that neither the judicial organisation of the Member States nor the conferral of powers on administrative authorities can affect the scope of that regulation or the interpretation of civil matters. Consequently, the term civil matters' must be interpreted autonomously. Only the uniform application of Regulation in the Member States, which requires that the scope of that regulation be defined by Community law and not by national law, is capable of ensuring that the objectives pursued by that regulation, one of which is equal treatment for all children concerned, are attained.[198]

The CJEU also confirmed the interpretation of civil matters in its judgment in *Case C-523/07 'A'* delivered in 2009. The CJEU specifically emphasised that the concept of "civil matters" in Article 1(1) of the Regulation must be interpreted as meaning that a decision ordering that a child be immediately taken into care and placed outside his original home is covered by the term 'civil matters', for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection. 29

According to the Court, that interpretation is supported by Recital 10 in the preamble to the Regulation, according to which that regulation is not intended to apply to 'public measures of a general nature in matters of education or health.' That exception confirms that the Community legislature did not intend to exclude all measures falling under public law from the scope of the Regulation.[199]

In *Case C-215/15 Gogova*, the CJEU emphasised that the concept of civil matters cannot be interpreted restrictively but must be regarded as an *autonomous* concept *of EU law* covering, inter alia, all applications, measures and decisions relating to parental responsibility. In this regard, the concept of parental responsibility has also been given a broad definition, covering all rights and obligations relating to the person and property of the child.

198 Judgment of the Court in Case C-435/06 C paras 45-47.
199 Judgment of the Court in Case C-523/07 A paras 28-29.

In this respect, the concept of parental responsibility has also been given a broad definition, as it covers all rights and obligations relating to the person and property of a child which are exercised by a natural or legal person by virtue of a decision, legislation or a legally binding agreement. The Court found that an application by one parent requesting the court to replace the other parent's missing consent for their child to travel outside the Member State of residence and for a passport to be issued in the child's name falls within the material scope of Regulation.[200]

The CJEU also confirmed in *Case C-428/15 Child and Family Agency v J. D.* that the rules on jurisdiction in matters of parental responsibility must be interpreted as meaning that it is applicable where a child protection application brought under public law by the competent authority of a Member State concerns the adoption of measures relating to parental responsibility, such as the application at issue in the main proceedings, where it is a necessary consequence of a court of another Member State assuming jurisdiction that an authority of that other Member State thereafter commence proceedings that are separate from those brought in the first Member State, pursuant to its own domestic law and possibly relating to different factual circumstances.[201]

According to the case law of the CJEU, the concept of civil matters must therefore be interpreted *broadly and autonomously*, regardless of whether the decision or group of decisions in question falls under public or private law in the law of a Member State. In addition, the concept of civil matters must also cover applications, measures and decisions relating to the return of a child under the Hague Convention on Child Abduction.

2.2. Matters of parental responsibility

According to Article 1(1)(b) of the Regulation, matters relating to to the attribution, exercise, delegation, restriction or termination of parental responsibility fall within the scope of the Regulation. It should be noted that,

200 Based on the Judgment of the Court in Case C-215/15. Gogova
201 Judgment of the Court in Case C-428/15 Child and Family Agency v J. D. para 38.

unlike Hungarian legal terminology, the Regulation uses the collective term 'parental responsibility', one element of which is parental custody as defined in Hungarian legal terminology.

Article 1(2) *provides an illustrative list* of matters falling within the scope of parental responsibility. These include, for example, rights of custody and rights of access, guardianship, guardianship, curatorship and similar institutions, the designation and functions of any person or body having charge of the person or property of a child, or representing or assisting a child, the placement of a child in institutional or foster care, or measures for the protection of the child relating to the administration, conservation or disposal of the property of a child.

According to the definition in Article 2(2)(7) of the Regulation, *parental responsibility* is *a comprehensive category* means all rights and duties relating to the person or the property of a child which are given to a natural or legal person by a decision, by operation of law or by an agreement having legal effect, including rights of custody and rights of access.

Article 2(2)(9) and (10) of the Regulation define the latter two. According to this, *rights of custody* includes rights and duties relating to the care of the person of a child and in particular the right to determine the place of residence of a child, while *rights of access* means rights of access to a child, including the right to take a child to a place other than his or her habitual residence for a limited period of time.

Article 2(2)(6) of the Regulation defines *the upper age limit for children* under parental custody who are covered by the Regulation. According to this, a child means any person below the age of 18 years.

2.2.1. Extensive interpretation of parental responsibility in CJEU case law

In cases concerning parental responsibility, as in civil cases, the CJEU uses an explicitly broad interpretation and applies the concept in its broadest sense. We touch on this topic in the volume because, following the entry into force of the Brussels IIb Regulation, the CJEU reinterpreted the concept in terms of its scope in its judgment of March 2025 in Case C-395/23.

In its former case law, e.g. in *Case C-400/10 PPU, J. McB. v L.E.*[202] which concerned the cohabiting partners J. McB, of Irish origin, and L.E., a British national, the CJEU interpreted the concept of 'rights of custody'. In this context, the question arose as to whether the removal of a child could be considered unlawful in the absence of a decision establishing rights of custody that could have been infringed by the removal. The CJEU explained that the *concept of custody rights is autonomous* in relation to the law of the Member States, because this legal provision must be interpreted independently and uniformly throughout the Union.

The CJEU confirmed in *Case C-404/14 Marie Matousková*[203] that the issue of parental responsibility under the Regulation must be interpreted as broadly as possible. In October 2015, the CJEU delivered a judgment in a case concerning parental responsibility, in which it further clarified the scope of cases defined in Article 1(b) of the Brussels IIa Regulation. The case was also groundbreaking in that it gave the Court the opportunity to interpret the Brussels IIa Regulation and the 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. The Court found that the Regulation must be interpreted as meaning that the approval of a settlement of succession concluded by a guardian on behalf of minor children is not subject to the provisions of the Regulation. The Court found that the Regulation must be interpreted as meaning that the approval of a settlement of succession concluded by a guardian on behalf of minor children constitutes a measure relating to the exercise of parental responsibility within the meaning of Article 1(1)(b) of the Brussels IIa Regulation and therefore falls within the scope of the Regulation, rather than a measure relating to succession within the meaning of Article 1(3)(f) of the Brussels IIa Regulation (Article 1(4)(f) of the Regulation – author's note), which does not fall within the scope of the Regulation.

202 Judgment of the Court in Case C-400/10 PPU J. McB. v L.E.
203 Based on Judgment of the Court in Case C-404/14 Marie Matoušková.

In Case C-759/18 OF v PG[204] the CJEU held that the concept of 'parental responsibility', as defined in Regulation No 2201/2003, must be interpreted as covering decisions relating to, in particular, custody of the child and the child's place of habitual residence, but it does not include parental contributions towards the costs of the child's care and upbringing, which is covered by the concept of 'maintenance obligations' and comes within the scope of Regulation No 4/2009 (hereinafter referred to as the Maintenance Regulation).

The CJEU confirmed in its judgment in *Joined Cases C-325/18 PPU and C-375/18 PPU between Hampshire County Council and C. E., N. E. and Child and Family Agency v Attorney General*[205] , confirmed that the transfer of custody rights to an administrative authority also falls within the scope of the Regulation, as do decisions placing children under guardianship.

The CJEU also interpreted matters falling within the scope of parental responsibility in *Case C-565/16 Alessandro Saponaro and Kalliopi-Chloi Xylina.*[206]

In this case, parents brought proceedings on behalf of their child seeking authorisation to renounce the inheritence from the maternal grandfather ('the deceased') of that child. The CJEU held that the issue did not fall within the scope of succession law but of parental responsibility and was therefore covered by the Regulation. According to the facts of the case, Alessandro Saponaro and Kalliopi Chloi Xylina, who are Greek nationals, brought proceedings before a Greek court on behalf of their minor child in order to authorisation to renounce the inheritence from the deceased. The deceased died intestate on 10 May 2015. At the date of his death, he was living in Greece. His estate comprises a car and a boat located in that Member State and worth EUR 900 in total. After the deceased was convicted by a criminal court of attempted serious fraud, the heirs feared that they would liable to be the subject of a civil action for damages brought by the victim. In order to avoid this, the father and mother of the child requested permission to renounce the inheritance on behalf of the child who would have inherited.

204 Order of the Court in Case C-759/18 OF v PG.

205 Judgment of the Court in Joined Cases C-325/18 PPU and C-375/18 PPU Hampshire County Council v C.E., N.E. other parties: Child and Family Agency, Attorney General.

206 Judgment of the Court in Case C-565/16 Alessandro Saponaro and Kalliopi-Chloi Xylina.

The parents and their child are habitually resident in Rome. The CJEU found that it is necessary to regard an application lodged by parents in the name of their minor child for authorisation to renounce an inheritance as being *concerned with the status and capacity of the person* and does not fall within the law on succession. It follows that such an application does not fall within the law on succession but within that of parental responsibility and that, therefore, the question referred must be examined having regard to Brussels IIa Regulation,[207] so this issue fell within the scope of parental responsibility.

According to recital 11 of the Regulation, any type of placement of a child in foster care, that is, according to national law and procedure, with one or more individuals, or institutional care, for example in an orphanage or a children's home, in another Member State should fall within the scope of this Regulation unless expressly excluded, which is for example the case for placement with a view to adoption, placement with a parent or, where applicable, with any other close relative as declared by the receiving Member State. As a result, also 'educational placements' ordered by a court or arranged by a competent authority with the agreement of the parents or the child or upon their request following deviant behaviour of the child should be included. Only a placement – be it educational or punitive – ordered or arranged following an act of the child which, if committed by an adult, could amount to a punishable act under national criminal law, regardless of whether in the particular case this could lead to a conviction, should be excluded.

2.2.1.1. The most recent case law concerning the scope: Case C-395/23

The CJEU has already interpreted Article 1(1)(b) and (2)(e) of the Brussels IIb Regulation in *Case C-395/23 E. M. A., E. M. A., M. I. A.* The case also concerned the delimitation of the material scope of the Brussels Ia Regulation.

According to the facts of the case, in 2023, an application was made to the referring Bulgarian court on behalf of two minors of Russian nationality

207 Judgment of the Court in Case C-565/16 Alessandro Saponaro and Kalliopi-Chloi Xylina paras 18-19.

whose habitual residence are in Germany in order to obtain authorisation to sell the shares they own in three immoveable properties in Bulgaria which they inherited following the death of their father.

The referring court essentially sought to determine whether judicial authorisation, sought on behalf of a minor habitually resident in a Member State, to sell the shares owned by that child in immovable property situated in another Member State comes within the scope of the Brussels IIb Regulation or that of the Brussels Ia Regulation.

The CJEU stated that in the present case, as is clear from the order for reference, judicial authorisation, as sought in the main proceedings, is a measure taken having regard to the status and legal capacity of the minor, which aims to protect the best interests of that minor. It is apparent from the Court's case-law that, since the fact that judicial authorisation is necessary is the immediate consequence of that status and of that legal capacity, that authorisation, regardless of the subject matter of the legal act concerned by that authorisation, constitutes a protective measure for the child relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of Article 1(2)(e) of the Brussels IIb Regulation, which relates directly to the legal capacity of a natural person concerned, within the meaning of Article 1(2)(a) of the Brussels Ia Regulation.[208]

The CJEU pointed out that the Brussels IIb Regulation must be interpreted as meaning that judicial authorisation, sought on behalf of a minor habitually resident in a Member State, to sell the shares owned by that minor in immovable property situated in another Member State comes within the scope of parental responsibility, within the meaning of Article 1(1)(b) of that regulation, in that that authorisation concerns protection measures, as referred to in Article 1(2)(e) of that regulation, with the result that, pursuant to Article 7(1) of that regulation, it is the courts of a Member State in which the minor is habitually resident at the time the court is seised which, in principle, have jurisdiction to grant that authorisation.[209]

208 Judgment of the Court in Case C-395/23 E. M. A., E. M. A., M. I. A. para 25
209 Judgment of the Court in Case C-395/23 E. M. A., E. M. A., M. I. A. para 25.

2.2.2. Cases of international child abduction

Article 1, which defines the scope of the Regulation, has been supplemented with reference to unlawful child abduction and retention cases compared to the Brussels IIa Regulation. According to recital 5 of the Regulation, this Regulation covers 'civil matters', which includes civil court proceedings and the resulting decisions as well as authentic instruments and certain extra-judicial agreements in matrimonial matters and matters of parental responsibility. Moreover, the term 'civil matters' should cover applications, measures or decisions as well as authentic instruments and certain extra-judicial agreements concerning the return of a child under the 1980 Hague Convention, which, according to the case-law of the Court of Justice and in line with Article 19 of the 1980 Hague Convention, *are not proceedings on the substance of parental responsibility but closely related to it* and addressed by certain provisions of this Regulation.

3. Jurisdiction in matters of parental responsibility

Building on the positive experience gained in applying the Brussels IIa Regulation, the Regulation has retained the concept of differentiated and flexible rules on jurisdiction, taking into account the best interests of the child, and allowing choice of court in parental responsibility cases with regard to the best interests of the child, which is currently not allowed in matrimonial matters.

3.1. General jurisdiction

According to Article 7 of the Regulation, the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is *habitually resident* in that Member State at the time the court is seised. It is important to note that the child must have their habitual residence in that Member State at the time of the court's seised i.e. at the time the application is filed. If, during the proceedings, the child's habitual residence changes,

for example if he or she moves to another Member State, this does not in itself result in a change of jurisdiction.

The Regulation therefore makes *the child's habitual residence* the main connecting factor for general jurisdiction in matters of parental responsibility. In the vast majority of cases, this *physical and territorial proximity* enables the court seised to take a well-founded decision in matters of parental responsibility.

3.1.1. Interpretation of the child's habitual residence

The CJEU first referred to this in its judgment in *Case C-523/07 Applicant 'A'*, stating that the 'habitual residence' of a child, must be established on the basis of all the circumstances specific to each individual case. In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. The concept of 'habitual residence' must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.[210]

So when defining the concept, we must start from the adjective 'habitual', which implies a certain *degree of permanence, stability and regularity*. We must distinguish between habitual residence and the mere presence of the child. The child's presence in a Member State may also establish a direct connection with a court, but this is of a completely different nature than

210 Judgment of the Court in Case C-523/07 "A" paras 37-39. and 44.

habitual residence. Article 11 of the Regulation – on an ancillary basis – only allows jurisdiction based on presence if the habitual residence cannot be determined, which ceases to apply as soon as it can be established that the habitual residence is in another Member State.

In *Case C-497/10 PPU Barbara Mercredi v Richard Chaffe*, the CJEU provided further aspects for the interpretation of habitual residence and defined it in the case of an infant. The CJEU emphasised that, the social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant. As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of. That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant. the concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which

the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.[211]

Articles 8, 10, 11 and 12 of the Regulation lay down exceptions to the general rule of jurisdiction, conferring jurisdiction under EU law on the courts of a Member State in matters of parental responsibility even where the child *is not* habitually resident in that Member State. The special jurisdiction regime applicable to cases of wrongful removal or retention of a child is governed by Article 9, which is discussed separately.

3.2. Flexible jurisdictional provisions respecting the interests of the child and the parties involved

3.2.1. Continuing jurisdiction in relation to access rights

Article 8 of the Regulation creates a special jurisdiction rule for the holder of access rights. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall retain jurisdiction, for three months following the move, to modify a decision on access rights given in that Member State before the child moved if the person granted access rights by the decision continues to have his or her habitual residence in the Member State of the child's former habitual residence.

Article 8 essentially grants an advantage to the person entitled to rights of access so that, since he or she is unable to exercise those rights as before due to the child's move, he or she is exempt from the difficulties of bringing proceedings in the new Member State and can initiate those proceedings in the Member State of his or her habitual residence.

211 Judgment of the Court in Case C-497/10 Barbara Mercredi v Richard Chaffe paras 53-56.

3.2.2. Choice of court

The Regulation allows for a choice of court agreement in matters of parental responsibility, in situations where it is in the best interests of the child to have the case heard by a court of a Member State in which the child is not habitually resident but with which he or she has a close connection.

Article 10 of the Regulation allows for the application of jurisdiction by agreement if three conditions are met, namely:

- the child *has a substantial connection with that Member State*, for example because it is the child's former habitual residence or because the child is a national of that Member State;
- the parties, as well as any other holder of parental responsibility *have agreed freely upon jurisdiction* at the latest at the time the court is seised,
- the exercise of jurisdiction is in *the best interests* of the *child*.

The latter connecting factor, the *best interests of the child*, may provide grounds for an exception to general jurisdiction. With regard to the first condition, namely a substantive or close connection, the list is illustrative and a close connection may also be based on other criteria.

3.2.3. Transfer of jurisdiction to the courts of another Member State

One of the significant innovations of the Brussels IIa Regulation in matters of parental responsibility was that, in the best interests of the child, Article 15 of the Regulation allowed the court having jurisdiction under the Regulation to transfer jurisdiction to a court which did not have jurisdiction under the Regulation, but with which the child had a close connection and is therefore better suited to hearing the case. Allowing this possibility in an EU norm meant applying the *forum non conveniens* doctrine known from Anglo-Saxon law, which is a good example of the

flexibility of the rules of jurisdiction established in the field of parental responsibility.[212]

If the court requested to accept jurisdiction takes over the case, the court first seised shall decline jurisdiction. It is important to emphasise that the transfer of the case may only take place if, due to the specific circumstances of the case, this is in the best interests of the child, a factor which must be examined by both courts.

The possibility of transferring jurisdiction is also provided for in Article 12 of the Regulation, and Article 13 even regulates the case where a court that does not have jurisdiction requests the court that has jurisdiction to hear the case to transfer jurisdiction.

Jurisdiction may be transferred to a court in another Member State at the request of a party, but also ex officio, with the proceedings being suspended. The court in the other Member State to which the request is made must decide within six weeks whether to accept jurisdiction. The decisive factor here is also the best interests of the child. The child may have *a particular connection* with another Member State if that is the child's former habitual residence, the Member State of the child's nationality or the habitual residence of the person with parental responsibility. However, it may also be a

212 The CJEU has repeatedly dealt in depth with the relationship between the application of the forum non conveniens doctrine and EU law, for example in its judgment in Case C-281/02 Andrew Owusu on the material scope of the Brussels I Regulation. In that case, the Court explained that Article 2 of the Brussels Convention is mandatory in nature and that the principle laid down therein may be derogated from only in the cases expressly provided for in the Convention. It is clear that the drafters of the Convention did not provide for a ground for transfer based on forum non conveniens, although, as is apparent from the report on the Convention published by Schlosser (OJ 1979 C 59, 71, paragraphs 77 and 78). Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention, would not be fully guaranteed if a court having jurisdiction under the Convention were allowed to apply the forum non conveniens objection. According to the preamble to the Brussels Convention, the purpose of the Convention is to strengthen the legal protection of persons residing in the Community by laying down common rules on jurisdiction which ensure that the allocation of jurisdiction between the various national courts hearing a given dispute is clear. However, the application of the forum non conveniens doctrine, which gives the court seised a wide discretion in assessing whether a foreign forum is more appropriate for deciding the merits of a dispute, may affect the Brussels Convention, in particular Article 2 thereof, and thus the principle of legal certainty, which is the basis of that Convention. Judgment of the Court in Case C-281/02 Andrew Owusu v Villa Holidays Bal-Inn Villas N. B. Jackson paras. 37-42.

Member State where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of that property. (Article 12(4))

Article 13 of the Regulation also allows for request for transfer of jurisdiction by a court of a Member State not having jurisdiction. In exceptional circumstances, if a court of a Member State which does not have jurisdiction under the Regulation, but with which the child has a particular connection in accordance with Article 12(4), considers that it is better placed to assess the best interests of the child in the particular case, it may request a transfer of jurisdiction from the court of the Member State of the habitual residence of the child. The requested court must decide on the transfer of jurisdiction within six weeks.

Practice shows that, following the entry into force of the Brussels IIa Regulation in 2005, it took several years for the courts of the Member States to recognise the potential offered by the Regulation. However, there have been cases where the court with jurisdiction has transferred jurisdiction, in some cases after proceedings lasting several years, to a court in the Member State to which one of the parents had unlawfully taken the child. This solution is completely contrary to the regulatory concept of the Brussels IIb Regulation and its 'predecessors', which aim to maintain jurisdiction in cases of wrongful removal or retention.

It should be noted that neither the Brussels IIa Regulation nor the Brussels IIb Regulation contain procedural rules on the procedural framework within which jurisdiction may be transferred under national procedural law. I believe that the most critical issue is what legal remedies are available to a party who disagrees with the transfer of jurisdiction if it is initiated ex officio rather than at the request of the parties. If the transfer of jurisdiction is initiated ex officio and the requested foreign court assumes jurisdiction, the transferring court terminates the proceedings. Although this order may be appealed, even if the appeal is upheld, there is no procedural possibility for the receiving court to 'return' the case to the court of the Member State that transferred jurisdiction. This situation can be seriously harmful to the party initiating proceedings under the jurisdiction rules of the Brussels IIb Regulation and, in my opinion, is also contrary to the principle of fair trial.

In Hungary Act XXIV of 2022 sought to remedy this situation by incorporating Section 473/A into the Code of Civil Procedure. According to this provision, where a case has a foreign dimension and a binding legal act of the European Union or an international convention enables the transfer of jurisdiction to the court of another State, the proceeding court shall, before taking the measures prescribed for such a situation, adopt an order on whether the transfer is permissible; this order may be challenged by a separate appeal. The measures relating to the transfer of jurisdiction shall be taken only after the order becomes final and binding. The court shall terminate the proceeding ex officio after transferring the jurisdiction to the court of another State.

4. Trends in rules on International Child Abduction

4.1. Innovations of the rules on child abduction within the EU

It should be noted that the subject of wrongful removal of children is comprehensively regulated by the Hague Convention on Child Abduction, to which all Member States are parties. At the same time, the drafters of the Regulation considered it essential that the EU norm should effectively regulate cases of unlawful removal and retention of children arising between Member States, by establishing a smoothly functioning procedural mechanism which, according to the legislators' intentions, is capable of deterring parents from unlawfully removing or retaining children between Member States. The Regulation differentiates between the rules of the Convention and applies the Regulation only in cases where the child's habitual residence is in an EU Member State.

The concept of wrongful removal and retention of a child is defined in Article 2(11) of the Regulation. The basic condition for wrongful removal of a child is that such removal or retention is in breach of rights of custody acquired by decision, by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention.

Article 9 of the Regulation creates a *perpetuatio fori* (continuity of the forum) in cases of wrongful removal or retention of a child, which means that

the courts of the Member State in which the child was lawfully habitually resident immediately before the removal or retention retain jurisdiction in matters of parental responsibility. These courts therefore retain their jurisdiction even after the wrongful removal, which can only be transferred to the courts of the Member State where the child is currently (wrongfully) staying if strict conditions are met.

The essence of the rules on child abduction:

1. Where a child is abducted from one Member State ('the Member State of origin') to another Member State ('the Member State of refuge'), the Regulation ensures in principle that the courts of the Member State of origin retain jurisdiction to determine matters of parental responsibility, including on the question of custody, notwithstanding the abduction.
2. Once an application for the return of the child is lodged before a court in the Member State of refuge, this court applies the 1980 Hague Convention as complemented by the Regulation. The courts of the Member State of refuge shall ensure the prompt return of the child.
3. If the court of the Member State of refuge decides to return the child its decision is enforceable in this Member State in accordance with national law. In case of a further abduction to another Member State this decision may be recognized and enforced there, and thus the persons seeking the return do not need to initiate new return proceedings under the 1980 Hague Convention (see Article 2(1)(a), Recital 16 and Article 36(1)(c).
4. If the court of the Member State of refuge decides not to return the child on the grounds set out in point (b) of Article 13(1)170, or on Article 13(2)171, or both, of the 1980 Hague Convention, the court of the Member State of origin still has the right to examine the substance of the rights of custody and thus influence whether the child shall return or not.
5. In such circumstances, if the court of the Member State of origin gives a decision on the substance of rights of custody entailing the return of the child, this decision may override the prior decision refusing the return given in the Member State of refuge. It may further benefit from the special privileged treatment regarding its recognition and enforce-

ment in the Member State of refuge and in any other Member State, thus being called 'privileged decision' (see Recital 52, the title of Section 2 of Chapter IV of the Regulation.

6. Alternatively, the child abduction case may be resolved by mediation or other means of alternative dispute resolution (Article 25), by an agreement of the parties reached in the course of the return proceedings (Articles 9 and 10 and Recital 22) or by the enforcement of a decision on parental responsibility, either pre-existing or rendered after a refusal to return the child under the Hague Convention on Child Abduction which cannot be qualified as privileged. It is up to the interested party to decide which path to choose as all of them are not mutually exclusive.
7. The two courts shall communicate and cooperate.
8. The Child Abduction Central Authorities of the Member State of origin and the Member State of refuge shall co-operate with each other and assist the courts in their tasks.
9. The Child Abduction Central Authorities, the court deciding on the return, as well as the authority competent for enforcement shall act expeditiously.[213]

4.2. Procedure for the return of a child

The rules governing Member State procedures for the return of child are laid down in Chapter III of the Regulation, which provides for *expeditious court proceedings* in Article 24. According to this, a court to which an application for the return of a child is made shall act expeditiously in proceedings on the application, using the most expeditious procedures available under national law. The court of first and second instance shall give its decision no later than six weeks after it is seised. An important objective of the Regulation was to concentrate jurisdiction, ensure strict time limits

213 Practice Guide, 93-94. See more: Kölcsényi Soma: Kommentár a 22. cikkhez [Commentary on Article 22] In: Wopera Zsuzsa (ed.): A Brüsszel IIb rendelet kommentárja [Commentary on the Brussels IIb Regulation]. ORAC Publishing House, Budapest 2023.

for proceedings and limit the number of legal remedies, which Hungary complies with.

