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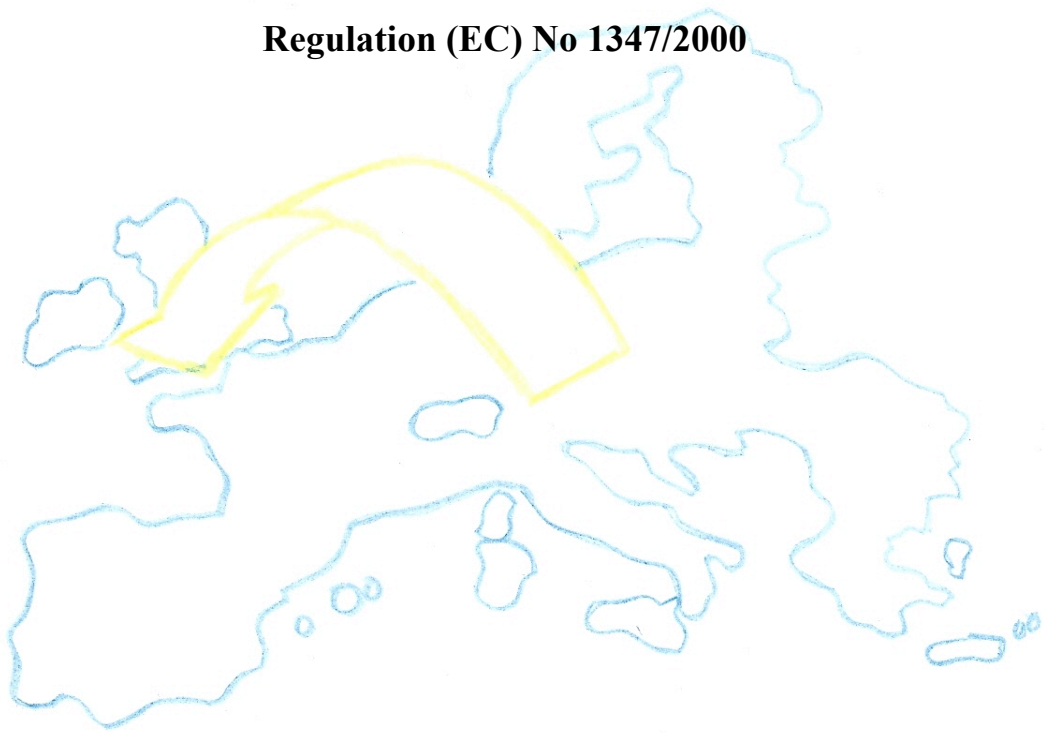
Semi-Final B

International Cooperation in Civil Matters – European Family Law

Placement of a child in another Member State

Article 56

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



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Introduction

The purpose of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[1] is to unite the provisions on divorce and on parental responsibility in a single document. In order to ensure equality for all children, the Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding[2]. This reflects the significant increase of the extra-marital births, as a change in the pattern of traditional family formation is evident[3].

The aim of this paper is to provide a survey of the scope, definition and jurisdiction as well as of the procedure, recognition and enforcement regarding Article 56 which deals with the placement of a child in another Member State. The wording of Article 56 was mainly derived from Article 33 of the Hague Convention 1996[4] which therefore can be used for interpretational purposes. In relations between Member States Article 56 of the Regulation takes precedence over Article 33 of the Hague Convention 1996[5]. The aim of Article 56 is to prevent the placement of a child in a Member State without its prior consideration as such a placement might have consequences concerning jurisdiction as well as financial liability.
In order to illustrate the various problematic aspects of the interpretation and consequently the correct application of Article 56 both actual and fictional cases shall be presented and critically analysed.

General considerations concerning the Regulation

Scope

The scope of the Regulation regarding parental responsibility is expressly stated under Article 1 (1) (b), whereby the Regulation shall apply in *civil matters relating to the attribution,*

[1] Hereafter: the Regulation; as far as Articles are cited without a source of law they refer to this Regulation.
[2] Recital 5 in the Preamble to the Regulation.
[3] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, 15.4.2014, 6.
[4] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.
[5] Article 61 (a) and (b).

exercise, delegation, restriction or termination of parental responsibility, regardless of the nature of the court or tribunal. Matters which are in particular referred to thereafter, are specified under Article 1 (2) where, among others[6], placement of the child in a foster family or in institutional care is listed (d). According to Article 1 (3) the Regulation shall not apply to preparatory measures to adoption or the annulment or revocation of adoption (b) as well as measures taken as a result of criminal offences committed by children (g).

Case C-435/06 *C* [2007]

In Case C-435/06 the CJEU had to give a preliminary ruling concerning the interpretation of the Regulation relating to its scope.

In the main proceedings, Ms C is appealing against the already carried out transfer of her two children by the Finnish authorities to the Swedish authorities, who had ordered the children to be taken into care and placed in Sweden, where the family previously resided.

The main questions that arose in context with this case were first, whether such a decision relating to child protection fell within the definition of "*civil matters*" for the purposes of the Regulation – even though it was governed by public law in the deciding Member State – and second, whether in cases where a decision concerning the placement of a child requires the adoption of not just one decision, but a whole series of decisions, the Regulation covers both the taking into care and the placement of children or solely the placement decision, as only the latter is explicitly listed under Article 1 (2) (d).

