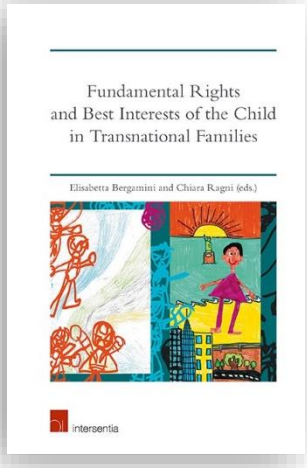
INTERSENTIA

This contribution was originally published in:

Fundamental Rights and Best Interests of the Child in Transnational Families
ISBN 978-1-78068-665-3

E. Bergamini and C. Ragni (eds.)

Published in September 2019 by Intersentia
www.intersentia.co.uk



For more information on the book or to purchase

https://intersentia.com/en/fundamental-rights-and-best-interest-of-the-child-in-transnational-families.html

---

Featured Recommendations

Party Autonomy in EU Private International Law
J. Gray
ISBN 978-1-78068-974-6
Forthcoming

Incorporating the UN Convention on the Rights of the Child into National Law
U. Kilkelly, L. Lundy and B. Byrne (eds.)
ISBN 978-1-83970-992-0
Forthcoming

IMPACT OF THE BEST INTERESTS OF THE CHILD ON THE BRUSSELS II *TER* REGULATION

Laura Carpaneto

1. THE BEST INTERESTS OF THE CHILD AND THE 'BRUSSELS II SYSTEM': SETTING TERMS OF REFERENCE

The best interests of the child[1] (BIC) is the key principle of the 1989 CRC, one of most ratified treaties in the world. Article 3 of the CRC states that the best interests of the child shall be a primary consideration in all actions concerning children, and other Articles explain how the BIC shall be considered in specific

[1] On the notion of the BIC under Article 3 CRC, 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 (Article 3 para. 1). On the notion in (public) international law, see C. Focarelli, 'La Convenzione di New York sui diritti del fanciullo e ilconcetto di 'best interest of the child', (2010) *Rivista di diritto internazionale*, 981. On the BIC in private international law, see M. Distefano, *Interesse superiore del minore e sottrazione internazionale di minori*, CEDAM, Padua 2012; K. Lenaerts, 'The Best Interests of the Child Always Come First: The Brussels II bis Regulation and the European Court of Justice', (2013) *Jurisprudencija/Jurisprudence* (online), 1302–1328; J.M. Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection', (2015) *International and Comparative Law Quarterly*, vol. 64, 327–363; O. Lopes Pegna, 'L'interesse superiore

situations.[2] As a well-established principle,[3] to what extent the BIC is an independent source of protection, for example, for migrant children, is widely debated.[4]

Today, the BIC principle surely plays a relevant and growing role in private international law, mainly due to increasing interaction between human rights and private international law: human rights protection strongly influences the functioning of private international law rules,[5] which are now not only interpreted coherently but also shaped to grant protection to human (and in particular children's) rights. On the other hand, the adoption of, as far as possible, uniform private international rules on matters concerning children is deemed in itself as facilitating the application and implementation of the BIC.[6]

---

del minore nel regolamento n. 2201/2003', (2013) *Rivista di diritto internazionale privato e processuale*, 357; R. Schuz, 'Influence of the CRC on Hague Conventions', (2010) *Journal of Family, Law and the Practice*, 48.

2 Reference is made to the situation of a child who might be separated from his/her parents (Article 9) to the situation of the common responsibilities of both parents for the upbringing and development of the child (Article 18), to adoption proceedings (Article 21), to the situation of children deprived of liberty being separated (Article 37) and to the situation of children accused of having infringed the criminal law. See C. Focarelli, above n. 1, p. 981 ff. and M. Zupan, *The Best Interests of the Child: a Guiding Principle in Administering Cross-Border Child-Related Matters*, in T. Liefaard and J. Sloth-Nielsen (eds.), *The United Nations Convention on the Rights of the Child. Taking Stock after 25 years and looking Ahead*, 2016, at 214, where the Author points out the importance of the above provisions for resolving cross-border cases.

3 This principle is recalled also in other instruments of (public) international law. Reference is made, for example, to the Convention on the elimination of all forms of discrimination against women, the African Charter on the rights and welfare of the child, the Charter of Fundamental Rights of the European Union. See J.M. Pobjoy, above n. 1, at 328. The impact of the best interests of the child in the Hague Conference on Private International Law's Conventions is expressly analysed by M. Zupan, above n. 2, at 215–219.

4 See J.M Pobjoy, above n. 1, at 328. In general, on the protection which instruments of public as well as private international law may grant to migrant children see F. Ippolito and G. Biagioni, *Migrant Children: Challenges for Public and Private International Law*, Editorialescientifica, Naples 2016.

5 See L.R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, 2013, https://rechercheisidore.fr/search/resource/?uri=10670%2F1.azcvbf; P. Kinsh, 'L'apport de la jurisprudence de la Court Européenne des droits de l'homme', in P. Lagarde (ed.), *La reconnaissance des situations en droit international privé*, Pedone, Paris, 2013, pp. 43–45; ibid., 'Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law', in K. Boele-Woelki, T. Einhorn, D. Girsberger and S. Symeonydes (eds.), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, Eleven International, The Hague 2010, 272 ff.; P. Ivaldi and C.E. Tuo, 'Diritti fondamentali e diritto internazionale private dell'Unione europea nella prospettiva dell'adesione alla CEDU', (2012) *Rivista di diritto internazionale privato e processuale*, 736.

6 See UN Committee on the Rights of the Child, General Comment No. 14, para. 68, p. 15, where specific reference is made to the main instruments in force at that time (i.e. 1980 Convention on the Civil Aspects of International Child Abduction, 1993 Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, the

A second reason possibly explaining the BIC's growing relevance in private international law is the 'irresistible extension'[7] of party autonomy to adults' relationships and their 'liberalisation', which needs to be counterbalanced by greater attention to the protection of the BIC, with the child considered a weaker party in family relationships. Consequently, family law tends today to focus not on marriage, but on parent-child relationships.[8]

EU private international law is developing coherently with these generally emerging global trends. Within the EU judicial area, interaction of private international law rules and fundamental freedoms makes it possible for adults to select a legal order that better satisfies their interests in personal and economic matters. Against this background, the EU's focus has shifted onto children's protection, in particular after the Lisbon Treaty: besides Member States' international obligations to protect the BIC derived from the CRC's ratification, today the EU itself is committed to pursuing the protection of children and their interests, as expressed in Article 3 TFEU and Article 24 of the European Charter of Fundamental Rights, which has achieved the same value as the fundamental Treaties.[9]

In particular, the BIC's increasing relevance clearly results from the evolution of the 'Brussels II system', the cornerstone rules of EU private international law in family matters, originally embodied in Regulation 1347/2000 (Brussels II), now in Regulation 2201/2003 (Brussels II *bis*) and, starting from the 01 August 2022, in Regulation 2019/1111 (Brussels II *ter*).[10] A few months after the adoption of the Brussels II Regulation, the need to grant equal protection to all children formed the basis of its first amendment,[11] which resulted not only in the

1973 Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations and the 1973 Convention on the Law Applicable to Maintenance Obligations), which have been a primary source of inspiration for the EU instruments in the field. See also European Parliament Resolution of 28.04.2016 on safeguarding the best interests of the child across the EU on the basis of petitions addressed to the European Parliament (2016/2575(RSP)), para. 23, where Member States are called to encourage non-contracting States to join the 1993 Hague Convention 'which would guarantee that all children benefit from the same standards'.