In Hungarian law, Chapter III of the PRA contains the rules for return proceedings. The Pesti Központi Kerületi Bíróság (Pest Central District Court) has exclusive jurisdiction to conduct court proceedings for the return of children brought to Hungary. The court shall proceed in civil non-contentious proceedings. During the proceedings, the court will personally hear the applicant and the respondent, and will also ensure that the child is heard, unless the child's sufficient level of understanding does not allow this. The hearing shall be scheduled no later than the 8th day after the application is received by the court, for which the court may, if necessary, request the assistance of the central child abduction authority. (Art 17 (1) of PRA)

4.3. Provisions ensuring the return of the child

According to Soma Kölcsényi, the experienced lawyer specialising in child abduction cases, there are five basic categories of protective measures, known in international legal literature[214] as undertakings or, alternatively, safe harbour provisions.

The *first* and most common type deals with financial and material issues, most often the costs of return, as well as the costs of accommodation and the provision of financial support for the child and the returning parent. The *second* type of undertaking is intended to prevent criminal proceedings from being initiated or continued against the parent who has wrongfully removed the child. This may include an undertaking by the applicant (left-behind) parent not to initiate criminal proceedings or to withdraw any charges already brought, or obtaining assurances from the law enforcement authorities of the State of habitual residence that no criminal proceedings will be brought or that charges will be dropped.[215]

214 Rhona Schuz: The Hague Child Abduction Convention - A Critical Analysis. Hart Publishing, Studies in Private International Law, Bloomsbury Publishing, Oxford. 2013. 291-293.

215 Kölcsényi Soma: Kommentár a 22. cikkhez. [Commentary on Article 22] In: Zsuzsa Wopera (ed.): Commentary on Brussels IIb regulation ORAC Publishing Budapest, 2023., 178-179. In this paper, Soma refers to 'Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980

The *third* category concerns parental rights over the child. If the applicant has been granted parental custody prior to or after the removal of the child in the absence of the parent who wrongfully removed the child, the measure may stipulate that this decision cannot be enforced until the absent parent has been fully heard. In such cases, the undertaking may be essential to restore the status quo and reflects the fact that 'sanctioning orders' in response to child abduction are not usually based on a full analysis of the best interests of the child. The *fourth* type of undertaking aims to protect the returning child and the parent from violence or other forms of abuse by the requesting parent. Such a measure typically also includes a prohibition on the applicant approaching the respondent or the child without the permission of the courts of the State of habitual residence. Finally, the applicant parent may undertake to initiate proceedings concerning the merits of parental responsibility in the State of habitual residence after the child's return.

However, the widespread use of protective measures may be criticised by both the respondent and the applicant. On the one hand, because they do not represent "real" value, because they may not be truly enforceable and thus, in essence, may be, to cite Professor Marilyn Freeman, merely "sophisticated forms of appeasing the judicial conscience". [216]

On the other hand, it is also a matter of debate whether these measures "if applied too widely, by the very fact of child abduction, will provide significant benefits to the parents who have taken the child."[217]

on the Civil Aspects of International Child Abduction (22–28 March 2001)' https://assets.hcch.net/upload/concl28sc4_e.pdf

216 See more: Marilyn Freeman: The Child Perspective in the context of the 1980 Hague Convention, European Union, Brussels 2020.

https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL_IDA(2020)659819_EN.pdf

217 Conclusions of the third meeting of the Special Commission on the review of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction (17-21 March 1997) https://assets.hcch.net/upload/abduc97e.pdf, paragraph 64

4.4. The overriding mechanism

The Brussels IIa Regulation introduced an innovative solution for cases where the court with jurisdiction over the return of the child refuses to return the child, and subsequently the court with jurisdiction over the merits of the case, based on the child's habitual residence, overrides this decision and orders the return of the child. Article 29 of the Brussels IIb Regulation establishes this so-called overriding mechanism, giving privileged status to the decision taken as a result in Article 42 of the Regulation.

The main legal policy reason for the establishment of the overriding mechanism was undoubtedly that it could serve to prevent child abduction cases within the EU. If the parent considering child abduction is informed in good time that he or she can only obtain legal access to the child in another Member State before the court of the Member State of the child's habitual residence before the abduction.

Even if the return of the child is refused in the other Member State, the decision on parental responsibility that determines the child's long-term life can only be taken in the Member State from which the parent would wrongfully remove the child.

The scope of the privileged decisions has not changed substantially compared to the Brussels IIa Regulation. The only substantive change in the Regulation is that the overriding mechanism now only applies to *decisions on the substance of rights of custody*. With this distinction, the Regulation consciously broke with the regulation under the Brussels IIa Regulation and with the way the scope of decisions was interpreted by the CJEU in the *Case C-211/10 Povse case*.[218]

An important difference from the Brussels IIa concept is that the Regulation is limited to cases where the court refuses to return the child under point (b) of Article 13(1) and Article 13(2) of the 1980 Hague Convention, or both.

It should be noted that Articles 10 and 11 of the Brussels IIa Regulation essentially reproduce the basic provisions of the procedural mechanism of the

218 Kurucz Mária: Kommentár a 42. cikkhez. [Commentary on Article 42.] In: Zsuzsa Wopera (ed.): Commentary on Brussels IIb Regulation ORAC Publishing Budapest, 2023.

Hague Convention on Child Abduction. The most significant difference from the procedural rules of the Convention is precisely in Articles 11(7) and (8) of the Brussels IIa Regulation, which allowed the court of the child's habitual residence to enforce the return of the child to the Member State of his or her original residence even after a decision refusing to return the child had been taken.

This is where the system established by the Regulation fundamentally differs from the procedural rules of the Hague Convention: the most striking consequence of this change in approach is that the court of the child's original place of residence may order the return of the child under Article 11(8) of the Brussels IIa Regulation, in other words, it has the 'last word' say in the matter.[219]

It was the undisguised intention of the legislators to limit the possibilities allowed by the Convention for refusing to return a child. One way of doing this is to retain jurisdiction in the Member State of origin and to give that Member State the power to decide whether to accept the reasons for refusing to return the child.[220]

According to the first English-language commentary on the Brussels IIa Regulation, Article 11(8) of the Regulation is one of the most innovative provisions of the Regulation and might have an important impact on the implementation of the Hague Convention among Member States.[221]

The procedural rules introduced under the overriding mechanism clearly go beyond the procedural mechanism established by the Hague Convention. The enforceability of a decision ordering the return of a child, taken after a decision refusing to return the child, enjoys procedural autonomy in order not to delay the return of a child who has been unlawfully removed.

At the same time, this solution may also be problematic from the point of view that if the decision refusing return was well-founded, because it was in the best interests of the child – with particular regard to the possibility laid

219 Based on the commentary of Étienne Pataut: Jurisdiction in cases of child abduction, in: Brussels IIbis Regulation, (Ulrich Magnus, Peter Mankowski eds.) European Commentaries on Private International Law, Sellier European Law Publisher, Munich, 2012., 144.

220 Based on the commentary of Étienne Pataut: Jurisdiction in cases of child abduction, in: Brussels IIbis Regulation, (Ulrich Magnus, Peter Mankowski eds.) European Commentaries on Private International Law, Sellier European Law Publisher, Munich, 2012., 144.

221 Étienne Pataut: Jurisdiction in cases of child abduction, in: Brussels IIbis Regulation, (Ulrich Magnus, Peter Mankowski szerk.) European Commentaries on Private International Law, Sellier European Law Publisher, München, 2012., 144.

down in the third sentence of Article 13 of the Hague Convention – the court of the place of the original proceedings may nevertheless enforce the return of the child to the Member State of his or her former habitual residence. This is the result of a regulatory logic that gives absolute priority to the jurisdiction of the courts of the Member State of the child's former habitual residence in all matters relating to parental responsibility for the child.

According to Thalia Kruger and her co-authors however, the overriding mechanism could be seen not as an extra procedure, but as a prolongation of the jurisdiction of the court of the former habitual residence of the abducted child until this court has had the opportunity to decide on the custody proceedings, which could entail the return of the child. The EU legislator has chosen the second view: the overriding mechanism is an integral part of the custody proceedings on the merits and is not an extra procedure. The court of the State where the child had their habitual residence before the abduction can only contradict the non-return order if it does so in custody proceedings which examine the entire situation.[222] They pointed out, that Regulation has the shortcoming of not being clear when the abduction procedure ends and the custody procedure starts. This overriding mechanism has now been clearly placed in the category of the custody proceedings. In the course of these proceedings, the court should examine thoroughly 'all the circumstances, including, but not limited to, the conduct of the parents'. It is therefore clear that what was sometimes called the 'trumping order' is not just a decision on the return of the child to the State of habitual residence, but a wider decision on the custody, taken as a result of a procedure on the merits of the case. The court of habitual residence always has the discretion not to 'trump' the non-return order. The court of the habitual residence might indeed share the same view of the court of the place to where the child had been taken.[223]

222 Thalia Kruger, Laura Carpaneto, Francesca Maoli, Sara Lembrechts, Tine Van Hof and Giovanni Sciaccaluga: Current-day international child abduction: does Brussels IIb live up to the challenges? In: Journal of private international law 2022, 159-185. https://repository.uantwerpen.be/docman/irua/7440f6/a190389.pdf

223 Thalia Kruger, Laura Carpaneto, Francesca Maoli, Sara Lembrechts, Tine Van Hof and Giovanni Sciaccaluga: Current-day international child abduction: does Brussels IIb live up to the challenges? In: Journal of private international law 2022, 159-185. https://repository.uantwerpen.be/docman/irua/7440f6/a190389.pdf

In my opinion, this approach is fundamentally correct. However, it places an enormous weight on the court of the child's habitual residence prior to the wrongful removal to decide to overturn the responsible decision of a court in another Member State and to issue a decision with the opposite content, which is automatic enforceable. The question is whether this can be considered a sufficiently justifiable approach in a judicial cooperation based on mutual trust between Member States?

5. The importance of child participation

It can be stated that the most visible trend in European family law is the strengthening of the child's right to participate.[224] The importance of the child's views in EU family law stems from Article 11 of the Brussels IIa Regulation, which became a central and defining element of this regulation when the Regulation was recast, enshrining this right of the child in Article 21 of the Brussels IIb Regulation. The right of the child to be heard also plays a major role in return proceedings in wrongful abduction cases, according to Article 26, which refers to Article 21.

In accordance with Article 12 of the CRC and Article 24(1) of the Charter of Fundamental Rights, the Regulation considers it essential to ensure that children are given the opportunity to express their views in proceedings relating to parental responsibility falling within its scope and in return proceedings.[225]

Article 21 of the Regulation differs only minimally from Article 12 of the CRC. Before analysing in detail the content of the child's right to be heard in the Regulation, let us look at the international legal background to this child's right.

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224 See more about the participation's rights: Barry Percy-Smith, Nigel Thomas: A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice. Routlegde, London and New York 2010.; Laura Lundy: Voice is not enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child. In: British Educational Research Journal, 2007. 33(6), 927–942.; Christina McMellon, Kay M. Tisdall: Children and Young People's Participation Rights: Looking Backwards and Moving Forwards In: The International Journal of Children's Rights, 2020.

225 Article 24 (1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

5.1. The child's right to participate in CRC

The CRC is the cornerstone instrument promoting children's rights at the international level. The CRC lays down social, civil, economic, and political standards for the protection of children's rights. It contains a set of rules and principles that guide its signatories to develop a comprehensive and coherent framework reflecting child-specific rights. It also provides for a general definition of a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.[226]

Article 12 of the CRC provides for the child's right to participate. According to the Article 12 of CRC:

"(1) States Parties shall assure to *the child who is capable of forming his or her own views* the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

The Committee in its *General comment of No 12. (2009) on the rights of the child to be heard* found that, Article 12 of the CRC is a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 assures every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.[227]

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226 EU Framework of Law for Children's Rights. Policy Department C - Citizens' Rights and Constitutional Affairs, European Parliament, Brussels 2012., 8.

227 UN Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12. para 1. https://www.refworld.org/docid/4ae562c52.html

The Committee has identified that Article 12 as *one of the four general principles* of the CRC, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.[228]

In its General Comment No. 12, the Committee emphasizes that the legal term "shall assure" in Article 12 leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children.

States parties shall assure the right to be heard to every child "capable of forming his or her own views". This phrase *should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible.* This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity. The Committee emphasizes that Article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him.[229]

The General comment No. 12 also made it clear that the wording of paragraph 2 of Article 12, according to "the child shall be provided the opportunity to be heard *in any judicial and administrative proceedings* affecting the child" must apply *all relevant procedures without any limitation*. It is important to emphasize that the right to be heard applies *both to proceedings* which are

228 UN Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12. para 2. https://www.refworld.org/docid/4ae562c52.html

229 UN Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12. para 19-21. https://www.refworld.org/docid/4ae562c52.html

initiated by the child, as well as to those initiated by others which affect the child, such as parental separation or adoption.[230]

The General comment No. 12 highlights that divorce and separation proceedings among civil proceedings as those in which the child's views is of great importance. It found that in cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. Issues of maintenance for the child as well as custody and access are determined by the judge either at trial or through court directed mediation. Many jurisdictions have included in their laws, with respect to the dissolution of a relationship, a provision that the judge must give paramount consideration to the "best interests of the child". For this reason, all legislation on separation and divorce *has to include the right of the child to be heard* by decision makers and in mediation processes. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views. The Convention, however, anticipates that this matter be determined on a case-by-case basis, since it refers to age and maturity, and for this reason requires an individual assessment of the capacity of the child.[231]

5.2. Charter of Fundamental Rights of the European Union

Article 24 on the 'Rights of the child' is included in Chapter III of the Charter entitled 'Equality'. According to Article 24 (1) of Charter "Children shall have the right to such protection and care as is necessary for their well-being. *They may express their views freely.* Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity." The Article 24 of the Charter – in accordance with Article 12 of the CRC -, ensures the right of the child to express their views

230 UN Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12. para 33. https://www.refworld.org/docid/4ae562c52.html

231 UN Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12. paras 51-52. https://www.refworld.org/docid/4ae562c52.html

freely. Nevertheless, it is worth mentioning, that paragraph 1 of Article 24 of the Charter ensures this right not only for children capable of forming a view, but for all children. The CJEU in Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz*[232] interpreted the provisions of Article 24 (1) of the Charter. [233] The CJEU found that since Brussels IIa Regulation may not

232 The main factual elements of the case from the point of view of hearing the child: Mr Aguirre Zarraga, of Spanish nationality (Father), and Ms Simone Pelz, of German nationality (Mother), were married in 1998 at Spain. In 2000 a daughter was born from the marriage, named Andrea. The family's habitual residence was in Spain. At the end of 2007, the relationship of the spouses broke down, they separated, and thereafter both parents brought divorce proceedings before the Spanish courts. Both Ms Pelz and Mr Zarraga sought *sole rights of custody*. By judgment 12 of May on 2008 of the Spanish Court the Father get sole rights of custody with provisional measure, while the Mother was granted rights of access. Following that judgment, Andrea went to her father's home. Ms Pelz had repeatedly expressed her wish to settle in Germany with her new partner and her daughter, the court considered that the award of custody to the mother would have been contrary to the conclusions of that report of the child psychologist expert. In June 2008 Ms Pelz moved to Germany and settled there. In August 2008, at the end of the summer holidays which she had spent with her mother, Andrea remained with her mother in Germany. Since then, Andrea has not returned to her father in Spain. Since the Spanish court handling the case considered that Andrea had been living with her mother in Germany in breach of its judgment of 12 May 2008, on 15 October 2008 that court handed down a fresh judgment in respect of provisional measures requested by the Father, which included prohibiting Andrea from leaving Spanish territory in the company of her mother, any member of her mother's family, and suspended until final judgment the rights of access previously granted to the Mother. In July 2009 the proceedings in relation to rights of custody were continued before the same court. The court considered that it was necessary both to obtain a fresh expert report and to hear Andrea personally and fixed dates for both in Spain. However, neither Andrea nor her mother attended on those dates. According to the referring court, the Spanish court rejected the Mother's application that she and her daughter be permitted to leave Spanish territory freely after Andrea's hearing. Nor did that court agree to Mother's request that Andrea be heard by video conference. By judgment of 16 December 2009 the Spanish court awarded sole rights of custody in respect of Andrea to her father. Ms Pelz brought before an appeal against this judgment which included the request that Andrea be heard.

Meanwhile, the procedure for the return of child was ongoing in Germany, where the second-instance court found that the Spanish Court did not obtain Andrea's current views and was therefore unable to take account of those views in its judgment of 16 December 2009 concerning rights of custody in respect of that child. According to the German Court's opinion the efforts made by the Spanish court to hear Andrea were inadequate given the importance attached to taking into account the child's views in Article 24(1) of the Charter of Fundamental Rights. The German court initiated the preliminary ruling procedure in the case.

233 See more: Katalin Raffai: The Principle of Mutual Trust Versus the Child's Right to be Heard – Some Observations on the Aguirre Zarraga Case. In: Hungarian Journal of Legal Studies 57, 2016 No 1, 76–86.

be contrary to the Charter the provisions of which give effect to the child's right to be heard, must be interpreted in the light of Article 24 of that Charter. Moreover, recital 19 in the preamble to that regulation states that the *hearing of the child plays an important role in the application of the regulation* and recital 33 emphasises, more generally, that the regulation recognises the fundamental rights and observes the principles of the Charter ensuring, in particular, respect for the fundamental rights of the child as set out in Article 24 of the Charter. In that regard, it must first be observed that it is clear from Article 24 of that Charter and from Brussels IIa Regulation that *those provisions refer not to the hearing of the child, but to the child's having the opportunity to be heard.* First, it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. (...) Accordingly, while remaining a right of the child, *hearing the child cannot constitute an absolute obligation*, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter.[234]

5.3. Right of the child to express views in Article 21 of the Regulation

There are many innovative provisions in Regulation, but if we want to point out one thing *as a general characteristic*, it is the strong child-centered approach of the Regulation, which is much more effective than in the Brussels IIa Regulation. It is considered a big step in the field of the child's right to express views that the Brussels IIb Regulation already establishes the child's right to express views in a separate article, and not only in child abduction cases in return proceedings, but in all matters related to parental

234 Judgment of the Court in Case C-491/10, Joseba Andoni Aguirre Zarraga v Simone Pelz 22. December 2010. paras 60-63.

responsibility. We must mention that Article 26 of Chapter III of the Regulation, which defines the rules related to 'International Child Abduction' refers back to Article 21 of the Regulation.[235]

According to Article 21 "(1) When exercising their jurisdiction, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. 2. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity."

The court must determine whether the child is capable of forming views or not. As we mentioned earlier, the definition of a child capable of forming views should be determined in accordance with the General Comment to Article 12 of the CRC.

It is worth noting that while the CRC mentions "child capable of forming his or her own views" in Article 12, the European Convention on the Exercise of Children's Rights (hereinafter: ECCR) refers to a "child with sufficient level of understanding" in Article 3. These are not the same legal categories. It is even more interesting that, while according to the CRC general comments, the child's capable of forming his or her views is not linked to age, the Explanatory report[236] of the ECCR indicates that the states parties can define an age limit[237] above which a child can be considered to have sufficient level of understanding.[238]

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235 According to Article 26 'Right of the child to express his or her views in return proceedings': Article 21 of this Regulation shall also apply in return proceedings under the 1980 Hague Convention.

236 Explanatory Report to the European Convention on the Exercise of Children's Rights, Strasbourg, 25.I.1996. Council of Europe

237 Cf. Explanatory Report to the European Convention on the Exercise of Children's Rights, Strasbourg, 25.I.1996. Council of Europe para 36.

238 It is worth noting that since 2020, a Committee of Expert set up by the Committee of Ministers of the Council of Europe has been working on the recommendation that defines of rights and the best interest of the child in parental separation and in care proceedings. The

Thalia Kruger and her co-authors mentioned that despite a proposal by the European Parliament's Committee on Petitions to this effect, the Regulation does not set a minimum age for hearing the child. This is in line with the CRC and General Comment No 12 by the Committee on the Rights of the Child. The child is under no obligation to participate in the proceedings; they only have a right to do so. Authorities are thus under an obligation to give the child an opportunity to participate, but the child may refuse to take up that opportunity.[239]

The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group etc.) does not deprive him or her of the right to express his or her views. The views of young children may be expressed by non-verbal forms of communication including play, body language, facial expressions, drawing and painting. The age and maturity are relevant when the court has to consider the weight of the views of the child in the decision-making process. The assessment of the capability of the child does not depend either on his or her request to be heard or on the request of the parents.[240]

overarching principles include the right to be heard otherwise right to participate. According to Draft Recommendation the child should be provided with a genuine and effective opportunity to express his or her views, either directly or otherwise, and be supported in doing so through a range child-friendly mechanisms or procedures. The child's level of understanding and ability to communicate as well as the circumstances of the case should be taken into account. It should be presumed that a child is capable of forming his or her views. Where a child needs assistance or is unable to express his or her views due to age or capability, the child's perspective on relevant matters should, where relevant, be ascertained and conveyed by a specially appointed and skilled representative or professional. See more information about the Committee of Expert on the protection of rights and the best interests of the child in parental separation and in care proceedings (CJ/ENF-ISE): https://www.coe.int/en/web/children/cj/enf-ise

239 Thalia Kruger, Laura Carpaneto, Francesca Maoli, Sara Lembrechts, Tine Van Hof and Giovanni Sciaccaluga: Current-day international child abduction: does Brussels IIb live up to the challenges? In: Journal of private international law 2022, 159-185. https://repository.uantwerpen.be/docman/irua/7440f6/a190389.pdf

240 Practice Guide for the Application of the Brussels IIb Regulation, Luxembourg, Publications Office of the European Union, 2023. https://op.europa.eu/en/publication-detail/-/publication/ff34bda5-ea90-11ed-a05c-01aa75ed71a1 6.3.1.

If the court establishes that the child is capable of forming a view, it must be provided this child with the opportunity to express views freely. The court must record this assessment in the certificate attached to its judgment.[241]

The court having jurisdiction must act in accordance with their national law, including national substantive law and procedural law. According to the Practice Guide, the Regulation does not modify the applicable national law and procedures on the question of how to establish the capability of the child to form his or her own views. Courts in the Member States develop their own techniques and strategies. Some courts do so directly; others commission special experts, such as psychologists, who then report back to the court. Whichever technique is deployed, it is a matter for the court itself to decide whether or not the child is capable of forming his or her own views.[242]

The Regulation should, however, leave the question of who will hear the child and how the child is heard to be determined by national law and procedure of the Member States. Consequently, it should not be the purpose of

241 It should be noted that Hungarian civil law does not define the concept of "child who has sufficient level of understanding". According to the Hungarian judicial practice, "the court must examine the child who has sufficient level of understanding in each case, in which the age is not a determining factor." Hungarian family law regulations do not specify the age at which a child has sufficient understanding. Among the relevant laws only the Section 2 a) of 49/1997. (IX. 10.) Government decree on guardianship authorities and the child protection and guardianship procedure defines that "a child who has sufficient understanding: a minor who, in accordance with his age and intellectual and emotional development, is able – during his hearing – to understand the essential content of the facts and decisions affecting him, to foresee the expected consequences."

The Supreme Court of Hungary reached a similar conclusion in its Directive No. 17 on aspects related to the placement of a child: "A child can be considered to have sufficient understanding, if due to his age and situation, he is able to form his views independently and without influence."

Based on legislation and judicial practice, this is clearly a subjective category. The court must decide whether the child has sufficient understanding and whether an uninfluenced opinion can be expected from him. The legal practitioner can find out about this based on the child's age and the parents' statement, and if necessary, a psychologist can decide on this issue. At the same time Supreme Court of Hungary in its civil decision took the position that the determination of the child who has sufficient understanding is not a professional matter. In this case, the court can take a position without appointing an expert.

Based on the above, it is therefore clear that there is no uniform standard for the judicial determination of the existence of sufficient understanding, the assessment of which is based on a thorough consideration of the circumstances in each case, of which the child's age is an important, but not the only, decisive factor.

242 Practice Guide 6.3.1.

this Regulation to set out whether the child should be heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom or in another place or through other means.[243] National law is also applicable to the provision of information to the child. In general, listening to the child needs to be carried out in a manner which takes account of the child's age and maturity. Assessing the views of all children should be done with expertise and care and in a manner compatible with the age and maturity of the child.[244]

Thalia Kruger and her co-authors emphasized that Regulation's Recital 39 limits this obligation of hearing of the child: 'while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties.' Member State authorities thus do not have to ensure the child's right to be heard if this could not be in the child's best interests. This view might be somewhat paternalistic: it is doubtful whether authorities can decide what is in the best interests of a child without hearing that child at all. In the case that parents reach an agreement, it is sometimes considered unnecessary or contrary to the child's interests to hear them, because agreements between the parents are deemed to be in the best interests of the child. However, this should not be considered a general presupposition. Irrespective of any influence on the outcome of the agreement between parents, engaging with children through a hearing allows adults to gain an understanding of children's experiences of their world and perspectives. The child's right to have an opportunity to participate in the decision concerning their lives implies that their views are meaningful and relevant in a decision about their lives, and thus must still be respected. Moreover, there could be situations in which the child does not agree with the arrangement agreed upon by the parents and they should have a chance to say so. The addition in Recital 39 can thus not be seen as a limitation of the child's right to be heard.[245]

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243 Recital (39) of the Regulation.

244 Practice Guide 6.4.

245 Thalia Kruger, Laura Carpaneto, Francesca Maoli, Sara Lembrechts, Tine Van Hof and Giovanni Sciaccaluga: Current-day international child abduction: does Brussels IIb live up to the challenges? In: Journal of private international law 2022, 159-185. https://repository.uantwerpen.be/docman/irua/7440f6/a190389.pdf

The court must be provided the child has a genuine and effective opportunity to express views; it cannot be formal. With this, the requirement imposed by the CJEU in the previously cited Zarraga case[246] was also included in the normative text of the Article 21 of the Regulation. In this regard, we emphasize that neither in the Zarraga case nor since then has the CJEU explained what can be considered a genuine and effective opportunity. This must be considered by the court in each case.