To answer these questions it was necessary to determine whether the decision related to parental responsibility and consequently falls within the scope of the Regulation. The CJEU clarified, that the fact that *taking a child into care* does not feature expressly amongst the matters which, according to Article 1 (2) of the Regulation, relate in particular to parental responsibility cannot exclude such a decision from the scope of the Regulation. The use of the words "*in particular*" implies that the list contained is only to be used as a guideline. "*Parental responsibility*" encompasses all rights and duties relating to the person or the property of a child, which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect, including rights of custody and rights of access. It was stated that it is clear from Recital 5 in the Preamble to the Regulation that, in order to ensure equality for all children, the Regulation covers all decisions on parental responsibility,

[6] (a) rights of custody and rights of access; (b) guardianship, curatorship and similar institutions; (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

including measures for the protection of the child. Furthermore a decision concerning taking a child into care, such as the one in the main proceedings, is inherently a public act that aims to satisfy the need to protect and assist young persons.

Concerning the question whether the Regulation applies to decisions regarding parental responsibility that are governed by public law, the CJEU has repeatedly held that the term "*civil matters*" must be interpreted autonomously with regard to the objectives of the Regulation in order to ensure the uniform application of the Regulation. The term "*civil matters*" therefore is capable of extending to measures which, from the point of view of the legal system of a Member State, fall under public law.[7]

Definitions

It is important to consider the definitions as stated within the Regulation under Article 2. Otherwise it is possible to misinterpret the entire scope of the Regulation and the true meaning of its provisions, which might lead to a misapplication or even a lack of application.

According to Article 2 (1) the term "*court*" shall cover any authority with jurisdiction in the matter falling within the scope of the Regulation. Consequently, all judgments relating to parental responsibility, pronounced by such a court of a Member State, are considered under Article 2 (4) as a "*judgment*" for the purposes of the Regulation, no matter how the judgment may be called, including a decree, order or decision. The term "*parental responsibility*", as already mentioned, shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect, whereas the term shall include rights of custody and rights of access, which essentially equates the definition laid down in Article 1 (2) Hague Convention 1996. Note that the right of access extends not only to the parents themselves but also to the grandparents of the child[8].

Jurisdiction

The courts of a Member State, in which the child is habitually resident at the time the court is seised, will as a rule have jurisdiction[9]. In this context the concept of "*habitual residence*" corresponds to the place which reflects some degree of integration by the child in a social and

[7] Case C-435/06 *C* para 45-47, 51; Recital 5 in the Preamble of the Regulation.
[8] *Dr. Christiane Holzmann*, Verfahren betreffend die elterliche Verantwortung nach der Brüssel IIa VO, FPR 11/2010, 497 (498).
[9] Article 8 (1).

family environment[10]. In cases of relocation, the courts of the Member State of a child's former habitual residence shall – by way of exception – retain jurisdiction during a three-month period following the move for the purpose of modifying an issued judgment on access rights. Although only where the holder of access rights continues to have his or her habitual residence in that Member State and did not accept the jurisdiction of the Member State of the child's new habitual residence[11].

According to Article 12 there are certain circumstances in which a prorogation of jurisdiction is possible providing that the *parents have accepted expressly or otherwise in an unequivocal manner the jurisdiction and that it is in the best interests of the child*. Where a child's habitual residence cannot be established and jurisdiction cannot be determined by prorogation, the courts of the Member State where the child is present shall have jurisdiction[12]. Where no court of a Member State has jurisdiction pursuant to Article 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State[13].

Considerations specific to Article 56

Various aspects of the applicability of Article 56 in "real life"

In the following different scenarios shall be presented, ranging from those where Article 56 is obviously applicable to those where its applicability has to be denied.

Scenario 1

The parents of a child decide to send it to boarding school in another country / to live with a family member or friend in another country.

In these cases Article 56 undoubtedly is not applicable as there is no court contemplating the placement of a child in another country, but it's rather the parents exercising their parental rights and sending their child to another country to gain experience and / or education. It shall be noted though, that only the applicability of Article 56 is to be denied, the applicability of the Regulation as such would have to be examined separately.

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[10] Case C-497/10 PPU *Barbara Mercredi v. Richard Chaffe* [2010].

[11] Article 9; by participating in proceedings before the courts of the Member State of the child's new habitual residence without contesting their jurisdiction, the holder of access rights accepts their jurisdiction.

[12] Article 13.

[13] Article 14; Note that there is a great divergence between the jurisdiction rules of Member States, especially that, in about half the Member States, the citizenship of the child (or of either parent) is sufficient to establish jurisdiction in the Member State of such citizenship, while this is not the case in the other half. Although in some of these latter States other grounds of residual jurisdiction may in some circumstances allow an action to be brought in the Union, there is no guarantee to that effect (2007 Report Study on Residual Jurisdiction prepared by *Prof. A. Nuyts*, http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm).

Scenario 2

The court of a Member State contemplates and subsequently decides to place a child in a residential home for long-term childcare / in a foster family in another Member State.