7 See A.E. von Overbeck, 'L'irrèsistible extension de l'autonomie en droit international privé', in *Nouveaux itineraries en droit. Hommage à Francois Rigaux*, Bruylant, Bruxelles 1993, pp. 619–636.

8 See G. Douglas, '*Marriage, Cohabitation, and Parenthood – from Contract to Status?*', in S.N. Katz, J. Eekelaar and M. Macklean (eds.), *Cross Currents: Family Law and Policy in the US and England*, Oxford Scholarship Online, Oxford 2000, p. 212.

9 In this light, a new mechanism of surveillance and monitoring in respect of the best interests of the child has been set up, by virtue of the 'Eurochild report'. See COM (2014) 224 final, 2013 Report on the Application of the EU Charter of Fundamental Rights, and SWD (2014) 141 final – Commission Staff Working Document accompanying the Report. On this point, see M. Zupan, above n. 2, 220.

10 See art. 105 of Regulation 2019/1111.

11 See recital no. 5 of the Regulation 2201/2003.

enlargement of its scope to include children born outside of wedlock,[12] but also in the adoption of innovative solutions in the area of parental responsibility.[13] A few years later, the Commission embarked on the first recast, focusing on matrimonial matters,[14] resulting in no changes to the Brussels II *bis* Regulation, but in the adoption of a separate legal instrument applicable to cross-border divorces and separations (Regulation 1259/2012).

A novelty with an indirect, but crucial impact on the Brussels II *bis* Regulation's proper functioning in relation to the BIC is the urgent preliminary reference procedure (PPU).[15] After this fast track's introduction in 2008,[16] the Court of Justice has consistently recognised urgency in cases within the scope of application of the Brussels II *bis* Regulation and, in particular, in cases concerning a child's separation from one of the parents.[17] In 2016, a second recast started,[18]

---

12 See COM (2002). With specific reference to the enlargement of the scope of application of the Regulation, see O. Lopes Pegna, above n. 1, at 361.

13 Reference is made, in particular, to: (i) the introduction of special rules of international child abduction, supplementing those of the 1980 Hague Convention; (ii) the introduction of some space for party autonomy in choice of court; and (iii) the mechanism of the transfer of jurisdiction to a more appropriate forum.

14 See Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning the applicable law in matrimonial matters COM (2006) 399.

15 The urgent preliminary procedure (also known with the acronym 'PPU' deriving from the French translation '*procedure préjudicielle d'urgence*') is regulated by Article 23a of the Statute of the Court, Article 107 of the Rules of Procedure, paras. 39 and 40 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, in OJ C 338 06.11.2012, pp. 1–6. See T. Kruger and L. Samyn, '*Brussels II bis: Successes and Suggested Improvements*', (2016) *Journal of Private International Law*, 146, where they point out how crucial this mechanism has been to adequate development of the law combined with respect of the rights of the children and families. On the relevance of the PPU mechanism in Brussels II *bis* proceedings, see K. Lenaerts, above n. 1, at 1303, and, with specific reference to child abduction proceedings, in particular where compared with the procedure *vis-à-vis* the European Court of Human Rights, see R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis*, Hart Publishing, Oxford/Portland 2013, p. 28.

16 See Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice, OJ L 24 of 29 January 2008, p. 42; Amendments to the Rules of Procedure of the Court of Justice, OJ L 24 of 29 January 2008, p. 39; and OJ L 92 of 13 April 2010, p. 12. The PPU is available from 1 March 2008.

17 See A. Dutta and A. Schulz, 'First Cornerstones of the EU Rules on Cross-border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation From C to Health Service Executive', (2015) *Journal of Private International Law*, 1–40, at 7.

18 On the recast procedure, see *Recasting the Brussels IIa Regulation. Workshop 8 November 2016*, PE 571.383; H. Van Loon, 'The Brussels IIa Regulation: Towards a Review?', *in Cross-Border Activities in the EU – Making Life Easier for Citizens*, PE 510.003, 2015, pp. 177–207; C. Honorati, 'La proposta di revisione del regolamento Bruxelles II bis: più tutela per iminori e più efficacia nell'esecuzione delle sentenze', (2017) *Rivista di dirittointernazionale privato e processuale*, 2–55; M.C. Baruffi, 'Uno spazio di libertà, sicurezza e giustizia a misura di minori: la sfida (in)compiuta dell'Unione europea nei casi di sottrazioneinternazionale', (2017) *Freedom, Security and Justice: European Legal Studies*, 2–25; Th. de Boer,

focusing on parental responsibility,[19] and aimed at better protecting the best interests of the child by simplifying the procedures and enhancing their efficiency.[20]

EU institutions have reviewed the existing rules in order to strike a new balance between the need to provide as clear-cut uniform rules of private (procedural) international law as possible based on abstract reasoning for the BIC involved in cross-border proceedings of parental responsibility and, conversely, the need to better protect the BIC in specific and concrete situations. Under the post-Lisbon legal framework, this is a challenging task that requires a more proactive approach to the protection of the BIC. The task is challenging also because the Brussels II *bis* Regulation, as previously mentioned, is the cornerstone of EU private international law instruments in family matters and, therefore, impacts other private international law rules concerning children.[21]

The importance of the revision of such a key instrument is also confirmed by the fact that, despite Brexit, the United Kingdom has participated in the recast and, up to now, is bound by Regulation 2019/1111.[22]

'What We Should Not Expect from a Recast of the Brussels IIbis Regulation', (2015) *Nederlands Internationaal Privaatrecht*, 10 ff.; T. Kruger and L. Samyn, above n. 14, pp. 132–168; E. Rodriguez Pineau, 'La refundición del Reglamento Bruselas II bis: de Nuevo sobre la function del derecho internacional privado europeo', (2017) *Revista Espanola de Derecho Internacional*, vol. 69, 139–165; B. Ubertazzi, 'The Hearing of the Child in the Brussels IIa Regulation and its Recast Proposal', (2017) *Journal of Private International Law*, 568–601; C. Honorati, 'La proposta di revisione del Regolamento Bruxelles II-bis: più tutela per iminori e più efficacia nell'esecuzione delle decisioni', (2017) *Rivista di diritto internazionale privato e processuale*, 247–282; J. Borg-Barther, *Jurisdiction in Matrimonial Matters – Reflections for the Review of the Brussels IIa Regulation*, PE 571.361, 2016.