In the light of the earlier described facts of the Zarraga case, we can conclude what the CJEU meant by genuine and effective opportunity. The Spanish court of first instance ordered the hearing of the child living in Germany, but even before the hearing, it made a decision according to which the child cannot leave the territory of Spain, if there for some reason, e.g. she returns for her hearing. The Spanish court rejected the mother's application that she and her daughter be permitted to leave Spanish territory freely after the child's hearing, or that the child be heard via video conference, which was rejected by the Spanish court. So, it can be concluded that the child was not given a genuine and effective opportunity to express her views, because by appearing in court she would have risked not being able to leave the territory of Spain after her hearing.[247]

The Practice Guide points out that all appropriate legal tools must be made available for the child to express his or her views freely. Thus, the court of the Member State concerned is required to take all measures which are appropriate for the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case. The court should, in so far as possible and always taking into consideration the best interests of the child, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by the Taking of Evidence Regulation.[248] The reference to

246 Judgment of the Court 22 December 2010 in Case C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz points (62)-(66).

247 See more: Zsuzsa Wopera: Child's rights to participate in particular EU legal sources. In: Child-Friendly Justice. The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective (Marta Benyusz, Katarzina Zombory eds.) CEA Publishing 2025., 303-326.

248 Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast).

the Taking of Evidence Regulation in Recital 39 is intended to clarify that the hearing of the child falls within its scope for the purposes of this Regulation, irrespective of the national classification of the hearing as evidence, or another procedural institute. In addition, where it is not possible to hear a child in person, and where the technical means are available, the court might consider holding a hearing through videoconference or by means of any other communication technology[249] unless, on account of the particular circumstances of the case, the use of such technology would not be appropriate for the fair conduct of the proceedings (see Recital 53).[250]

Article 21 does not require the hearing of the child, but the provision of the opportunity to express views: the child is free to decide whether or not to exercise his or her right to express their views. According to the Recital (39) of the Regulation while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties. If, according to the court, the child must be provided with the opportunity to express his opinion, his opinion must also be taken into account.

If the child makes use of the opportunity to express freely his or her views directly or through a representative or an appropriate body, the court of the Member State shall give due weight to these views in accordance with his or her age and maturity. The consideration of the views of the child is of particular importance when assessing his or her best interests (see Recital 39). Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child to influence the determination of their best interests.[251]

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249 See more: Proposal for a Regulation of the European Parliamant and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation [COM/2021/759 final]

250 Practice Guide 6.3.2., 160-161.

251 Zsuzsa Wopera: Child's rights to participate in particular EU legal sources. In: Child-Friendly Justice. The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective (Marta Benyusz, Katarzina Zombory eds.) CEA Publishing 2025., 319-320.

The obligation to give due weight means that it is not sufficient merely to listen to the child; in addition, the views of the child must be taken into consideration. The reasoning of the court in this regard should be part of the decision, in particular when the decision does not follow the child's views. The court must evaluate the views of the child having regard to the particular circumstances of each case and of each individual child, as the level of children's development of the same age may differ.

In any case, the obligation of the court to give due weight to the child's views does not mean that the court is bound by the wishes of the child when deciding on the subject matter, as decisions need to be taken according to the best interests of the child.[252]

The provisions of refusal of recognition and enforcement of decisions show that there are serious consequences for violating the rules of the rights of the child to express views. Article 39 (2) of the Regulation establishes the possibility to refuse recognition, in case the child's right to express views is ignored. According to this provision the recognition of a decision in matters of parental responsibility may be refused if it was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance with Article 21, except where:

– the proceedings only concerned the property of the child and provided that giving such an opportunity was not required in light of the subject matter of the proceedings; or

– there were serious grounds taking into account, in particular, the urgency of the case.

As we mentioned earlier, the ground for refusal related to the child's right to express views can already be found in Article 23(b) of the Brussels IIa Regulation. In order to make this ground for refusal more prominent in the Regulation, it was made an independent ground for refusal named in paragraph 2 of Article 39, if the court did not provide an opportunity for the child, who is capable of forming his or her own views during the procedure.

It should be emphasized that, in contrary to the mandatory grounds for

252 Practice Guide 6.3.3., 161-162.

refusal in Article 39 (1), the refusal of recognition is not mandatory in the case of a violation of the child's right to express views. The court must consider whether the absence of the opportunity to express views affected the substance of the decision to such an extent that the refusal to recognize is justified.

Two exceptions to the duty to hear the child where the absence of hearing may not be a reason for the refusal of recognition and enforcement stem from Article 39(2). The first exception concerns proceedings related only to the property of the child, provided that giving an opportunity to the child to express his or her own views is not required in light of the subject matter of the proceedings. The second exception refers to the existence of serious grounds, to be established taking into account, in particular, the urgency of the situation, (for example when ordering provisional, including protective, measures).[253] Such serious grounds could be given, for instance, where there is imminent danger for the child's physical and psychological integrity or life and any further delay might bear the risk that this danger materializes.[254]

All exceptions to the duty to hear the child should be interpreted very restrictively. In particular, it should be borne in mind that the rights of the child are very significant in relation to proceedings affecting the child, and that generally decisions about the future of a child and his or her relationships with parents and others are crucial for ensuring the best interests of the child.[255]

5.4. Child's rights to express views in return proceedings

Thalia Kruger and her co-autors pointed out that Brussels IIa already referred to the abducted child's right to be heard, but in language that was not entirely conform to that of the CRC. In return cases 'it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.' Under the CRC the right of a child to express their views is dependent

253 Practice Guide 6.5, 164.
254 Recital (57)
255 Practice Guide 6.5, 165.

only on their capability to do so, and not on their age or maturity. Age and maturity become relevant only at the stage when the judge assesses what weight to give to the child's opinions.[256]

The Commission's Proposal for the Recast of Brussels IIa identified the hearing of the child as one of the main shortcomings of the Regulation. Brussels IIb has rectified this shortcoming. A duty to hear the child is envisaged for all proceedings covered by the Regulation, thus including child abduction proceedings. All authorities exercising jurisdiction in proceedings concerning parental responsibility have a duty: i) to ensure that a child capable of forming his or her views is given the genuine, effective opportunity to express those views freely during the procedure and ii) to give due weight to the child's views according to age and maturity. This obligation is reiterated specifically in the chapter on child abduction. The wording is thus more in line with that of the CRC and the Regulation emphasises that the duty should be taken seriously by referring to a 'genuine, effective opportunity'.[257]

In return proceedings the hearing of the child is indeed relevant on two fronts. First, it may reveal the objection of the child to return. Second, it can reveal other reasons why the child should or should not be returned. The child could for instance give an insight into a possible risk that they face if returned, or could reveal information about their habitual residence, or about whether the parent requesting the return was exercising their custody rights. In order to get the full picture and to respect the child's rights under the CRC, it is important that the child always gets the opportunity to be heard, and not only when someone (most often the taking parent) raises

256 Thalia Kruger, Laura Carpaneto, Francesca Maoli, Sara Lembrechts, Tine Van Hof and Giovanni Sciaccaluga: Current-day international child abduction: does Brussels IIb live up to the challenges? In: Journal of private international law 2022, 159-185. https://repository.uantwerpen.be/docman/irua/7440f6/a190389.pdf

257 Ibid. They note that regrettably, Brussels IIb makes no reference to the right of the child to be informed. Research on children involved in international child abductions has shown how children are often unaware of the fact that they can raise an objection to their return, and that children would need to be better informed about the mechanism of the 1980 Hague Convention - as well as of their opportunities to participate and raise their voice in the proceedings.

the ground for refusal that the child objects to return.[258]

5.5. Strengthening the right of child to express views in Hungarian Civil Law

The amendment to the Civil Code and the Child Protection Act, introduced by Act LVII of 2021, which entered into force on 1 August 2022, stipulates that in all actions related to parental custody and in guardianship proceedings/ proceedings in connection with guardianship matters, the court and the guardianship authority shall ensure that the child who has sufficient level of understanding is given the opportunity to make a statement. To this end, the court and the guardianship authorities shall inform the child of the opportunity to make a statement. This amendment strengthens the right of the child to be heard and ensures that the child who is capable of forming his or her own views is given a genuine and effective opportunity to express his or her views. The amendment is in line with above-mentioned provisions of the Brussels IIb Regulation. See more later.

5.6. Guidelines of the Council of Europe on child friendly justice

In the following, we examine the recommendations of the Guidelines of the Council of Europe on child friendly justice adopted in 2010 (hereinafter: Guidelines) and then we examine the question of the child's right to participate in the light of the ECtHR's jurisprudence.[259]

The "Participation" is the first principle in point "A" among the fundamental principles of the Guidelines. According to this provision "The right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or

258 Ibid.

259 See more: Barbara Tóth: Legal Standards Provided by the Council of Europe and the Case-Law of the European Court of Human Rights, In: Benyusz Márta - Zombory Katarzyna (eds.) Child-Friendly Justice. The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective, Miskolc, Budapest (2025) Central European Academic Publishing, 231-267.

affecting them should be respected. This includes giving due weight to the children's views bearing in mind their maturity and *any communication difficulties they may have* in order to make this participation meaningful."

The Guidelines stated that in all proceedings, children should be treated with respect for their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have. Language appropriate to children's age and level of understanding should be used.[260]

The explanatory memorandum of the Guidelines makes it clear that "the reference made to the term the child who is "*capable of forming his or her own views*" should not be seen as a limitation, but rather a duty on the authorities to fully assess the child's capacity as far as possible. Instead of assuming too easily that the child is unable to form an opinion, states should presume that a child has, in fact, this capacity. It is not up to the child to prove this.[261]

The leading case of the ECtHR is the *Sahin v. Germany*,[262] in which the Court made a judgment in 2003. A relevant factual element in the case was that the applicant initiated proceedings in Germany in order to grant a right of access to his daughter born out of wedlock. During the first instance proceedings, the almost 4-year-old child was not heard, because the expert's opinion was taken as the basis for the conflictual relationship between the parents. The court of second instance did not hear the child, who was already 5 years old at the time.

According to the ECtHR the German courts' failure to hear the child reveals an insufficient involvement of the applicant in the access proceedings. It is essential that the competent courts give careful consideration to what is in the best interests of the child after having had direct contact with the

260 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum The Council of Europe Council of Europe Publishing 2010. para 54-56

261 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum The Council of Europe Council of Europe Publishing 2010. para 33 of part explanatory memorandum

262 Case Sahin v Germany (Application no. 30943/96) Judgment 8 July 2003

child. Court found that the substantive violation was the failure to hear the child's own views, and indicated that the national court had to take considerable steps to ensure direct contact with the child and that, by this means only, can the best interests of the child be ascertained.[263]

The ECtHR found that Article 8 of ECHR requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. Nevertheless the Court found as regards the issue of hearing the child in court, the Court observes that as a general rule it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33). It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.[264]

5.7. Two Council of Europe Recommendations to strengthen children's rights and best interests

Since 2020, a Committee of Experts established by the Committee of Ministers of the Council of Europe has been working on a Recommendation defining the rights and best interests of the child in parental separation and care proceedings. Finally, two recommendations were adopted in May 2025, one on parental separation proceedings and the other on care proceedings.[265]

Given that the two recommendations differ in only one point regarding

263 Case Sahin v Germany (Application no. 30943/96) Judgment 8 July 2003 para 47.
264 Case Sahin v Germany Application no. 30943/96) Judgment 8 July 2003 para 47. para 66, 73.
265 Recommendation CM/Rec (2025) 4 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in parental separation proceedings and Recommendation CM/Rec (2025) 5 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in care proceedings.

the part related to hearing of the child, we will use the recommendation regarding the care proceedings as the basis for the analysis.

The overarching principles include the right to be heard otherwise right to participate. According to this principle, "The child should have the right to be informed and consulted, and to express his or her views. Due weight should be given to the child's views in accordance with his or her age and maturity."

It is worth highlighting that the Recommendation, under the title 'Right to be heard' distinguishes between the category of 'children capable of forming views' and the category of 'children who has sufficient level of understanding'. In addition, the regulation also shows that the Recommendation accepts that there may be national regulations that link the child who has sufficient level of understanding to an age. This is unacceptable in the UN CRC system. The Recommendation in this case only stipulates that if national regulations set an age, it should be reviewed regularly.

According to relevant paragraphs of the Recommendation 'The child should be provided with a *genuine and an effective*[266] *opportunity to express his or her views*, either directly or otherwise, and be supported in doing so through a range of child-friendly mechanisms and procedures. The child's level of understanding and ability to communicate, as well as the circumstances of the case, should be taken into account.

The competent authorities should assess on a *case-by-case basis the level of understanding of the child.* Irrespective of age, in particular when a child asks to be heard, a sufficient level of understanding should be presumed.

Where national law prescribes an age limit below which a child is not considered to have a sufficient level of understanding to express his or her views, such an age limit should be subject to periodic review and member States are encouraged to consider removing it.

Where a child needs assistance to express his or her views, this should

266 With these two adjectives, genuine and effective, the Recommendations adopts the terminology of Article 21 of the Brussels IIb Regulation, which is not included in Article 12 of the CRC. For an analysis of the meaning of these two adjectives, see earlier in the Zarraga case.

be provided. Where a child is unable to express his or her views due to age or capability, the child's perspective on relevant matters should, where appropriate, be ascertained and conveyed by a specially appointed and skilled representative or professional.[267]

Due weight should be given to the child's views or, where appropriate, perspective, in accordance with his or her age and level of maturity. It should be made clear to the child that his or her views are an important factor in the decision-making process, but that they do not necessarily determine the decision of the competent authority; the competent authority should take the child's views into account, together with other relevant factors, for the purpose of determining his or her best interests.[268]

Where proceedings concern more than one child, each of them should be provided with the opportunity to express his or her views separately.

The child's views may be ascertained in various ways, such as:

a) through the child being interviewed by the competent authority, subject to appropriate safeguards;

b) through a report based on an interview with the child by a trained professional appointed by the competent authority.

The mechanism or procedure to be used in any particular case should take account of the specific circumstances, the child's age and level of understanding, and his or her ability to communicate; where considered appropriate, the child should be consulted on the manner in which he or she wishes to be heard. Whenever appropriate, the child should be heard directly.

In order to avoid undue stress and discomfort, the hearing of a child's views should take place in a child-friendly environment.

Adequate safeguards should be in place to ensure, as far as possible, that

267 See: Zsuzsa Wopera: The Rights of Participation of Children with Disabilities in Cross-Border Family Matters. In: Hominum Causa Omne Ius Constitutum Sit Collection of Scientific Papers of the Polish-Hungarian Research Platform Volume II edited by Marcin Wielec Paweł Sobczyk Bartłomiej Oręziak. Warszawa 2025., 337-372.

268 Recommendation CM/Rec (2025) 5 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in care proceedings. Part IV. paragraphs 20-25.

the child is able to express himself or herself freely and that any views expressed are not the result of undue influence or duress.

The child should never be subject to cross-examination on the content of his or her views.

For reasons of procedural fairness, a report on the views expressed by the child should be brought to the attention of the parties in accordance with the best interests of the child and by any appropriate means to ensure the child's protection. To this end, preference should be given to a summary report instead of a full report. Where appropriate, the child should be consulted on how his or her views are portrayed in the report.[269]

The Recommendation on parental separation proceedings contains a further provision according to repeated hearings of the child should be avoided wherever possible, except where they are in the child's best interests.[270]

Explanatory memoranda aid the interpretation of the Recommendation. Accompanied by detailed Explanatory Memoranda, these Recommendations provide national authorities with guidance to take into account all circumstances that may be relevant when assessing a child's best interests in proceedings relating to parental separation or care. They also ensure that the substantial and procedural rights of children affected by such proceedings, including the right to be informed and to be heard, are fully implemented, and the principles of rule of law, non-discrimination and timeliness of proceedings are respected.[271]

6. The main innovations of the Brussels IIb Regulation concerning enforcement

269 Recommendation CM/Rec (2025) 5 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in care proceedings. Part IV. paragraphs 26-30.

270 Recommendation CM/Rec (2025) 4 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in parental separation proceedings care proceedings. Part IV. paragraph 30.

271 https://www.coe.int/en/web/portal/-/new-council-of-europe-recommendations-on-protecting-rights-of-children-in-parental-separation-and-care-proceedings

It is well known that the number of international families in the EU is constantly growing, and with it, naturally, the number of cross-border family law disputes. The importance of uniform EU regulation of these disputes is further enhanced by the fact that a judgment or settlement in a family law case that originally had no international element falls within the scope of EU law if, for example, the parent exercising parental custody moves abroad with the child and it becomes necessary to recognise or enforce a decision previously made in Hungary regulating custody rights. Therefore, as we shall see, the provisions analysed below go far beyond the cross-border family law disputes.

Within the framework of this section we primarily analyse these specific provisions facilitating child-centered enforcement in Act LIII of 1994 on Judicial Enforcement (hereinafter: JEA), Act CXXX of 2016 on Civil Procedure (hereinafter: CPC) and Act CXVIII of 2017 on the Rules Applicable to Non-Contentious Civil Proceedings and Certain Non-Contentious Court Proceedings (hereinafter: Non-contentious Act).

6.1. General and privileged methods of enforcement of decisions concerning parental responsibility

Among the most important innovations of the Regulation applicable to matters of parental responsibility,[272] it is important to note that it enforces children's rights much more strongly[273] than its ancestor.[274] This approach can be seen in the central and clear regulation of the child's right to express his or her views[275] as well as in the provisions reflecting the conceptual

272 The Regulation uses the concept of parental responsibility, which includes parental custody and rights of access in accordance with Hungarian legal terminology. Regarding the material scope of the Regulation: see: Wopera Zsuzsa (ed.): A Brüsszel IIb rendelet kommentárja [Commentary on the Brussels IIb Regulation] ORAC Publishing House, Budapest 2023.

273 For more details, see: Katonáné Pehr Erika: A gyermek jogainak érvényesülése a jogellenes külföldre viteli jogvitákban, különös figyelemmel a Brüsszel IIb rendelet megváltozott jogi környezetére [The enforcement of children's rights in disputes concerning wrongful removal abroad, with particular regard to the changed legal environment of the Brussels IIb Regulation] In: Iustum Aequum Salutare 2023/3. 7-22.

274 Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. The so-called Brussels IIa Regulation, recast as the Brussels II Regulation.

275 See Article 21 cited above and Article 26 referring to it.

change introduced in the suspension and refusal of enforcement of decisions, authentic instruments and agreements in matters of parental responsibility.

It should be noted that, after several decades, the exequatur procedure has been abolished in matters of parental responsibility, with regard to all decisions on parental responsibility, while maintaining the special nature of certain privileged decisions. The Regulation also introduces a significant minimum level of harmonisation in the area of enforcement. Article 56 of the Regulation, which will be analysed in detail later, for example, partially harmonises the enforcement law of Member States by introducing uniform provisions on the suspension of enforcement.

Chapter IV of the Regulation contains provisions on recognition and enforcement, first summarising the general provisions on recognition and enforcement and establishing the principle of *ipso iure* recognition [Article 30(1)]. Article 34 (1) abolishes the exequatur procedure, stating that 'A decision in matters of parental responsibility given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.' It follows from the cited provision that the only condition for enforceability is that the decision be enforceable in the Member State in which it was taken. The abolition of the exequatur procedure in Hungarian practice means that, in order to enforce a decision on parental responsibility made in an EU Member State, an enforcement order may be requested in Hungary without any intermediate proceedings.[276]

The abolition of the declaration of enforceability procedure does not mean that the enforcement of a decision in a parental responsibility case cannot be refused, because Article 41 of the Regulation provides for this possibility in all cases where it is established that one of the grounds for

276 Pursuant to Section 16(1)(p) of the Judicial Enforcement Act an enforcement order shall be issued p*)* with the exception of decisions on contact, in matters of matrimonial and parental responsibility, on jurisdiction, the recognition and enforcement of decisions, and on the wrongful removal of children Council Regulation (EU) 2019/1111 of 25 June 2019, based on a foreign decision certified in accordance with Articles 36 or 47 thereof, the court of first instance operating at the seat of the court of the place of habitual residence of the child, in Budapest, the Buda Central District Court.

refusal of recognition[277] set out in Article 39 applies.[278] The Regulation refers back to the grounds for refusal of recognition as general grounds for refusal of enforcement. These may include grounds such as public policy,[279] or a breach of the requirements of fair procedure as default of apperarance by the defendant. In addition, Article 39(2) of the Regulation specifically mentions the violation of the child's right to be heard as a ground for refusing recognition and thus enforcement of the decision.[280]

The Brussels IIb Regulation has a separate subchapter on the recognition and enforcement of so-called privileged decisions, in which cases – with the exception of the grounds set out in Article 56 of the Regulation – no grounds for refusal of enforcement may be invoked, so that in essence we can speak of automatic enforcement in these cases. Such privileged decisions include, for example, decisions granting rights of access or decisions taken as a re-

277 Recital (55) of Regulation emphasizes that "The recognition and enforcement of decisions, authentic instruments and agreements given in a Member State should be based on the principle of mutual trust. Therefore the grounds for non-recognition should be kept to the minimum in the light of the underlying aim of this Regulation which is to facilitate recognition and enforcement and to effectively protect the best interests of the child."

278 For more details, see: Kurucz Mária: Kommentár a 39. cikkhez [Commentary on Article 39] In: Zsuzsa Wopera (ed.): A Brüsszel IIb rendelet kommentárja [Commentary on the Brussels IIb Regulation] ORAC Publishing House, Budapest 2023.

279 In Case C-455/15 PPU between P and Q, the CJEU clarified, in relation to the application of the public policy clause in Article 23(a) of the Brussels IIa Regulation, that while it is not for the Court to define the content of the public policy of a Member State, it is none the less required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of declining to recognise a judgment delivered in another Member State (see, by analogy, judgment in Diageo Brands, C-681/13, EU:C:2015:471, paragraph 42).

The Court stated that recourse to the public policy rule in Article 23(a) of that regulation should thus come into consideration only where, taking into account the best interests of the child, recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, in that it would infringe a fundamental principle. In order to comply with the prohibition laid down in Article 26 of the regulation of any review of the substance of a judgment given in another Member State, the infringement would have to constitute a manifest breach, having regard to the best interests of the child, of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order. (see, by analogy, paragraph 44 of the judgment in C-681/13. case Diageo Brands). C-455/15. PPU. P and Q, recitals 37-39.

280 See more: Wopera Zsuzsa: Szülői felügyeletet érintő perek – új utakon [Parental custody cases – new paths]. In: Balázs Bodzási (ed.): Jogászegyleti Értekezések, Magyar Jogász Egylet, Budapest, 2022., 384-395.https://jogaszegylet.hu/wp-content/uploads/2022/08/jogasz-egylet-2022.pdf

sult of the so-called 'overriding mechanism'[281] under the Regulation.[282]

6.2. Suspension and refusal of enforcement on the grounds of the child's best interests

One of the innovations of the Regulation, which considers the best interests of the child to be primary consideration, is Article 56(4) and (6). Article 56 sets out the grounds for suspending and refusing enforcement in cases where an enforceable decision on parental responsibility exists under the Regulation, but the child's physical and psychological well-being overrides the principle of the primacy of enforcement.

Of course, there are precedents for refusing enforcement in cross-border enforcement cases on the grounds of the child's physical or mental health, since in proceedings concerning unlawful child abduction and retention, Article 13(b) [283] of the Hague Child Abduction Convention[284]provides for the possibility of refusing to return the child.[285] Based on the practice of the Convention, the following may cause physical or psychological harm or be an intolerable situation for the child physical, sexual or other abuse of the child, separation of the child from the parent who took him or her away, separation of the child from his or her siblings, or psychological or other health, educational or economic problems relating to the child in the State

281 In connection with the overriding mechanism, see: Kölcsényi Soma: Kommentár a 29. cikkhez [Commentary on Article 29.] In: Wopera Zsuzsa (ed.): A Brüsszel IIb rendelet kommentárja [Commentary on the Brussels IIb Regulation] ORAC Publishing House, Budapest 2023., 217-220.

282 For more on this, see: Mária Kurucz: Kommentár a 42. cikkhez (Commentary on Article 42.) In: Zsuzsa Wopera (ed.): A Brüsszel IIb rendelet kommentárja [Commentary on the Brussels IIb Regulation] ORAC Publishing House, Budapest 2023., 254-257.

283 The judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that (...) *b)* there is a *grave risk that his or her return would expose the child to physical or psychological harm* or otherwise place the child in an intolerable situation.

284 Hague Convention on the Civil Aspects of International Child Abduction, done at Hague on 25 October 1980.

285 For more information, see: Várai-Jeges Adrienn: Kommentár a 27. cikkhez [Commentary on Article 27]. In: Zsuzsa Wopera (ed.): A Brüsszel IIb rendelet kommentárja (Commentary on the Brussels IIb Regulation) ORAC Publishing House, Budapest 2023., 196-214.

of his or her habitual residence.[286]

In order to strengthen the child-centered approach, Article 56(4) of the Regulation introduces a new ground for suspension of a decision, which allows, in exceptional cases, the authority competent for enforcement or the court may, upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned or of any interested party acting in the best interests of the child, suspend the enforcement proceedings if enforcement would expose the child to a grave risk of physical or psychological harm *due to temporary impediments* which have arisen after the decision was given, or by virtue of any other significant change of circumstances. Enforcement shall be resumed as soon as the grave risk of physical or psychological harm ceases to exist.

It is important to emphasise that this ground must be invoked at the request of the person against whom enforcement is sought, i.e. at the request of the person liable or, where applicable, at the request of the child concerned or any interested party acting in the best interests of the child.

According to the Practice Guide[287] to the Regulation, "the temporary impediments exposing the child to a grave risk of physical or psychological harm may stem among others from a situation of serious illness of the person to whom the child is to be handed over or imprisonment of that person or it may stem from a situation where the child is seriously ill and in hospital. The authority competent for enforcement or the court must assess if this impediment may cause grave risk to the child in this particular case. The separation of the child from the parent, who has to hand over the child, or the anxiety of the child, typical during such enforcement, *should not be considered in itself as an impediment exposing the child to a grave risk of physical or psychological harm and cannot justify the suspension of the enforcement proceedings*."[288]

The significant change of circumstances is illustrated in Recital 69 of Reg-

286 Várai-Jeges Adrienn: Kommentár a 27. cikkhez. [Commentary on Article 27.] In: Zsuzsa Wopera (ed.): A Brüsszel IIb rendelet kommentárja [Commentary on the Brussels IIb Regulation] ORAC Publishing House, Budapest 2023., 203.

