

Themis Competition 2016
Semi-Final B
International Cooperation in Civil Matters - European Family Law

**IN THE NAME OF MUTUAL TRUST.
A PLEADING FOR THE ABOLITION OF THE EXEQUATUR
PROCEDURE IN REGULATION
(EC) NO. 2201/2003 FOR JUDGMENTS REGARDING PARENTAL
RESPONSIBILITY**



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Chapter I: Introduction

1.1 What and how?

At the EU level, the enforcement and recognition of judgments regarding parental responsibility is subject to Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000¹ (hereinafter Regulation (EC) no. 2201/2003 or Brussels II bis). The Regulation seeks to facilitate the enforcement and recognition of judgments regarding parental responsibility. It provides for two different systems of enforcement: one with exequatur and one without, applicable only in the expressly mentioned areas. In the name of mutual trust, we consider that it is time to take a step forward and abolish the exequatur procedure for all the judgments regarding with parental responsibility.

The analysis will start with a brief introduction to the enforcement and execution of judgments in the area of parental responsibility, which leads us to the second part where assess whether the abolition of the exequatur procedure is desirable, which is the best means of achieving it and the additional safeguards that can be brought by the uniform interpretation and definition of some pivotal terms.

1.2 The free circulation of judgments

The abolition of exequatur for decisions in civil and family law matters within the European Union (EU) has been one of the objectives laid down in 1999 at the European Council in Tampere.² The Stockholm Programme, adopted by the European Council in December 2009, establishes that the process of abolishing all intermediate measures (the exequatur), should be continued.³

Exequatur is the name which has traditionally been given to the judicial procedure whereby foreign judgments may be imported in the forum so that they may produce legal effects in that legal order.⁴ The exequatur decision will provide for the enforceability of the foreign judgment in the forum, and will thus authorize any local enforcement authority to intervene and attach assets. However, the law of the forum will typically provide that a court may only grant exequatur after reviewing the foreign judgment and verifying that certain requirements are met.⁵

¹ Official Journal L 338, 23.12.2003 P. 0001 - 0029.

² Tampere European Council, 15-16 October 1999, Presidency Conclusions, no. 34.

³ The Stockholm Programme -An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010, point 3.1.2.

⁴ Gilles Cuniberti, Isabelle Rueda, *Abolition of Exequatur, Addressing the Commission's Concerns*, Law Working Paper Series, Paper number 2010-03, p. 2, available at: <http://ssrn.com/abstract=1691001>.

⁵ Cuniberti, Rueda, op. cit. supra note. 4.

The sole goal of the exequatur is to verify that there are no grounds for refusing the recognition of the foreign decision. The decision issued in the exequatur procedure establishes whether the foreign decision can be accepted in the forum. When the procedure ends with a positive resolution, the foreign decision becomes effective in the forum. Without the decision adopted in the exequatur procedure, the foreign decision lacks any effect.⁶

Despite sustained efforts to facilitate the procedure, it still makes cross-border litigation more cumbersome, time-consuming and costly than national litigation. Parties have to bear court fees for processing the application. A lawyer is often hired to prepare the documentation and handle the procedure abroad. Finally, costs of translation and service of documents add to the bill. The delay and costs involved in obtaining the recognition and enforcement of cross border judgments discourage people from making full use of the possibilities offered.⁷

On an EU average, in 93% of the cases, this intermediate step is a pure formality as there are no reasons to refuse recognition and enforcement of the foreign judgment. Between 1 and 5% of the decisions to grant exequatur are appealed but these appeals are rarely successful. Only a handful of cases actually lead to a refusal of recognition and enforcement.⁸

The European lawmaker has repeatedly explained that EU's aim is to turn the EU into a single market where borders would lose their significance and that abolishing exequatur would be economically efficient and would thus increase the economic welfare of European economic actors and citizens.⁹ It seems clear that its abolition would result in an increase of the speed and a decrease of the cost of enforcement of foreign judgments abroad.¹⁰

The first instrument including provisions abolishing exequatur was Regulation (EC) no. 2201/2003. Articles 41 and 42 of the Regulation provide that, as far as the rights of access or the return of abducted children are concerned, enforceable judgments given in a Member State shall be recognized and enforceable in another Member State without the need for intermediate measures.¹¹

⁶ Rafael Arenas García, *Abolition of exequatur: Problems and Solutions. Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: too many words in the sea*, Yearbook of Private International Law Vol. XII, 2, Sellier European Law Publishers, 2010, p. 354.

⁷ Impact Assessment, accompanying document to the proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, European Commission, 14.12.2010, p. 12, available at: http://ec.europa.eu/justice/policies/civil/docs/sec_2010_1547_en.pdf .

⁸ Ibid.

⁹ Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for Uncontested Claims (OJ L143, 30.04.2004 p.15), recitals 8-9 of the Preamble, Regulation (CE) No 1896/2006 of 12 December 2006 creating a European Order for Payment Procedure (OJ L399, 30.12.2006), recitals 6-9 of the preamble & art. 1(a).

¹⁰ Cuniberti, Rueda, op. cit. supra note. 4, p. 4.

¹¹ Cuniberti, Rueda, op. cit. supra note 4, p. 4.