In these cases Article 56 is on the first glance rather undoubtedly applicable, as they reflect the wording of Article 56 almost entirely. But still a closer look might be necessary to determine its actual applicability. Questions that may arise in this context are mainly those concerning the underlying definitions of the terms and expressions used in the Regulation. The problem of what constitutes a "*civil matter*" in the context of the Regulation has been analysed and expounded already[14]. While the Regulation itself defines several terms used, it does not define others that superficially seem to have a single specific meaning but in reality might be interpreted rather differently by the various judicial systems. As far as Article 56 is concerned these terms that seem to be straight forward but actually hide a plethora of various meanings are mainly "*institutional care*", "*foster family*" and "*child placement*". The following scenarios shall demonstrate this issue further:

Scenario 2.a

A child is under the care of its home state, the parental rights of the parents have long been revoked. The child is diagnosed with a psychiatric illness and needs special treatment. The treatment needed cannot be offered within the borders of its home state e.g. because there are no psychiatric facilities that are specialized in dealing with this specific illness or in children's psychiatry. Therefore the competent court decides to place the child in a locked ward of a psychiatric facility within another Member State.

This scenario is by far less straight forward than the ones mentioned before as it seems at least questionable if the scope of the Regulation was intended to expand also towards medically indicated placements of children, ie if this still falls under the definition of a "*child placement*" in "*institutional care*" as the terms are used in the Regulation, especially as the placement is supposed to take place in a locked ward of a psychiatric facility and as such involves the deprivation of liberty of the child. According to the CJEU a placement of a child in a secure institution that offers therapeutic and educational care has to be considered equal to the placement of the child in a care home in another Member State[15].

It is debateable if the same conclusion would be reached in a case where the child were to stay at a children's hospital due to a physical illness, especially as staying in a hospital does

[14] cf. above page 2.
[15] Case C-92/12 PPU *Health Service Executive v. S.C., A.C.* [2012] para 56 and 64.

usually not include education of the child and might thus not be considered equivalent to institutional care[16].

Scenario 2.b

The parents have full custody of their child but realize that they are unable to keep it from "going down the wrong path". They rely upon the services of the child welfare institutions of the state of residence and agree upon the necessity of a radical change in the child's life. Thus the placement of the child at a specialized residential home with programs for at risk youths in another Member State is decided and agreed upon between the parents and the state's authority.

In this scenario the parents who still have full custody of the child at this point actively seek the help of the authorities. They not only have some input in what to do with their child to keep it from succumbing to the risks it is facing at its momentary surroundings, but have the final say in what happens with the child. The parents enlist the assistance of the authorities to help organize and maybe even finance the temporary relocation of their child. In this scenario the main question is if the assistance of the authorities in organizing the child's placement can already be considered as "*a court contemplating the placement of a child*" as stated in Article 56. After all the placement of the child is not contemplated only by the authorities but rather is initiated by the parents. In this scenario the final decision is made by the parents who still have all custodial rights. Thus it might very well be argued that due to the lack of a formal decision by any state authority the applicability of Article 56 is to be denied[17]. At the same time one might reach the exact opposite conclusion when taking into account that even though the parents were willing to seek the help of the authorities and agreed with them to send their child to another Member State. This consent could be revoked by the parents at any given time after the placement of the child takes place. In such a case it would be rather likely that the state authorities would revoke their parental rights and consequently ensure the further stay of the child. So even though the original placement of the child took place with the consent of the parents it might happen that a decision of the court becomes necessary later on. In order to avoid unnecessary complications in such a case it has been argued that the mere assistance by a state authority with placing a child in an institution or foster home in another Member State should be considered a formal decision. Thus Article 56 should be

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[16] cf. *Pesendorfer* in *Fasching/Konecny²* Article 56 EuEheKindVO Rz 19*; Höllwerth* in *Burgstaller/Neumayr/ Geroldinger/Schmaranzer,* Internationales Zivilverfahrensrecht, zu Artikel 56 EuFamVO Rz 20.

17 cf. *Pesendorfer* in *Fasching/Konecny²* Article 56 EuEheKindVO Rz 36.

applicable immediately and not only after the parents revoked their consent to the placement of the child[18].

Scenario 2.c

Member State A runs programs for its own at risk youths in Member State B, where it not only finances the home the children are to stay in but also provides the therapists and other staff. If Member State C places a child in the home run by Member State A situated within Member State B, it gets even more complicated.

Placing a child in such a home might at first glance seem rather similar to simply sending it on an educational adventure trip over summer. But seeing how these abroad homes are mainly intended to deal with high risk youths and are rather a last resort, children that are placed in these homes generally are not sent there for a few weeks but rather several months to years. Member State A does not relinquish the custody of the children by sending them to such a home in Member State B. Even though the home is run by Member State A Article 56 is applicable in these cases, as Member State A still places children in another Member State. In this case the applicability of Article 56 might not primarily concern the monetary consequences and the question of which Member State is liable for the expenses, but seems to rather focus on the question of the child's well-being while it stays in Member State B. Because even though Member State A might run and finance the home, as the child will take residence in Member State B, Member State B will have jurisdiction in cases of endangerment of the child according to Article 20.

In cases where the child is sent there by yet another Member State, this fail safe concerning the child's welfare seems even more important, which is why any other Member State placing a child in such a home or program would have to consult Member State B in accordance with Article 56 but obviously would still have to coordinate the placement with Member State A[19].

In cases in which Member State A effectively runs an adventure camp in Member State B where children would be sent by a court only for the duration of a few weeks, the applicability of Article 56 would have to be questioned yet again. Article 56 does not specify a minimal duration of a child's placement for its applicability. Considering the Case C-92/12 PPU where the CJEU affirms the applicability of Article 56 for intended short stays of a child at a secure institution as well as their subsequent extensions, a time frame argument might not be as valid as it seems at first glance. So while simple group vacations abroad might not fall

[18] cf. *Mag. Christine Miklau,* Die Unterbringung Minderjähriger im Ausland unter Mitwirkung des Jugendwohlfahrtsträgers, iFamZ 2010, 51 (53).