287 Practice guide for the application of the Brussels IIb Regulation. Luxembourg: Publications Office of the European Union, 2023.

288 Practice guide for the application of the Brussels IIb Regulation. Luxembourg: Publications Office of the European Union, 2023., 136.

ulation with one example - manifest objection of the child voiced only after the decision was given which is so strong that, if disregarded, it would amount to a grave risk of physical or psychological harm to the child. This example clearly shows that the significant change of circumstances must have arisen *after the decision subject to enforcement* has been given. Another example could be a change of circumstances where the child threatens to commit suicide or self-harm if the decision would be enforced.[289]

If the serious risk of physical or psychological harm ceases to exist, the suspension of enforcement must be lifted and enforcement must continue. Thus, in the above examples, enforcement must continue after the child has recovered from illness or served their prison sentence. Similarly, enforcement must also be resumed if the child's protest, which was the reason for the suspension of enforcement, ceases to exist.

According to Recital 69 of the Regulation, enforcement should be resumed as soon as the grave risk of physical or psychological harm ceases to exist. If it continues to exist, however, before refusing enforcement any appropriate steps should be taken in accordance with national law and procedure including, where appropriate, with the assistance of other relevant professionals, such as social workers or child psychologists, to try to ensure implementation of the decision. In particular, the authority competent for enforcement or the court should, in accordance with national law and procedure, try to overcome any impediments created by a change of circumstances, such as, for example, manifest objection of the child voiced only after the decision was given which is so strong that, if disregarded, it would amount to a grave risk of physical or psychological harm for the child.

It is important to note that Article 56 of the Regulation introduces *uniform grounds for suspension of enforcement*, with the aim of harmonising the law of the Member States in this area. The suspension of enforcement proceedings under Article 56(4) applies to all types of decisions, including *specific decisions* under Article 42, as well as authentic instruments or agreements.

Article 56(4) of the Regulation is closely linked to Article 56(6), which allows the competent authority to refuse enforcement if *the* enforcement of

289 Practice guide for the application of the Brussels IIb Regulation. Luxembourg: Publications Office of the European Union, 2023., 136.

the decision would expose the child to a risk of serious physical or psychological harm.

It should be noted that refusal of enforcement can only take place upon application. However, before refusing the enforcement under Article 56(6), the authority competent for enforcement or the court shall take appropriate steps to facilitate enforcement in accordance with national law and procedure and the best interests of the child. The implementation of the decision may be ensured with the assistance of relevant professionals, such as social workers or child psychologists. In particular, the authority competent for enforcement or the court should, in accordance with national law and procedure, try to overcome any impediments created by the change of circumstances (see Recital 69). [290]

The provision cited represents a fundamental change in approach compared to the position taken by the CJEU in Case C-211/10 PPU Doris Povse v Mauro Alpago[291] interpreting the Brussels IIa Regulation, as it allows the authorities of the Member State enforcing the decision to assess the impact of the change in circumstances on the child , which previously only the court of the Member State having jurisdiction over the merits of the case, i.e. the court of the Member State where the original proceedings took place was entitled to do.

6.3. Child-centered innovations in Hungarian enforcement law

In Hungarian law, Act LXII of 2021 on international judicial cooperation in matters of parental responsibility (hereinafter: PRA) adapted certain provisions of relevant Hungarian legislation to the provisions of the Brussels IIb Regulation analyzed above, and in its spirit and expanding on it, established rules concerning forward-looking implementation.

Pursuant to Section 48(9) of the JEA, if necessary, *the court enforcing the*

290 Practice guide for the application of the Brussels IIb Regulation. Luxembourg: Publications Office of the European Union, 2023., 147-148.

291 For details, see: Wopera Zsuzsa: Az európai családjog gyakorlata [The Practice of European Family Law] Wolters Kluwer Publishing, 2017.

decision shall decide on the suspension *of the enforcement* of a decision, public document or agreement concerning parental custody pursuant to Article 56(4) of the Regulation. The court enforcing the decision shall also decide on the enforcement of foreign decisions *not covered by the* Brussels IIb Regulation or a settlement concluded abroad, if enforcement would entail a serious risk of physical or psychological harm to the child due to temporary impediments which have arisen after the decision or by virtue of any other significant change of circumstances. The court shall seek the opinion of the guardianship authority on the grounds for the suspension. If the deadline is missed, or if the reason for the suspension ceases to exist, enforcement shall be continued as a matter of priority.

Given that the material scope of the Brussels IIb Regulation also covers decisions on right of access (contact), Section 22/L of the Non-contentious Act shall apply to the suspension of enforcement in such cases.

This means that in proceedings initiated after 1 August 2022, it will be possible to suspend the enforcement of foreign decisions, public documents, etc. if it would entail a serious risk of physical or psychological harm to the child, a possibility which the Judicial EA extends to decisions outside the EU.

An essential element of this provision is, that only temporary impediments or circumstances arising after the decision to be enforced has been made, or a significant change in the circumstances after the decision has been made, may serve as grounds for suspending enforcement, and only if they entail a serious risk of physical or psychological harm to the child affected by the enforcement.

It should be emphasised that it is the task of the court enforcing the decision or the court dealing with the enforcement of contact to identify 'serious risks', primarily on the basis of the statements and evidence presented by the party requesting the suspension.[292]

The JEA – in line with the provision in Article 56(6) of the Brussels IIb Regulation allowing for refusal of enforcement – amends the rules on *the withdrawal of the enforcement order* in Section 211 of the JEA. Accordingly, the

292 For details, see: Czellecz Botond: Kommentár az 56. cikkhez [Commentary on Article 56] In: Wopera Zsuzsa (ed.): Kommentár a Brüsszel IIb rendelethez [Commentary on the Brussels IIb Regulation] ORAC Publishing House, Budapest 2023., 285-287.

court shall revoke an enforcement order issued on the basis of a foreign decision on parental custody, a foreign public document, or a foreign settlement or agreement if

a) upon the request of the obligated party, it finds that the conditions for refusal of enforcement under Article 56(6) of the Brussels IIb Regulation are met, or

b) upon request by the obligated party, it is determined that the enforcement of a decision not covered by the Brussels IIb Regulation would pose a serious risk of physical or psychological harm to the child due to obstacles that have arisen since the decision was made or due to a significant change in circumstances.

If it is justified to terminate the proceedings for the enforcement of a foreign decision, foreign public document, foreign settlement or agreement on contact, the court shall proceed in accordance with Section 22/L of the Non-contentious Act.

In order to ensure that the best interests of the child are upheld, a highly forward-looking amendment has been made to the Pp., which, in connection with the entry into force of the Brussels IIb Regulation, expands the range of situations giving rise to proceedings for the termination of enforcement in the spirit of Article 56 of the Regulation, as analysed above.

The PRA supplemented Section 528(3) of the CPC with a provision according to 'pursuant to the Act on international judicial cooperation relating to parental responsibility, the obligor may bring an action for the termination of the enforcement of a decision ordering the return of a child wrongfully removed to Hungary if enforcement would expose the child to a grave risk of physical or psychological harm of a lasting nature due to impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances. The court shall seek the opinion of the guardianship authority on whether the termination of enforcement is justified.'

The amendment to the CPC cited above is considered exceptional because Article 56 of the Brussels IIb Regulation does not apply to this situation, as the decision ordering the return of the child in the case of wrongful removal

of the child in question does not originate from another Member State,[293] but is a decision made by a Hungarian court.[294] In this situation, the CPC also provides for the possibility of taking into account circumstances that have a serious negative impact on the child's life when ordering the return of the child, and thus of bringing an action for the termination of the enforcement of the Hungarian decision ordering the return. This action may be brought by the person obliged to return the child if the conditions of Article 56(6) of the Regulation are met.

It should be noted that the court must seek the opinion of the guardianship authority on the grounds for terminating enforcement, the background to the enforcement and the possible vulnerability of the child. The court's decision to uphold the claim in the proceedings overrides the general rule on the automatic enforcement of a decision ordering the return of a child wrongfully brought to Hungary, on the grounds of the best interests of the child. It is important to emphasise that in this specific enforcement termination case, the court cannot decide on the merits of parental responsibility and custody rights.[295]

It is clear from the provisions analysed above that in recent decades, the approach to highlighting the rights and interests of children has been significantly strengthened in both legislation and jurisprudence in matters related to parental responsibility. This trend, almost 40 years after the adoption of the Convention on the Rights of the Child, can even be said to be overdue. European family law also respond relatively slowly and, in many cases, exceed the previous case law of the Court of Justice of the

293 The Brussels IIb Regulation applies where the wrongful removal or retention of a child concerns more than one Member State, complementing the 1980 Hague Convention. Chapter IV of this Regulation applies to decisions ordering the return of a child to another Member State pursuant to the 1980 Hague Convention which *have to be enforced in a Member State other than the Member State where the decision was given.* [Article 1(3)]

294 The PRA regulates the rules of extraordinary non-contentious proceedings aimed at the return of children wrongfully brought to Hungary (Sections 10-22), for which the Pesti Központi Kerületi Bíróság (Central District Court of Pest) has exclusive jurisdiction. Appeals against the order are heard by the Fővárosi Törvényszék (Capital Court).

295 Kaáli Éva: Végrehajtási perek [Enforcement proceedings] Kommentár a Pp. 528. §-ához [Commentary on Section 528] In: Wopera Zsuzsa (ed.): Nagykommentár a polgári perrendtartásról szóló 2016. évi CXXX.f törvényhez [Comprehensive commentary on Act CXXX of 2016 on civil procedure] Wolters Kluwer 2025. online commentary

European Union in terms of the expectations placed on the enforcement of decisions in the best interests of the child and their physical and mental well-being. Looking at the development of European family law regulations, it can be concluded that both the European Union and the legislative bodies of the Hague Conference on Private International Law face the challenge of finding the right balance between the best interests of the child and the effective enforcement of decisions that serve those interests. These two interests do not always coincide due to the complexity and specificities of family law disputes. I am convinced that by incorporating the child-centered approach analysed in this study into the rules of enforcement, we have taken a significant step towards achieving this gentle balance at European level and in national law.

7. EU regulation and COE Recommendations strengthening mediation

The benefits of mediation and other alternative dispute resolution processes have been evidenced and widely acknowledged. Mediation helps to improve the relationship and communication of parents and supports them in reaching an amicable agreement while focusing on the needs and best interests of their child. The confidentiality of mediation and other alternative dispute resolution processes encourages parents to engage in an open dialogue to resolve their dispute. Compared to adversarial judicial proceedings, parents tend to feel a stronger sense of ownership in mediation and alternative dispute resolution processes and, therefore, tend to be more willing to adhere to the mediated agreement, which makes mediated agreements typically more sustainable than court orders. Mediation specifically tends to be more cost-effective than judicial proceedings, in particular where parents have access to mediation aid.[296]

296 Explanatory Memorandum to the Recommendation CM/Rec(2025)4 of the Committee of Ministers to member States on the protection of the rights and best interests of the child in parental separation proceedings para 215. https://search.coe.int/cm#_Toc196407107

7.1. Mediation in cross-border family law matters

One of the main innovations of the Brussels IIb Regulation is that it raises the ruling on alternative dispute resolution to a new European level. This is done in Chapter III in Part on International Child Abduction.

Article 25 of the Regulation sets out the possibilities for mediation under the heading 'Alternative dispute resolution'. As early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings.

On the issue of mediation in the field of family law, we should mention the European Parliament resolution of 5 April 2022 on the protection of the rights of the child in civil, administrative and family law proceedings (2021/2060(INI)). A Resolution pointed out that an increasing number of children and adolescents are coming into contact with the judicial system in civil, administrative and family law proceedings, mainly due to the increase in divorce, separation and adoption. In such proceedings all children should be guaranteed non-discriminatory access to justice including, in particular, access to courts and alternative methods of dispute resolution. In certain cases experience has shown the benefits of having a dedicated and independent person of trust to support and accompany the child throughout the legal proceedings, including in cases of mediation. Children involved in cross-border civil and family law disputes should enjoy the same rights, level of protection, procedural guarantees and minimum standards in all Member States, regardless of the nationality of their parents. The Resolution pointed out that in many cases, family mediation has proven to be quicker, cheaper and more child-friendly to resolve the dispute than court proceedings and may therefore help to prevent future parental child abductions. The use of alternative dispute resolutions should be encouraged, unless it is contrary to the best interests of the child, notably in the case of domestic

violence and sexual abuse. The Resolution highlights that cross-border family mediation is more complex than mediation in domestic family disputes from a legal and logistical perspective and requires additional knowledge and language skills from the mediator.

The Resolution stated that cross-border family mediation has the potential to facilitate agreements between parents that serve to uphold the best interests of the child, reducing the emotional and financial burden and legal complexity inherent in judicial proceedings.[297]

Thalia Kruger and her co-authors pointed out that Brussels IIb follows the current pattern of attention to mediation by making reference to the possibility to find amicable solutions by virtue of alternative dispute resolution methods. It imposes on the competent court a duty to examine whether parties are willing to engage in mediation to find, in the best interests of the child, an agreed solution, provided this does not unduly delay child abduction proceedings. While this is an important step forward, some challenges remain. In practice the logistics of arranging mediation over a distance and in different languages can be challenging. Moreover, the enforcement of agreements deriving from mediation needs special regulatory attention. In enhancing mediation in child abduction proceedings, Brussels IIb has unfortunately missed the opportunity to mention the existence of the European Parliament's Coordinator for Children rights, which is competent to help in child abduction cases: an express reference in the Regulation would have given more visibility (and perhaps authority) to this institution.[298]

297 See more: European Parliament resolution of 5 April 2022 on the protection of the rights of the child in civil, administrative and family law proceedings (2021/2060(INI)). https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022IP0104#ntr10-C_2022434EN.01001101-E0010

298 Thalia Kruger, Laura Carpaneto, Francesca Maoli, Sara Lembrechts, Tine Van Hof and Giovanni Sciaccaluga: Current-day international child abduction: does Brussels IIb live up to the challenges? In: Journal of private international law 2022, 159-185. https://repository.uantwerpen.be/docman/irua/7440f6/a190389.pdf

7.2. COE Recommendations strengthtening alternative dispute resolution

As previously discussed in detail, the Council of Europe adopted two recommendations[299] in May 2025, both of which deal in detail with the issue of alternative dispute regulation. Below, we examine the relevant provisions of the recommendation in the recommendation on parental separation procedures.

The recommendation applies to all proceedings as well as to alternative dispute resolution processes involving the parents of a child who are not living together or no longer wish to do so, which may lead to decisions regarding parental responsibility, custody or upbringing, access to, or contact with the child.

According to Recommendation CM/Rec (2025) 4 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in parental separation proceedings (hereinafter: Recommendation) Member States are encouraged to develop and promote voluntary processes such as mediation or other alternative dispute resolution processes to support parents in reaching an agreement or a settlement which takes account of the best interests of the child. Mediation or other alternative dispute resolution processes are not appropriate where domestic violence has been established, or where there are well-founded risks of violence or abuse, unless the appropriate safeguards are in place to ensure the safety of the parties and to enable the parents to reach a mutual agreement freely. Information explaining the benefits of mediation and other alternative dispute resolution processes should be provided prior to the commencement of any legal proceedings; it may be appropriate under national law to require the parents to attend an information meeting about such processes. The commencement of legal proceedings should not prevent the competent authority from encouraging parents to engage in mediation or other alternative dispute resolution processes at any time. The best interests of the child should

299 Recommendation CM/Rec (2025) 4 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in parental separation proceedings and Recommendation CM/Rec (2025) 5 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in care proceedings.

be a primary consideration for the mediator or other professionals involved in such processes. They should encourage the parents to focus on the best interests of the child at all times and should remind them of their primary responsibility to ensure the well-being of the child and the need to inform and consult the child. The right of the child to be heard and to participate, where appropriate, in alternative dispute resolution processes should be ensured, in accordance with the child's best interests. To give legal effect to mediation or other alternative dispute resolution agreements, provision should be made for their registration or approval by a competent authority where that authority is satisfied that the agreement gives due consideration to the best interests of the child and is fair to all participants. Communications, including statements and records, relating to the mediation or other alternative dispute resolution processes should be regarded as confidential and should not be disclosed in proceedings or in any other context; disclosure should be permitted only where required by law or where there are safeguarding or where there are child protection concerns.[300]

The Explanatory Memorandum higligts that in assessing whether a case is suitable for mediation or other alternative dispute resolution, the mediator or other facilitator should ascertain that each parent has the capacity to engage in mediation, that is, the parent is able and willing to protect his or her personal interests, as well as the rights and best interests of the child with continuity before, during and after the mediation or other alternative dispute resolution process. To facilitate this process, standardised screening tools for relevant risks that could reduce a parent's mediation competence, including domestic violence, and other relevant risks should be in place to guide mediators and other relevant professionals in effective screening, with due consideration to the rights and best interests of the child.[301]

Whether or not a case is suitable for mediation needs to be assessed case by case. To facilitate this process, standardised screening tools for relevant

300 Recommendation CM/Rec (2025) 4 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in parental separation proceedings. paras 44-55.

301 Explanatory Memorandum to the Recommendation CM/Rec(2025)4 of the Committee of Ministers to member States on the protection of the rights and best interests of the child in parental separation proceedings para 207.

risks that could reduce a parent's mediation competence, including domestic violence, should be in place to guide mediators and other relevant professionals in effective screening, with due consideration to the rights and best interests of the child. Before parental separation proceedings are initiated, the parents should be invited and encouraged to participate in an information meeting on alternative dispute resolution processes. An information meeting is useful to inform the parents of the benefits of mediation and other alternative dispute resolution processes. It may be appropriate to make the participation in an information meeting mandatory, as long as safeguards are in place such as the possibility for each parent to attend the information meeting separate from the other parent, as well as screening for cases of domestic and other forms of violence between parents or against the child.[302]

7.3. Possibilities for the development of mediation in Hungarian family law

The spread of alternative dispute resolution procedures has been a European trend for decades, yet it has not really found a place in Hungarian regulation. Below, we examine the possibilities for the further development in Hungarian legislation.

Lawyers and legal users have been looking for suitable alternatives to civil litigation for several decades, those dispute resolution methods where one can not only win by making the other lose, i.e. a win-win situation. These movements gained strength in Europe in the 90s and are summarized by the name ADR (Alternative Dispute Resolution), which has various forms, including mediation. The institution of mediation does not look back on a long history in Western European countries; even in pioneering states such as France, Germany or the Netherlands, the first pilot programs were only launched in the 1990s.

Mediation is a conflict management and dispute resolution procedure where the parties to the dispute, with the involvement of a third, independ-

302 Ibid. paras 211, 214.

ent and impartial person, attempt to resolve the dispute between them and create a written agreement. If the parties reach a written agreement, they adhere to it 90% of the time.

7.3.1 Current Hungarian regulatory background

Mediation has been part of Hungarian legal system for nearly 20 years, but there has been no real breakthrough in this area. The number of successful mediation procedures in civil matters is around 1,000 per year, 75% of which are family law cases. Since 2012, court mediation has also been available free of charge in ongoing civil litigation or non-contentious proceedings.

In Hungary, mediation has been available as an alternative dispute resolution procedure since the entry into force of Act LV of 2002 on Mediation (hereinafter: Mediation Act). Nevertheless, it is still underutilised in the resolution of private law disputes, including family law disputes.

According to Section 2 of the Mediation Act, the fundamental purpose of mediation is to reach a mutual agreement between the parties to the dispute with the involvement of an independent mediator and to draw up a written agreement containing the solution to the dispute between the parties.

However, pursuant to Section 36(1) of the Mediation Act, an agreement reached in mediation does not affect the parties' right to enforce their claims in court. This is essentially the provision that is most likely to deter parties from mediation.

According to opponents of mediation, the biggest risk factor of the mediation process is that despite the time and cost involved, and the written agreement concluded, the possibility of a claim being asserted in court cannot be ruled out, which leads to duplication of procedures.

During the codification of the CPC, a key issue that arose was how to combine enforceability with the written agreement concluded in the mediation procedure. This issue is of fundamental importance because the essence of mediation is to resolve conflicts, so the content of the written agreement concluded does not necessarily have to comply with legal requirements.

However, the content of court decisions that have substantive legal force and can be enforced, even through enforcement proceedings, must in all cases comply with the relevant legal requirements.

In my opinion, based on positive international, including European, experiences with mediation, it is justified to strengthen the role of mediation in resolving family law disputes in order to effectively prevent or manage family law conflicts. The reason for this is that typically in these disputes – where the most personal legal relationships of the parties are being assessed – mediation can be suitable for reducing the conflict between the parties or preventing a conflict situation.

A good mediation procedure, if the parties are willing to use it or can be made interested in using it, can prevent the parties' relationship from becoming sour, the further deepening of their conflict, and is one of the most suitable tools for developing a consensual solution. This goal can be achieved much less effectively with litigation tools in civil litigation or cannot be achieved at all.

The strengthening of mediation therefore arises from time to time in the resolution of family law disputes, because here the parties (spouses, parents) typically need to develop a long-term solution for the future due to changes in family legal relationships, e.g. due to divorce, and they need to establish a system that can function for several years or even decades, e.g. for the exercise of parental rights or for maintaining contact.

The concept of civil procedure law defined the legislative objective as the establishment of procedural rules promoting settlement between the parties. The rules of the CPC maintained and further developed the normative provisions encouraging the use of mediation.

The intention to promote mediation can be clearly seen from the rule set out in Section 195 of the CPC. In the divided litigation structure of Hungarian civil procedure, the framework of the dispute is already outlined by the time the preparatory-trial is closed. The time before the preparatory-trial is closed is the most suitable time for the court to attempt to reach an agreement between the parties, since at that time the (costly and time-consuming) taking of evidence has not actually begun.

7.3.2. Mediation in family law cases

According to Hungarian data, mediation is mostly used in divorce cases, but it is also becoming increasingly common in cases of parent-child conflicts, workplace, inter-company and organizational conflicts.

In comparison, it is striking that although the number of divorces exceeds 20,000 annually, in the field of family law, including data from the field of child protection, only about 1,000 mediation cases arise (not counting court mediation)[303]. This definitely needs to be improved. According to data from 2017-2019, approximately 70% of the procedures are successful. The number of mediation procedures used in child protection in 2018 also did not exceed 2,000 cases overall.

Under the current rules, it is only in cases concerning the exercise of parental custody that the court may require the parties to participate in mediation, or more precisely, to attend the first mediation meeting. Pursuant to Section 4:172 of the Civil Code, the court may, in justified cases, oblige parents to use mediation in order to ensure the proper exercise of parental custody and the necessary cooperation between them, including contact between the separated parent and the child.

In this case, therefore, it is not the parties but the court that decides on the need for mediation, while at the same time suspending the proceedings. The costs incurred in connection with mediation during the proceedings form part of the costs of the proceedings. If the court has ordered the parties to undergo mediation and one of the parties proves that it has initiated the mediation procedure but that it has failed due to the fault of the other party, the other party shall be obliged to reimburse the party's legal costs. The law thus encourages the parties to actually undergo mandatory mediation.

In the event of an obligation to mediate, the parties may also choose court mediation, as on the one hand it is free of charge, i.e. it is more cost-effec-

303 According to data provided by the National Judicial Office, the number of mediation proceedings conducted in 2018 was 819, in 2019 it was 746, and in 2020 it was 561. Of these, the following were concluded with an agreement: in 2018: 410, in 2019: 352, in 2020: 248. 75% of all cases were related to family law.

tive, and on the other hand it has the advantage, since the court mediator has a legal qualification, that the court mediator tends to guide the parties in a direction when resolving the conflict that complies with the law, thus being suitable for concluding a later settlement in court and for approval by the court.

The CPC specifically mentions the court's obligation to inform in matrimonial proceedings regarding the use of the mediation procedure in accordance with Section 4:22 of the Civil Code, according to which spouses may use mediation before or during the commencement of the divorce proceedings - at their own discretion or at the initiative of the court - in order to settle their relationship or disputes related to the divorce by agreement. They may include their agreement as a result of the mediation procedure in a settlement in court.

7.3.3. Selected European regulation on family law mediation

The following summary is based on information published on the e-justice portal. Results that are more specific require in-depth comparative law research.[304]

In Germany, mediation is essentially voluntary. Pursuant to Section 135 of the 2008 Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit FamFG, the court may order the spouses to participate jointly or individually in a free consultation with a mediator selected by the court or another out-of-court conflict management person and to confirm their attendance before the court. The order in this regard cannot be appealed separately and is not enforceable. The court shall take non-compliance with the order into account when deciding on the costs of the proceedings. According to Section 156(1) FamFG, the same applies to matters relating to children. In such cases, the court may also order the parents to participate in mediation information or other forms of out-of-court dispute resolution. This provision is not binding,

304 https://e-justice.europa.eu/topics/taking-legal-action/mediation/family-mediation/family-mediation_en

but the court will take non-compliance into account when deciding on the costs of the case.

Mediation is also voluntary *in Spain*. If court proceedings are initiated without the parties having resorted to mediation, the court may, taking into account the circumstances of the case, initiate mediation between the parties and, to this end, the family court will send them free information. If the parties decide to use mediation, the proceedings will not be suspended unless the parties request it. The court will approve the agreement. However, in the absence of an agreement, or if the parties do not wish to use a mediator, the court will rule on all matters on which the parties disagree.

In France, family mediation is possible:

1) without recourse to the courts: this is known as traditional family mediation; in this case, the parties refer the matter directly to the mediator;
2) within the framework of court proceedings: pursuant to Article 1071 of the Code of Civil Procedure and Article 255 of the Civil Code:

– the family court may recommend mediation to the parties and, with their consent, appoint a family mediator.
– the family court may require the parties to consult a family mediator who will inform them about the purpose and process of family mediation.

