

CHAPTER 1: Scope and Definitions

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1. Introduction

This Chapter primarily deals with the **substantive scope of application** (*ratione materiae*) as defined in Article 1 and with the definitions provided in Article 2 of the Regulation¹. The latter includes the definition of the ‘**geographical scope of application**’ as determined in Article 2(3). It indicates in which EU Member States the Regulation applies. The Regulation imposes uniform rules on jurisdiction and the recognition and enforcement of matrimonial matters and parental responsibilities that are to be applied by participating Member States. All Member States apart from Denmark are parties to the Regulation. Under the Treaty of Amsterdam, the UK, the Republic of Ireland² and Denmark³ negotiated opt-outs from participating in measures concerning the area of freedom, security and justice. In this present instance, the UK and the Republic of Ireland have chosen to opt into this Regulation.⁴ Denmark, on the other hand, which has a more rigid opt-out from this policy area,⁵ has not chosen to follow suit. The substantive scope of application is reduced to matrimonial matters (divorce, legal separation and a marriage annulment) and matters of parental responsibility. No other issue pertaining to family matters is dealt with in the Regulation. How to understand and interpret these concepts is detailed in the present Chapter. The definition, understanding and interpretation of the substantive scope is relevant for the application of both rules on jurisdiction and provisions on the recognition and enforcement of judgments. The Regulation defines the **personal scope of application** (*ratione personae*) of the rules on jurisdiction in matrimonial matters in Articles 6 and 7. As for the personal scope of application of jurisdictional rules in cases of parental responsibility, this can be derived from Article 8 of the Regulation. Since different provisions are relevant to determine the personal scope of application, this issue is not addressed in the present Chapter. Instead it is analysed *infra* in Chapter 2, under 5 ‘*Application of Articles 6 and 7 of the Brussels IIbis Regulation*’ and in Chapter 3, under 4 ‘*General rule on jurisdiction based on the habitual residence of the child*’. A proper understanding of how the personal scope of application is defined in a certain legal instrument appears to be crucial in practice. In particular, if the personal scope of application is not clearly defined, it may prove difficult for the judiciary to determine whether a certain EU legal source has a universal application or whether its application is limited to cross-border cases that have a certain connection with the EU. In the latter case, it is necessary to determine in each individual case whether there is a required link with an EU Member State.

Also the **temporal scope of application** (*ratione temporis*) as defined in Article 64 of the Regulation has not been discussed in the current Chapter. Instead, this is addressed in greater

¹ 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 [2003] OJ L 338/1 (hereinafter also the Regulation or Brussels IIbis).

² See Protocol (No. 4) on the position of the United Kingdom and Ireland (1997) [2006] OJ C321E/198.

³ See Protocol (No. 5) on the position of Denmark (1997) [2006] OJ C321E/201.

⁴ Although, with the impending ‘Brexit’, the exit of the UK from the anticipated recast is almost inevitable.

⁵ Measures adopted under the area of freedom, security and justice must be concluded in the form of intergovernmental agreements between Denmark and the EU.

detail *infra* in Chapter 11, under 2.1.1 ‘*Scope of application ratione temporis regarding rules on jurisdiction*’.

The Regulation deals with only international jurisdiction and the recognition and enforcement of judgments rendered in matters falling under its substantive scope. Thus, other sources are to be relied upon when deciding on the applicable law. As for matrimonial matters, this is either the Rome III Regulation⁶ for those EU Member States that are bound by this legal instrument, or national conflict of law rules for other Member States. With respect to matters of parental responsibility, the 1996 Hague Child Protection Convention⁷ is relevant.

2. Substantive (*ratione materiae*) scope of application – Article 1

The Regulation sets out rules concerning jurisdiction, recognition and enforcement in civil matters relating to matrimonial matters and parental responsibility. At the outset of this examination, it should be noted that the concept of ‘civil matters’ is to be interpreted autonomously, and in view of the objectives and aims of the instrument.⁸ In the context of Brussels Ibis, it is to be defined broadly.⁹ It is thereby irrelevant if a certain subject-matter is considered to be of a public law nature. According to the Practice Guide 2015 and CJEU¹⁰ case law, matters that are listed as examples under Article 1(2), but which are nevertheless classified as public law by national law, are to be considered as falling within the scope of the Regulation.¹¹

The sections below serve to elaborate upon the material scope of the two aspects of family law that are covered by the Brussels Ibis Regulation, namely matrimonial matters (2.1) and matters of parental responsibility (2.2).

2.1 Matrimonial matters – Article 1(1)(a)

For the purposes of the applicability of Brussels Ibis, matrimonial matters are to be considered as those involving judicial or administrative decisions that give rise to either the dissolution (divorce or marriage annulment) or the weakening (legal separation) of a marital status. Matters relating to the property consequences of the marriage, other ancillary measures¹² or maintenance obligations¹³ are expressly excluded by the Regulation. The following sections

⁶ Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343/11 (hereinafter – the Rome III Regulation).