19 See the Study on the assessment of Regulation (EC) 2201/2003 and the policy options for its amendment, (Final Evaluation Report) at https://publications.europa.eu/en/publication-detail/-/publication/463a5c10-9149-11e8-8bc1-01aa75ed71a1/language-en, in particular at p. 53.

20 See Commission Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility and on international child abduction (recast), COM (2016), 411, 30.6.2016, p. 2.

21 In this regard, it should be considered that Regulation 4/2009 does not expressly mention the BIC among its leading principles and the European Court of Justice has missed the opportunity to consider them as a guiding principle for the interpretation of the rules on jurisdiction, although reference is made to it in the joint cases C-400/13 and C-408/13, *Sanders*, ECLI:EU:C:2014:2461. On this point, see M. Zupan, above n. 2, at 222. It should be also pointed out that no express reference exists in other EU private international law instruments on family matters to the need of applying them coherently with the Brussels II *bis* Regulation (whilst in the field of civil and commercial matters, it is imperative to interpret Brussels Ia, Rome I and Rome II Regulations as a 'system', see recital no. 7 of the Rome I Regulation stating that its substantive scope as well as the provisions should be consistent with Brussels I Regulation and, therefore, also with Brussels Ia, as well as with Regulation Rome II).

22 On this topic, see N. Bennet, 'The European Family in Crisis: The Consequences of Brexit on English Family Law', in *Family Law*, October 2018. On the effects of the Brexit on private international law instruments concerning children in the United Kingdom, see P. Beaumont,

In the following section, the amendments proposed by the institutions in the recast procedure and finally incorporated in the Brussels II *ter* Regulation are considered through the lens of the BIC.[23]

2. IMPACT OF THE BIC PRINCIPLE: THE STRUCTURE AND SCOPE OF APPLICATION

Crucial for swifter application of the 'Brussels II system' is clear determination of its (broad) scope of application and also clearer determination of its key notions (i.e. parental responsibility matters and habitual residence of the child). Under the current rules, parental responsibility matters are completely autonomous from matrimonial ones:[24] when dissolution of marriage jurisdiction is settled without clear evidence of prorogation in favour of that court under Article 12 of Brussels II *bis*, parental responsibility matters concerning a child born in wedlock shall be adjudicated by the court of her/his habitual residence.[25] In adopting Regulation 2019/1111, EU institutions have not taken the opportunity to create an independent instrument devoted only to issues of parental responsibility.[26] Even if that solution might have further increased the EU private international law instruments' fragmentation, practice has proved that in parental responsibility matters, the EU has been not only more successful in amending existing rules, but also in adopting innovative solutions. One might argue that a more precise determination of the Regulation's scope would have made its application easier not only internally (i.e. in relation to matrimonial matters), but also with regard to other EU instruments and other instruments in force globally.

'Private International Law Concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations', available at https://www.abdn.ac.uk/law/documents/CPIL%20Working%20Paper%20No%202017_2.pdf.

23 For information on the status of the ongoing recast procedure, see the following web-page: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/0190(CNS)#tab-0.

24 Brussels II *bis* (as well as Brussels II *ter*) Regulation has a double character: it provides rules on jurisdiction and recognition and execution, on one side, and autonomous rules concerning respectively matrimonial and parental responsibility matters, on the other.

25 Reference is made in C-184/14, *A v. B*, ECLI:EU:C:2015:479, where the Court confirmed that in the absence of prorogation of jurisdiction towards ongoing proceedings on matrimonial matters, the courts where the children have their habitual residence shall retain jurisdiction on parental responsibility matters. This also means that no *lis pendens* arises from the two proceedings mentioned. See I. Kunda and D. Vrbljanac, 'Lis Pendens' (Articles 16, 19), in C. Honorati (ed.), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, Giappichelli, Turin 2017, pp. 227–231.

26 Despite authoritative suggestions in this regard, see A. Borràs, 'From Brussels II to Brussels II bis and Further', in K. Boele-Woelki and C. Gonzales Beilfuss (eds.), *Brussels II bis: Its Impact and Application in the Member States*, Intersentia, Antwerp 2007, pp. 3–22, at p. 21.

In relation to other EU instruments, the Brussels II *bis* (as well as *ter*) Regulation keeps its cornerstone position in family matters, for example, through Article 3 of Regulation 4/2009 and Article 5 of Regulation 2016/1103, which coordinate their rules on jurisdiction with those provided by the Regulation. When such coordination is not expressly established, the European Court of Justice tends to confirm the centrality of Brussels II system rules.[27]

Furthermore, incidental questions on parental responsibility arising before an authority of a Member State without jurisdiction under the Regulation are expressly addressed by the new Regulation, which states that the jurisdictional authority should solve the incidental question, with effects limited to the proceedings at stake.[28]

In external relations with instruments in force globally, a step forward in the BIC has been made by better clarifying the Brussels II *ter* Regulation's relationship with the 1996 Hague Convention (ratified by all EU Member States). More precisely, the 1996 Hague Convention conflict of law rules are expressly recalled as applicable by the Member States' authorities.[29] Such a step, even if it is not much celebrated, surely increases global uniformity and aligns the Brussels II system with modern EU Regulations on private international law matters, providing rules aimed at solving all private international law issues arising in cross-border situations. Furthermore, while confirming the Regulation's jurisdictional priority over that of the 1996 Hague Convention anytime the child concerned habitually resides in an EU Member State's territory, in specific circumstances, the new rules extend application of some 1996 Hague Convention jurisdictional rules to fill gaps in the BIC in practice.[30]

Practice shows that difficulties arise in establishing the scope of application *ratione materiae* and, in particular, whether a public law issue falls within the Brussels system.

The European Court of Justice case law has provided some guidance,[31] which has not been incorporated into new rules, for example, in the recitals.