The family court decides on the approval of the agreement reached as a result of family mediation. The court approves the agreement unless it finds that the agreement does not sufficiently protect the interests of the child, or if the parents' consent was not voluntary, or if it may generally violate public order.

In *Croatia*, there is mandatory counselling or mandatory mediation. In family law disputes, the parties must attend mandatory counselling provided by the social welfare centre or the first meeting of the family mediation procedure before the court is opened. The Family Law Act (*Obiteljski zakon*), which entered into force in 2015, introduced the institution of mandatory counselling in family law disputes. The rules for family mediation are contained in a separate law (*Pravilnik o obiteljskoj medijaciji*). Mandatory counselling takes place before the initiation of divorce proceedings between spous-

es who have a common minor child, as well as other court proceedings for the exercise of parental custody and contact rights with the child.

Mandatory counselling is initiated upon a written application submitted by one of the parties to the social welfare centre or recorded in the minutes. Upon receipt of a request for mandatory counseling, the social welfare center is required to schedule a meeting and summon the parties to it. Otherwise, if the social welfare center considers that a joint meeting would not be useful in the circumstances, or if one or both parties request it for a valid reason, a separate hearing of the parties must be scheduled and held.

Family members participate in family mediation proceedings voluntarily. An exception to this is the voluntary nature of divorce proceedings, as the first family mediation meeting is mandatory before it can be initiated.

In family mediation proceedings, the parties attempt to reach an agreement on their family dispute with the help of one or more family mediators. The main purpose of family mediation proceedings is to develop a plan for shared parental custody and other agreements regarding the child. In addition to achieving this goal, the parties may reach an agreement in family mediation proceedings on all other issues related to property and other issues.

Family mediation proceedings will not take place in cases where the social centre's experts or the family mediator determine that the spouses cannot participate equally in family mediation proceedings due to domestic violence, or if one or both spouses have limited capacity to exercise their rights.

Family law mediation may be conducted independently of court proceedings prior to the initiation of court proceedings, during court proceedings or after their conclusion.

If, during court proceedings, the parties jointly propose to settle the dispute through family mediation, the court may suspend the proceedings and give the parties three months to attempt to settle the dispute through family mediation. If, during court proceedings, the court considers that it is possible to settle the family law dispute by mutual agreement, it may also propose to the parties that they engage in family law mediation.

In Portugal, mediation is not mandatory before initiating family law proceedings. However, in court proceedings relating to parental responsibility

(e.g. custody, contact, maintenance of minor children), there is always a so-called mediation phase or a meeting with a professional supporter if the parties fail to reach an agreement at the first hearing. In this case, the judge will postpone the hearing for two to three months and refer the parties to one of the following alternative mechanisms:

– mediation, if the parties accept or request it, or
– participation in a hearing held by the court's professional support service.

Once the deadline has expired, the hearing will continue and, if the parties have reached an agreement through one of the above methods, the judge will examine and approve the agreement. If no agreement has been reached, the case will proceed to the litigation phase.

Under Article 273 of the Code of Civil Procedure (*Código de Processo Civil*), courts usually suspend proceedings involving spouses (e.g. divorce and separation, maintenance payments between spouses and former spouses, and the allocation of the spouses' home, if there was no prior agreement) and refer the case to mediation, unless one of the parties objects.

Under Article 272(4) of the Code of Civil Procedure, the parties may also request, by mutual agreement, that the proceedings be suspended for three months and may initiate mediation on their own initiative.

If the parties reach an agreement through mediation in the above-mentioned cases, they must request the court to approve the agreement.

Under *Maltese law*, mediation is mandatory in cases of separation of spouses (separation prior to divorce) or the settlement of parental custody issues. However, the mediator is not legally obliged to involve the child in this process. At the beginning of the mediation process, the court usually appoints a lawyer to represent the interests of the minor child. This allows the child to express their views, and the mediator or court will hear them separately if deemed necessary for the purposes of evidence.

In many countries, there are family law mediation services specialising in family law disputes, meaning that professionals with special qualifications (most often psychologists) assist those involved in family law conflicts.

7.3.4. Legislation proposals for widening family law mediation in Hungary

In the following, we outline the conceptual directions along which, in our opinion, the role of mediation procedures in resolving family law disputes could be strengthened in the future:

In family law disputes, we consider it necessary to avoid making mediation procedures mandatory before the initiation of a lawsuit. There were no positive experiences in the former CPC regarding mandatory mediation before the initiation of a lawsuit. However, it should be encouraged if the plaintiff proves that they voluntarily participated in mediation procedures before the initiation of a lawsuit. This could be rewarded with a fee exemption or a higher fee discount than the current one.

We consider it advisable that the court, after considering the individual circumstances of the case and after hearing the parties, order the parties to participate in mediation procedures in all family law lawsuits, where it deems it expedient. This means that the court would call on the parties to participate in mediation by reasoned order. This does not mean an obligation to participate in mediation, because the party may decide not to use mediation, but in this case it must state in writing, within a short period of time, the reason for refusing to participate in the mediation, which the court will take into account when deciding on the cost of the proceedings.

If both parties declare that they will participate in mediation, the court will suspend the proceedings for two months, which can be extended if there is a chance of success in the mediation. This solution is similar to the German model, where mediation is not mandatory, but is not entirely based on the parties' decision, because the court, if it considers it justified in the course of the proceedings, will order the parties to participate in mediation by order.

There is no reason to order participation in a mediation procedure if, in the opinion of the court, it can be established based on the data of the case that the parties' positions are unequal or domestic violence is likely, so that the mediation procedure could only worsen the position of the weaker party. (Croatian model)

If the parties reach an agreement in the mediation procedure, they must submit it to the court for approval as a settlement. In this way, the parties would be aware that the mediation procedure is at stake and would not have to fear that, despite the agreement, one of the parties - given its unenforceability - would deviate from it or initiate another lawsuit. Successful mediation procedures could also be rewarded with a cost discount. (French, Portuguese model)

It would be justified to train mediators specializing in family law mediation and to introduce a register of family law mediators. It is necessary to strengthen and differentiate the quality assurance of mediator training and further training, and to expand the topics of mediator training and further training related to child protection.

8. Trends in parental custody: joint parental custody, shared physical custody, and other forms of cooperation of parents

8.1. Joint parental custody

In most Member States of the European Union, joint parental custody is the general rule after the parents' cohabitation has ended. [305] There are significant differences in the regulations of the Member States as to when the end of the parents' cohabitation justifies an official or judicial settlement in matters relating to the child, including the settlement of parental custody. In some cases, an agreement between the parents is sufficient, but there are also regulations where all matters concerning the child must be agreed in writing. However, joint parental custody is not the same as shared physical custody (otherwise: joint physical custody), where the two separated parents spend essentially the same amount of time with the child in turns. Although research on this subject clearly supports the continuous growth of this form of care, it is clear that many aspects need to be considered when deciding on shared physical custody.

305 See more: Family Law, Sixth Edition (James Stewart ed.) Thomson Reuters 2024.

8.2. Joint physical custody

In addition to joint parental custody joint physical custody (hereinafter: JPC) is also becoming increasingly common in Europe. An expanded study published in 2025[306] brought the following results. In it, researchers compared the practices of 21 European countries.

The proportion of children living in JPC is highest in the following countries: Sweden (53.72%), Denmark (39.89%), Belgium (30.15%), Finland (31.62%), France (29.25%), Slovenia (22.13%). It is lowest in the following countries: Lithuania (0.59%), Greece (1.66%), Poland (2.89%), Hungary, Croatia, Italy, Malta and Romania, with JPC around 5%.[307]

Concurrently, increased involvement of fathers in child rearing has been noted across a diversity of country settings (Haux & Platt, 2021; Yavorsky et al., 2015), motivated by social support for father involvement in children's daily lives and the benefits in terms of relational and psychological well-being (Cano et al., 2019; Oren & Hadomi, 2020; Popov & Ilesanmi, 2015). Paternal involvement pre-separation, in turn, is linked to post-separation childcare (Poortman, 2018; Westphal et al., 2014), suggesting it to be a driver of increased JPC uptake.[308]

According to Elke Claessens and her co-author over the past decades, most European countries revised their legal approaches to child custody after separation, generally aiming to stress the importance of continued parental involvement. This minimally refers to legal joint custody (JLC), where both parents (are motivated to) share legal parental responsibilities, irrespective of their relationship or living situation, in the light of the best interests of the child.[309]

The researchers found JPC prevalence (compared to main and sole custody) to be highest in Northern European countries but closely followed by several others (e.g. France and Belgium). While the incidence of mother residence

306 Claessens E, Mortelmans D. Joint Physical Custody in Europe: A Comparative Exploration. Eur J Popul. 2025 Mar 4;41(1):8. doi: 10.1007/s10680-025-09732-y. https://rdcu.be/e6WYO

307 Claessens E, Mortelmans D. Joint Physical Custody in Europe: A Comparative Exploration. Eur J Popul. 2025 Mar 4;41(1):8. doi: 10.1007/s10680-025-09732-y. https://rdcu.be/e6WYO

308 Claessens E, Mortelmans D. Joint Physical Custody in Europe: A Comparative Exploration. Eur J Popul. 2025 Mar 4;41(1):8. doi: 10.1007/s10680-025-09732-y. https://rdcu.be/e6WYO

309 Claessens E, Mortelmans D. Joint Physical Custody in Europe: A Comparative Exploration. Eur J Popul. 2025 Mar 4;41(1):8. doi: 10.1007/s10680-025-09732-y. https://rdcu.be/e6WYO

remained higher than father residence in all countries, we noted a similarity in the father- to mother-residence ratio for countries with the highest and lowest JPC incidences. This was especially prominent due to the inclusion of several countries with lower JPC levels not previously considered using the first release of the EU-SILC module. It could be expected that, in the light of country-level differences concerning legal and social care norms across Europe (in terms, e.g. of labour market and family policies), mother-oriented care would remain most prominent in contexts with less institutionalization of father-involved and gender equal care-giving. This warrants further investigation, preferably building on the EU-SILC module, of how and why dissimilarities in JPC prevalence align with the father- to mother-residence ratio in potentially very different policy contexts across Europe.[310]

Concerning characteristics of the child, there appears to be a curvilinear relationship between JPC and age, with very young children and older adolescents being more likely to reside in single-parent than in shared custody. In terms of gender, results vary by country, with some studies indicating that boys are more likely to be in JPC, while others note no gender difference. Further, as stated previously, JPC is generally associated with higher well-being among children, related to both social, mental and academic outcomes.[311]

The researchers also found that, in addition to the numerous other factors examined in the study, the timing of the introduction of the JPC is also relevant in terms of its prevalence, with a lower proportion of children living in JPCs in Central and Eastern European countries.

8.3. Some Member State experiences

The European models cited below point to a number of additional considerations when examining shared physical custody.

Shared physical custody is a term used for various custody arrangements where parents either equally or unequally, legally and/or physically share the care of their children after separation. In this chapter, we consider it

310 Claessens E, Mortelmans D. Joint Physical Custody in Europe: A Comparative Exploration. Eur J Popul. 2025 Mar 4;41(1):8. doi: 10.1007/s10680-025-09732-y. https://rdcu.be/e6WYO

311 Ibid. https://rdcu.be/e6WYO

solely as the situation where children live with each parent for an equal amount of time. While not legally mandatory in Belgium, an equal division of physical custody over a child is the primary custody arrangement to be considered by a judge.[312]

Although there is evidence that the financial advantage of parents with shared physical custody over parents with a sole custody arrangement is becoming less pervasive, we find that the likelihood of sharing care still increases with income. As Melli and Brown point out, a higher income not only adds to the feasibility of raising a child in two households, but is also positively related to gender equal attitudes on the division of work and childcare, which higher-earning parents can more easily maintain after separation. For the highest income group however, we see a decline in the likelihood of sharing care.[313]

Elke Claessens and Dimitri Mortelmans's results show that if a mother re-partners soon after separation, the ex-partners are more likely to switch to shared care. Furthermore, while not refuting that the custody arrangement can influence a parent's decision to re-partner the longitudinal nature of our data allows us to posit that a new partner creates time restraints for mothers, making shared physical custody more interesting for her. For fathers, re-partnering does not have a significant effect. This is may be because fathers do not experience significantly less time for a social life when sharing care than when having visitation rights , suggesting that re-partnering may be perceived as less of a time constraint. However, we find that if both parents are re-partnered, the likelihood of switching to shared physical custody is not significantly different from when neither parent is in a new relationship. This could indicate that the positive effect of mother's re-partnering is neutralized by that of father's re-partnering, meaning that father's re-partnering does – to some extent – have, as hypothesized, a negative effect on the likelihood of switching to shared care.[314]

Although Germany is not included in the research cited in the previous point, the research on the German situation also points to a number of con-

312 Elke Claessens and Dimitri Mortelmans: Who Cares? An Event History Analysis of Co-parenthood Dynamics in Belgium. In: L. Bernardi, D. Mortelmans (eds.), Shared Physical Custody, Interdisciplinary Insights in Child Custody Arrangements, European Studies of Population, Springer 2021., 132.

313 Ibid., 138.

314 Ibid., 149.

nections that point to other aspects beyond the best interests of the child, the physical feasibility of shared physical custody.

Researchers pointed out that such dual-residence shared parenting or shared physical custody is strongly discussed in Germany, too. Its proponents view it as a better solution for separated parents and their children than the traditional preference for children's residence with one parent – typically the mother – who holds sole physical custody. In particular, shared physical custody has been proposed to provide a broad range of advantages, not only for the father-child relationship, but also for separated mothers' employment opportunities and particularly for children's well-being The current family law in Germany is not yet adapted to this parenting arrangement. While joint legal custody has become the most common arrangement for divorced parents, decisions of the family court about physical custody strongly favor sole physical custody. According to the German family law, child alimony is only reduced in cases with strictly equally shared physical custody time while asymmetrical types of shared physical custody are not considered in legal decisions about alimony payments. This issue clearly fuels public debates. While there is some agreement that adaptations in the complex legal system of German family and tax law are necessary, there is also a controversy about the appropriate scope of these changes. While some demand that shared physical custody should be the new norm for separated families, others favor a more cautious approach, which is sensitive to case-specific conditions and children's best interest when deciding about their physical custody.[315]

According to Paloma Fernandez-Rasines when current discourse in Spain refers to joint custody, this implies not only shared legal custody and guardianship, but cooperative parenting regarding day-to-day care, along with shared/alternated residence for children. Joint custody is applied in the child's best interest calling on shared parental responsibility between father and mother. For the Spanish case, this legal norm is being implanted in a cultural system, where emerging configurations exist side by side with

315 Sabine Walper, Christine Entleitner-Phleps, and Alexandra N. Langmeyer: Shared Physical Custody After Parental Separation: Evidence from Germany. In: L. Bernardi, D. Mortelmans (eds.), Shared Physical Custody, Interdisciplinary Insights in Child Custody Arrangements, European Studies of Population Springer 2021., 286.

quite traditional gender relations. It is possible that this implantation might turn out to be pedagogic for the new generations but it remains to be seen whether the gender gap in dedication to direct childcare will be closed in the future. Some experiences from countries that we take as benchmarks are not particularly optimistic for the time being and talk about a new matrifocality despite legal agreements because it is the mothers, grandmothers and step-mothers that perform the care either directly or indirectly. Co-parenting, as it has been designed, refers to the two-parent nuclear family model and requires cooperation from the parents for an indefinite period of time. The designs were drawn up to perpetuate a two-parent system where other figures do not fit except as third parties, despite the social reality that includes multiple new family configurations.[316]

8.4. Changes in Hungary in joint parental custody and shared physical custody

In litigations concerning the exercise of parental custody, the provisions of the Civil Code that entered into force on 1 January 2022 also represent a paradigm shift, because from that date onwards, in the absence of an agreement between the parents, the court may order joint parental custody at the request of one parent if it is convinced that this solution is in the best interests of the minor child.

Act CXXII of 2021 amended and supplemented several points of Title XII of the Civil Code regulating parental custody in the area of joint exercise of parental custody. This amendment *broadened* the range of possible decisions in *court* proceedings *concerning the exercise of parental custody* and, on the other hand, specified *shared physical custody* as one possible way of exercising joint parental custody.

316 Paloma Fernandez-Rasines: Sharing Child Custody: Co-parenting After Divorce in Spain. In: Onati Socio-legal Series 7 (6) November 2017., 1237 https://www.researchgate.net/publication/317661745_Sharing_Child_Custody_Co-parenting_After_Divorce_in_Spain

8.4.1. Joint parental custody at the request of one parent

Section 4:164(1) of the Civil Code – in line with the prevailing European solutions[317] – establishes *as a general rule* for the exercise of parental custody.[318] Unless otherwise provided by the parents in their agreement, or by the guardianship authority or the court, the parents shall jointly exercise parental custody even if they do not live together any longer, [319] which expresses the principle of equal rights of parents laid down in the Civil Code.[320]

The provisions of the Civil Code gives priority to the parents' agreement on the exercise of parental custody. Based on their agreement, they may continue to exercise parental custody jointly, either one parent exercises it fully or the parents divide the rights and obligations related to parental custody between themselves. Therefore, determining the method of exercising parental custody remains a "private matter" as long as there is a consensus between the parents on the issue of exercising parental custody. The regulatory concept of

317 In all of the following EU Member States, the court may decide on joint parental custody at the request of one parent: Germany, Austria, France, Belgium, Spain, the Netherlands, Sweden, Denmark, Italy, Slovenia, Latvia, Luxembourg, Poland, Portugal, Finland, Slovakia and the Czech Republic.

318 There is debate in the literature as to whether the use of the term 'general rule' in Section 4:164(1) of the Civil Code is correct based on the Family Law Book of the Civil Code. According to Orsolya Szeibert, the Civil Code (from the date of its publication) stipulates that parental supervision shall be exercised jointly by the parents – unless otherwise agreed by them, the guardianship authority or the court – even if they no longer live together. Although the Csjt. already contained a similar provision, difficulties have arisen and continue to arise in relation to its interpretation: this provision is often interpreted to mean that joint parental supervision by separated parents is a general rule in domestic law. However, this has not been and is not currently the case: Section 4:164(1) states that *separation alone* does not *change joint parental custody,* and the situation may continue until the guardianship authority or court decides, or the parents agree, which may also be done tacitly through conduct. In: Szeibert Orsolya: Új mérföldkő a hazai családjogi szabályozásban: a bíróság által elrendelhető közös szülői felügyelet és váltott gondoskodás. [A new milestone in Hungarian family law: joint parental custody and alternating care ordered by the court.] In: Családi Jog, Family Law, 2022, issue 1, 11.

319 For details on the international background of joint parental custody, see: Szeibert Orsolya: Együtt a házasság felbontása után is? A közös szülői felügyelet és a váltott elhelyezés európai tendenciái. [Together even after divorce? European trends in joint parental custody and joint physical custody]. In: Családi Jog, Family Law 2012/4, 1-11.

320 See: Barzó Tímea: A szülői felügyelettel kapcsolatos perek. [Actions related to parental custody]. In: Kommentár a polgári perrendtartásról szóló 2016. évi CXXX. törvényhez. [Commentary on Act CXXX of 2016 on Civil Procedure (ed. Zsuzsa Wopera)] Magyar Közlöny Lap és Könyvkiadó, Budapest, 2017, 764.

the Civil Code, with regard to the exercise of joint parental custody, prioritizes the agreement of the parents in resolving this issue. (Civil Code, Section 4:165)

Only in the absence of an agreement between the parents can settle the exercise of parental custody by the court. According to the previous legislation, in the absence of an agreement between the parents, the court could only authorize one parent to exercise parental custody. This means that until December 31, 2021, there was therefore a legal obstacle to the court ordering joint parental custody if it considered both parents to be suitable for the upbringing and care of the child, even if this would have been in the child's best interests. In such cases, the court had to choose between the two parents, both of whom were equally capable of raising and caring for the child, as to which of them would exercise parental custody in the future.

In practice, the courts have tried to "interpret flexibly" this restrictive provision by granting the separated parent the same amount of time to maintain contact with the child as the custodial parent in cases of sole parental custody. However, in its court decision No. 2020.11., the Supreme Court made it clear that in cases of sole parental custody, in the absence of an agreement, contact cannot be regulated by a court ruling in such a way that the separated parent is entitled to the same amount of time with the child as the custodial parent. Such an arrangement means that joint parental custody is replaced by the legal institution of contact, which is essentially joint parental custody in substance.

Taking into account practical needs and international experience, as well as the principle of equal rights for parents, the amendment to the Civil Code supplemented Section 4:167 of the Civil Code, according to 'Absent an agreement between the parents living separately, the court shall decide, upon request or in the interest of the child ex officio, which parent shall exercise parental custody. The court may decide that parental custody be jointly exercised even at the request of one of the parents if this serves the interest of the minor child. When deciding, the court shall consider how the child's physical, mental and moral development can be ensured the best.'

In this regard, Orsolya Szeibert points out that at the time of the codification of the Civil Code, the possibility of ordering joint parental custody arose at most in the context of the fact that it still required the agreement of the parties. The

fact that the court can decide – at least at the request of one of the parents – that the parents should exercise parental custody in this way *is a further step towards ensuring the equality of parents*. Without a request from at least one of the parents, the court cannot order the latter, and it must be considered a particularly important condition that it is in the best interests of the minor child.[321]

The addition to Section 4:167(1) of the Civil Code therefore makes it clear that the court cannot decide on the issue of joint parental custody ex officio, but only *at the request of one of the parents*. However, the question may arise, with regard to Section 477(4) of the CPC,[322] whether it is possible for the court, deviating from the plaintiff's claim, to decide to order joint parental custody even if the plaintiff's claim is for sole custody. Based on a combined interpretation of the cited sections of the Civil Code and the Civil Procedure Code, taking into account the intention of the legislator, it must be concluded that in such cases the court *cannot decide ex officio on the exercise of joint parental custody*, unless the defendant requests the court to order joint parental custody in a counterclaim. If the question arises in reverse, i.e. if the plaintiff's request is for joint parental custody to be ordered, but the court considers that this is not in the best interests of the minor child, taking into account the provisions of Section 4:167(1)-(2) of the Civil Code, the court may decide to grant parental custody to the parent who is more suitable for the care and upbringing of the minor, thereby rejecting the plaintiff's claim. Section 477(4) of the CPC provides for this possibility, taking into account the substantive legal framework laid down in the Civil Code.

It can be stated, that the amendment analyzed above introduced a significant change, which provides for the possibility in a dispute related to the exercise of parental custody that, if the court is convinced that it is in the best interests of the child, the parents may exercise custody jointly even after their separation. Joint parental custody does not mean that the parents

321 Szeibert Orsolya: Új mérföldkő a hazai családjogi szabályozásban: a bíróság által elrendelhető közös szülői felügyelet és váltott gondoskodás. [A new milestone in Hungarian family law: joint parental custody and alternating care ordered by the court.] In: Családi Jog, Family Law, 2022, issue 1, 12-13.

322 Section 477 (4) In its judgment in a lawsuit concerning the exercise of parental custody, the court shall, *even in the absence of a claim to that effect*, determine *the manner of exercising parental custody,* contact, the placement of the child with a third party, and the maintenance of the minor child.

effectively and physically raise and care for the child for for equivalent periods of time. This is ensured by the option of shared physical custody, also introduced from 1 January 2022, where parents take turns to care for the child for the same amount of time. In such cases, the decision of the court does not include the issue of contact, which helps to avoid a series of legal disputes. It is important to emphasize that in each case, the court must consider – taking into account the requests of the parties, the individual circumstances of the case, the parents' ability to cooperate, the age and interests of the minor child, and the results of the taking of evidence – which method of exercising parental custody serves the best interests of the child. In this matter, the court is not bound by the parties' requests.

8.4.2. Alternating exercise of parental custody: shared physical custody

It should be emphasized that the amendments to the Civil Code presented above do not affect the issue of how parents exercise joint parental custody in everyday life. Joint parental custody does not mean that parents actually raise and care for the child for the same amount of time physically.

According to Section 4:164(1) of Civil Code joint parental custody may also be exercised in a manner that the parents are entitled and obliged to bring up and care for the child alternately and for identical periods of time. When deciding on joint parental custody, the court, taking account of the interests of the minor child, may order that the parents care for the child alternately and for identical periods of time; failing that, the court shall determine the contact arrangements and decide on the maintenance of the child. When ordering joint parental custody, the court shall designate the place of domicile of the child. If the court authorises the parents to care for the child alternately and for identical periods of time, it shall determine the length of the period of time for which each parent can independently care for the child, including school vacations and holidays, and the manner of handing over and receiving the child as well as, if necessary, the maintenance of the child. If the court authorises the parents to care for the child alternately and for identical periods of time, any request to modify a decisions may only be addressed to the court. (Section 4:167/A of the Civil Code)

Shared physical custody therefore means actual physical cohabitation with the child for the same period of time,[323] the *prerequisite and basis* for which is joint parental custody, but joint parental custody does not necessarily entail the ordering of alternating custody.[324] In the event of joint parental custody, the court must decide how the parents will exercise joint custody on a day-to-day basis. Alternating custody may be ordered if the court is satisfied that this is in the best interests of the child and that the parents' living conditions allow for it. If the court grants the parents equal rights to care for the child on an alternating basis, it must decide on the length of time each parent will have sole custody, including breaks and holidays, the manner of handing over and receiving the child, and, if necessary, the child's maintenance.