The condition for this “automatic” enforceability is that the judgment is certified in the Member State of origin in accordance with the provisions of the Regulation.¹²

As a result of the above mentioned aspects, a judgment shall be treated for enforcement purposes as if it was given by a court in the Member State of enforcement itself. In order to get this result, the court of origin must follow strict formalities at the process of giving its judgment. It must, first of all, verify compliance with the conditions of Article 40 and Article 42 Regulation 2201. Secondly, it must issue a specific certificate and deliver it to the court of the Member State where its judgment will be enforced.¹³

Chapter II: Current methods of enforcement of judgments

2.1. Judgments concerning rights of access

On condition that at least one of the parties has submitted a request or a lawsuit at the court of origin, the court gives a judgment about the rights of custody and access of the parties. It can order, as a result, the return of the child to one of the parties, even if this would mean that, contrary to a judgment of the requested court of the other Member State, it has to come back to the Member State where it had its habitual residence immediately before it was abducted. Access rights are directly recognised and enforceable under the Brussels II Bis.¹⁴

“One of the main objectives of the Regulation is to ensure that a child can maintain contact with all holders of parental responsibility after a separation even when they live in different Member States. The Regulation will facilitate the exercise of cross-border access rights by ensuring that a judgment on access rights issued in one Member State is directly recognised and enforceable in another Member State provided it is accompanied by a certificate. The consequence of this rule is two-fold: (a) it is no longer necessary to apply for an exequatur and (b) it is no longer possible to oppose the recognition of the judgment. The judgment is to be certified in the Member State of origin provided certain procedural safeguards have been respected. (Article 40(2)).”¹⁵

“Access rights” include in particular the right to take a child to a place other than the habitual residence for a limited period of time (Article 2(10)). The rules on access rights apply to any access rights, irrespective of who is the beneficiary thereof. According to national law access rights may be attributed to the parent with whom the child does not reside, or to other family members, such as

¹² Regulation 2201/2003, Art. 41(1) and 42(1).

¹³ The Brussels II Regulation 2003 – Enforceability of Judgments Concerning Rights of Access and the Return of a Child, available at <http://www.dutchcivillaw.com/content/brusselstwo077.htm>.

¹⁴ Ibid.

¹⁵ Practice Guide for the Application of the Brussels IIa Regulation, p. 43, 64, available at: http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf.

grandparents or third persons. “Access rights” include all forms of contacts between the child and the other person, including for instance contact by telephone or e-mail.

The rules on recognition and enforcement apply only to judgments that grant access rights. Conversely, decisions that refuse a request for access rights are governed by the general rules on recognition.¹⁶

Paragraph 1 of Article 41 Regulation 2201 states the basic principle whereby a special procedure in the Member State of enforcement shall not be required for the recognition and enforcement of judgments that have been certified in accordance with the provisions of this Section. Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal (Article 41(1) Regulation 2201). Paragraph 2 of Article 41 sets out the relevant procedural requirements, namely that the judgment was not given in default of appearance and that the child was given the opportunity to be heard having regard to his or her age and maturity. Also a standard certificate must be handed over to the court of the Member State of enforcement.

2.2. Judgments ordering the return of a child

Article 40(1)(b) states that Section 4 Chapter III shall also apply to the return of a child entailed by a judgment of the court of origin given pursuant to Article 11(8) Regulation 2201. Article 42 especially deals with the enforcement of judgments to return the child. Paragraph 1 of Article 42 states the basic principle whereby a special procedure in the Member State of enforcement shall not be required for the recognition and enforcement of judgments that have been certified in accordance with the provisions of Section 4. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2. Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable’ (Article 42(1)).

Paragraph 2 sets out the relevant procedural requirements, namely that the child was given an opportunity to be heard having regard to his or her age and maturity and that a standard certificate must be handed over to the court of the Member State of enforcement, which guarantees that certain procedural safeguards have been respected during the procedure in the Member State of origin.

¹⁶ Practice Guide for the Application of the Brussels IIa Regulation, op. cit. supra note 15, p. 43.

2.3. Decisions for which the exequatur is required and grounds of refusal

Regulation (EC) no. 2201/2003 still provides for the institution of exequatur for judgments regarding parental responsibility, with the two above mentioned exemptions. However, it does not mention the grounds on which recognition must be granted. However, Article 21 stipulates that a judgment given in a Member State shall be recognized in another Member State without any special procedure being required. The basis for the recognition and enforcement of the judgment in Member States is the principle of mutual trust, as indicated in recital 21 of the Preamble.

The exequatur procedure requires that the party seeking to enforce a judgment given in another Member State files an application and request the courts of the Member State where the enforcement is sought to declare the foreign judgment enforceable. The procedure is governed by the national law of the Member state of enforcement, according to Article 30 and is meant to erase all doubts regarding the authenticity of the judgement¹⁷. The court cannot rule on the merits of the judgment, cannot verify the jurisdiction of the national court of the other Member State and cannot analyse whether the legislation was applied adequately or whether the outcome is correct.

Article 23 of Regulation (EC) no. 2201/2003 establishes grounds on which the judgment relating to parental responsibility shall not be recognised. These grounds for refusal aim at granting, among other aspects, that the judgement is not contrary to the public policy of the state of enforcement and that a set of minimum procedural rights is respected, for example the right of the child to be heard, according to his or her age, the right of the other parties involved to be heard, whether it is irreconcilable with a later judgement. This indicates that the rule is the recognition of the judgment and that the grounds for non-recognition mentioned in article 23 are an exception from the general rule and are to be strictly interpreted in order for the Regulation to have the full intended effect¹⁸.