⁷ Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (hereinafter 1996 Hague Convention).

⁸ CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710 para 26-28; CJEU Case C-251/12 *Van Buggenhout and Van de Mierop* [2013] ECLI:EU:C:2009:474, para 26 and CJEU Case C-435/06 *C.* [2007] ECR I-10141, para 45-46.

⁹ The European Commission’s Practice Guide for the application of the Brussels Ia Regulation, pp. 19-20, para 3.1.1.3 (available at: [file:///C:/Users/user/Downloads/brussels_ii_practice_guide_EU_en%20\(7\).pdf](file:///C:/Users/user/Downloads/brussels_ii_practice_guide_EU_en%20(7).pdf)), hereinafter also Practice Guide 2015.

¹⁰ Court of Justice of the European Union (hereinafter – the CJEU or the Court).

¹¹ Practice Guide 2015, pp. 19-20, para 3.1.1.3. See also CJEU Case C-523/07 *A.* [2009] ECR I-2805, paras 21-29 and CJEU Case C-435/06 *C.* [2007] ECR I-10141, paras 45-53 for this exemplified point with regard to public law rules relating to child protection.

¹² Brussels Ibis Regulation, Recital 8.

¹³ *Ibid.*, Recital 11.

elucidate further on the material scope of matrimonial matters in the context of Brussels IIbis by setting out the boundaries of the marital relationship for the purposes of its application, before turning to examine the types of decisions that fall within the remit of this topic.

2.1.1 Admissible relationships

As established above, Brussels IIbis clearly applies to the marital relationship, which has traditionally been regarded as a legally recognised union between a husband and wife. The following sections seek to move beyond this definition and to consider the possible applicability of the Regulation to less conventional forms of marriage – informal marriage and same-sex marriage, as well as registered partnerships.

2.1.1.1 Informal marriage

Informal marriages, such as those that are concluded according to religious rules, are said to be included within the scope of the Regulation to the extent that they are recognised as equivalent to a formal marriage by the applicable law in the competent jurisdiction (see *infra* Chapter 6, under 2.3.2 ‘*Judicial and non-judicial decisions*’).¹⁴

2.1.1.2 Same-sex marriage

Although neither the Regulation itself nor the accompanying documentation (e.g. the Borrás Report¹⁵ or the Practice Guide 2015) explicitly establishes a stance on its application to same-sex marriage, the reference to ‘wife’ and ‘husband’ in Annex I of the Regulation would indicate that it is primarily intended to apply to a ‘traditional’ marriage – i.e. a marriage between a man and a woman. It is telling that this designation has been retained in the present 2016 Commission’s Proposal.¹⁶

At the same time, it has to be kept in mind that there has been considerable social and legal change in the Member States since the introduction of the original Brussels II Regulation¹⁷ in 2000 as regards same-sex marriage. Whilst this institution did not exist in any Member State sixteen years ago, it is now present in 11 out of these 28 countries. Recent case law from the CJEU¹⁸ also indicates a growing tendency towards paralleling same-sex relationships with

¹⁴ Magnus/Mankowski/Pintens, *Brussels IIbis Regulation* (Sellier European Law Publishers 2012), Article 1, note 17.

¹⁵ Borrás Rodríguez, A., ‘Explanatory report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters’ (hereinafter Borrás Report).

¹⁶ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final (hereinafter also the 2016 Commission’s Proposal or Proposal).

¹⁷ Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L 160/19 (hereinafter – the Brussels II Regulation).

¹⁸ See the CJEU’s recent judgment in Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2013] ECLI:EU:C:2013:823, in which the Court stated that an employee who is in a same-sex registered partnership should receive the same benefits as married employees (as long as a registered partnership is the highest level of status that same-sex couples can have access to in that jurisdiction). The Court opined that opposite-sex spouses and same-sex partners were in a comparable situation in these circumstances,

marriage for the purposes of obtaining equal treatment in other fields (e.g. staff employment benefits).

It is unclear whether marriage, for the purposes of the Brussels IIbis Regulation, is to be autonomously defined on an EU level rather than by reference to national law.¹⁹ The National Reports show that there is no consensus in this regard. The reports of Spain, France, Greece, Italy, Latvia, Lithuania, and Romania explicitly refer to the national rules in order to define the concept of marriage. According to the National Report of Belgium, its legal doctrine leans towards the existence of an autonomous interpretation. In the context of the Rome III Regulation, the European legislator seems to indicate that interpretation should be undertaken in line with national rules.²⁰

The National Reports indicate that if a Member State allows same-sex marriage in its national law, it will tend towards including same-sex marriage within the scope of the Brussels IIbis Regulation (Estonia, Spain, France, Ireland, the Netherlands, and Portugal). Conversely, where same-sex marriage is not allowed under national rules, it will tend to be excluded from the definition of marriage for the purposes of the Regulation (Austria, Bulgaria, Germany,²¹ Greece,²² Hungary, Italy, Latvia, Lithuania, Poland, and Romania). The National Reports of Belgium,²³ Cyprus, the Czech Republic,²⁴ Finland,²⁵ Luxembourg,²⁶ Malta, Slovenia,²⁷ Sweden²⁸ and the UK are silent on whether same-sex marriages fall within the Regulation's scope.