Orsolya Szeibert draws attention to the fact that the legislator sets the same durations of shared care, but in many cases, parents do not necessarily set the duration of shared care for one parent and the other in the same period. The question is whether there will be a transition between joint pa-

323 In their comparative law work, Laura Bernardi and Dimitri Mortelmans cite the reasons for the spread of shared physical custody (SPC) in Europe as being related to increasing aspirations for gender equality among parents, where mothers are increasingly active in the labour market and engaged in demanding professional careers, as well as wanting equality in the sharing of housework, while, at the same time, fathers want to care more for their children. The daily time that both residential and non-residential fathers report spending on childcare has increased substantially over the last decade, indicating that many separated fathers are increasingly engaging with their children. The introduction of more gender-neutral family policies facilitating active fatherhood (e.g., longer parental and paternal leave Thevenon 2011) contributed to this shift. In addition, shared physical custody is also seen as a way to counteract the negative consequences of separation and divorce for children. Several social and psychological studies addressing this issue have pointed out the multiple risks of children when losing contact with one of their parents (in the large majority of cases fathers). Economic and psychological hardships would threaten children's adjustment, their future development and life chances. Laura Bernardi and Dimitri Mortelmans: Advances in Research on Shared Physical Custody by Interdisciplinary Approaches. In: Laura Bernardi and Dimitri Mortelmans (eds.): Shared Physical Custody- Interdisciplinary Insights in Child Custody Arrangements, Springer, 2021. E-book, 2.

324 According to Orsolya Szeibert, while joint parental custody "only" establishes the legal equality of parents, shared physical custody goes one step further and allows parents to care for and raise their child equally, although not simultaneously, but alternately, for equal periods of time. It follows from this that joint parental custody is possible without alternating care and with alternating care. In: Szeibert Orsolya: A new milestone in Hungarian family law: joint parental custody and alternating care ordered by the court. In: Family Law, 2022, issue 1, 13.

rental custody without shared physical custody and joint parental custody with shared physical custody, and in particular what provisions will apply if the agreement does not specify whether the parents agree on shared physical custody or extended contact. As long as the parents cooperate, this is less of a problem, but if this cooperation is not smooth, questions may arise, including in relation to enforcement.[325]

Sections 4:167-4:167/A of the Civil Code do not contain a system of criteria on the basis of which factors the court must decide whether, in addition to the parents' suitability to care for the child, other conditions arising from the parents' living conditions, employment, etc. necessary for the operation of shared physical custody exist.

According to foreign research, in cases where shared custody is ordered by the court, five factors must be examined – the order of importance, which differs significantly from Hungarian legal practice. First and foremost, *from a logistical point of view*, it must be examined whether the parents' situation – e.g. proximity of their homes, adequate financial resources – is suitable for the operation of shared custody. Secondary considerations are *the extent of conflict between the parents* and their *willingness to cooperate.* According to research, the former has no significant impact on whether shared custody is in the best interests of the child. This is the most researched area, with numerous studies and meta-analyses published over the past 20 years, and apart from one or two striking results, the majority show that high levels of parental conflict are just as harmful in a limited contact relationship as they are in shared custody. Other factors that matter include the *child's age* (3-14 is ideal), *psychological state, attachment to parents* (boys adapt better to this contact arrangement) and mental state.[326]

325 Szeibert Orsolya: Új mérföldkő a hazai családjogi szabályozásban: a bíróság által elrendelhető közös szülői felügyelet és váltott gondoskodás. [A new milestone in Hungarian family law: joint parental custody and alternating care ordered by the court.] In: Családi Jog, Family Law, 2022, issue 1., 13.

326 Illés Blanka: Évi 52 költözés? Gondolatok a váltott gondoskodásról. [52 moves a year? Thoughts on shared physical custody.] In: Jogászvilág
https://jogaszvilag.hu/szakma/evi-52-koltozes-gondolatok-a-valtott-gondoskodasrol/

8.4.3. Current Hungarian case law on joint parental custody

Although the rules analyzed above entered into force on January 1, 2022, the Supreme Court (Kúria, Curia of Hungary) ruling that provided important aspects for the court to order joint parental custody was published in 2025.

The Kúria issued a landmark precedent judgment[327] in October 2025, in which it interpreted in detail the content and forms of cooperation between separated parents, with particular attention to cases in which one of the parents requests the order of joint exercise of parental custody based on the second sentence of Section 4:167. (1) of the Civil Code.[328] The ruling also emphasised that the court must take into account the child's interests when deciding on the exercise of parental custody.

The principle that most directly emphasises the joint rights and responsibilities of parents in raising minor children is enshrined in Article 18(1) of the CRC. According to this, "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

Of course, as is clear from the last sentence of Article 18(1) of the CRC, other articles of the CRC, in particular Article 3, are also decisive in terms of regulating the exercise of parental authority. Article 3(1) specifies that the best interests of the child shall be a primary consideration in the formulation and implementation of legislation and policies. According to this, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or leg-

327 Supreme Court (Curia of Hungary) Judgment No. Pfv.20.764./2025/4.

328 Section 4:167 [Settling the exercise of parental custody by the court]

(1) Absent an agreement between the parents living separately, the court shall decide, upon request or in the interest of the child ex officio, which parent shall exercise parental custody. *The court may decide that parental custody be jointly exercised even at the request of one of the parents if this serves the interest of the minor child.*

islative bodies, the best interests of the child shall be a primary consideration."[329]

The Family Law Book of the Civil Code defines the obligation of parents to cooperate as a basic principle of the exercise of parental authority in Section 4:147 of the Civil Code, stating that "The parents shall be required to exercise, in cooperation with each other, parental custody with a view to ensuring the child's appropriate physical, mental and moral development. (2) In the joint exercise of parental custody, the rights and obligations of the parents shall be equal."

In addition, under the heading of the exercise of parental supervision, the Civil Code also stipulates the obligation of parents to cooperate in the internal relations of parents who are already separated in Section 4:173 of the Civil Code. "The parent exercising parental custody and the parent living separately from the child shall cooperate in the interest of the balanced development of the child, respecting each other's family life and tranquillity."

Cooperation as a general principle of the exercise of parental custody indicates that *in all situations affecting the child*, parents are *expected* to take each other's views into account and jointly make decisions that they consider to be in the best interests of the child. A lack of cooperation between parents, or a lack of willingness to cooperate on the part of one or both parties, may ultimately be assessed in a number of situations, either by the guardianship authority or by a court. If the parents cannot agree on a particular issue in the exercise of joint parental custody, the guardianship authority will generally take action. Although this is a possibility, parents are expected to make decisions on matters affecting their child in a responsible manner, in the best interests of the child and with consideration for each other's interests. *There is a particular need for cooperation between separated parents.* If the court intervenes to settle parental custody, it may take into account the willingness of both parents to cooperate in the event of a dispute between them. Co-

329 The commentaries issued by the UN Committee on the Rights of the Child provide detailed guidance and legal interpretations of the content of the individual articles of the Convention. The interpretation of the best interests of the child is contained in a separate commentary.

See: Committee on the Rights of the Child General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)

operation is of overriding importance in the case of contact between separated parents and children, as, given the constantly changing circumstances of life, it is only through cooperation between the parent caring for the child and the separated parent that contact can be maintained in a way that truly serves the interests of the child. The increased requirement for cooperation is reflected in the emphasis placed on mediation (conciliation) procedures in both parental custody disputes and guardianship proceedings.[330]

Simon Károly László emphasises that the regulation that came into force on 1 January 2022 requires a change of attitude from both parents and the court, but it would be a mistake to interpret this as meaning that the legislator has removed the ability to cooperate from the criteria for joint parental custody. (...) In his view, the paradigm shift in the Civil Code should not be interpreted as anything more than the legislator's desire to remove the formal obstacle to the granting of joint parental custody, which, due to the objection of one parent – even without reasonable grounds – but contrary to the interests or wishes of the child. The change in the law therefore expresses that the legislator *no longer attaches any substantive significance to the lack of willingness to cooperate* in this sense, i.e. the *new regulation should* be interpreted *as a shift in emphasis*, meaning that in justified cases, the interests (opinion, wishes) of the child can be enforced even against the opinion of the parent who opposes joint parental custody.[331]

No interpretation of the amendment to the Civil Code suggests that joint parental custody can only be ordered in cases where there is smooth cooperation between the parents. This would mean that one parent could prevent the exercise of joint parental custody by refusing to cooperate, which is contrary to the interests of the minor child.[332] Therefore, one of the aims of the

330 Szeibert Orsolya: Kommentár a 4:147. §-hoz [Commentary on Section 4:147 of the Civil Code] In: Péter Gárdos, Lajos Vékás (eds.): Comprehensive Commentary on Act V of 2013 on the Civil Code. 20 June 2025 edition in Jogtár format, ISBN 978-963-594-518-4 Wolters Kluwer

331 Simon Károly László: A közös szülői felügyelet bírósági elrendelésének mérlegelési szempontjai a hazai szabályozás tükrében [Considerations for court orders on joint parental custody in light of domestic regulations.] In: Családi Jog, Family Law 2022/4, 7.

332 Grád András describes this situation as follows: in a large proportion of cases, the party concerned does nothing more than refer to their own culpable behaviour in order to gain advantages. Consciously or unconsciously, they themselves cause at least some of the disruption in cooperation with the other parent in order to then use this as a basis for obtaining "sole" parental custody. The most important question is to what extent the parties

amendment to Section 4:167(1) of the Civil Code was precisely to enable the court to decide on the exercise of joint parental custody even in cases where a parent refuses to cooperate without reason. [333]

Legal practice experiences[334] shows that, despite the permissive provisions of the Civil Code, joint parental custody is still rarely ordered at the request of one parent in legal practice, the recurring reason being the lack of cooperation between the parents. The court typically continues to order joint parental custody only on the basis of an agreement between the parents if it considers that adequate cooperation between the parents is ensured.[335]

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concerned will be able to engage in such behaviour in the changed legal environment from 1 January 2022, or more precisely, whether the justice system will be able to take action against this phenomenon. In: Grád András: Veled vagy nélküled? A különélő szülők közötti együttműködés néhány jogi és pszichológiai kérdése közös szülői felügyelet esetén [With or without you? Some legal and psychological issues of cooperation between separated parents in cases of joint parental custody.] In: Családi Jog, Family Law 2022/2. 23-24.

333 Based on his experience as a practising lawyer, András Grád believes that problems with cooperation between the parties do not necessarily mean that the best interests of the child would automatically result in the non-application or termination of joint parental custody. However, if it ultimately turns out that this is indeed in the best interests of the child, it is reasonable to carefully examine *why* the cooperation required of both parents by the Civil Code *is not* actually *possible*. In most cases, it will probably turn out that this can be traced back to the behaviour of both parents to some extent, but it can usually be determined which of them played the predominant role in causing the problems. In this case, it is worth bearing in mind the aforementioned principle of the Civil Code that "no one may invoke their own culpable conduct in order to gain an advantage" and, in addition to the obvious interests of the child as the primary and overriding goal, as a form of general prevention, if only to avoid similar cases in the future, to assign custody to the parent who can be proven to be no more or less responsible for the lack of cooperation than the other parent. András Grád: Veled vagy nélküled? A különélő szülők közötti együttműködés néhány jogi és pszichológiai kérdése közös szülői felügyelet esetén [With you or without you? Some legal and psychological issues of cooperation between separated parents in cases of joint parental custody.] In: Family Law 2022/2., 25.

334 This conclusion, which is not supported by statistical data, was reached in the autumn of 2024 by a working group operating within the Ministry of Justice, which analysed the experiences of civil courts and in which all levels of the judiciary were represented. The author was a member of the working group.

335 I agree with Simon Károly László that the reason for the slow shift in judicial practice can also be found in the fact that the 2002 codification of the Civil Code took the position that joint parental custody after divorce or the termination of cohabitation requires such a high degree of cooperation that it can only be ensured by parents who are willing and able to undertake and fulfil this in the interests of the child, and that parents cannot be obliged to cooperate to this extent after separation. In his view, this "philosophy" permeated the further codification of the Civil Code, and this approach is also reflected in the explanatory memorandum to the adopted law. In: Simon Károly László: A közös szülői felügyelet bíró-

The Supreme Court's (Kúria, Curia of Hungary) judgment, No. 20.764/2025/4. issued on October 7, 2025, determined the criteria for unilaterally ordering joint parental custody. In its ruling, the Supreme Court emphasised that Act CXXII of 2021 supplemented Section 4:167(1) of the Civil Code and inserted Section 4:167/A, thereby fundamentally changing the rules governing the settlement of parental custody. The new text, which came into force on 1 January 2022, further strengthened parental rights and children's rights, as well as the equal rights of separated parents: it gave the court the possibility to order joint parental custody at the request of one of the parents, or to order shared physical custody within joint parental custody, which is realised in the child's life as the equality of separated parents. Both parents are entitled and obliged to bring up and care for the child alternately and for identical periods of time.[336]

The Supreme Court's reasoning pointed out that by introducing the unilateral application into law, substantive law created the legal basis for the "enforceability" of joint parental custody: in essence, this means that the court obliges the parent who refuses to cooperate to do so in the interests of the child. The provision is not intended to sanction the parent (just as the right to exercise full parental custody is not intended to punish the parent who is separated from the other parent), but rather to enforce the legal interests of the child against a parent who refuses to cooperate without a valid and genuine reason.[337]

In its reasoning of the judgment, the Supreme Court emphasised, in line with the legislative intent of the amendment to Section 4:167(1) of the Civil Code, that *substantive law specifies the interests of minor children as an independent legal condition*. This fundamental principle, which applies to this situation, is both a legal guarantee for the child in the adjudication of the legal dispute and a benchmark: in the joint exercise of parental supervision, the facts of the case must be assessed from the perspective of the child's interests, which means that the child's opinion must be given significant weight.

sági elrendelésének mérlegelési szempontjai a hazai szabályozás tükrében [Considerations for the court's decision on joint parental custody in light of domestic regulations.] In: Family Law 2022/4, 6.

336 Point [42] of the Supreme Court's judgment No. 20.764/2025/4.

337 Point [43] of the Supreme Court's judgment No. 20.764/2025/4.

A combined interpretation of the interests of the child and the expected behaviour of the parents (cooperation) leads to the conclusion that, as a general rule, substantive law considers cooperation between the parents to be in the interests of the child: they should ensure a balanced lifestyle for the child and make decisions affecting the child jointly.[338]

The Supreme Court highlighted, that the court must always decide on the existence or lack of cooperation based on the facts of the case. Life situations are different, the child's best interests differ from child to child, and the *parents' cooperation or lack thereof is closely linked to the specific facts*. In accordance with the legal requirements for the best interests of the child, disputes between parents that are not related to the care of the minor child, whether during cohabitation or after the termination of cohabitation, *have no legal significance* when assessing the ability and willingness to cooperate.

Among the minimum content of cooperation, communication regarding matters and events related to the child is the most important. A complete lack of communication between the parents precludes the implementation of cooperation. Unilateral withdrawal of one parent from cooperation without proof of harm to the child's interests and without a real and valid reason cannot prevent the ordering of joint parental custody. The general reference to the child's best interests is weightless, but the parent's convenience (it is much easier to make a decision alone than to make a decision together), negative feelings towards the other parent, and inability to compromise in this regard cannot be used as a basis for rejecting joint parental custody on the grounds of lack of cooperation.

The Supreme Court stated, that the method of communication *is not of particular importance*. In the 21st century, in everyday life, in addition to personal conversations, there are countless forms of communication: parents can communicate via FaceTime, WhatsApp, Facebook, telephone, e-mail, or even text messages. Therefore, it is not the form of communication that is evaluated, but the fact and content of the communication.

The Supreme Court pointed outm that the *form of communication can also be exclusively written*. It is acceptable if the parents have been communicat-

338 Points [47] and [49] of the Supreme Court's (Curia) judgment No. 20.764/2025/4.

ing exclusively in writing since the end of their cohabitation, if this works between them and is mutually accepted. In an emotionally charged situation, verbal communication does not always facilitate a compromise in the best interests of the child (written communication reduces arguments and quarrels).

Joint parental custody is becoming increasingly common in the laws of other countries, and so there are various forms of joint parental care for children that would be unthinkable without parental cooperation in the interests of the child. There are practices around the world that are worth studying in relation to the exercise of parental custody affecting joint children following the breakdown of a couple's relationship. This is reflected in the English term *'cooperative parenting*' , used as a comprehensive category for various forms of joint parenting, or *'co-parenting*' for short,[339] which is not the same as joint parental custody in Hungarian law.

339 See, for example: Catherine K. Buckley: Co-Parenting after Divorce: Opportunities and challenges. The Family Institute of Northwestern University 2013. https://www.family-institute.org/sites/default/files/pdfs/csi_buckley_co-parenting_after_divorce.pdf ; Fernandez-Rasines, Paloma, Sharing Child Custody: Co-Parenting After Divorce in Spain (26 October 2017). Oñati Socio-Legal Series, Vol. 7, No. 6, 2017, Available at SSRN: https://ssrn.com/abstract=3059523;

ZSUZSA WOPERA

Chapter IV
Trends in child-centered justice

1. Introduction

In this chapter, we present the latest developments in child-friendly justice and the trends experienced in recent years. We will discuss the joint COE-EU project, the aim of which is to update the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice[340] (hereinafter: Guidelines), adopted in 2010. Hungary participated in the project as a partner country, and thus from 2024 it participated in updating the content of the Guidelines and in developing and commenting on the closely related Chilf Friendly Justice Assessment Tool (hereinafter: CFJ Assessment Tool). In the book, I would like to draw attention to the importance and results of this joint COE-EU project.[341] In the previous chapter, we analyzed two Recommendations[342] adopted within the framework of the Council of Europe in relation to child's right to be heard and mediation. In this chapter, we touch on these two Recommendations adopted in 2025, which have a great impact on the future development of children's rights.

This chapter of the volume presents the tools and solutions of Hungarian child-friendly justice in civil substantive and procedural law. It also makes proposals for their further development and supplementation with new tools.

340 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum The Council of Europe Council of Europe Publishing 2010.

341 The author of the volume participated in the project from 2024-2026.

342 Recommendation CM/Rec(2025)4 of the Committee of Ministers to member States on the protection of the rights and best interests of the child in parental separation proceedings and Recommendation CM/Rec(2025)5 of the Committee of Ministers to member States on the protection of the rights and best interests of the child in care proceedings.

2. Joint European Union – Council of Europe Child Friendly Justice Project

The project, which started in January 2024 and will finish in June 2026, aims to improve the protection of children in contact with the law – as offenders, victims or witnesses in non-judicial, judicial (such as civil and criminal cases) and administrative proceedings – across Europe at national and local level. By aligning with priorities of the EU Strategy on the Rights of the Child and the European Child Guarantee and the Council of Europe Strategy for the Rights of the Child (2022-2027), the project strives to ensure that children's rights are not only recognised but actively upheld throughout their interactions with the justice system. In this regard, the project facilitates the practical implementation of the Guidelines aiming to support the set-up of national justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level before, during and after judicial proceedings. The Council of Europe's Child-Friendly Justice Assessment Tool, which will operationalise the Guidelines will be finalised and rolled out in the framework of the project. Belgium, Poland and Slovenia have been selected as focus countries to pilot the implementation of activities at national and local levels to collect data, identify gaps, improve legislation, policies, and practices. Three additional countries, Greece, Hungary and Portugal have joined the project as valued partners. They will contribute their unique perspectives and insights to the project Steering Committee, enriching the overall approach and ensuring its effectiveness across diverse European contexts.[343]

2.1. The relevance of Child-Friendly Justice Assessment Tool

As part of the project the Child-Friendly Justice (CFJ) Assessment Tool[344] was completed in 2025. It aims to support member states in meeting the

343 https://www.coe.int/en/web/children/child-friendly-justice-project (accessed: 12.02.2026)

344 Child-Friendly Justice (CFJ) Assessment Tool. Prepared by: Shauneen Lambe, Ton Liefaard, Nuala Mole and Benoît Van Keirsbilck Updated by: DEI Belgique and Sabrina Cajoly, Council of Europe April 2025. https://rm.coe.int/child-friendly-justice-assesment-tool-final/1680b5fe71

standards for child-friendly justice in all situations in which children are likely to be brought into contact with the justice system, for whatever reason and in whatever capacity – as offenders, victims, witnesses or parties – in judicial proceedings (criminal, civil or administrative law) or non-judicial proceedings. The Assessment Tool is intended to assist member states in best implementing the Guidelines and in best self-assessing their progress in doing so.

The CFJ Assessment Tool is designed to help member states:

- best implement the Guidelines;
- understand and assess to what extent their justice system is child-friendly (identify what works well and what should be improved in the country);
- evaluate to what extent the various parties and professionals involved in the justice system are aware of and understand the principles of child-friendly justice and access to justice for children;
- identify their capacity-building needs and seek tailored solutions;
- ensure that the availability of information and data is improved and that data are collected regularly on child-friendly justice for sound policy making;
- establish a baseline as well as concrete and feasible national objectives to overcome existing gaps and challenges and measure progress over time;
- highlight, promote and share good practices.[345]

The CFJ Assessment Tool consists of 18 indicators over three separate sections identifying core elements of child-friendly justice in law, mechanisms and institutions, and at all stages of the proceedings (before, during and after). They are not meant to be exhaustive but rather to highlight key areas and core elements to be considered when monitoring the Guidelines and assessing their effective implementation at country level.

345 https://rm.coe.int/child-friendly-justice-assesment-tool-final/1680b5fe71 (accessed: 12.02.2026)

In the following, we summarize those of the core institutions of child-friendly justice that are relevant in civil cases, based on the CFJ Assessment Tool.

2.2. The core institutions of chilf friendly justice in CFJ Assessment Tool

2.2.1. Existence and use of specialised children's court specially trained judges and court officials

Specialised courts (or separate specialised chambers of ordinary courts) for children in conflict with the law are a necessary minimum. Specialised courts (or separate specialised chambers of ordinary courts) should be established for all other cases that concern children's rights either inherently (such as child protection or family matters) or regularly (such as immigration and asylum, disability provision, child mental health or children's special educational needs). Where specialised courts have not yet been established, all judges and court officials should have received special training on child law, including childfriendly justice, before they are allocated cases addressing child matters, including child justice, child protection, public and private family law and immigration and asylum cases.[346]

2.2.2. Child participation mechanisms and spaces enabling children to exercise their right to access justice

Children's right to participate effectively and meaningfully is central to child-friendly justice and children's access to justice. All stages of the proceedings should meet child-friendly standards, including the treatment of children and the design of interview rooms and courtrooms in a child-friendly layout. These standards should apply to all proceedings involving children, including family law proceedings and care and protection

346 Child-Friendly Justice (CFJ) Assessment Tool. Prepared by: Shauneen Lambe, Ton Liefaard, Nuala Mole and Benoît Van Keirsbilck Updated by: DEI Belgique and Sabrina Cajoly, Council of Europe April 2025. https://rm.coe.int/child-friendly-justice-assesment-tool-final/1680b5fe71 31.

proceedings or administrative proceeding and all other legal proceedings, including those that are permitted by law but are non-judicial.

Children are heard during proceedings affecting them, with due weight being given to their views bearing in mind their maturity and any communication difficulties they may have in order to make participation meaningful. This means that the environment should not be intimidating, hostile, insensitive or inappropriate so as to foster the effective and meaningful participation of the child.[347]

2.2.3. Independent children's rights institution protected by law

Children's rights institutions play a critical role in monitoring, protecting and promoting children's rights and supporting children's access to remedies. An ombudsperson or commissioner for children is established and protected in law with a child-specific mandate and the necessary resources (office, staff, budget) to pursue campaigns or address concerns on behalf of children on national and international levels. The ombudsperson for children may be a stand-alone institution or part of a broader human rights institution. However, the office should be independent of government and not be constrained or influenced by any specific political agenda but, rather, be able to respond to the key concerns and issues as identified by children.[348]

2.2.4. Children's right to legal assistance and legal aid

Children have a right to legal support, legal assistance, legal aid and legal representation from those trained in advising and representing children, who have a duty to make sure that children's views are taken into account and that their best interests are established as a primary consideration throughout the proceedings. Where a child or their holder of parental responsibility does not appoint a lawyer, one must, in principle, be appointed ex officio by the competent authorities. A special representative shall be ap-

347 Ibid., 33-35.
348 Ibid., 38.

pointed to a child victim in cases where the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim, or where the child victim is unaccompanied or separated from their family. Legal assistance is advice and support to assist children in understanding the proceedings, the decisions they can make and the implications of any decisions they may make. It involves access to an individual who is able to explain the proceedings to the child, including possible outcomes. It also includes legal representation, i.e. the provision of a lawyer tasked with representing the child in the written and oral proceedings. Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between them and their parents or the other parties involved. Legal aid is the free provision, funded by the public purse, of legal support, assistance and representation. Children should have access to free legal aid under the same or less strict conditions as adults. Children must have trust and confidence in those appointed to support, assist, advise or represent them. Changes in those individuals should be avoided unless absolutely necessary.[349]

2.2.5. Children participate effectively and meaningfully throughout the proceedings

Measures are in place to ensure children participate effectively and meaningfully before, during and after the proceedings and that their views, opinions and perspectives are given due weight in accordance with their age and maturity. Procedures provide for the possibility of appointing a guardian ad litem or similar representative to ensure the rights of the child, including that the child's views and perspective are heard and that their best interests are a primary consideration during the proceedings. Procedures also regulate the right of holders of parental responsibility or, in cases where the latter's presence would not be appropriate for important reasons, the right of another appropriate adult appointed by the child to accompany them during the trial as well as, where appropriate, other procedural stages. Children

349 Ibid., 43.

should be consulted on the manner in which they wish to be heard in the proceedings, bearing in mind that they have the right to be heard, but this is not a duty. Where the child's views are contrary to what may be perceived as their best interests, these conflicting positions are given due weight and consideration. For infants and very young children unable to articulate views, their perspective must be presented by an independent person representing their interests.[350]

2.2.6. Measures to avoid undue delay in proceedings involving children

In all proceedings involving children, there is a need to strike the right balance between the principle of urgency and lengthy or expeditious procedures. The judicial system should provide a speedy response, adjusting its pace to the best interests of the child, while respecting the rule of law. Proceedings should be reasonably speedy, avoiding undue delay, taking into account children's perception of time (also very important to allow victims to be able to start their recovery). Procedures that take too long can cause anxiety for children, who may wonder what is going on and whether their requests have been taken into account. Lengthy proceedings may also lead to children being held in pre-trial detention for unreasonable amounts of time and should therefore be avoided. It should be borne in mind that children have a different perception of time from adults and that the time element is very important for them: for example, one year of proceedings in a custody case may seem much longer to a 10-year-old than to an adult. The rules governing procedures should allow for a system of prioritising in serious and urgent cases, or where potentially irreversible consequences could arise if no immediate action is taken. Furthermore, respecting the best interests of the child may require flexibility on the part of judicial authorities. States should take measures to avoid undue delay in proceedings involving children, ensure that such proceedings are dealt with speedily and that national legislation provides, where appropriate, specific time limits for children. A system of prioritising cases involving children could be encouraged.[351]

350 Ibid., 47.
351 Ibid., 49-50.

3. Representation of the child in civil proceedings

It can be seen that the CFJ Assessment Tool also places great emphasis on the appropriate representation of the child. The CFJ Assessment Tool distinguishes between legal assistance and legal representation. According to this, "legal assistance" refers to assistance by a lawyer or other appropriate representative including, for example, assistance in drafting documents and court pleadings, support in mediation and help in navigating the rules and procedures of state administrative agencies. „Legal representation" refers to representation by a lawyer or other appropriate representative, including in courts or proceedings before other state tribunals. The CFJ Assessment Tool determine, that "guardian ad litem" refers to a person who is appointed or designated to support, assist and, where provided for by law, represent children in proceedings that affect them. Where an institution or organisation is appointed or designated as a guardian to support, assist and exercise legal capacity for a child, it should designate a natural person to carry out the duties of guardian as set out in this Assessment Tool. The guardian acts independently to ensure that the children's rights, best interests and well-being are guaranteed. The guardian acts as a link between the children and all other stakeholders with responsibilities towards them. Guardians ad litem may be a role with inherent contradictions, as guardians are required to put forward (i) their opinion as to what is in the best interests of the child and (ii) the views of the child. "Lawyer" refers to a person qualified and authorised according to national law to plead and act on behalf of their clients, to engage in the practice of law, to appear before the courts or advise and represent their clients in legal matters.[352]

Below we will analyze one of the important but controversial legal institutions of child-friendly justice. This is the lawyer or guardian representing the child, who acts in the best interests of the child in the proceedings. The basic document for child representation is the Guidelines, which provide a clear point of reference for the Council of Europe member states when developing their national regulations.