Despite the fact that the procedure is merely a formality, the exequatur procedure leads to delays and hinders the free circulation of judgements. It establishes an obstacle in EU's path towards an area of freedom, security and justice, in which the free movement of persons is ensured. Moreover, it can be detrimental to the best interest of the child, as in family law matters, time is of essence.

¹⁷ Burkhard Hess, Maria Bergström, Eva Storskrubb, *EU Civil Justice: Current Issues and Future Outlook*, Chapter 13. *Abolition of Exequatur, All in the Name of Mutual Trust*, 2016 Hart Publishing, p.260.

¹⁸ Case C-195/08 *Inga Rinau*, PPU, ECLI:EU:C:2008:406, para. 50.

Chapter III: Future developments

3.1. For or against the abolition of exequatur in parental responsibility matters?

In the context of the Europeanization, disputes concerning exequatur have arisen. This chapter aims at analyzing the advantages and disadvantages of this procedure with a focus on the question whether abolition is desirable or rather problematic. The internalisation of family law leads to very complex cross border cases. Migration, mixed marriages, adoption of foreign children, divorce, parental responsibility confront practitioners and scholars within the EU with complex cross border-cases. Practice in European family law requires knowledge of comparative law, the ability to compare different legal systems and to apply EU law accordingly. To all these, the exequatur is added. There have been numerous inadequacies and weaknesses for Member States which have resulted from the use of the exequatur procedure. It has been regarded as a matter of formality in most of the cases among the EU Member States.¹⁹

The exequatur makes Member States litigation complex, very time-consuming and costly comparatively to the national litigation. Some national systems do not contain special rules for the enforcement of family law decisions and the parties have to resort to procedures available for ordinary civil decisions for the enforcement of family law decisions, which do not take into account the fact that, in the area of parental responsibility, the passing of time may have irreversible consequences with regards to the well-being of children.²⁰ Significant delays might be seriously detrimental to the best interests of the child. In relation with the above mentioned European Court of Human Rights has consistently emphasized that proceedings related to children require urgent handling as the passage of time can have irremediable consequences for the relations between the child and the parent with whom he/she does not live. The adequacy of a measure must therefore be judged by the swiftness of its implementation.²¹ Furthermore, the average cost for straightforward cases in the EU was found to be €2,200. For example, such an exequatur procedure in Bulgaria and Italy would cost between €1,100 to €3,800 and for more complex cases, the costs would even reach up to €12,700 or more.²² Due to

¹⁹ European Commission Press Release Database, *Civil Justice: The Reform of the "Brussels I" Regulation and the European Commission's Green Paper on the Free Circulation of Public Documents: Frequently Asked Questions*, available at: http://europa.eu/rapid/press-release_MEMO-10-677_en.htm?locale=en.

²⁰ Report from the Commission to the EP, the Council and the EESC on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0225>.

²¹ *Shaw vs. Hungary* (application no. 6457/09), Judgment 26.10.2011, para. 66; *Raw vs. France* (application no. 10131/11), Judgment 07.06.2013, para. 83; *Ignaccolo-Zenide vs. Romania* (application no. 31679/96, ECHR 2000-I), Judgment 11.01.2000, para. 102; *PP vs. Poland* (application no. 8677/03), Judgment 08.01.2008, para. 83.

²² Zaineb Aumir, *The Abolishment Of Exequatur From The Brussels Regulation*, 3rd September 2015, available at: <http://courtingthelaw.com/2015/09/03/commentary/the-abolishment-of-exequatur-from-brussels-regulation/>.

such problems and shortcomings, it had been the aim and intent of the EU, to abolish both the requirement and procedure of *exequatur* relating to foreign judgments.²³ The question which often arises is whether the abolition of *exequatur* in a wide range of family law issues, especially in matters of parental responsibility, would be desirable or problematic.

3.1.1. Against the abolition of *exequatur*

Within the European community there has been criticism and scepticism relating to the abolition of *exequatur* in matters concerning parental responsibility. Both scholars and governments have considered that, in order to entirely remove the *exequatur*, a certain degree of harmonisation of substantive law is needed. As long as there is no common understanding and practice as to what pertains to fundamental principles of civil procedure and family law, the abolition of *exequatur* would leave a gap where particular care is most needed due to the complex nature of cross-border litigation.²⁴ Critics have further pointed out that the abolition of *exequatur* has already created a serious challenge to the protection of human rights, since the ECJ upheld the strict premise of mutual trust even where a gross violation of human rights (the right to be heard) was invoked.²⁵ However, with regards to these critics it has to be pointed out that around 95% of applications for getting judgments declared enforceable in other EU countries are successful today and that *exequatur* is a pure formality.²⁶ Therefore, the advantages of removing the *exequatur* would outweigh.

3.1.2. For the abolition of *exequatur*

In its impact assessments, the European Commission pointed out that the operational functioning of Regulation 2201 has been at times hampered by a series of legal issues as well as a lack of awareness and information on the part of both citizens and legal practitioners. The efficiency of the instrument has therefore not reached its full potential.²⁷ Parents and courts also have difficulties with the interpretation of the conditions which enable one court to handle both parental responsibility and other child-related proceedings together.²⁸ Also, parents face challenges when applying rules favoring a consensual solution and avoiding that divorce and parental responsibility proceedings be dealt with

²³ Ibid.

²⁴ X.E. Kramer, C.H. van Rhee, *Civil Litigation in a Globalising World*, TMC Asser Press, 2012, p.137.