[19] *Miklau*, loc. cit. 54; *Pesendorfer* in *Fasching/Konecny*[2] Article 56 EuEheKindVO Rz 29.

under Article 56, the moment another aspect – such as an exceptional long stay in a certain Member State or the absence of a prominent recreational purpose of such a trip – comes into play Article 56 would have to be applicable[20].

Scenario 2.d

The parents are citizens of a different Member State than the one they live in with their child. The court of this Member State strips the parents of their parental rights / the parents are unable to exercise those rights at the moment due to sickness / an accident or any other reason and the Member State therefore looks for a suitable foster family. Finally it decides to place the child with a relative in the home state of the parents, ie another Member State.

It is not clear if the definition of the term "*foster care*" includes cases where biological family members take the child in. The definition of "*foster care*" ("*Pflegefamilie*") within the Austrian legal system used not to include biological family members but rather only third parties that took in children who were not biologically related to them in any way[21]. This definition changed in 2013 when a new federal law concerning child welfare took effect and thus now even closely related family members might be considered foster parents if the child is placed in their care after the parents' custodial rights have been fully revoked[22]. In Austrian literature the applicability of Article 56 in such cases was denied mainly due to the fact that close family members could not be foster parents as defined in Austrian law before 2013[23] and to the text of the judgment C-435/06 where it is stated that a "*decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters'*". The argument that was made, seems to stem from the deviating German translation, where the child is not to be placed "*outside his original home in a foster family*" but rather "*outside his original family in a foster family*"[24]. It was argued that the CJEU implicitly negated the foster status of close relatives – a conclusion that is not shared by the authors of this paper. Especially when taking into account that the CJEU stated, that in order to reach the expressed aim of the Regulation to ensure the equality of all children even a placement in a psychiatric facility is to be considered a placement in institutional care[25], the placement of a child with relatives should be considered a placement in foster care as well.

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[20] *Miklau*, loc. cit. 54.
[21] § 14 Jugendwohlfahrtsgesetz (JWG) defined foster children as children who were not taken care of by closely related family members.
[22] § 18 Bundes-Kinder- und Jugendhilfegesetz 2013 (B-KJHG).
[23] *Pesendorfer* in *Fasching/Konecny*² Article 56 EuEheKindVO Rz 20.
[24] C-435/06 *C*.
[25] Case C-92/12 PPU *Health Service Executive* para 64.

Right to respect for private and family life

Article 8 of the ECHR protects family life as such and thus prohibits the state from separating a family. Article 8 (2) ECHR states an exception from this prohibition of interference with family life as far as the interference is in accordance with the law and necessary for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others. The thus protected right to respect to family life has to be considered by the state authorities not only when separating a child from the parents and sending it across state borders, but rather even in cases of encroachments on this fundamental right on a much smaller scale. Any and all separations of children from their parents have to withstand the examination of its necessity and have to adhere to the principle of proportionality[26]. Even a simple separation of a child from the parents with the child staying in the same city has to adhere to these restrictions. Thus the cases in which a placement of a child in another Member State against the will of the parents can be considered necessary and proportionate are far from common.

Procedure

Whilst it is incumbent on the Member State to facilitate the placement of a child in another Member State within an appropriate time period (e.g. in cases where a child has already been placed in various institutional care/foster families and fled, or whereby a living situation has become untenable), there are cases the placement needs to be urgently enacted for the best interests of the child (e.g. the child has lost his/her family and the godmother resides in another Member State). Since the decision to place a child in another Member State is a big step in the life of the child, it has to be done in its best interests and must be approached with requisite gravitas. It has to be kept in mind, that the placement is an infringement upon the fundamental rights (Article 8 ECHR Right to respect for private and family life, Article 24 Charta of Fundamental Rights of the European Union Right to maintain contact with both parents) and all relative interests have to be considered carefully. Due course and procedure can take time in this respect. Furthermore, to achieve a judgment on a placement that will be recognized by another Member State, the procedure laid down under Article 56 has to be complied with. Depending on the national procedure of the respective Member State the length of proceedings cannot be predicted. Article 56 identifies two diverse situations with regards to the placement of a child whereby a court of a Member State can seek to render a

[26] cf. *Pontes vs Portugal* (application no. 19554/09) and *Vojnity v. Hungary* (application no. 29617/07) ECtHR.

judgment that will be recognised by another Member State without any further special procedure being required. Depending on whether the Member State where the placement of the child is to take place (requested Member State) requires public authority intervention for domestic cases of child placement or not, the requesting Member State has to take different steps to comply with the procedure laid down in Article 56.

Article 56 (1), (2) and (3): If in the requested Member State a public authority intervention is required for domestic cases of child placement, the requesting Member State's court shall first consult the Central Authority[27] or other authority having jurisdiction in the requested Member State. Only if and after the competent authority of that Member State has consented to the placement, the judgment on placement may be made in the requesting Member State. According to Article 56 (3) the procedures for consultation or consent referred to in (1) and (2) shall be governed by the national law of the requested State.