In this regard, a most delicate issue which has been considered in the recast is whether to expressly extend the application of new rules to unaccompanied

---

27 Reference is made in the following Court of Justice case-law: C-404/14, *Matouskova*, ECLI:EU:C:2015:653, and C-565/16, *Saponaro*, ECLI:EU:C:2018:265. See M. Zupan, 'Scope of Application, Definitions and Relations to Other Instruments', in C. Honorati (ed.), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, above n. 25, at 5.

28 See recital no. 32 of the Regulation 2019/1111, where the example of a succession dispute in which a child is involved and a guardian *ad litem* needs to be appointed is made.

29 See Recital 92 Regulation 2019/1111.

30 See art. 97 of Regulation 2019/111. On this topic, see M. Zupan, above n. 2, pp. 33–35, and T. Kruger and L. Samyn, above n. 14, pp. 151–154.

31 Reference is made to C-435/06, A, ECLI:EU:C:2007:714 and C-92/12 PPU, *Health Service Executive v. S.C. and A.C.,* ECLI:EU:C:2012:255.

minors.[32] With reference to the 1996 Hague Convention, the Brussels II system's primary source of inspiration, this issue was debated during a Special Session in October 2017.[33] The majority of States did not agree on possibly and expressly extending the Convention rules' application to unaccompanied minors, relying mainly on the Convention's exclusion from the scope of its application the rights of asylum and immigration under Article 4(j).[34] Under the Brussels II *bis* Regulation, the same exclusion is provided under recital 10. Furthermore, a specific ground of jurisdiction based on presence in case of refugee or internationally displaced children is expressly foreseen under Article 13(2). However, starting from the considerations above and taking into account, on the one hand, the European Court of Justice's approach, which tends to construe the scope of application of the Regulation as extending to all measures for the protection of minors, including those taken by public authorities,[35] and, on the other, the relevance of the BIC principle[36] and its interpretative function, there is little doubt that the Brussels II *bis* Regulation applies also to migration and asylum and, in particular, to unaccompanied minors.[37]

The new rules confirm the above approach and, in this light, references to decisions on rights of asylum and immigration have been removed. Furthermore, whilst, on the one hand, the proposal of a specific recital providing that jurisdiction rules should be applicable to refugee children and children who have been internationally displaced, not only by disturbances in their country, but also for socio-economic reasons, has not been accepted,[38] on the

---

32 Under EU law, the unaccompanied minors are those children who are not accompanied by adults who are responsible for them whether by law or by the practice of the Member State concerned and for as long as they are not effectively taken into the care of that adult (see article 2(j) Dublin Regulation).

33 See Prel doc special session no. 7.

34 In the Explanatory report (no. 36), with regard to the meaning of the above exclusion, Prof. Paul Lagarde pointed out that 'These are decisions which derive from the sovereign power of States. Only decisions on these matters are excluded: in other words, the granting of asylum or of a residence permit. The protection and representation of children who are applying for asylum or for a residence permit fall, to the contrary, within the scope of the Convention'.

35 See C-435/06, *C*, ECLI:EU:C:2014:2461, and C-523/07, *A*, ECLI:EU:C:2009:225; C-92/12 PPU, *Health Service Executive v. S.C. and A.C.*, ECLI:EU:C:2012:255.

36 Committee on the Rights of the Child, General Comment No. 6, 2005, CRC/GC/2005/6, paras. 19–21.

37 See S. Corneloup (coordinator), *Children On the Move: A Private International Law Perspective*, Study for the Juri Committee, PE 583.158 – June 2017, p. 13–14, where the group of researchers expressly suggests recalling Lagarde's explanations (see above n. 33) concerning the scope of application of the 1996 Hague Convention also within the context of the new Brussels II *bis* Regulation. Such an invitation has not been followed by the Commission in its proposal.

38 See European Parliament legislative resolution of 18 January 2018 on the proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast) (COM(2016)0411 – C8-0322/2016 – 2016/0190(CNS)) (Special legislative procedure – consultation – recast).

other, recital 25 of Regulation 2019/1111 introduces further guidance as to coordinate the application of the new rules with the analogous jurisdictional rules of the 1996 Hague Convention. More precisely, under the above recital, the rule on jurisdiction grounded on the presence of the child under Article 11 of the Regulation should be applied only to children who had their habitual residence in a Member State before the displacement and, therefore, assuming that children who had their habitual residence in a third State could be granted a *forum* under the relevant rules of the 1996 Hague Convention.

Further steps toward better assessment of the scope of application have been made. First, the new rules apply to children up to 18 years old (including those having acquired capacity before that age, through emancipation for example), but rules on child abduction, coherent with the 1980 Hague Convention, apply only to children under 16 years old.[39] The introduction of such a rule at EU level should surely be appreciated since it grants uniform interpretation of a key notion, avoiding any reference to national laws.

With regard to the scope of application *ratione personae*, the new Regulation has not taken the opportunity to provide guidance on the position of persons having *de facto* family ties with the child in cross-border proceedings concerning parental responsibility matters, even if some rules of Regulation 2019/111 expressly recognise the possibility for them, being interested parties, to act in the BIC.

On the other hand, the European Court of Justice has recently confirmed the trend toward extending the scope of application *ratione personae* in the *Valcheva* case, where a grandmother's right of visitation was recognised as falling within Brussels II *bis*' scope of application.[40]

Habitual residence is another key notion for determining the Brussels II *bis* Regulation's scope of application and its functioning. Notwithstanding its importance and difficulties in practical application, the new Regulation does not provide any further guidance in this regard.[41] Indeed, European Court of

---

See European Parliament legislative resolution of 18 January 2018 on the proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast) (COM(2016)0411 – C8-0322/2016 – 2016/0190(CNS)) (Special legislative procedure – consultation – recast).

39 See recital no. 17 of the Regulation 2019/111.

40 See C-335/17, *Neli Valcheva* v. *Georgios Barbanarakis*, ECLI:EU:C:2018:359, at para. 36, where the Court points out that in order to avoid the adoption of conflicting measures in the best interests of the child, the same court which has given the custody to the child to the father and has recognised the right to visit of the mother, shall deal also with the issue of the right to visit to a person different from the parents.