²⁵ Case C-491/10, *Aguirre Zarraga v. Pelz*, ECLI:EU:C:2010:828, para. 46.

²⁶ European Commission Press Release Database, *Civil Justice: The Reform of the "Brussels I" Regulation and the European Commission's Green Paper on the Free Circulation of Public Documents: Frequently Asked Questions*, available at: http://europa.eu/rapid/press-release_MEMO-10-677_en.htm?locale=en.

²⁷ Review of Regulation (EC) NO 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (Brussels IIA Regulation), p. 1, available at: http://ec.europa.eu/smart-regulation/roadmaps/docs/2013_just_003_matrimonial_matters_en.pdf.

²⁸ Ibid.

by courts in different Member States.²⁹ Even though the Regulation is the first Union instrument to have abolished the exequatur in respect of certain decisions, namely certified judgments on access rights to children and certified return orders in child abduction cases, the exequatur is still in place for parental responsibility judgments in another Member State. Citizens therefore suffer from the complex, lengthy and costly procedures they have to go through in order to obtain enforcement abroad.³⁰

Ineffective enforcement procedures or inadequate means have led in many instances to problems faced by parents when they enforce parental responsibility decisions

Likely economic impacts

The abolition of exequatur would likely have positive economic impact: citizens could save money through less litigation concerning jurisdiction questions and the abolition of exequatur.

Likely impacts on simplification and/or administrative burden

The complete abolition of exequatur would significantly decrease administrative burden for parents because there would be no need to go through additional procedures to apply for an enforceability declaration. For exequatur proceedings, costs of around EUR 1 000 are thought to be incurred per case and the proceedings may last, depending on the Member State, up to 6 months.³¹

Likely impacts on public administrations

Abolishing exequatur would be in line with the frequent references to „mutual trust” as the basis for the new civil law cooperation. Where mutual trust prevails there should be no need of an additional procedure checking the conditions for recognition and enforceability.³²

3.2. Methods of abolition of exequatur

The judicial cooperation in civil matters in the EU is reaching another level. The abolition of the exequatur makes it possible for the European citizens to have the judgments issued in one Member State recognized and enforced without a national procedure in another Member State. Even though the effect is similar, the procedure of abolition of exequatur differs from a category to the other, so that currently, three different methods of regulation can be identified. The differences come from the way in which the rights and interests of the parties are granted protection. The judgments issued in the domains to which Regulation 1215/2012³³ and Regulation 4/2009³⁴ refer to are recognizable and

²⁹ Case C-436/13, *E. vs. B.*, EU:C:2014:2246, paras 18-22.

³⁰ Review of Regulation (EC) NO 2201/2003, op. cit supra note 27, p. 1.

³¹ Ibid.

³² Katharina Boele-Woelki, *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, 2003, p. 205.

³³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 351, 20.12.2012, p. 1–32.

³⁴ Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations OJ L 7, 10.1.2009, p. 1–79.

enforceable without any formalities. In what concerns Regulation (EC) no. 2201/2003 the exequatur is not applicable to judgments regarding the right to access to the child and the return of the child in case of abduction.

3.2.1. Regulation (EC) 4/2009 has applicability in the domain of maintenance obligations arising from a family relationship, parentage, marriage or affinity and refers to two types of judgments: decisions given in a Member State bound, respectively not bound³⁵ by the 2007 Hague Protocol³⁶.

For the first type of decisions the exequatur is abolished, the interested party being able to apply for a review of the decision if they did not enter an appearance in the Member State of origin. Furthermore, the parties can apply for a refusal of enforcement, if the right to enforce the decision of the court of origin is extinguished by the effect of prescription or the limitation of action or if it is irreconcilable with a decision given in the Member State. Here, due to the fact that this protocol shall determine the law applicable to maintenance obligations, the states can develop a stronger cooperation and the issues regarding the guarantees of the parties are solved with the application of the determined law and the national procedures.

The situation is different for the decisions issued in the states which are not bound by the 2007 Hague Protocol. The exequatur is not abolished. Furthermore, the interested party has the right to apply for a refusal of the decision's recognition and enforcement for the reasons presented in Article 24 and 34: public policy, default of appearance, reconciliation with another decision, restricting in this way the enforcement of the decision without solving the problem regarding contested ground of that decision.

3.2.2. Regulation (EU) 1215/2012 applies from 10 January 2015 and replaces Regulation 44/2001³⁷ from that date. Its main achievement is the abolition of exequatur, although a party may invoke the same grounds as under the previous regime to oppose recognition or enforcement: public order, inappropriate service or reconciliation with another decision.

3.2.3. Regulation (EC) 2201/2003 implements a different method of granting automatic recognition and enforcement of the judgments, but not for its entire area of application, only for the right of access to the child and for the return of the child.

Since the exequatur was abolished, the states have to respect the minimum standard of guarantees for the parties, so that the decision could be enforced without any special procedures in another state. The difference from the other regulations is that the certificate mandatory for the

³⁵ Denmark and United Kingdom.

³⁶ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

³⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012 , 16/01/2001 P. 0001 – 0023.

enforcement will not be issued in the Member State of origin if some standard rights were not observed: appropriate service for the parties to be heard. In addition to this, the certificate necessary for the recognition of a judgment in relation to the return of the child will only be issued if the court has taken into account the reasons for and evidence underlying the order issued pursuant to the 1980 Hague Convention³⁸. In this way the issues regarding the decision will be identified in the Member State of origin and possibly solved.