Article 56 (4): Where the placement shall take place in a *foster family* and where for domestic cases of such a placement a public authority intervention is not required, the Member State's requesting court only needs to inform the Central Authority or other authority having jurisdiction in that Member State of the judgment on a placement of a child. As Article 56 (4) only mentions the placement *in a foster family* – argumentum e contrario – a contemplated placement in *institutional care* will always need a prior consultation or consent of the requested Member State[28].

If the requesting Member State does not know whether the domestic law of the requested Member State requires a public authority intervention on child placement, its Central Authority has to request that information from the Central Authority of the other Member State, who has to provide such information and other assistance as it is needed by courts to apply Article 56[29].

[27] In accordance with Article 53 each Member State shall designate one or more Central Authorities to assist with the application of the Regulation and shall specify the geographical or functional jurisdiction of each.
[28] *Großerichter* in *Althammner/Weller* Article 56 Brüssel IIa Rn 1.
[29] Article 55 (d).

Country-by-Country review of the procedure[30]

Requested Member State	Procedure Article 56 (1) (2)	Procedure Article 56 (4)	Request may be submitted directly to the Central Authority of the requested Member State	Note
Belgium	X		Yes	1
Czech Republic	X		Yes	
Estonia	X		Yes	2
Finland	X		Yes	
France	X		Yes	3
Germany	X		Yes (also to the relevant youth welfare office)	4
Greece	X		Yes	
Ireland	X		No, only via the Central Authority of the requesting MS	
Italy	X	X	No, only via the Central Authority of the requesting MS	5
Latvia	X		Yes	6
Luxembourg	X	X	Yes	7
Malta		X	Yes	
Poland	X		Not specified	8
Portugal	X		Yes	9
Romania	X		No, only via the Central Authority of the requesting MS	
Slovakia	X		Yes	
Slovenia	X		Yes	
Sweden	X		Yes	
Hungary	X		No, only via the Central Authority of the requesting MS	
UK	X		Yes	

1: As the selected institution / foster family will be examined by the Belgium authorities, the procedure will be faster, if the request relates to an already acknowledged institution / foster family. If a child shall be placed within the German-speaking Community, the request may be directly submitted to the relevant department of the Ministry of the German-speaking Community.

2: The Central Authority forwards the request to the relevant rural municipality government, which has to give a decision within two months.

3: Depending whether a civil court or another authority having jurisdiction in matters of parental control is requesting consent for a contemplated placement of a child, the French Central Authority forwards the request via the High Public Prosecutor's Office to the relevant judge of a juvenile court or to the relevant Conseil Général to give a prior opinion before it grants or refuses consent for the requested placement. Note, that the Conseil Général usually won't consent to a requested placement if it does not relate to an already acknowledged institution / foster family.

[30] https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Unterbringung/Unterbringung_node.html with further links to the respective Member State; Note that information was not available for all Member States.

4: A request may be submitted directly to the relevant youth welfare office or will be forwarded to by the central authorities. The youth welfare office has to seek prior consensus of the relevant Family court, if it contemplates to consent to the requested placement.
5: If the child shall be placed at relatives up to the fourth degree of relationship the procedure laid down under Article 56 (4) is sufficient.
6: A request will be forwarded to the relevant Orphan's court and has to be submitted one month prior to the contemplated time of the placement.
7: If the holder(s) of rights of custody consented to the placement, the procedure laid down under Article 56 (4) is sufficient. Otherwise consent of the competent Judge of a juvenile court is needed.
8: If the child shall be placed by a decision other than a civil court judgment, there is no need of a consultation procedure at all.
9: The request has to contain special information about the child and the contemplated institution or foster family for their examination by the Portuguese Central Authority.

Recognition

In principle, a judgment given in a Member State shall be recognised by another Member State without any special procedure being required[31]. Article 23 lists different grounds of non-recognition for judgments relating to parental responsibility and the lack of complying with the procedure laid down in Article 56 is one of them (g). Further grounds a judgment relating to parental responsibility shall not be recognised are the ordre public ground of non-recognition (a), a non sufficient service of documents where the judgment was given in default of appearance (c)[32], the fact that the judgement was given without the parent concerned or the child having been given an opportunity to be heard (d), (b), or the judgment being irreconcilable with a later judgment relating to parental responsibility given in another Member State in which recognition is sought (e) or given in another Member State or in the non-Member State of the habitual residence of the child, provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought (f). Note that in this context, due to diverging national rules e.g. concerning the hearing of the child, particular difficulties may arise[33].

[31] Article 21 (1).
[32] The service has to be done in sufficient time and in such a way as to enable the person to arrange for the defence unless it is determined that the person has accepted the judgment unequivocally.
[33] Report from the Commission 15.4.2014, 10.

Even if a judgment on placement has been given without compliance with the procedure laid down in Article 56 it is still a valid judgment. In practice though it is useless because it is not enforceable in the requested Member State as it will refuse the required prior recognition.