41 The European Parliament was in favour of the introduction of a definition, see European Parliament Resolution 28 April 2016 on safeguarding the best interests of the child across EU on the basis of the petitions addressed to the European Parliament (2016/2575(RSP)), but the Commission's proposal does not take into account this indication and the European

Justice case law has not only indicated the rationale underlying this notion and the elements considered for its assessment, but has also provided specific guidance in difficult cases, for example, concerning new born children in abduction proceedings.[42] The choice not to provide a specific definition of habitual residence in parental responsibility issues and, thus, not to transform a factual notion into a legal one, seems coherent with the overall purpose of facilitating free movement of persons and their integration into new countries; it also seems coherent with the approach adopted under the aegis of the Hague Conference on Private International Law. Given its crucial role, however, the introduction of a few recitals to synthesise the assessment method of the child's habitual residence, as indicated by European Court of Justice case law, would have surely aided the Regulation's swifter application.[43] Still, it is possible that the Commission will adopt an adjourned version of the Practice Guide, which, as happened for previous versions, and will provide specific guidance for the interpretation of such a notion.[44]

3. RULES ON JURISDICTION

Rules on jurisdiction now in force are shaped for the BIC following the criterion of proximity:[45] since citizenship no longer necessarily reflects the proximity of a child to a specific jurisdiction, the court of the child's habitual residence decides the case. Habitual residence is therefore *in abstracto* the ground that better grants protection to the BIC (*rectius* of all children) at the procedural level. Assigning jurisdiction to the court that effectively and *in concreto* is better placed to decide the specific case, makes it exceptionally possible to move from the general rule and to apply special ones, provided that such action serves the BIC. Besides the general rule of jurisdiction, holders of parental responsibility can prorogue jurisdiction in favour of courts exercising jurisdiction on matrimonial matters

Parliament has not reiterated it during the recast, see European Parliament Legislative Resolution 18 January 2018 on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast) (COM(2016)411 – C8-0322/2016 – 2016/0190(CNS)).

42 Reference is made in case C-376/14 PPU, *C. v. M.*, ECLI:EU:C:2014:2268, at paras. 50–57.

43 Such a solution has been adopted in Regulation 650/2012 in recitals 24 and 25.

44 This approach has been recently followed by the Hague Conference of Private International Law for the 1993 Hague Convention on protection of children and co-operation in respect of inter-country adoption: given the challenges encountered by some contracting States in determining the habitual residence of the adoptive parents as well as of the adoptable children, a note has been recently published. The document is available at https://assets.hcch.net/docs/12255707-4d23-4f90-a819-5e759d0d7245.pdf.

45 See S. Cornelup, 'Les règles de compétence relatives à la responsabilité parentale', in H. Fulchiron and C. Nourissat (eds.), *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, Dalloz, Paris 2005, pp. 79 ff.

or of courts of the State having a substantial connection with the child; on the other hand, transferring the case to a more appropriate *forum* is also possible.

This flexible structure of rules on jurisdiction[46] is not altered in the new Regulation. However, the important amendment proposed by the Commission that rules on jurisdiction will no longer refer to a court, but more generally to an authority, in order to encompass any judicial or administrative authority having jurisdiction on matters of parental responsibility, has not been included in the final version.[47]

The new Regulation not only confirms that rules on jurisdiction are shaped toward the BIC, but it also emphasises that such rules should be applied in compliance with the BIC, as defined by Article 24 of the Charter of Fundamental Rights and by the CRC.[48] Under the post-Lisbon legal framework, a general duty to interpret and apply any piece of EU law in light of the BIC arises; *a fortiori*, this shall be followed in applying the Brussels II system's rules concerning parental responsibility. Thus, any time a departure from the general rule of the child's habitual residence is established based on party autonomy or jurisdictional transfer, specific reasoning that justifies such a departure in light of the BIC should be provided.

In relation to the general rule establishing jurisdiction of the court of the child's habitual residence, Regulation 2019/1111 clarifies that, in case of the child's lawful relocation, jurisdiction should follow the child. For proceedings already pending, the rule is to maintain the existing jurisdiction until the proceedings come to an end. However, the courts are also allowed to transfer jurisdiction, which, therefore, may move with the child.[49] These clarifications do not affect, however, the rule establishing *perpetuation jurisdictionis* for three months for proceedings modifying a decision on access rights in the Member State where the child's former habitual residence was before lawful transfer, provided that the parent left behind still has her/his habitual residence in that State.[50] An important novelty is the enhancement of party autonomy in the choice of court and, given that the achievement of an agreement on jurisdiction reduces litigation, this is an important step forward in light of the BIC.[51]

---

46 Given that – as clearly stated by the CJEU in the case of *E v. B* – '(j)urisdiction in matters of parental responsibility must be determined, above all, in the best interests of the child', flexibility is crucial.

47 See Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) – General approach, available at https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-15401-2018-INIT.

48 See recital no. 19 of Regulation 2019/1111.

49 See recital no. 21 of Regulation 2019/1111.

50 See art. 8 Regulation 2019/1111.

51 See P. Beaumont, above n. 22.

Under Article 10 of Regulation 2019/1111, proceedings in parental responsibility can be initiated (i) before the courts of a Member State having a substantial connection with the child, (ii) provided that the exercise of jurisdiction is in the BIC, and (iii) anytime the parties, as well as any holder of parental responsibility, so agree, not only at the time the court is seised, but also in the course of the proceedings.

As with choice of court, the new regime proposed also emphasises the exceptional character of the rule providing for a case's transfer to a more appropriate *forum*, and thus also confirms the necessity not to transfer the case further. An important novelty is the 'bi-directional' character of the transfer: besides the transfer from the court having jurisdiction to a more appropriate forum, under Article 14 of Regulation 2019/1111 a court not having jurisdiction may request a transfer of jurisdiction to the court of habitual residence of the child. Such a transfer shall be exceptional in nature and justified by the existence of a particular connection with that court, which is considered to be better placed to assess the BIC in that particular case.

No further guidance for the application of the transfer mechanism is provided. However, the European Court of Justice has made important statements in this regard in the *Child and Family Agency* case,[52] where the Court has clarified not only the transfer mechanism's rationale, but also indicated elements relevant for assessing whether the transfer complies with the BIC. First, a transfer shall have a 'concrete and real added value' that must be evaluated *not* based on Member States' substantial laws, but on procedural ones. Second, the transfer will be deemed in the BIC any time it does not negatively affect the child's free movement or that of persons involved. Important novelties with regard to provisional measures have been proposed and these are of great importance for granting protection to children involved in cross-border disputes. Notwithstanding its clear wording,[53] the European Court of Justice has made many decisions on the Brussels II *bis* Regulation's Article 20, aimed at clarifying not only its scope of application, but also the effects deriving from the adoption of protective measures in other proceedings. Under the Court's interpretation of current rules, provisional measures adopted by a court not having jurisdiction on the merits shall have only territorial reach and, therefore, cannot circulate within the European judicial area. Consequently, such measures cannot grant effective protection to the child.