3.3. Review of the refusal grounds and suggestions regarding Brussels II bis.

The previous examples of methods for abolishing the exequatur help when considering a review of the current Regulation Brussels II bis. Moreover, the area of parental responsibility is more specific because it involves the analysis of the best interest of the child and when considering the enforcement of decisions in other Member States, it is important to understand that the meaning of this concept may differ from country to country. A practical method of abolition of exequatur would follow the one already implemented in Regulation (EC) 2201/2003. This would build the unity and ensure an efficient enforcement of the issued decisions. Additionally, the Regulation should provide criteria for determining the law applicable, in this way many of the enforcement problems could be avoided.

Regarding the interpretation of the refusal grounds, there has been no pertinent case-law of the European Court of Justice (ECJ) on the application of Articles 22 and 23 of Regulation (EC) 2201/2003. However, this first impression seems to be misleading. In practice, the provisions on the recognition and enforcement of decisions on parental responsibility are seldom applied, since these decisions are usually made by the courts at the habitual residence of the child (Article 8 of Regulation (EC) no. 2201/2003)³⁹.

3.3.1. Article 23 (a) – Public policy. Let the judge decide about it.

The concept of public policy is used in several fields of Community law. It constitutes a safeguard to national sovereignties of the Member States⁴⁰. Among all the grounds for the refusal of recognition, contrariety with public policy is the most difficult to connect with the principle of mutual recognition, mainly because every country must define this concept and settle for what rule of law would be considered as essential for the national legal order. This is why, this way this ground might suffer from a wide application and interpretation. Since public order is a continuously evolving

³⁸ Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Hague Conference on Private International Law.

³⁹ Interpretation of the Public Policy Exception as referred to in EU instruments of Private International and Procedural Law, Directorate General for Internal Policies, 2011, p. 39.

⁴⁰ Aurelio Lopez-Tarruella, *The Public Policy Clause in the System of Recognition and Enforcement of the Brussels Convention*, p. 122, available at <http://www.simons-law.com/library/pdf/e/22.pdf>.

concept⁴¹, it is hard to determine some specific guarantees in case of exclusion of this ground of refusal. The aim of the Regulation (EC) no. 2201/2003 is the mutual trust between countries and specific for refusal grounds is the rule of narrow interpretation, but granting in the same time the rights of the persons involved. A review of the Regulation should not provide the public policy as optional reason of refusal for the decision's enforcement, but it should indicate the law applicable in the case, which may be refused by the competent authority from the Member State of origin to the extent that its effects would be manifestly contrary to the public policy of the forum. This procedure will involve an analysis of the best interest of the child and all the details of the case. The legal framework could be determinate in relation with the parties and enforcement of the decision in another Member State would encounter less problems.

3.3.2. Article 23 (b) and (d) - The right to be heard

Article 23 (b) mentions that a judgment relating to parental responsibility shall not be recognized if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought. In this way, the regulation enhanced the right to be heard of the children in the proceedings regarding their persons. The hearing of the child represents one of the minimum standards which have to be taken in consideration in the cases of parental responsibility and it is also helpful in the determination of the best interest of the child.

The regulation should not bring a modification to the national proceedings applicable in the process of children's hearing, but with the mention that in order to obtain information from younger children it is necessary **a certain experience and special precautions**, which are different from the ones practiced in the hearing of an adult or a teenager. Studies have revealed that the fear of being heard in front of the authorities can be compared to the fear of an exam⁴².

Taking into consideration the fact that many of the countries have a different age limit for the hearing of the child, a general rule regarding the starting age for a child to be heard in front of the competent authorities would be in favor of the cooperation between states. For example, the Romanian law states that the child must be heard in court starting with age 10, but if the competent authority decides that the opinion is necessary for solving the case, under certain conditions the child under age 10 can also be heard. For Germany, the child must be heard in some circumstances starting with 14,

⁴¹ Opinion of the Advocate General Alber delivered on 22 June 1999 in case *Renault vs. Maxicar and Formento*, available at <http://curia.europa.eu/juris/>.

⁴²Badenschier Franziska Kindesanhörung ist nicht schlimmer als Prüfungsangst, available at <http://www.zeit.de/wissen/2011-03/kind-anhoerung-gericht>.

because they can object in cases regarding custody⁴³ but if is necessary for the decision, a younger child can also be brought in front of the court. Studies have showed that a child will develop a better perception of himself and the environment around him starting with age 9-11⁴⁴. As a result, establishing as a rule the **hearing of the minor child starting with age 12 during the proceedings** regarding parental responsibility would avoid many problems with the recognition and enforcement of the foreign decisions. A few exceptions should be relevant in this kind of situations. First of all, children under age 12 can also come in front of the competent national authorities if it is decided that his hearing is necessary for the right solution in the case. Or, on the other hand, the hearing of the child will not be compulsory even if he or she is over 12 years old, if she does not have a proper mental development due to a sickness or in case of urgency, the child cannot be brought in front of the authorities. This type of exception should be given a narrow interpretation and should be motivated.

Article 23 d) refers also to a reason of refusal regarding the right to be heard, but in favor of a person, who has parental responsibility regarding the child, the issued decision is against it and the person did not have the chance to be heard. Parties in a case regarding parental responsibility should be all the persons who could have this right over the child, and they should have the chance to express their opinion officially.