Ex-post correction of a judgment given without compliance to the procedure laid down in Article 56

If the procedure had originally not been complied with as laid down in Article 56 but the Member State remedies that lack by consulting the requested Member State in the proper way later on, the question arises whether it is possible to correct the procedure ex-post – especially if the placement has already been carried out. The Regulation itself does not contain any explicit provision for this case. Austrian Commentaries consider it reasonable to allow an ex-post correction of the procedure required especially since the possibility is not expressly denied either[34]. Furthermore, keeping the best interests of the child in mind, a possible posteriori correction of the procedure – without having to displace and resettle a child that might have already been placed in the hosting Member State – seems desirable. Especially in cases where a mere information as laid down in Article 56 (4) would have been sufficient, negating the possibility of an ex-post recognition doesn't seem effective. On the contrary, it would rather extend the already long procedure. Based on this consideration and taking into account that the applicable procedure depends on national law, it would be in conflict with the objective of the Regulation to ensure as far as possible equality for all children, if a posteriori correction of the procedure laid down in Article 56 (1) and (2) would not be possible. But in cases of a Member State blatantly ignoring the required procedure the initiation of infringement proceedings might be considered and recompense for damages might be claimed[35].

Enforcement

A placement judgment must be declared enforceable before it can be enforced in the host Member State. On the application of any interested party, a judgment on the exercise of parental responsibility given in a Member State which is enforceable in that Member State and has been served shall be declared enforceable without delay, if none of the reasons specified in Article 22, 23 and 24 apply[36]. At this point, neither the person against whom

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[34] *Pesendorfer* in *Fasching/Konecny*[2] Article 56 EuEheKindVO Rz 31; *Höllwerth* in *Burgstaller/Neumayr/ Geroldinger/Schmaranzer*, Internationales Zivilverfahrensrecht, Article 56 Rz 25.

[35] e.g. costs of the institutional care or for the foster family – if it has not been paid by the requesting Member State already; cf. *Pesendorfer* in *Fasching/Konecny*[2] Article 56 EuEheKindVO Rz 31.

[36] Article 28, 31.

enforcement is sought, nor the child shall be entitled to make any submissions on the application[37]. The procedure for making the application for a declaration of enforceability as well as the enforcement procedure itself is governed by the law of the Member State of enforcement[38]. The decision on the application for a declaration of enforceability must be made with particular expedition[39]. Either party may appeal against the decision on the application for a declaration of enforceability[40], but in order not to deprive the Regulation of its effectiveness, appeals brought against that decision will not have a suspensive effect[41]. However, on the application of the party against whom enforcement is sought, the court of appeal may stay the proceedings if an ordinary appeal has been lodged in the Member State of origin, or if the time for such appeal has not yet expired[42].

Health Service Executive, C-92/12 PPU

The CJEU answered open questions relating to Article 56 in the case Health Service Executive v. S.C., A.C. in which the High Court of Ireland decided to stay proceedings and to refer six questions to the Court for a preliminary ruling.

The facts which gave rise to the main proceedings

S.C., a child of Irish nationality, is habitually resident in Ireland while her mother, A.C., lives in London (U.K.). The child has been placed in care with foster families and in open or secure care institutions several times in her early childhood. In 2000 S.C. was placed in the care of the Health Service Executive (HSE), which is the statutory authority responsible for children taken into public care in Ireland. S.C. has absconded on several occasions and there have been repeated episodes of risk-taking, violence, aggression and self-harm. Clinical professionals agreed that S.C. should remain in a secure care institution, but there was no institution in Ireland which could meet her specific needs. However there was an appropriate institution available in England which was convenient considering the fact that S.C. continually expressed the wish to be closer to her mother.

The HSE requested, by interlocutory application, the High Court to order S.C.'s placement in the chosen secure care institution in England. In September 2011 the HSE informed the Irish Central Authority of the proceedings before the High Court and requested to ask for the

[37] Article 31 (1).
[38] Article 30 (1), Article 47 (1).
[39] Case C-92/12 PPU, *Health Service Executive*.
[40] Article 33 (1).
[41] Case C-92/12 PPU, *Health Service Executive*.
[42] Article 35 (1).

consent of the Central Authority for England and Wales with the planned placement. In October 2011 the International Child Abduction & Contact Unit sent on behalf of the Central Authority for England and Wales a letter on notepaper showing the heading of the secure care institution and the local authority of the town to the Irish Central Authority. In the letter it was stated, that the secure care institution accepted the placement of the child. Therefore the High Court made an order placing S.C. in the mentioned institution, on which basis HSE transferred S.C. to England. The question of any necessary proceedings in England and Wales for recognition and a declaration of enforceability of the placement order under the Regulation was originally not considered. Only when the order was to be extended, the following questions arose and the High Court decided to stay proceedings and to refer them to the CJEU for a preliminary ruling[43]:

Material Scope of the Regulation

The first question to be resolved was whether the placement is within the scope of the Regulation, since it involves the deprivation of liberty. Article 1 (1) (b) of the Regulation states that the Regulation is to apply in all civil matters concerning parental responsibility, naturally including the right to determine the child's place of residence. It doesn't make any difference, if the right is exercised by the parents or an administrative authority[44]. Article 56 of the Regulation also explicitly refers to "*the placement of the child in a foster family or in institutional care*". Following the opinion of the Advocate-General[45] the CJEU made clear, that the Regulation aims to ensure the equality of all children. Leaving cases involving the deprivation of liberty out of the material scope would be contrary to the expressed aim of the Regulation. The CJEU therefore confirmed that the material scope of the Regulation and especially Article 56 are to be interpreted broadly and the Regulation thus applies in this case.

Extent of the obligations stemming from Article 56

Next the CJEU was asked to specify the nature of consultation and the mechanism of obtaining consent to the placement, especially when deprivation of liberty is involved. One of the main problems in the discussed case was that the consent was given by the secure care institution itself.