---

52 Reference is made in case C-428/15, *Child and Family Agency v. J. D and R.P.D*, ECLI: EU:C:2016:819.

53 See on this point T. Kruger and L. Samyn, above n. 14, at 148, who point out that the existing rule of Brussels II *bis* is very clear, compared to other rules existing in other Regulations where, for example, it has been necessary for the Court to clarify the scope of application of the rule.

In an attempt to strike a new balance between the need to grant immediate protection to the child and the need to prevent forum shopping,[54] it has been originally proposed that protective measures should 'travel' with the child and, therefore, that such measures should be automatically enforceable in all Member States and that they should automatically expire as soon as the authority of the competent jurisdiction has ruled on the matter's merits.

In the end, such amendments have not been included: as a general rule, only provisional measures adopted by the court having jurisdiction 'travel' with the child. However, as an exception, the same regime has been granted also to those provisional measures adopted by the courts of the State of refuge for the protection of children from the grave risk of being exposed to an intolerable situation in return proceedings.[55,56]

4. MORE EFFICIENT CIRCULATION OF DECISIONS

Major problems have been encountered concerning the execution of decisions in other Member States.[57] Thus, the recast's intervention was twofold: (i) abolition of the *exequatur* for all decisions concerning parental responsibility matters, as has recently been done in civil and commercial matters with the Brussels Ia Regulation;[58] and (ii) measures to enforce decisions more efficiently (despite States' well-known reluctance *vis-à-vis* the imposition of a standard affecting national procedural rules).[59]

In the new Regulation, the abolition of *exequatur*, already applying for decisions on visitation rights and on the child's return, has been extended to all decisions falling within the Regulation's scope of application, including custody rights, child protection orders and placement orders.[60] Consequently, a decision

---

54 See T. Kruger, 'Enhancing Cross-Border Cooperation', *in Recasting the Brussels IIa Regulation. Workshop 8 November 2016*, PE 571.383, p. 39.

55 See recital 30 of Regulation 2019/1111.

56 Recital no. 40 of the Commission's proposal points out that such measures, when ordered without the respondent being summoned to appear, should not be recognised and enforced under the Regulation. Unlikely under the regime concerning the execution of decisions, under Article 35.3, provisional and protective measures do not need to be notified or communicated, neither translated into the official language of the State of destination.

57 It resulted in decisions that are often not executed or executed with significant delays. Furthermore, the intervention of specialised lawyers is necessary, and costs may vary from €1000 to €4000.

58 See S.M. Carbone and C.E. Tuo, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il Regolamento CE n. 1215/2012*, Giappichelli, Turin 2016.

59 On the proposed rules on abolition of *exequatur* and execution of decisions, see E. Rodriguez Pineau, above n. 17, at p. 146–152.

60 See art. 34 of Regulation 2019/1111. Even if the *exequatur* is abolished with regard to all decisions on parental responsibility matters, decisions on the rights of visit as well as those

can be immediately executed in the destination State, where, under recital 60, competent authorities are granted the possibility of ordering, taking or arranging for specific measures at the enforcement stage, such as non-coercive but also coercive measures.

Besides the possibility of starting an action for non-recognition of a foreign decision in parental responsibility matters, expressly envisaged by the new Regulation, incorporating the achievement of the *Rinau* decision,[61] it is now also possible to suspend, or even refuse, execution under specific circumstances: not only when execution is suspended in the State of origin, but also when there is still room for an appeal against the decision itself.

Temporary suspension of the enforcement of the decision is also possible in case of grave risk of physical or psychological harm to the child. Such a request shall be made not only by the person against whom enforcement is sought, as well as by any interested party acting in the BIC, but also by the child concerned (where applicable under national law). However, if the grave risk is of a lasting nature, enforcement shall be refused.[62]

As authoritatively observed,[63] the Commission has proposed the *exequatur*'s abolition as inevitable. However, whether such a step is justified on the ground of enhancing mutual trust and European integration, or on the ground of enhancing the BIC, remains an open question. Besides the *exequatur*'s abolition, further measures have been introduced in order to make execution of foreign decisions in Member States more efficient.[64] To start the execution, the interested person shall provide the certificate, accompanied by a copy of the decision before the authority that has been granted competence for execution by the Member State where the decision shall be executed.

A very important change has occurred with regard to the so-called 'privileged decisions' on rights of access and return of the child: while under the current rules there is no way to stop their recognition and enforcement, under Article 50 of Regulation 2019/1111, in compliance with the principle *rebus sic stantibus*, their recognition and enforcement shall be refused if and to the extent that it is irreconcilable with a later decision relating to parental responsibility and concerning the same child. The different positions mentioned confirm a common need to strike a new balance between competing purposes: on the one side, extending the *exequatur*'s abolition to all decisions covered by the Regulation coherent with the Stockholm Program and with results achieved in other fields of civil judicial cooperation is clearly a step forward in enhancing mutual trust;

---

on the return of the child still follow a special regime, as expressly provided by section II of Title IV of Regulation 2019/1111. See E. Rodriguez Pineau, above n. 17, at p. 146.

61 C-195/08 PPU.

62 See art. 56 of Regulation 2019/1111.

63 See E. Rodriguez Pineau, above n. 17, at p. 149.

64 Reference is made in Articles 30–36 of the Commission's proposal.

on the other side, making it possible under Article 56 to suspend or refuse enforcement of all decisions (included the 'privileged' ones) in case of grave risk for the child, as well as under Article 50 to refuse recognition and enforcement of the 'privileged' decisions (for which automatic execution has been working since the Brussels II *bis* Regulation) anytime they are 'irreconcilable' with a later decision, clearly shows a greater attention to BIC *in concreto*.

5. THE NEW PROACTIVE ATTITUDE TOWARD HEARING THE CHILD AND MEDIATION

One of the most significant improvements in procedures concerning children is the acknowledgment that offering the child a genuine opportunity to express her/his views freely is crucial for the BIC principle's effectiveness. Hearing the child not only empowers her/him through direct participation in procedures affecting her/him, but also better enables the judge or authority to assess the factual situation, a particularly difficult task in cross-border proceedings.[65] In Regulation 2201/2003, despite a commitment in recital 33 to respect for fundamental rights, hearing the child still plays a limited role. First, an explicit requirement to hear the child is limited to child abduction procedures: when the 1980 Hague Convention rules on the general obligation to return the child in case of abduction and on exceptions to the above obligation apply, it shall be ensured that the child is given the opportunity to be heard, unless this appears inappropriate having regard to his or her age or degree of maturity.[66]

Notwithstanding the absence of a general requirement, failure to hear the child may be a ground for non-recognition of judgments in parental responsibility matters. More precisely, under Article 23(b), a foreign decision on parental responsibility may not be recognised in another EU country any time a child capable of forming her/his own views, in the absence of reasons of urgency, has not been heard.