With the abolition of the exequatur the responsibility of verifying if these standards were respected during the procedures, lays on the judge who issues the certificate necessary for the recognition or enforcement of the judgment.

3.3.3. Article 23 (c) - Assuring appropriate service

As it is known, in Regulation (EC) no. 2201/2003 the ground for non-recognition based on defective service to the defendant requires, firstly, that the judgment was given in default of appearance; secondly, that the defendant was not served with the document which instituted the proceedings (or equivalent document) in sufficient time and in such a way as to enable him to arrange for his defense; with the exception of the case in which it is determined that such person has accepted the judgment unequivocally. If any one of these requirements is not fulfilled, recognition must be granted. But none of these conditions can be properly controlled in the State of origin⁴⁵: indeed, usually the proceedings can go on even if the defendant fails to appear, and effective service is not always a necessary condition in order to give a judgment.

⁴³Bürgerliches Gesetzbuch, Beck-Texte im dtv, Section 1671, 69 Auflage 2012.

⁴⁴ Piaget, Jean, Inhelder, Barbel, *The Psychology of the Child*, 2011, p. 121, available at <https://books.google.ro/>.

⁴⁵ Arenas García, op. cit. supra note 6, p. 36

As the ground for the refusal of recognition is not a repetition of a control already carried out in the State of origin, this obstacle to recognition is compatible with the principle of mutual recognition⁴⁶. However, the proposal is to eliminate this control and to provide the obligation of the authority who issues the certificate to control if the defendant was notified regarding the proceedings in the trial. If defendant was not served with the document which instituted the proceedings (or equivalent document) in sufficient time and in such a way as to enable him to arrange for his defense or the defendant who did not enter an appearance in the Member State of origin would nevertheless have the right to apply for a review⁴⁷ of the judgment before the competent court of the State of origin.

3.3.4. Article 23 (f) - National procedure in case of a second judgment

In such case, if an irreconcilable judgment given in the State where recognition is sought *after* the decision which is intended to be recognized was given, the control carried out in the State of destination is obviously not a repetition of control already done in the State of origin⁴⁸. Since the irreconcilable decision is subsequent to the decision whose recognition is sought, it was impossible for the court of the State of origin to control this ground of non-recognition. Therefore, denying recognition on the basis of an irreconcilable decision given in the requested State is coherent with the principle of mutual recognition when the latter decision is subsequent to the decision of the State of origin⁴⁹.

The abolition of the exequatur means that the judgment will be recognized and enforced without special formalities. Problems will arise if another decision based on the same issue and the same circumstances will be issued in the Member State of origin, the Member State of enforcement or a third Member State. In this case a second judgment will be irreconcilable with the first one, the interested party should have the chance to review the decisions in the Member State of enforcement. Based on this request, the judge from the Member State of enforcement will review the decisions to settle for a solution which is in the best interest of the child. This method of protecting the rights of the interested parties is more efficient than a simple refusal of enforcement because it gives a practical solution and not just a denial.

⁴⁶ Arenas García, op. cit. supra note 6, p. 36.

⁴⁷ The Romanian Civil Procedural Code provides at Article 503 a special procedure for the reason of inappropriate service in a case ended with a judgment.

⁴⁸ Arenas García, op. cit. supra note 6, p. 40

⁴⁹ Cuniberti Gilles, Cuniberti, Rueda, op. cit. supra note. 4.

3.3.5. Article 23 (g) - Special Procedure

Finally, Regulation 2201/2003 provides also as grounds of non-recognition if the procedure laid down in Article 56 has not been complied with. This condition will be also checked by the competent authority in the process of issue of the certificate.

3.4. A new version of the Regulation Brussels II bis

With the abolition of exequatur a decision issued in a Member State will receive the status of decision issued by the national courts in the Member State of enforcement, which means that that decision will have to comply with a set of procedural standards, in order to give certain guarantees to the parties in the case. A proposal for a Council Regulation amending Regulation (EC) No 2201/2003 has already been drafted. A new version of the Regulation should establish the criteria for the identification of the applicable law and the standards which have to be verified when an application for a certificate for enforcement is submitted: the children should have been given the possibility to express their opinion in front of the competent authorities starting with a certain age, persons who had parental responsibility in the case should have had the possibility to be heard, all parties should have benefited from an appropriate service during the procedures. Furthermore, for the situation of irreconcilable decisions the states should provide the interested party a procedural way to apply for a review of the judgment through a national procedure, since after the enforcement the both decisions have the same status in the national case law.

3.5. Additional safeguards through the interpretation of autonomous notions

One method for establishing minimum standards regarding judgments that become automatically enforceable in all the Member States is through autonomous and explicit interpretations of the pivotal terms in the Regulation. Unlike the Brussels II Convention, which was complemented by an explanatory report, the Council Regulation no 2201/2003 lacks such a text, which means that the interpretation of its provisions is more difficult. Further, we make a short analysis of the current meaning of the terms public policy, parental responsibility, child, the superior interest of the child and whether a uniform definition is required.

3.5.1. Public policy

Public policy should not be used a means of reviewing the legality of the judgment or when there is discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State of enforcement. It is a remedy for situations „where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it

would infringe a fundamental principle⁵⁰.” It follows that it is improbable and even undesirable to have an autonomous and uniform interpretation of public policy. The Member States are the ones in the best position to analyze what constitutes an infringement serious enough to justify a refusal based on this ground.