352 Ibid., 60.

3.1. Representation of the child according to Guidelines

The Guidelines on a child-friendly justice during judicial proceedings, under the subheading 'Legal counsel and representation', define the cornerstones of child representation.

According to this:

- Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.
- Children should have access to free legal aid, under the same or more lenient conditions as adults.
- Lawyers representing children should be trained in and knowledgeable on children's rights and related issues, receive ongoing and indepth training and be capable of communicating with children at their level of understanding.
- Children should be considered as fully fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child.
- Lawyers should provide the child with all necessary information and explanations concerning the possible consequences of the child's views and/or opinions.
- In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian ad litem or another independent representative to represent the views and interests of the child.
- Adequate representation and the right to be represented independently from the parents should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.[353]

According to the Explanatory Memorandum of Guidelines, if children are

353 Guidelines paras 37-43., 27.

to have access to justice which is genuinely child friendly, member states should facilitate access to a lawyer or other institution or entity which according to national law is responsible for defending children's rights, and be represented in their own name where there is, or could be, a conflict of interest between the child and the parents or other involved parties. This is the main message of the Guideline 37. The European Convention on the Exercise of Children's Rights (ETS No. 160)75 states: "Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular [...] a separate representative [...] a lawyer".

Guideline 38 recommends providing children with access to free legal aid. This should not necessarily require a completely separate system of legal aid. It might be provided in the same way as legal aid for adults, or under more lenient conditions, and be dependent on the financial means of the holder of the parental responsibility or the child him or herself. In any case, the legal aid system has to be effective in practice.

Guideline 39 describes the professional requirements for the lawyers representing children. It is also important that the legal fees of the child's lawyer are not charged to his or her parents, either directly or indirectly. If a lawyer is paid by the parents, in particular in cases with conflicting interests, there is no guarantee that he or she will be able to independently defend the child's views. A system of specialised youth lawyers is recommended, while respecting the child's free choice of a lawyer. It is important to clarify the exact role of the child's lawyer. The lawyer does not have to bring forward what he or she considers to be in the best interests of the child (as does a guardian or a public defender), but should determine and defend the child's views and opinions, as in the case of an adult client. The lawyer should seek the child's informed consent on the best strategy to use. If the lawyer disagrees with the child's opinion, he or she should try to convince the child, as he or she would with any other client. The lawyer's role is different from the guardian ad litem, introduced by Guideline 42, as the latter is appointed by the court, not by "a client" as such, and should help the court in defining what is in the best interests of the child. However, combining the functions of a lawyer and a guardian ad litem in one person should be avoided, because of the po-

tential conflict of interests that may arise. The competent authority should in certain cases appoint either a guardian ad litem or another independent representative to represent the views of the child. This could be done on the request of the child or another relevant party.[354]

3.2. Good Practices in Europe

The laws of several European countries recognize a lawyer/professional with a special status who represents a child. In addition to their name, there are significant differences between the states in terms of who this person acts on behalf of, who bears their costs, when their appointment is mandatory, what qualifications they must have, who keeps records of them, etc.

In Croatia, the Family Law Act stipulates that in certain proceedings, the child is not represented by the parent, but by an extraordinary/special guardian (*posebni skrbnik*). These are basically proceedings aimed at ordering child protection measures. In addition, the child is represented by a special guardian in almost all court proceedings affecting children (establishment of paternity and maternity, withdrawal of parental custody, adoption, etc.). In these proceedings, a qualified lawyer employed by the Special Guardianship Office (*Centar za posebno skrbništvo*) and holding a professional examination may be appointed as a special guardian. [355]

In Austria, according to Article 35 of the Federal Child Protection Act (Bundes Kinder- und Jugendhilfegesetz 2013), each federal state is obliged to establish an autonomous child advocate. The family court advocate is appointed by the court in charge of the proceedings in accordance with the Federal Act on Non-Contentious Proceedings (Außerstreitgesetz - AußStrG). The child advocate is appointed by the court in charge of the proceedings in matters of parental custody and contact in accordance with the Federal Act on Non-Contentious Proceedings (Außerstreitgesetz - AußStrG) from among

354 Guidelines paras 101-106., 77-78.
355 https://www.czps.hr/centar/poseban-skrbnik/111

the persons on the register of the Federal Ministry of Justice or the Judicial Care Agency (Justizbetreuungsagentur) on its behalf.[356]

In France and Belgium, there are also children's lawyers. The avocat du mineur, avocat d'enfant, can act in a number of civil and criminal proceedings. In criminal proceedings, the minor is either the perpetrator or the victim, and in civil proceedings, typically in cases involving parental custody and contact. Both the Civil Code and the Code of Civil Procedure define cases in which the appointment of an avocat du mineur is mandatory. Such as hearing the child.[357] In France, as in Belgium, a minor's lawyer refers to lawyers specializing in minors' cases, with special knowledge. [358] All regional bar associations have lawyers who deal with minors' cases and hold pre-announced reception hours. Each bar association determines the training of a minor's lawyer.

In the United Kingdom, a separate body represents children: The Children and Family Court Advisory and Support Service (CAFCASS)

Cafcass is an independent organisation tasked with looking after the interests of children involved in family proceedings. Cafcass work with children and their families and advises the court on what it considers to be in the children's best interests.

Family Court Advisers become involved in cases when children are subject to an application for care or supervision proceedings by social services (public law) or in an adoption applications. Cafcass also provide assistance when parents who are separating or divorcing can't agree on arrangements for their children (private law).

In cases relating to child contact disputes (such as for a Child Arrangements Order) Cafcass will usually carry out certain checks prior to the first hearing. This will involve them contacting the police and local authority to see if there are any known safeguarding or welfare concerns about the child(ren) involved. Cafcass will also usually speak to each parent (usually by telephone) to give them an opportunity to explain any safeguarding or

356 https://www.ris.bka.gv.at/geltendefassung.wxe?abfrage=bundesnormen&gesetzesnummer=20008375

357 L'article 1186 du Code de Procédure civile.

358 https://sab-avocat.com/avocat-protection-enfants-droit-famille/

welfare concerns which they have. Cafcass will then prepare a safeguarding letter; this is a short report which Cafcass make available to the court containing the outcomes of the safeguarding checks and any potential welfare issues which have been identified. The safeguarding letter is usually made available to the court at least three days prior to the hearing. At the first hearing the court will determine the future role of Cafcass in the proceedings. If there are no welfare concerns then a Cafcass officer may still be involved to try to assist the parties in coming to an agreement with minimal further court proceedings. If parents are unable to reach an agreement or there are welfare concerns then the Cafcass officer may be asked to carry out further work with the family and prepare a more detailed report on the welfare issues.[359]

4. COE recommendations for strengthening children's rights in parental separation and care proceedings

The Council of Europe's Committee of Ministers has adopted two new Recommendations to strengthen the protection of the rights and best interests of the child in parental separation proceedings and in care proceedings in May of 2025.

According to the original ideas, one recommendation would have included the rights of the child in the two different types of procedures, but in the end, because of the differences between the two procedures, two recommendations were adopted. In this subsection, we briefly analyze the main, primarly procedureal law provisions and innovations of the Recommendation that would apply to parental separation proceedings.

359 See more: https://childlawadvice.org.uk/information-pages/the-role-of-cafcass/ or https://www.cafcass.gov.uk/

4.1. Recommendation on the protection of the rights and best interests of the child in parental separation proceedings[360]

The scope of the Recommendation covers all proceedings as well as to alternative dispute resolution processes involving the parents of a child who are not living together or no longer wish to do so, which may lead to decisions regarding parental responsibility, custody or upbringing, access to, or contact with the child. (Art I.1)

Part II of the Recommendation defines the overarching principles. Among these, the best interest of the child is recorded first. The best interests of the child should be a primary consideration or, where required by law, the paramount consideration, when securing agreements and resolving disputes in all proceedings and alternative dispute resolution processes falling under the scope of this recommendation. (Art II.3)

The principles also highlight the child's right to be heard. According to this the child should have the right to be informed and consulted, and to express his or her views. Due weight should be given to the child's views in accordance with his or her age and maturity. (Art II.4)

According to 'rule of law' principle due process standards should apply to children in the same way as to adults; these standards should be applied in a child-sensitive and age-appropriate way, and should not be minimised or denied under the pretext of the child's best interests. (Art II.5)

Dignity is a particularly important principle. Every child should be treated with sensitivity and respect at all times; special attention should be given to the child's level of maturity, personal situation and specific needs. (Art II.6)

According to principle 'timeliness' proceedings in which a child is involved should be initiated, concluded and followed up in a timely manner and should be treated with exceptional diligence. Delays in proceedings are generally not in the best interests of the child and may indeed be prejudicial to the child. (Art II.7)

360 https://search.coe.int/cm?i=0900001680b60132

According to principle non-discrimination, the rights of the child should be secured and his or her needs met, without discrimination on any ground. (Art II.8)

According to principle right to respect for private and family life, Member States should ensure the right to respect for the private and family life of children, parents and other holders of parental responsibility, and other family members. (Art II.9)

Part III of the Recommendation highlights the assessment of the best interests of the child. This part emphasizes that the best interests of the child should be regarded as a primary consideration or, where required by law, as the paramount consideration. When assessing the best interests of a child, consideration should be given to the circumstances of the case and all factors relevant to securing the rights of the child and meeting his or her needs. Where justified in the circumstances of the case, the competent authorities should be able to call on the relevant services and expertise, using a multidisciplinary approach to assess the needs of the child and the level of conflict between the parents. (Art III 10,11,14)

Part III of the Recommendation under paragraph 15 identifies a very important group in relation to the exercise of children's rights: children with disabilities.[361] It states that in proceedings involving a parent or a child with a disability or with special or additional needs or vulnerabilities, appropriate arrangements should be in place to enable the meaningful participation of the parent or the child in the proceedings.[362]

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361 Committee on the Rights of the Child in General comment No 9. (2006) the rights of children with disabilities found, that Article 2 of CRC requires States parties to ensure that all children within their jurisdiction enjoy all the rights enshrined in the Convention without discrimination of any kind. This obligation requires States parties to take appropriate measures to prevent all forms of discrimination, including on the ground of disability. This explicit mention of disability as a prohibited ground for discrimination in Article 2 is unique and can be explained by the fact that children with disabilities belong to one of the most vulnerable groups of children. It has been therefore felt necessary to mention disability explicitly in the non-discrimination article of CRC. See more: UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, para 8. https://www.refworld.org/docid/461b93f72.html

362 See more: Zsuzsa Wopera: The Rights of Participation of Children with Disabilities in Cross-Border Family Matters. In: Hominum Causa Omne Ius Constitutum Sit Marcin Wielec, Paweł Sobczyk, Bartłomiej Oręziak, Wydawnictwo, Warszawa 2025. 337-372.

Part IV of the Recommendation defines the child's right to be heard, which was discussed in detail in the previous chapter.

Part V of the Recommendation deals with the importance of informing and representing the child under the title 'Right to information and assistance', which was discussed in detail in the previous section.

Based on right to information Member States should ensure that child-friendly information services are in place to inform the child about, in particular:

- the reasons for the proceedings;
- his or her rights and role in the proceedings;
- the stages and the likely duration of the proceedings;
- the mechanisms or institutions as well as procedural adjustments available to support him or her during and after the proceedings;
- where relevant, access to appeals, including any applicable time limits, and independent complaints mechanisms. (Art V 32)

According to 'right to assistance and right to legal counsel and representation', Member States should ensure that the child has the right to receive independent support and legal assistance and, where required by national law, legal representation separate from that of his or her parents or other parties throughout the proceedings, in accordance with the Guidelines.

The child should have the right to be assisted by a person who is able to advise and support him or her, facilitate his or her comprehension of the proceedings, provide reliable and relevant information, ascertain his or her wish to exercise the right to be heard, and accompany him or her during the hearing and, where relevant, during the appeal proceedings. The child should be able to contact this person at any time for information and advice. Where the protection of the best interests of the child requires it, a special guardian ad litem or a separate legal representative should be appointed as early as possible to represent the child, in accordance with the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice. Access to an effective, sustainable and reliable legal aid scheme should be available for the child and his or her parents. Where relevant, access to a free legal aid scheme should be available for the child under the same or more lenient conditions than those applicable to adults, in accordance with the Guidelines. (Art V. 33-36)

Part VI of the Recommendation sets out important provisions for the period before and during separation proceedings affecting children, with a separate section on interim measures. According to this part during proceedings Member States should put in place effective mechanisms and case-management measures to enable timely identification of high-conflict cases in order to allow for the earliest and most appropriate form of intervention with families, with a view to securing the rights and best interests of the child. Such measures may include early screening, supervised direct contact, mediation or other alternative dispute resolution processes, parental education programmes and parental co-ordination. Where necessary to protect the best interests of the child, the competent authorities should assess the need to activate any care procedures and/or measures to protect the child. Where protective measures or services are considered to be necessary, the competent authorities, where separate, should co-operate closely with each other. Emergency and interim measure. (Art VI 40-41)

Within the framework of interim measures in situations of imminent risk to the health or safety of a child, especially in high-conflict cases, national law should make available urgent referral and accelerated procedures in order to obtain emergency decisions or interim protective measures. In accordance with the child's best interests, emergency measures may be adopted without a prior hearing of the child, provided that the child has the possibility to be heard before the final decision on the merits is provided. Where, due to the circumstances of the case or the nature of the proceedings, a final decision is likely to be delayed, especially when the case needs special investigation, appropriate interim measures to safeguard the rights and best interests of the child should be taken. (Art VI 41-42)[363]

5. Main elements of child-centered justice in Hungarian civil substantial and procedural law

In recent decades, Hungary has made progressive steps to implement the Guidelines.[364] The Guidelines include the best interests of the child and par-

363 In the following, we will discuss in detail what special provisions in Hungarian procedural law apply to interim measures.

364 See more: Nagy, Adrienn: Child-Friendly Justice - Hungarian Perspective, In: Benyusz Már-

ticipation among the fundamental principles. In the following, we highlight those measures related to these principles that have come into force in Hungary in recent years.

The Hungarian Civil Procedure Code took into account the strong protection of the *best interests of child as a primary consideration,* when defining family law procedures and developing its special regulations. The Civil Procedure Code significantly expanded the range of family law court procedures for which special rules are established by the Code, compared the Act III of 1952 on the Code of Civil Procedure. Act CXIX of 2020 amending the Civil Procedure Code from January 1, 2021, introduced additional special rules is based on the experience of judicial practice, the purpose of which was to speed up these procedures on the one hand, and to protect the interests of children on the other hand.

In addition, the amendment of Act V of 2013 on the Civil Code (hereinafter: Civil Code), which entered into force on January 1, 2022, broadened the joint parental custody and shared physical custody, keeping in mind the best interests of the child.

Both, when the Civil Procedure Code was codified and when the Civil Code and the Civil Procedure Code were amended, an important legislative goal was to ensure that the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, were implemented in the new regulations. As the main elements of the child-centered justice, the Civil Procedure Code allows the court to *ex officio exclude the public from the hearing* by the protection of minor child, and also *establishes special rules of territorial jurisdiction in family law procedures*, which enable the above-mentioned lawsuits to be initiated at the domicile or place of residence of the minor child. One of the most important innovations of the Civil Procedure Code for the strengthening of child-friendly justice is that the Code defines the rules for *interviewing a minor child as an interested person* (Section 473 of Civil Procedure Code).

ta - Zombory Katarzyna (szerk.): Child-Friendly Justice. The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective, Miskolc, Budapest, Central European Academic Publishing (2025), 83-102. DOI: https://doi.org/10.71009/2025.mbkz.cfj_4

In recent years, significant progress has been made in Hungarian private law in terms of ensuring the rights of the child.[365]

5.1. Children's rights in Family Law Book of Civil Code

In Hungary, the Civil Code includes the rules on family law as well. The Civil Code provides for the family law rules in a separate Book (Book Four). The Family Law Book, in accordance with the UN CRC concerns protecting the best interests of the child as a matter of principle, that is 'in legal relationships concerning the family, the interests and rights of the child shall be granted increased protection'. The best interest of the child is prioritised in almost every area of the family law legislation. In particular, in connection with the rules of parental custody, guardianship and adoption, the law explicitly provides for the child's opinion to be heard. Moreover, in such proceedings the views of children above the age of fourteen shall to be taken into account.

The provisions on parental custody should be emphasised, in relation to which the Civil Code also stipulates, in connection with Article 12 of the CRC, that parents are obliged to inform the child of any decisions affecting him. They shall ensure that their child who has sufficient level of understanding may express his views before the decisions are taken, and in the cases specified by law decide jointly with his parents. The parents shall take the child's views into account with appropriate weight, according to his age and maturity The child therefore has a say in decisions affecting him or her, even if his or her parents are co-parenting/raising the child together. But the child's views is also of particular significance if his or her parents are having a divorce or no longer wish to share parental custody.

Among the basic principles of the Family Law Book, *the protection of the best interests of the child is the first* (Section 4:2 (1). According to this provision in family legal relationships, *the interests and rights of the child shall be granted increased protection.*

365 For more information on other countries' compliance with the CRC, see: Gerison Lansdown, Roberta Ruggiero, Ziba Vaghri, Jean Zermatten (eds.): Monitoring State Compliance with the UN Convention ont he rights of the child. An Analysis of Attributes, Springer 2022. https://link.springer.com/book/10.1007/978-3-030-84647-3

The Civil Code stipulates that in proceedings related to parental custody, in justified cases or if requested so by the child, either directly or with involving an expert, the child shall be heard as well. For a child older than fourteen, the consent of the child shall be required for any decision on parental custody and placement regarding him, unless the child's choice endangers his development. In addition, the Civil Code also provides, relating to settling contact with the child, that before adopting the decision the child who is of sound mind shall be heard by the guardianship authority or the court.

The "Involving the child in the decision-making" provision is of fundamental importance in the Family Law Book. According to Section 4:148 "The parents are obliged to inform the child of any decisions affecting him; they shall ensure that their child who has sufficient level of understanding may express his views before the decisions are taken, and in the cases specified by an Act decide jointly with his parents. The parents shall take the child's views into account with appropriate weight, according to his age and maturity."

The sections of the Civil Code on exercising parental custody contain a series of provisions regarding the consideration of the best interests of the child where the parents are separated.

The main principles governing the parent-child relationship are the following:

- the parents shall be required to exercise, in cooperation with each other, parental custody with the view to ensure the child's appropriate physical, mental or moral development,
- in the joint exercise of parental custody, the rights and obligations of the parents shall be equal,
- the parents are obliged to inform the child of any decisions affecting him; they shall ensure that their child who has sufficient level of understanding may express his views before the decisions are taken, and in the cases specified by an Act decide jointly with his parents. The parents shall take the child's views into account with appropriate weight, according to his age and maturity,

– the parent's parental custody may be restricted or withdrawn by the court of other authorities in exceptionally justified cases set out by an Act, to the extent required to ensure the interests of the child.

The Civil Code lists the additional parental obligations to ensure that the parent caring for the child and the parent living separately may cooperate in the interest of the balanced development of the child. These additional parental obligations are: the parents' cooperation obligation, the parents' mutual information obligation, the right to jointly make decisions regarding the substantial matters affecting the future of the child, the right and obligation of contact.

If the parents are unable to come to agreement regarding the disputed issues relating to the dissolution of the marriage, the court may decide on certain issues including the exercising of parental custody. When deciding, the court shall consider how the child's physical, mental or moral development can be ensured the best.

As we mentioned in the previous chapter the amendment of the Civil Code that entered into force on 1 January 2022 introduced a significant change, which provides for the possibility in a dispute related to the exercise of parental custody that, if the court is convinced that it is in the best interests of the minor child, the parents may exercise custody jointly even after their separation. Under the previous legislation, this was only possible if the parents could come to an agreement on this issue. Joint parental custody does not mean that the parents effectively and physically raise and care for the child for for equivalent periods of time. This is ensured by the possibility of shared physical custody, also introduced from 1 January 2022, where parents take turns to care for the child for the same amount of time. In such cases the decision of the court does not include the issue of parental custody, which helps to avoid a series of legal disputes. It is important to emphasise that in each case it is for the court to consider in its own discretion which form of parental custody is in the best interests of the child, taking into account the requests of the parties, the specific circumstances of the case, the ability of the parents to cooperate, the age and best interests of the minor child and the results of taking evidence. On this issue, the court is not bound by the parties' request. The 2021 amendment to the Civil Code sets out precisely on what matters shall the court decide in cases of alternating care.

According to Section 4:171 (4) of Civil Code in the procedures for settling the exercise of parental custody and for the child's placement with a third party, *the court must inform the child who has sufficient level of understanding about the opportunity of express his or her own views*. In justified cases or if requested so by the child, either directly or with involving an expert, the child shall be heard as well. For a child older than fourteen, the consent of the child shall be required for any decision on parental custody and placement regarding him, unless the child's choice endangers his development." The Civil Code therefore establishes a notification obligation for the court, which ensures the possibility of the child expressing his views and does not establish an obligation regarding the hearing of the child in these lawsuits.

In the notification the court informs the child that he or she can express views in different ways. They can do this in writing, in the form of any electronical message, video message or drawing, which they can send to the court electronically with the help of their parents or even independently, namely the child does not have to appear in court.

In 2022, the Children's Rights Cabinet of the National Office of the Judiciary prepared four notification-samples with the involvement of child psychologist experts. The samples were made for four age groups: 0-6 years old, 7-10 years old, 11-14 years old and 15-18 years old. The use of these notification-forms is not mandatory for the courts, and they are available as a recommendation on the courts' internal interface. The forms were prepared with age-appropriate child-friendly language. Notifications are always addressed to the child not for his/her parents.

The Civil Code guarantees the participation of the affected child not only in actions related to parental custody, but also in action settling contact.

5.2. Child centered civil procedure rules in CPC

Act CXXX of 2016 on the Code of Civil Procedure, which entered into force on January 1, 2018 (hereinafter: CPC) codified the protection of the best interests of the child as a primary consideration when defining family law procedures and developing its special regulations. The best interests of the child are at the centre of the legislation on family law litigation.

The CPC contains special regulations for the following family law actions: matrimonial actions, actions for the establishment of parentage, actions related to parental custody, actions related to contact with the child, actions related to the termination of adoption and actions brought for the maintenance of a minor child.

In marriage dissolution actions, establishment of parentage, parental custody and contact disputes, special provisions have been introduced into the CPC, by Act CXIX of 2020 which differ significantly from the general rules of procedure and are adapted to the specific nature of these legal disputes. On the one hand, these amendments extend the court's ex officio procedural powers to protect the interests of the minor child, independent of the party's request, and on the other, they focus on the parties' personal, oral statements, where the court can accelerate the making of statements on the contentious issues by active guidance within its obligations relating to case management.

Accordingly, the CPC excludes party-appointed expert evidence in these proceedings, which, similarly to the Barnahus model in criminal proceedings, helps to avoid the need for the child to be heard repeatedly by an expert. In family law proceedings, in the absence of a request, it is also possible for the court to decide to order provisional measures, even in the beginning of the proceedings on the maintenance of the child or on which parent will have custody. If it is necessary de court may decide to deprive the parent of the right of contact or to order supervised contact, if it finds circumstances that justify a decision that cannot be delayed by means of a provisional measure. The best interests of the child are also strongly protected by the provision requiring the court, to disregard evidence which is manifestly contrary to the best interests of the child, in proceedings related to the exercise of parental custody.[366]

366 See more: Nagy, Adrienn: A személyi állapotot érintő perek eljárási szabályainak változása az új perjogi kódexben (Changes in the procedural rules of litigation concerning personal status in the new Hungarian Code of Civil Procedure), In: Görög, Márta - Hegedűs, Andrea (ed.) Lege duce, comite familia : Ünnepi tanulmányok Tóthné Fábián Eszter tiszteletére, jogászi pályafutásának 60. évfordulójára (Lege duce, comite familia: Studies in honour of Eszter Tóthné Fábián, on the 60th anniversary of her career as a lawyer), Szeged, Iurisperitus Press (2017), 344-355.