A third field in which hearing the child plays a role is the issuance of certificates under Article 41(2)(c) for decisions concerning access and under Article 42(2)(a)

---

65 In this regard, it should be considered that in all proceedings, it is of great importance to avoid the exercise of a basic right of the child becoming an excessively onerous responsibility and this is all the more important in cross-border cases 'since the consequences of the choice expressed by the child can have a far heavier impact on the child's environment compared to cases geographically circumscribed to a small area'. See I. Pretelli, 'Child Abduction and Return Proceedings', in *Recasting the Brussels IIa Regulation*, above n. 17, at pp. 10–11.

66 It should be noted that this is one of the rules supplementing the 1980 Hague Convention, where a general obligation to hear the child is not clearly stated, but derives implicitly from Article 13.2. On this point, see B. Ubertazzi, 'Hearing of the Child', in C. Honorati (ed.), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, above n. 25, at p. 171.

for decisions concerning the child's return. As is well known, these decisions are the first in the EU judicial space benefiting from the special regime of direct enforceability, subject to the issue of specific certificates, on which the court must declare, by 'ticking' a specific box, that the child had an opportunity to be heard, unless doing so was considered inappropriate. As the European Court of Justice has clearly pointed out in the *Aguirre Zarraga* case, courts of the State of origin decide whether hearing the child is appropriate and, if so, for taking all measures appropriate to the hearing's arrangement, having regard for the BIC and each case's circumstances. The current rules do not provide methods and means by which national courts should hear the child; they just recommend the use of EU rules on the taking-of-evidence Regulation.

Regulation 2019/1111, while confirming the recommendation above, takes a significant step forward in enhancing the BIC by providing a general, but very detailed, duty to hear the child in all proceedings concerning parental responsibility. Under Article 21,[67] all authorities exercising jurisdiction in proceedings concerning parental responsibility will have a duty to: (i) ensure that a child capable of forming views is given the genuine, effective opportunity to express those views freely during the proceedings; (ii) give due weight to the child's views according to age and maturity; and (iii) document its consideration in the decision. Such a solution is unprecedented: neither the 1996 Convention nor the 1980 Convention require that a child capable of forming her/his own views have a genuine, effective opportunity to express those views freely in judicial and administrative proceedings.[68]

In addition, the new rules reiterate the duty to hear the child in abduction proceedings[69] and confirm EU institutions' desire to enhance further the child's fundamental right to be heard.

In the same vein, a new pro-mediation stance is present. Article 25 of Regulation 2019/1111 imposes on the competent court a duty to examine

---

67 Article 21 – Right of the child to express his or her views: '1. When exercising their jurisdiction under section 2 of this Chapter, the authorities of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her 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 view 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.'

68 See Permanent Bureau of the Hague Conference on Private International Law, in Recasting the Brussels IIa Regulation – Workshop on 08.11.2016, p. 70. Clearly, the two relevant Hague Conventions do not prevent the contracting States from hearing children in proceedings affecting them in accordance with their national procedural rules regarding the hearing of the child (as is clearly confirmed in Article 23(2)(b) of the 1996 Hague Convention, which is directly inspired by Article 12 of the Convention on the rights of the child).

69 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.'

whether parties are willing to engage in mediation to find, in the BIC, an agreed solution, provided this does not unduly delay child abduction proceedings.[70] Under the new rules, competent authorities have a duty to consider achieving an amicable solution through mediation and other appropriate means for all cases concerning children, in particular in international child abductions. Reference is also made to the possibility for competent authorities to be assisted, where appropriate, by existing networks and support structures for mediation in cross-border parental responsibility disputes.

The European Parliament resolution of 18 January 2018 has proposed a specific amendment imposing on competent authorities, after assessment of the parties' desires, to ask them to engage in mediation. The Parliament also proposed: (i) a few amendments to facilitate parties' access to mediation (including a mention of financial aid); and (ii) the introduction of a new provision[71] stressing the importance of mediators' specific education in cross-border family disputes. However, such proposals have not been included in the final version of the Regulation.

None of the institutions have proposed to include in the new rules a specific reference to the European Parliament Coordinator on children's rights (formerly Mediator for International Parental Child Abduction), which has the power to provide assistance and also to encourage parties to have access to mediation. A reference within a recital would surely have been useful to let people, and not just experts in the field, know of its existence.

6. ASSESSMENT OF THE CHILD'S SITUATION IN 'MOVING' WITHIN THE EU JUDICIAL AREA

Among the novelties proposed, particularly important are the possibilities of collecting information on the child and assessing the compliance of her/his situation. More precisely, under the new rules, central authorities of Member States have a general duty of cooperation not only to discover a child's whereabouts, but also to collect and exchange information (also concerning the situation of a parent, a relative or other person who may be suitable to care for the child), and, moreover, to provide a report (i) on the situation of the child,

---

70 On this topic, see I. Pretelli, 'Child Abduction and Return Proceedings, in Recasting the Brussels IIa Regulation', above n. 17, pp. 10–11. The Author also points out that the idea of compulsory mediation has been rejected during preparatory works, on the ground that mediation is based on the willingness of the parties to conclude an agreement under the guidance of experts, and it is very unlikely that a party who is forced to enter into mediation will cooperate. However, the article points out that it might be possible to consider the solution of a compulsory intervention of a mediator in relation to the compulsory hearing of the disputed child. This could also work as a first step of the two parents resuming dialogue.

71 See Recital no. 43 of Regulation 2019/1111.

(ii) on any procedures under way concerning the child, or (iii) on decisions concerning the child.[72]

Besides the general possibility of assessing, through cooperation and exchange of information between central authorities, a child's situation and reporting on the child, in order to better decide cross-border issues concerning parental responsibility and to facilitate adoption of decisions related to a child's moving within the EU judicial space, the new Regulation also introduces specific rules asking for an assessment of the child's situation for the purposes of placing her/him abroad or deciding on her/his return after an abduction.

Starting from the child's cross-border placement, the main criticisms of its functioning have been tackled. Under the new rules, the receiving State's consent is mandatory and it shall be provided before the child's placement. Furthermore, because placement as a measure of protection is generally urgent,[74] the proposed rules introduce a three-month time limit for the receiving State to decide on the placement, which, together with the *exequatur*'s abolition, surely enhances the mechanism's functioning. For the BIC, however, the most important novelty is the rule requiring the submission of a report on the child. Under Article 82 of Regulation 2019/1111, the requesting authority has a duty to transmit a report on the child, together with reasons for the proposed placement or provision of care. More precisely, the proposed rule asks the central authority of the Member State of origin to transmit to the central authority of the Member State where the child is to be placed 'a request for consent which includes a report on the child together with the reasons of the proposed placement or provision of care', and also to provide these documents with the necessary translation. In providing for the duty to transmit a report on the child, together with reasons justifying the measure of protection, the proposed rule aligns the new Regulation with rules provided by Article 33 of the 1996 Hague Convention.