There is a strong link between public policy and the best interest of the child. Asked whether the best interest of the child as ground for refusal is seen as independent and cumulative with public policy⁵¹, from the majority of the Member States no relevant information could be gathered, many of the Member States stated that the question cannot be answered exhaustively due to little case law, some stated that the best interest of the child is a criteria taken into consideration within the public policy test.

The solution we consider to be the best and which would facilitate the abolition of the exequatur, while maintaining an adequate protection of fundamental rights, is by considering the best interest of the child as a separate test to that of public policy. The situations in which a violation of the best interest of the child would lead to an infringement of public policy is extreme, given the narrow meaning public policy has. It is not desirable and not in the best interest of the child for this notion to be given an equivalently narrow meaning.

3.5.2. Who is a child?

The child plays a crucial role in Regulation (EC) no. 2201/2003. It is a pivotal term, as many of the other notions are gravitating around it: parental responsibility, wrongful removal, right of access. Moreover, the Regulation can be seen as accommodating children’s interest in the procedural and substantive aspects within its remit. However, the term is not defined and it may prove essential for all the Member States to have a uniform understanding of it if we are to abolish the exequatur procedures regarding parental responsibility.

Unlike the 1996 Hague Convention on child protection⁵², the Regulation does not mention the maximum age of the child, leaving it to the national laws of the Member State to establish the limit. This can prove detrimental to the best interest of the child and was characterized as a “very regrettable⁵³” omission which can lead to legal uncertainty. Actual and potential difficulties have been

⁵⁰ Case C-619/10 – *Trade Agency Ltd v Seramico Investments Ltd*, ECLI:EU:C:2012:531, para. 51.

⁵¹ Directorate General for Internal Policies, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law*, 2011.

⁵² 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.

⁵³ Peter Stone, *EU Private International Law: Harmonization of Laws*, Edward Elgar Publishing, 2006, p. 405.

identified by legal experts from various Member States⁵⁴. The age at which a person stops being a child can be assessed with due regard to more aspects: the age of majority, the age when legally binding consent can be given, the age when one can vote, the age of criminal responsibility etc. Nevertheless, decisions regarding parental responsibility concern, in the majority of cases, children under the age of 18⁵⁵. In line with Article 2 of the 1996 Hague Convention on the protection of children the age limit should be 18 years. One particular question is what happens to children who undergo the procedure of emancipation in national law. However, cases involving these persons do not normally fall within the area of parental responsibility, hence they are outside the ambit of our analysis⁵⁶. Bearing all these aspects in mind, a uniform interpretation of “child” may prove beneficial and increase legal certainty.

3.5.3. What is parental responsibility?

The notion of parental responsibility is defined within Brussels II bis, art. 2 (7) stating that parental responsibility consists of a bundle of rights and responsibilities 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. Hence, the definition is meant to cover all possible aspects that fall within the meaning of parental responsibility under the national legislation of the Member States. Its purpose is not confined to children from wedlock, but applies to issues regarding parental responsibility of the child regardless of the marital status of the parents, even regardless whether the parties are the parents or other relatives of the child. This comprehensive definition does not create problems for the national courts of the Member States, despite some issues involving its application to grandchildren and their grandparents⁵⁷. It follows that the current definition should be maintained.

3.5.4. Best interest of the child

Closely related to the term child, but vaguer and contested, is the principle of the child’s best interest, a concept that can also be found in the Regulation and which is a determining factor underpinning decisions around child custody and access. The principle can also be found in art. 24 (2) of the Charter of Fundamental Rights of the EU⁵⁸. It is criticized as being vague, subjective and that it allowing too much room for the value preferences and prejudices of the one making the decision⁵⁹. Therefore, the principle leaves much leeway to the decision maker and may lead, among Member

⁵⁴ Directorate-General for Justice and Consumers, Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment - Analytical annexes, p. 123-124, available at: http://ec.europa.eu/justice/civil/files/bxl_iaa_final_report_analytical_annexes.pdf.

⁵⁵ European Commission, Practice Guide for the Application of Brussels Iia Regulation, p. 18.

⁵⁶ Ibid.

⁵⁷ On the assessment of Regulation (EC) No 2201/2003, op. cit. supra note 54.

⁵⁸ Charter of Fundamental Rights of the European Union (2000/C 364/01).

⁵⁹ Helen Stalford, Children and the European Union: Rights, Welfare and Accountability, Oxford and Portland, 2012, p. 100.

States, to diametrically opposed solutions is alike cases. A uniform interpretation will prove beneficial in the case of abolishing the exequatur.

The Regulation already gives great importance to the best interest of the child, especially from a procedural point of view⁶⁰. It makes the whole family law trial more bearable for the child, as it established jurisdiction in the parental responsibility cases with regard to the Member State where the child has habitual residence. By establishing jurisdiction in this manner, the chances of the child's participation at the procedure are higher, first of all because they will be able to be present there physically and secondly because they are accustomed with the language.

However, in the context of abolishing the exequatur, supplementary safeguards may prove necessary in order to prevent similar situations being given diametrically opposed solutions, due to the interpretation given by the national courts. Hence, a series of guarantees and guidelines should be given regarding the interpretation of the best interest of the child. Therefore, the definition of "best interest of the child" should consist of a set of minimum standards which the national courts should take into account and which can apply to all the rights and obligations falling within the meaning of parental responsibility. The list should be exemplificative and no priority order should be established between the criteria. Therefore, the national judge will still retain leeway in ruling on parental responsibility, while the mutual trust principle is enhanced by the guarantee that some basic aspects were taken into account.