The CJEU points out, that although Article 56 (3) allows the national laws to define the procedures, the term 'authority' indicates, that – if necessary – the consent to a placement

[43] cf. Case C-92/12 PPU *Health Service Executive*, para 22-35.
[44] cf. Case C-92/12 PPU *Health Service Executive*, para 56-62.
[45] cf. Case C-92/12 PPU *Health Service Executive vs. S.C., A.C.* [2012] Opinion of AG *J. Kokott*, para 20.

order has to be given from an authority governed by public law. As a result the consent of the institution which takes the child in care in return for payment, does not fulfil the criteria of Article 56. The CJEU declared that in situations where a judge is not certain whether the consent was given by the competent authority of another Member State it is his obligation to ensure a valid consent. If doubts arise after a judgment, it is also possible to obtain the consent afterward and therefore rectify the situation. But this doesn't apply for situations where the procedure of consultation is completely lacking[46]. However as expressed above the possibility of a remedy should also be considered for these situations[47].

This highlighted another weak point of Article 56: Because of the different judicial systems in the EU it can be very difficult – if not impossible – for the judge of a Member State or even for the Central Authority to determine the competent authority in another Member State. It is unnecessarily time-consuming having to check if the consent to the planned placement has been given by the competent authority, especially in a proceeding where a place to stay for a troubled, deprived or abandoned child has to be found as quickly as possible. This hurdle of Article 56 could easily be avoided: If Article 56 (2) required the consent of the Central Authority and not (any) competent authority, it would be much easier to ensure, that the consent is valid. As the communication most of the time runs via the central authorities anyways, this wouldn't lead to any delay of the procedure.

The need of a declaration of enforceability

Not as easily answered was the question, whether a declaration of enforceability is needed in the Member State addressed, especially because the CJEU had to consider the concern of the HSE, the child itself and other parties about the loss of time during this proceeding.

The CJEU made clear, that since the Regulation expressly excluded only two types of judgments[48] from the need of a declaration of enforceability all other judgments have to be declared enforceable.

According to Article 31 (1) a court has to give its decision about a declaration of enforceability without delay and no one is entitled to submissions at this stage of the proceedings, the CJEU stated that therefore there is no reason to be concerned about any substantial loss of time. Eventually the CJEU referred to the possibility of taking provisional measures in accordance with Article 20 (1)[49]. It should be considered, that such a provisional

46 cf. Case C-92/12 PPU *Health Service Executive*, para 73-93.
47 cf. page 13.
48 Judgments concerning the right to access and the return of the child, Articles 40 to 42.
49 cf. Case C-92/12 PPU *Health Service Executive*, para 113-131.

measure wouldn't find an appropriate remedy in this or similar cases: Under Article 20 (1) provisional measures are to be taken by the courts of the Member State, where the concerned person is present. The problem is, that such a provisional decision lacks of recognition and enforceability in another Member State. Chapter III of the Regulation deals with the recognition and enforceability of judgments in another Member State. Article 2 (4) defines a judgment as a decision named in Article 1 (1), for that matter a *final* decision[50]. The CJEU confirmed that Chapter III of the Regulation does not apply to provisional matters relating to the rights of custody[51]. Consequently it can be assumed, that Chapter III does not apply to a provisional placement order either. Applying these principles to the presented case, it wouldn't have been of much use for the Irish High Court to make a placement order on a provisional basis, because the English authorities wouldn't have been obliged to recognize the order anyways. Therefore a provisional measure is not really a feasible solution to speed up the proceedings as long as the child resides in its home state.

Extension of a placement order

Finally the CJEU was asked whether a contemplated extension of the placement order requires a renewed consent of the competent authority in the requested Member State. The CJEU stated, that a placement order can't be prolonged unless the procedure of Article 56 is adhered to. Any extending placement order then needs to be declared enforceable separately. Therefore it is advisable to request the consent for a sufficient period of time to avoid unnecessarily frequent requests[52]. It is easier to bring the child back early, than to obtain several extensions.

The long way back to Austria

We decided on the topic of the placement of children due to the case of a troubled Austrian teenager who was placed in Ireland. To tell his story, let's call him Max.

Background story

Max's parents separated soon after his birth, his stepfather was abusive and violent. After interactions with Social Services in Austria, Max was placed in a voluntary care arrangement in Ireland for several months – the consent required in Article 56 was not obtained and neither was the Irish Central Authority informed.

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50 cf. *Simotta* in *Fasching/Konecny*²Artikel 20 EuEheKindVO Rz 45.
51 cf. Case C-256/09 *Bianca Purrucker v. Guillermo Vallés Pérez* [2010].
52 cf. Case C-92/12 PPU *Health Service Executive,* para 134-145.

Even after being placed with a second foster family Max didn't socialize and he absconded several times. In December 2013 he was found sleeping rough after going missing for 48 hours, which led to the involvement of the HSE with this case. It turned out, that Max's foster family never received any training in fostering a child and that no formal vetting had taken place. Max, who was placed in emergency foster care with another family, expressed the wish to return to Austria to live with his mother. Austrian Social Services indicated as well, that Max could be transferred back to his home country. But no immediate action was taken, because Max seemed to be doing fine at this point until an incident in March 2014. Max was reported missing and refused to speak to anyone when he was finally located. He only stated, that he wanted to return to Austria immediately. Max was then placed in an emergency hostel for homeless boys – again no long-term solution. In the middle of March 2014 Austrian Social Services told their Irish colleagues, that Max should be brought back to Austria, where he could reside in a crisis centre in Vienna.