No specific reference is made (i) to the need to safeguard the child's rights and, in particular, the right to maintain personal contacts with parents, or (ii) to the need to provide solutions of care granting, as much as possible, continuity in a child's upbringing and the child's ethnic, religious, cultural and linguistic backgrounds. Both of these suggestions, even without having binding character, should surely be considered and possibly followed in drafting the report to be transmitted to the central authority of the State where the child will be placed. Furthermore, given the proposed rules' lack of further indications as to the report's content, guidance provided by Lagarde's Explanatory Report in the 1996 Hague Convention shall surely be considered. More specifically, the Explanatory Report indicates that the requesting authority shall provide information

72 See article 80 of Regulation 2019/1111.

on the child's situation and on reasons for the proposed placement or provision of care.[73]

As for the requested Member State's consent, the proposed rules take an important step forward not only by making consent necessary in all EU Member States, preliminary to a child's transfer, but also in providing a deadline of three months for the requested Member State to give consent or not. On the other hand, unfortunately, the new rules do not make any reference to the grounds on which the requested Member State may deny consent and reject a child's placement. This is clearly regrettable considering that placement is a measure of protection for children in need of care and, consequently, denial of consent opposes the BIC *in abstracto* and in the specific situation. Lack of guidance for solving a dialectic between the BIC justifying the consent request and the requested State's interests justifying denial is likely to affect good and uniform functioning of cross-border placement.

A 'substantial' assessment of the child's situation is also required in child abduction procedures. Deep, critical analysis of the proposed rules on child abduction procedures is provided in Ruth Lamont's contribution to this volume. For the present work's purposes, however, attention is paid to the 'overriding mechanism' or 'second chance procedure' and, in particular, to the need for the court of habitual residence, when deciding on whether to replace the non-return order provided by the court of the Member State where the child has been wrongfully removed with a decision of return, to examine questions of custody of the child by thoroughly examining all circumstances, including, but not limited to, the conduct of the parents and taking into account the best interests of the child.[74]

The duty to undergo such an assessment clearly finds inspiration from ECtHR case law and, in particular, from the *Neulinger* and *Kampanella* decisions, in which the Court asked for an 'in-depth examination of family life' in order to decide on the return of the children illicitly abducted. While such a thorough examination was not possible in a procedure focused on the child's return as in the Brussels II *bis* Regulation, the new rules now ask for it in the context of a broader procedure on the merits. Together with the opposition procedure considered in the previous section, the requested examination shifts the balance between the BIC *in abstracto* (i.e. immediate return to the habitual residence) and the BIC *in concreto* in favour of the latter.

---

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

74 See recital 48 of Regulation 2019/1111.

7. IS THE BIC BETTER PROTECTED BY THE NEW RULES?

The Commission's purpose was a 'prudent and focused' recast aimed at 'better protect[ing] the best interests of the child by simplifying the procedures and enhancing their efficiency'.[75] Balancing the need to provide clear-cut solutions, aimed at reaching the overall purposes of EU private international law coherently, with protection (*in abstracto* and in general) of the BIC, and the need to provide flexible devices granting *in concreto* the BIC's protection has proved to be no easy task. In assessing whether this aim has been reached, the BIC's three dimensions may be considered:[76] (i) substantive, i.e. the child's right to have her/his best interests assessed and taken as a primary consideration; (ii) interpretative, i.e. granting priority to the interpretation most effectively serving the child's best interests; and (iii) procedural, i.e. asking for a specific evaluation of the possible impact of a decision on the child or the children concerned.

In the new Regulation, clearly, the procedural dimension plays a primary role in the identification of the court best placed to adopt decisions and to circulate decisions, agreements or public acts on parental responsibility matters in the European judicial space. In both respects, the proposed rules try to strike a new balance between 'procedural values' and the BIC.

As far as jurisdiction is concerned, the general rule of the child's State of habitual residence is further strengthened by the new provision establishing that pending proceedings shall also follow the child's moves, thereby further enhancing predictability and certainty. On the other hand, small steps toward the enhancement of party autonomy and, therefore, of flexibility, have been taken by giving parties the possibility of agreeing on jurisdiction not only at the beginning, but also during proceedings (if the Member State's law so provides).

More significant changes occur with regard to the movement of decisions, where a step toward the enhancement of mutual trust has been made by virtue of the *exequatur*'s abolition for all decisions on parental responsibility. Such a change is counterbalanced by the possibility of suspending, or even refusing, the enforcement of a decision any time the enforcement of a decision would expose the child to a grave risk.

The BIC principle's interpretative dimension is significantly strengthened: such a principle, which traditionally has been the *fil rouge* of the Brussels II system,[77] is now expressly recalled under the new rules. Beside this, as previously

---

75 See Commission proposal COM(2016)411, p. 8.

76 See General Comment No 14, p. 4.

77 See M.C. Baruffi, 'La responsabilità genitoriale: competenze e riconoscimento delle decisioni nel Regolamento Bruxelles II', in S.M. Carbone and I. Queirolo (eds.), *Diritto di famiglia e dell'Unione europea*, Giappichelli, Turin 2009, p. 262.

mentioned, the overall EU legal framework demands more proactive action for the protection of children's rights.

Relevant changes have also to do with the principle's substantial dimension: an assessment of a child's situation in light of the BIC principle is required under the proposed rules in child abduction and cross-border placement cases, to obtain a better picture of the child's situation and, therefore, decisions better tailored to the individual child.[78]

The adoption of Regulation 2019/1111 clearly shows EU institutions' efforts toward better protecting children's rights in cross-border parental responsibility procedures, the major difficulty being striking a balance between the BIC *in abstracto* and the BIC *in concreto*. While the new Regulation seems to take steps in both directions and grants sufficient flexibility to move from one notion to the other, the challenge will be to develop consistent practice within the EU judicial space when considering the BIC in *concreto*. Crucial, in this respect, will be the role of the European Court of Justice, benefiting the PPU's fast track.

[78] The new rules do not expressly specify how broad the assessment shall be. Such an assessment should take into consideration elements necessary for assessing the BIC: the child's views, the child's identity, the preservation of the family environment and maintenance of relations, the child's care, protection and safety, the situation of vulnerability, and the child's rights to health and education. See General Comment No. 14, above n. 1, at pp. 12–18.