From a procedural perspective, beside the obligation of Member States to hear the parties involved, it could prove to be in the interest of the child that he or she is **represented by a lawyer** protecting their interests, independent from the other parties involved. On the other hand, it is questionable how efficient this would be, bearing in mind the fact that the lower the age of the child the more improbable it is that they would be intimidated by such a procedure. Another aspect that could facilitate the hearing of the child would be that at the hearing, especially for children under the age of 14, to participate a **psychologist**.

From a substantive point of view, the paramount considerations should be **the wishes of the child** regarding and his or her relationship with each of the parents. That said, the child's views should be considered according to their level of understanding and maturity, and subject to any form of influence that the parents might have tried to exercise. In this situation the previously discussed need for a psychologist proves its fundamental importance.

⁶⁰ Regulation 2201/2003, para. 12 of the Preamble.

One aspect that should be considered by the national courts when they analyze the best interest of the children is the need to protect them from **physical or psychological harm**, which may consist in, but is not limited to abuse, neglect or family violence. This aspect could override other criteria, such as the right of the child to have contact with both parents. Nevertheless, the contact with the violent parent should not be altogether ceased, but the contact with the child could be subject to other persons being there or to other conditions established by the national judge.

One of the fundamental rights that should be considered when analysing the best interest of the child is his or her right to have **a relationship and direct contact with both parents**⁶¹. Although recent studies show that shared parental responsibility is preferable to a “the winner takes it all” approach⁶², in transnational cases this may prove problematic, as the child may have to accommodate with different languages and cultures, if he or she is to live an equal amount of time with each parent. However, bearing in mind the variety of extra-marital relationships and consequent parent-child relationships, this should not be interpreted as precluding a situation where the parental rights are granted exclusively to one of the parents⁶³. Nevertheless, we propose that one of the criteria for defining the best interest of the child is to establish a just balance between the time each parent spends time with the child, proven that the child is not at risk of violence, verbal or physical and taking into account the probable impact this will have on the child’s mental and emotional growth.

Another aspect is the fact that the child should have an **equivalent lifestyle** to the one they had before. In assessing this, national courts should take into account the financial status of the parents and their ability to support the child financially and also to pay the child support on time. However, this should be balanced with another criterion: the willingness of the parents to facilitate the child’s contact with the other parent and also their willingness to spend themselves time with the child. Hence, it may prove to be in the best interest of the child, that the custody of the child is held by the parent who can spend more time with him or her, than to the parent who has a better financial situation.

Other aspects that should be taken into account are the **other personal relationship** the child has established, for example with grandparents, with other relatives and friends. It follows that the national courts should assess how the change in circumstances might influence the wellbeing of the child, aspects including the change of **language**, the change of the **school**, the background of the child and that of his or her parents.

⁶¹ Case C-403/09, *Jasna Detiček v Maurizio Sgueglia*, ECLI:EU:C:2009:810, para. 54.

⁶² Edward Kruk, *Child Custody, Access and Parental Responsibility: The Search for a Just and Equitable Standard*, The University of British Columbia, 2008, p. 3-4.

⁶³ Case C-400/10, *J. McB. v L. E.*, ECLI:EU:C:2010:582, para 60 - 62.

From this analysis we can infer that, in order to guide the national courts, a set of minimum criteria can be established through the autonomous interpretation of some notions. First, a clarification of who can be considered a child can reduce the risk of legal uncertainty. Further, the best interest of the child should include, but not be limited to, aspects such as: legal representation, hearing his or her voice, sometimes in the presence of a psychologist, the right to have contact with both parents, the financial issues, etc.

Chapter IV: Conclusions

Taking into account the costs, the administrative burden, the waste of time triggered by the exequatur procedure and the fact that in most situations it is a mere technicality, for judgements regarding parental responsibility the abolition of exequatur is a must. It is, first of all, in the interest of the citizens and in the best interest of the children to whom the judgments refer that they become immediately enforceable in other Member States. Bearing in mind the multitude of forms family life takes and the high number of transnational families in the EU, the free circulation of judgements is a further means of guaranteeing the free movement of persons.

At the heart of all this is the mutual trust in the other Member States' justice systems. Not only is "the whole EU legal system ... based on mutual trust"⁶⁴, but also "trusting the administration of justice by foreign courts is not (so much anymore) comity amongst the states but the individual's right to access to justice in due time and without disproportionate effort in international cases"⁶⁵. The European Union is founded "on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities"⁶⁶. In the name of our common legal tradition and of the values we share, the abolition of the exequatur procedure for judgments in matters of parental responsibility is a further step in the direction of reaffirming the mutual trust that lays at the core of the European Union.

⁶⁴ European Commission, Press Release "Building Trust in Justice Systems in Europe: "Assises de la Justice" Forum to Shape the Future of EU Justice Policy", 2013, available at: http://europa.eu/rapid/press-release_IP-13-1117_en.htm.

⁶⁵ Matthias Weller, Mutual trust: in search of the future of European Union private international law, *Journal of Private International Law*, Volume 11, Issue 1, 2015, p. 65.

⁶⁶ Consolidated version of the Treaty on European Union, 2012/C 326/01, Official Journal C 326 , 26/10/2012 P. 0001 – 0390, art.2.