In the regulatory system of CPC minor child appears in *three procedural roles*: they can be witnesses, they can be party according to the rules on legal capacity, and they can also be interested person in action related to parental custody and settling contact. It is exceptional for the child to participate in the family law proceedings as a party.

5.2.1. Interviewing the minor child

As we mentioned earlier the Civil Code places great emphasis on obtaining and listening to the child's views. According to Section 4:171 (4) of Civil Code during its proceeding the court shall hear both parents, except if there is an irremovable obstacle, and notify a child who has sufficient level of understanding of the possibility to make a statement. Where the child himself requests to be heard or the court finds the hearing of the child justified even absent such a request, the court shall hear the child either directly or with involving an expert. Any decision on parental custody and placement regarding a child who has attained the age of fourteen years shall require the consent of the child, unless the child's choice endangers his development.

Within the framework of child-friendly justice, this above cited substantive law provision also had to be accompanied by appropriate procedural law regulations. For this purpose, the Hungarian legislator created the following special rules and placed them in the special part of the CPC under the title 'interviewing the minor child.'

According to Section 473 of CPC (1) If the court decides in the course of the action to interview a minor child as an interested person, in justified cases it shall simultaneously appoint ex officio a guardian ad litem for the minor. The court may interview the minor child in the absence of the parties or their representatives as well.

(2) The court shall summon a minor below the age of fourteen through his statutory representative, calling upon him to ensure that the minor will appear. If a minor above the age of fourteen is summoned, the court shall notify his statutory representative of the summons, even if the representative is also summoned to the hearing.

(3) The interview of the minor shall be conducted in a suitable atmosphere and in a manner that is understandable for him, taking his age and level of maturity into account. At the beginning of the interview, the minor shall be asked his name, place and date of birth, mother's name and domicile, and he shall be informed that all statements made during the interview must be in accordance with the truth, and that he may refuse to make a statement or answer individual questions. If the court appointed a guardian ad litem for the minor, the provided information shall also cover the procedural role, rights and obligations of the guardian ad litem.

(4) The minor child shall be interviewed by the chair. The parties may propose questions before the interview, even if the minor is interviewed in the absence of the parties. The guardian ad litem may propose questions during the interview of the minor. The chair may allow the guardian ad litem to ask the minor questions directly. The chair shall decide whether the proposed and the directly asked questions are admissible.

(5) At the end of the interview, while the minor is still present, the testimony recorded in the written minutes shall be read out, and if the minutes are recorded by making a sound recording of the contents of the minutes, it shall be recorded in the presence of the minor. The occurrence or omission of this shall be recorded in the minutes. The minor may correct or supplement his testimony while it is being read out or recorded. With the permission of the chair, the minutes may be supplemented or modified according to any remarks made by the guardian ad litem or the parties, if the interview is conducted in the presence of the parties. If it is dismissed, the respective request of the guardian ad litem or the parties shall be recorded in the minutes.

(6) If the minor is interviewed in the absence of the parties, the chair shall present the minutes of the interview to the parties.

If the court decides to obtain the child's views by hearing him/her in the trial, it must also decide whether to do so directly or through an expert. The method of hearing is therefore, as a general rule, always chosen by the judge. Judges have very different views on whether it is appropriate to hear the child directly or through an expert. If the judge decides to hear a minor child directly as an interested person, he or she will be sent a special summons.

The minor child has the right to make a statement or refuse to answer certain questions during the hearing as an interested party. The effectiveness of the direct hearing of the child depends very much on the judge's personality, behavior, and empathetic attitude. During the hearing, the first duty of the judge is to alleviate the minor's fear and to relieve the tension that naturally arises from the situation. This can be reinforced by the judge's attitude that he is physically on the same level as the child, not higher. During the hearing, one must strive to get to know the child and find a point of contact that can help him mentally relieve his possible restlessness. A series of questions tailored to the minor's abilities and unique skills can provide him with the necessary emotional security.[367]

5.2.2. Provisional (interim) measures

The Recommendation[368] detailed earlier places great emphasis on the possibility of ordering interim measures in urgent cases within the framework of child-friendly justice. The Hungarian CPC contains special rules for ordering provisional, otherwise interim measures, in family law cases. In these cases, a quick reaction by the court is very important, and thus a quick decision.

The CPC does not contain provisions on time limits regarding actions brought for the dissolution of marriage and actions related to parental custody. However, the Act provides for several rules that serve to ensure that the best interests of the child remain unharmed. At the beginning of the procedure the court may settle the issues relating to the child by means of provisional measures. Pursuant to the CPC in the action, the court may decide on using *provisional or interim measures* especially, even if not specifically requested, on the maintenance of a minor child and on designating the place of residence of a minor child to be with one of the parents or a third party, on settling the

367 See more: Visontai-Szabó Katalin: Hogy mondjam el, hogy te is megértsd? A bírói kommunikáció és a gyermek tájékoztatáshoz való joga egy angol példa tükrében. [How should I explain it so that you understand? Judicial communication and the child's right to information in the light of an English example.] In: Family Law 2018/1 1-8.

368 Recommendation CM/Rec (2025) 4 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in parental separation proceedings.

exercise of parental custody, on keeping contact by and between a parent and a child, and on the use of the spouses' matrimonial home.

According to the special regulation of provisional (interim) measures in family law actions, if necessary, the court may take provisional measures, even in the absence of the parties' corresponding request. The court may take the provisional measure even absent the conditions specified in in the general part of CPC [section 103 (1)], if the requesting party substantiates, or the court detects, a fact serving as a basis for a provisional measure for the protection of a minor child's interests.

The court shall send the request for provisional measure within three working days of receipt by the court to the party with opposing interests in order for him to make a statement, who shall make a written statement within eight days of service. Following the expiry of the time limit, the court shall decide on the basis of available data. The court may obtain the statements of the parties as regards the request also by way of a personal interview, if it considers it more appropriate.

The court shall decide on a request for provisional measures within thirty days of the receipt of the request by the court. The court of second instance shall adopt its decision within thirty days of the receipt of the documents by the court of second instance. [Section 435 of CPC]

5.2.3. Mediation and special *ex officio* decisions

It is an essential procedural rule that the court shall inform the parties of the *possibility and advantages of engaging in a mediation procedure* during the action brought for the dissolution of marriage. The court may recommend, or in justified cases, order that the parents engage in a mediation procedure to ensure the proper exercise of parental custody and of the cooperation between them required for the former, including the contact rights between the parent living separately and the child.

The unique regulation in connection with actions related to the exercise of parental custody, introduced by the Civil Procedure Code Novell allows the court to order the parent acting as a party and the minor child to par-

ticipate in an expert examination by a specialized psychologist. This allows early detection of possible child abuse or neglect, which can be the basis for the court to take an *ex officio* provisional measure to deprive the parent of parental custody and to issue a warning. Requiring parents to undergo an expert examination can also identify other abusive behaviour not involving the child. Under the law on judicial experts, if an expert detects in the course of his/her work a circumstance that endangers the life, physical integrity or health of another person, he/she is obliged to report it to the administrative body supervising the field concerned.[369]

An equally important provision from the point of view of child protection is that the court may decide ex officio in its judgment on parental custody which court shall exercise parental custody, regardless of the content of the application.

5.2.4. Summary of the most child centered procedural provisions of CPC

In summary, the following are the main child-friendly procedural provisions of the CPC:

- In order to protect the minor child, the court may *ex officio exclude the public* from all or part of the trial at any time.
- A defendant acting without a legal representative *may present his or her statement of defence orally*.
- The court may for instance order the interviewing of witnesses, obtain documents or appoint an expert *without the parties' request*.
- There are *special rules of territorial jurisdiction in family law procedures*: the actions may also be brought before the court of the domicile or place of residence of the minor child.
- A minor child below the age of fourteen shall only be interviewed as a witness if the evidence expected from his testimony cannot be replaced in any other way.

369 See more: Nagy, Adrienn: A bizonyítás megváltozott szabályai az új polgári perrendtartásban (Reformed rules of taking evidence in Hungarian Code of Civil Procedure), ADVOCAT 2017 spec. ed. 15-21.

- The CPC *excludes party-appointed expert evidence in family law actions*, helps to avoid the need for the child to be heard repeatedly by an expert. Only officially appointed expert may be used in family law procedures.
- In family law proceedings, *in the absence of party's request, the court may take provisional, otherwise interim measures*, even in the beginning of the procedure e.g. on the maintenance of the child or on which parent will have parental custody.
- In family law procedures the court may *order ex officio the taking of evidence* it considers necessary specially in the best interests of the child.
- In family law procedures *preliminary taking of evidence can be ordered* in the interest of the child even at the very beginning of the procedure.
- The CPC contains *special procedural rules for the interviewing of minor child as an interested person*. It is a special procedural status. One of its essential elements is that the child can be heard even in the absence of the parties (his or her parents); this is the typical interviewing method. The other is to protect the child's interests with appointment of a *guardian ad litem,* who is a lawyer delegated by the Bar Association.
- If the court decides on an issue involving minor child, the procedural deadlines are half as long as in general civil lawsuits. (e.g. the trial must be held within 2 months otherwise it is 4 months).

It should be mentioned that the Hungarian courts have child-friendly *children's hearing rooms*[370], where minor children can be heard by the court in a child-friendly environment. Children under the age of 8-10 are typically heard in these children's hearing rooms, older children prefer to be heard in the courtroom. Judges in family law cases receive special training in the techniques of hearing of the children.

370 https://birosag.hu/birosagokrol/gyermekkozpontu-igazsagszolgaltatas/gyermekmeghallgato-szobakrol

https://balassagyarmatitorvenyszek.birosag.hu/galeria/20131103/torvenyszeken-belul-gyermekmeghallgato-szoba

6. Possible development directions of Hungarian civil substantive and civil procedure law

In line with Hungary's international and EU obligations, the Fundamental Law of Hungary provides that "every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development." Furthermore, it states that by means of separate measures, Hungary shall protect families and children. Hungarian laws offer a comprehensive framework for the protection of children. This includes financial, infrastructural and legal elements from the broad state support for families with children, through the maintenance of an appropriate institutional framework for the protection of children to legislative solutions. Independent authorities and institutions, including the Commissioner for Fundamental Rights, monitor the implementation of the rights of child. In urgent cases, the legislator reacts with utmost diligence.

As we mentioned in the last chapter from 1st August 2022, the court and the guardianship authority must ensure that the child who has sufficient level of understanding is given the opportunity to make a statement and express his/her views in all lawsuits for the settlement of parental custody and in guardianship proceedings. The court and the guardianship authority are obliged to inform the child about this possibility. The amendment of the Civil Code, which entered into force on 1st January 2022, makes it possible for the court to order joint parental custody even at the request of one parent, if it is in the best interest of the child. In the case of joint parental custody, the court can also order that the parents take turns taking care of the child for the same period of time (shared physical custody).

If we examine other options for strengthening the protection of children's rights, for example, the alternative dispute resolution mechanisms (on a voluntary basis) mentioned in the previous chapter come into play, as well as the representation of the child in civil proceedings.

6.1. The child rights lawyer in Hungary: starting points for a required regulatory concept

In order to strengthen child-centered justice and to protect the interests of children more effectively through procedural law, it is justified – in accordance with the CRC – to ensure a higher level of protection of the interests of the child in family law cases.

It can be seen that both previously cited COE Recommendations[371] place great emphasis on the representation and assistance of the child. Although Hungarian law allows for the appointment of a *guardian ad litem* when hearing a minor child as an interested person, this falls far short of the expectations of the CRC, the Guidelines and the two Recommendations.

According to the Explanatory Memorandum to the Recommendation CM/Rec (2025) 4 in accordance with the Guidelines, the competent authority should appoint either a guardian ad litem or another independent representative to represent the views and interests of the child in legal proceedings where there are conflicting interests between parents and children. The ECtHR found that in cases where there are conflicting interests between parents and children, for instance when the applicant is the child of divorced parents in a dispute over custody, the issue of the appointment of a *special guardian ad litem* in respect of the applicant to protect his or her interests may arise. The appointment of a guardian ad litem may be considered necessary to uphold the procedural rights of young children affected by legal proceedings. The ECtHR was satisfied that the procedural requirements implicit in Article 8 ECHR were complied with in a case where the domestic court refused to hear young children and to appoint them a special guardian instead of the social services who represented them in the proceedings.[372]

371 Recommendation CM/Rec (2025) 4 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in parental separation proceedings and Recommendation CM/Rec (2025) 5 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in care proceedings

372 Explanatory Memorandum to the Recommendation CM/Rec(2025)4 of the Committee of Ministers to member States on the protection of the rights and best interests of the child in parental separation proceedings paras 175-177. https://search.coe.int/cm?i=0900001680b60ce2

Explanatory Memorandum pointed out that the children and young people consulted in the course of the drafting process of this Recommendation, advised that children involved in parental separation proceedings benefit from the support of a person of trust suitable to advise and support the child throughout all phases of parental separation proceedings. In particular, the person of trust should be available and accessible to the child at all times to help the child to access and understand relevant information and comprehend the legal process. The person of trust should be available and prepared to accompany the child to any hearings in the proceedings, and to provide emotional support. A person of trust may be provided by appropriate service providers, such as social services, child protection services, psycho-social support or independent advocacy services for children in contact with the justice system, or community-based services. In addition, a person from within the child's social support network whom the child trusts, who is able to provide this service, can act as a person of trust. A person of trust should not be a party or participant to the proceedings, should not provide legal or other forms of representation of the child in the proceedings, and should not have any vested interests in the case. The person of trust should have a basic knowledge regarding the rights of the child and the proceedings, or have a willingness and capability to acquire this kind of knowledge. Moreover, this type of role holds with it responsibilities that the person should be informed about and accept.[373]

It is worth considering that in Hungary, based on successful foreign solutions, such as the Croatian and Austrian ones, guardians who can be appointed under the current rules when hearing minor child as interested person in civil cases should be given stronger procedural authority. It is justified to give a special status to the person acting in the interests of the child, who should be called a 'child rights lawyer'. The aim is that the participation of the child rights lawyer should promote the representation of the interests of the minor as well as the completion of the case within a reasonable time. To this end, the child rights lawyer is obliged to inform the court of all circumstances that may be relevant in making a decision regarding the child. In addition, he or she may make a proposal to the court on the content of a

373 Ibid. paras 173-174.

measure or judicial order serving the interests of the minor child. In addition, the child rights lawyer "amplifies the child's voice" and presents the opinion of the minor child during the procedure and may make comments on procedural actions affecting the child. The child rights lawyer may be appointed from among those lawyers who are registered in a separate register by the chamber and who, in addition to their legal qualifications, have special qualifications and training (e.g. family law specialist, mediator, psychologist) that make them suitable to act in a child support and information role.

According to the proposed regulation, the court shall appoint a child rights lawyer for the minor child as an interested person – from among the persons included in the list of lawyers that can be appointed as child rights lawyers by the regional bar association – if requested by any party or by the minor child who has sufficient level of understanding or if it decides to hear the minor child as an interested person in the lawsuit. A child rights lawyer may also be appointed if the court detects a circumstance that makes it necessary for the minor child to have a guardian ad litem to participate in the proceedings in order to protect the interests of the minor child.

The court shall inform the minor child of the appointment of a child rights lawyer through his or her legal representative. The court shall notify the minor child who has has sufficient level of understanding of the possibility of appointing a child rights lawyer.

The child rights lawyer

a) informs the minor child – taking into account the child's age, maturity and mental state – about the course of the proceedings, his/her procedural rights, the procedural acts affecting him/her, and the content and legal effects of the court decisions affecting him/her,

b) is present at the hearing of the minor child and may be present at all procedural acts affecting the child,

c) presents the minor child's views,

d) may inspect the case documents, make copies or extracts from them,

e) may make proposals to the court on the content of measures or judicial orders in the interest of the minor child,

f) informs the court about all circumstances affecting the minor child that are significant in making a decision affecting the minor child,

g) may make observations on procedural acts affecting the minor child, and

h) issues a warning if the child is perceived to be at risk and may request information from other members of the child protection reporting system.

The state shall advance and cover the fees of the child rights lawyer.

The fundamental criticism of the current Hungarian regulation is that the assigned guardian does not need to have any special child rights training or qualifications. There are no special requirements for him/her, and he/she can only be used when interviewing the child; he/she cannot be assigned at other stages of the procedure or for other procedural acts.

The above-mentioned Recommendation sets out the professional standards for all persons who come into contact with the child during the parental separation procedures. Member States should ensure that the competent authorities and professionals involved in parental separation proceedings, including judges, lawyers, mediators, psychologists and social workers, receive appropriate support, practical guidance and training in order to attain the necessary level of expertise regarding the needs and the rights of the child in parental separation proceedings, and regarding child hearing techniques.[374]

6.2. Feasible future directions for a child-friendly renewal of child hearing

Experiences in family law litigation show that although the special regulation of the hearing of a minor as an interested person represents a positive step forward, there are still shortcomings that need to be addressed. Such as the recording of the child's statement and thus the parents' knowledge of the content of this statement.

374 Recommendation CM/Rec (2025) 4 of the Committee of Ministers to Member States on the protection of rights and the best interests of the child in parental separation proceedings para 77.

The PRA the Act LXII of 2021 on international judicial cooperation in matters of parental responsibility, with the addition of Section 4:171. (4) of the Civil Code, gave a new impetus to the further expansion of the child's right to express their views, as we have written about in detail above. This amendment makes it mandatory in lawsuits for the settlement of the exercise of parental custody for the court to notify the child who has sufficient level of understanding of the possibility of making a statement. If the child requests to be heard himself or herself, or if the court deems it justified, the court will hear the child directly or through an expert. According to practical experience, children increasingly request to be heard in divorce and alimony proceedings and in proceedings concerning parental custody, and therefore it has become justified to renew the regulation on the hearing of minor child as interested person in view of the developments in the field of children's rights.

In order for minor children to be able to express their honest views in family law proceedings affecting them, it should be made a general rule that the court hears the child in the absence of the parties (typically the child's parents). If the court deems this to be contrary to the child's interests, it may allow the presence of either party at the hearing of the child. The presence of a party, typically the parent, may be justified in the case of hearings of children of a younger age or of children with disabilities.

It is proposed to amend the current regulation to require that the court, if possible, appoint a lawyer with a professional qualification in children's law as the guardian appointed to support the minor child. Such qualifications may include a degree in mediation, psychology or family law or child law.

It is also proposed to introduce changes that serve to ensure that the minor child can express himself freely during the proceedings without fear of consequences. To this end, the court shall ex officio exclude the public from the part of the hearing in which the court hears the child, and and shall not allow the minutes of the hearing of the child to be prepared electronically, by continuous recording. If the court hears the child in the absence of the parties, the separate minutes recording the child's statement shall be kept confidential among the documents, and only the court, the minutes keeper, the recorder, the prosecutor and the expert shall have the right to know its

content, but not the parents acting as parties to the lawsuit. In order to ensure that the child makes a truthful statement, it may also be necessary to stipulate that the court may only refer to the child's statement in the reasoning of the judgment to the extent necessary, taking into account the child's best interests. The aforementioned amendments are fully consistent with the Guidelines, the two COE Recommendations and the CFJ Assessment Tool.

ZSUZSA WOPERA

Chapter V
Conclusions

In this volume, we presented the current trends of broadly interpreted European family law in the mid-2020s in the light of the results of matrimonial matters, matters of parental responsibility and child-friendly justice. We deliberately did not or only tangentially deal with a number of important legislative processes and their results, such as the conventions adopted within the framework of the Hague Conference on Private International Law.

It can be stated that legislation in the field of family law is active within the Union, several EU acts have been adopted in the last 10 years, and the adoption of several drafts is in progress.[375] It is clear that EU law has undoubtedly had a great impact on Hungarian legislation and jurisdiction in the field of family law, just as in other countries of the European Union. At the same time, it is also clear that the different approaches of the Member States to certain family law institutions represent a serious obstacle to effective and predictable legislation for EU citizens. This is particularly true of the different approaches to the legal institution of marriage in the Member States. In our opinion, it cannot be considered a satisfactory and desirable solution if, in family law matters with cross-border implications, only enhanced cooperation is possible and only a recast of previously adopted norms can be implemented in the EU Member States.

In the volume, we have analyzed in detail the results of EU legislation on *matrimonial matters*, covering the latest CJEU jurisprudence. We have established that the CJEU has not interpreted the concept of marriage/spouse in relation to either the Brussels IIb Regulation or the Rome III Regulation. However, the CJEU has interpreted the concept of spouse in several cases in the context of Directive 2004/38/EC on the right of citizens of the Union

375 See e.g.: Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. COM/2022/695 final.

and their family members to move and reside freely within the territory of the Member States. It has established that the concept of marriage must be interpreted in a gender-neutral and autonomous manner.

In all cases, the CJEU has established that its legal interpretations do not go beyond the framework of the above-mentioned directive, but it is questionable whether these legal interpretations may have a radiating effect, for example, on the norms adopted in the field of judicial cooperation in civil matters, as well as on national regulations concerning the institution of marriage. Can these situations be resolved by a proper interpretation of the rights deriving from EU citizenship and how do these interpretations relate to the respect for national identity enshrined in Article 4(2) TEU?

The legal interpretations presented also show that although the legal interpretation given in the CJEU judgment is binding on the referring court, if the national authority considers this legal interpretation to be incompatible with its national law, it will not implement it. This was revealed in the aftermath of the Pancharevo judgment. This may also indicate more serious institutional dysfunctions.

It can be seen that the CJEU is still active in the 2020s in terms of the interpretation of matrimonial matters falling within the scope of Brussels IIb Regulation, whether out-of-court divorce or the habitual residence of the spouse is in focus. The situation is similar with the Rome III Regulation, the interpretation of which was also the subject of the first judgment. In this book, we analyze all the relevant, new CJEU judgments. It can be seen that habitual residence, which is the main connecting principle of jurisdiction in these cases, still causes difficulties in interpretation. However, the question is whether, for example, in the field of jurisdiction, the connecting principle favoured by EU law, the habitual residence, in the case of family law disputes, really means a closer connection to a given Member State than citizenship? Taking into account the direction of future legislation, it may be worth considering finding the right balance between the place of actual living and nationality as a connecting principle of jurisdiction? In the field of matrimonial matters, nationality is clearly at a disadvantage compared to the habitual residence, especially given that there is no possibility of a jurisdiction agreement in these matters. In my opinion, it would be justified

to pay more attention to these, the everyday needs of law seekers, during the periodic review and revision of EU legal acts in force, because one of the objectives of EU legislation set out in Article 81 TFEU is precisely to strengthen effective access to justice, which emerges as an even stronger need in the resolution of family law disputes.

In the *matters of parental responsibility*, the monograph analyzed the innovations of the Brussels IIb Regulation in this field, placing special emphasis on the child's right to express his/her views, the overriding mechanism in child abduction cases, the importance of mediation and the innovations of child-centered enforcement. The book analyzes in detail the impact of the above provisions on Hungarian legislation and presents the directions of future development opportunities of individual legal institutions in the Civil Code and the Code of Civil Procedure.

It is worth drawing attention to the fact that the decisions of the European Court of Human Rights also contain interpretations that differ from the explanations regarding the provisions of the UN Convention on the Rights of the Child, for example in the field of the child's right to express his/her viws.

But it is similar of the European Convention on the Exercise of Children's Rights, which was adopted in the framework of Council of Europe in 1996. This convention is fundamentally about the procedural rights of children, including the right to express an views. In this regard, it is essential to mention that this convention does not grant the right to express views to a child who is capable of forming views, but to a child considered by internal law as having sufficient understanding. This is significant difference in interpretation. The 1996 convention uses the term "child with sufficient understanding". This approach is taken forward by the two Recommendations adopted in 2025 on the protection of the rights and best interests of the child in parental separation proceedings and care proceedings. In these Recommendations, as in the 1996 Convention, the expression "a child who has sufficient level of understanding" appears as an indicator of the child's maturity under the heading related to the right to express views. It can be seen that there are differences in approach between the international instruments adopted by certain international organizations regarding how they define the circle of children capable of forming and expressing their views. In this chapter of

the volume, we have discussed Hungarian developments concerning joint parental custody and shared physical custody, as well as European legal solutions.

The last part of the book analyzed *current trends in child-friendly justice*, with a special focus on the ongoing joint COE-EU Child Friendly Justice project, which will finish at the end of June 2026, and its results. It can be stated that European countries have experienced significant progress in ensuring children's rights in civil cases in recent decades, but there are very different solutions, adapted to the legal culture of the given country.

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Family law has always been a sensitive area of legislation and legal practice, where the most intimate and private legal disputes arise. Their correct management, whether at the level of national legislation or EU legislation, also requires an empathetic approach and professionalism from all participants be they legislators, judges, lawyers or legal experts.

The volume summarizes the trends of broadly interpreted European family law in three closely related topics. First, we analyze the problems affecting the institution of marriage in the EU and Member State legislation and case law. Among these, we address the problem of out-of-court divorces and issues concerning the recognition of foreign marriages in other Member States in the light of the case law developed based on the right to free movement, and we evaluate the conclusions that can be drawn from this case law. The volume analyses the results of EU legislation on matrimonial matters.

The volume presents the trends in matters of parental responsibility, such as the forms and solutions of joint parental custody and shared physical custody in EU Member States. We discuss the relevant provisions of the Brussels IIb Regulation, which is the cornerstone of EU legislation of cross-border family law matters, primarily from the perspective of its effects on determining trends in European family law. The third part of the book presents the joint COE-EU project on child-friendly justice and analyzes the recommendations adopted within the framework of this project. The monograph examines the two Recommendations adopted in 2025 on the protection of the rights and best interests of the child in parental separation proceedings and care proceedings.

We recommend the volume to practicing lawyers because of its practice-oriented approach to the issues discussed, but it can also be a valuable read for academic researchers. The book also contains useful information for law students and participants in postgraduate legal studies.