Following Procedures

The Innere Stadt Wien District Court of Austria declined jurisdiction due to the habitual residence of Max in Ireland. The High Court of Ireland turned out to be the competent court for the decision of repatriation, as the obligations stated in Article 56 had not been fulfilled. On 11th April 2014 the High Court decided that Max has a particular connection with the jurisdiction of Austria within the meaning of Article 15 (3) and ordered the Courts of Austria to be requested to assume jurisdiction within a period of six weeks[53]. The judge based the decision on the facts, that all parties involved agreed to Max's return and the boy as well as his mother are Austrian citizens. Also Austrian Social Services dealt with Max for a longer time and therefore knew his history better than the Irish authorities. Furthermore as Max's mother resided in Austria, there was the possibility of returning him to his family at some point – an option not available in Ireland. Max's wish to go back to Austria was to be taken into consideration as well. Excluding the last months of placement in Ireland, all the boy's links were with Austria, so requesting the Austrian Courts to take over jurisdiction was in the best interests of the child. With its decision of the 6th May 2014 the Innere Stadt Wien District Court of Austria accepted jurisdiction according to the judgment of the Irish High Court. Two days after that the High Court ordered the Child and Family Agency to take Max from his current foster placement and place him in the aforementioned crisis centre in Vienna.

53 The High Court of Ireland, 2014/3554 P, Judgement on 11th April 2014.

Meanwhile Max had a troubled time and could sometimes only be calmed down with medication. Psychiatrists found that Max wanted to expedite his repatriation with this behaviour. From the moment he was told he was allowed to return to Austria, his attitude changed and his return in the middle of May proceeded without any problems.

Deriving thoughts

According to the CJEU the consent required in Article 56 cannot be remedied if the procedure of consultation is completely lacking[54]. The exact consequences however remain unclear. A question occurring in this context is, whether the jurisdiction remains in the home country or switches to the country where the child is placed. Article 8 links the jurisdiction to the habitual residence of the child but the Regulation gives no definition of the term. The CJEU interpreted it as has been expounded above[55].

In Max's case the High Court assumed that Max had been habitually residing in Ireland for the last few months and that the competence was therefore with the Irish courts. But in Max's case the procedure required in Article 56 had not been fulfilled. The High Court described in detail that it would make more sense if the jurisdiction remained in the home country of the child, where the child has been living all its life, where its history is well known by the authorities and where maybe even the parents are residing. So it could be said that the child's best interests are protected most efficiently in its home country. If immediate action is required Article 20 provides the possibility of taking provisional measures in the country of placement. It seems that the CJEU was in favour of the jurisdiction remaining with the child's home country as well, as the CJEU advised in the Case C-92/12 PPU to contemplate a placement order for a longer period and to review the order, if it turned out to last too long[56]. To be able to review the order the jurisdiction would have to remain with the original court.

Max's case showed how important it is to follow the procedure of Article 56 especially as following the described conclusions the jurisdiction would have remained with Austria and his return wouldn't have been as tedious and complicated.

54 cf. Case C-92-PPU *Health Service Executive;* see above page 13.
55 See above page 2.
56 cf. Case C-92/12 PPU *Health Service Executive*, para 145.

Conclusion

Even though the Regulation does contain several definitions of the used terminology, the CJEU has been asked frequently to give a preliminary ruling in order to clarify the meaning of various terms. Therefore more and clearer definitions in the Regulation itself would be desirable, because if the provision is interpreted as a mere reference to the internal law of one or other of the States concerned the achievement of a uniform application is impeded.

The fact that the applicable procedures between Member States depend on their national law adds a layer of uncertainty for the requesting Member State's authorities and thus prolongs the proceedings. As already mentioned above[57], the authors would consider it advisable if Article 56 (2) required the consent of the Central Authority and not (any) competent authority, as it would be much easier to ensure that the given consent was valid. At the moment this uncertainty often delays the proceedings unnecessarily. Given that the requested Member State can only deny the consent to the placement but does not decide about its necessity for the child's welfare, a Central Authority as the only one competent would seem rational. Especially as the consent needed mainly concerns financial aspects of the placement.

Considering this the authors would propose the adoption of a uniform procedure by all Member States in order to simplify and speed up the proceedings, especially since children have a different sense of time and thus suffer more from long proceedings than adults.

Another feasible option to speed up the proceedings would be to introduce a time limit during which the requested state has to render its verdict, otherwise the requested consent would be considered granted. Thus the child could be sent to the Member State after a predetermined period of time in which no answer was received. This should be a rather short period in order to prevent an elongation of the proceedings by the requested Member State not actively consenting but simply waiting for the time limit to expire[58]. Additionally, in order to further simplify the procedure, an automatic connection between the consent needed in accordance to Article 56 and the declaration of enforceability seems advisable.

Notwithstanding these improvement opportunities the Regulation as such and Article 56 in particular can be considered milestones in the continuously intensifying judicial cooperation between Member States in family law matters.

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[57] cf. page 16.

[58] cf. Article 33 of the Convention of 13 January 2000 on the International Protection of Adults concerning the trans-border placement of adults.