In the absence of any concrete guidance by the CJEU or other EU sources on the interpretation of marriage in this specific context, the most prudent approach²⁹ would be to hold that the Regulation does not generally apply to the dissolution of same-sex marriage. This does not stand in the way of Member States choosing to unilaterally recognise this institution in cases that fall within their judicial competence, as has been evidenced in the National Reports. However, the recent findings of the CJEU in the case of *Coman and Others*³⁰ might have implications on the application of the jurisdictional rules in Article 3 of the Regulation. This

and that the company had directly discriminated on the grounds of sexual orientation in not providing the same employee benefits for both groups.

¹⁹ Although it is argued to be such by Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 21 and Bogdan, M., *Concise introduction to private international law* (3rd edn., Europa law publishing 2016), p. 95.

²⁰ Verhellen, J., *Brussel IIbis Verordening – Huwelijkszaken* (Intersentia 2005), p. 62.

²¹ National Report Germany, question 7: In Germany same-sex marriages are characterised as registered partnerships.

²² National Report Greece, question 7: It is the dominant opinion in legal theory that same-sex marriages would be dealt with as being contrary to public policy.

²³ National Report Belgium, question 7: Most authors see it as an unresolved matter, some exclude same-sex marriages from the Brussels IIbis Regulation.

²⁴ National Report the Czech Republic, question 7: In the Czech Republic a marriage only exists between opposite-sex partners; Czech law however does recognise same-sex registered partnerships.

²⁵ National Report Finland, question 7: Same-sex marriages will be possible in Finland from 01/03/2017.

²⁶ National Report Luxembourg, question 7: Same-sex marriage is allowed in Luxembourg.

²⁷ National Report Slovenia, question 7: Same-sex marriage does not exist in Slovenia, only registered same-sex partnerships.

²⁸ National Report Sweden, question 7.

²⁹ With caution being necessary in this area, given the politically-charged nature of this topic.

³⁰ CJEU Case C-673/16 *Coman and Others* [2018] ECLI:EU:C:2018:385.

case concerned Mr Coman, who holds Romanian and American citizenship, and Mr Hamilton, an American citizen, who were married in Belgium in 2010. They intended to move to Romania relying on the EU free movement Directive³¹ which guarantees the rights of free movement and residence in the EU for spouses. The CJEU decided that a same-sex spouse who is not an EU citizen should be granted residence in an EU Member State even if under its laws same-sex marriages are not recognised (which is the case in Romania). Although the decision does not concern the application of the Regulation, it creates the possibility for the spouses to stay in an EU Member State and eventually obtain a habitual residence there. Accordingly, it could be argued that the CJEU's judgment has an indirect impact on the application of the rules on jurisdiction in Article 3 of the Regulation. However, it is particularly controversial whether the judgment will affect the position of a Member State currently offering no possibility to file for divorce, legal separation or annulment of a same-sex marriage.

2.1.1.3 Registered partnership

The stipulated application to 'divorce, legal separation or marriage annulment', as well as the references to 'spouses' and 'wife' and 'husband' within the Regulation appears to clearly indicate that it is intended to apply solely to marriage. Notwithstanding this, the Greek National Report states that since a registered partnership for same-sex couples has been introduced in Greece, it is considered to fall within the scope of the Regulation.³² There has also been at least one recorded instance in which the Regulation was applied by a Czech court to a registered partnership.³³

However, the CJEU has stated that a registered partnership cannot be assimilated with a marriage simply because it is treated as such by certain Member States' national rules.³⁴ Thus, in the absence of any express indication to the contrary by the EU legislator, this usage is to be treated as an analogous extension of the Regulation's rules to a registered partnership by a Member State jurisdiction, rather than a trend towards its inclusion on an EU level.

2.1.2 Types of decisions covered

The following subsections elaborate upon the three types of judicial or administrative processes that fall within the scope of Brussels IIbis in the context of matrimonial matters. At the outset, it is important to note that since two of the processes (legal separation and marriage annulment) do not exist universally throughout the Member States, the Regulation only assigns personal

³¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

³² National Report Greece, question 7.

³³ District Court of Rokycany No. 6 C 59/2011 of 20.9.2011. See also the European Commission, *Study on the assessment of Regulation (EC) No. 2201/2003 and the policy options for its amendment: Final report, analytical annexes* (hereinafter – Impact Assessment), p. 118.

³⁴ Joined CJEU Cases C-122/99 and C-125/99 *P – D and Kingdom of Sweden v Council of the European Union* [2001] ECR I-4319, para 29-41.

jurisdiction through its rules. Member States are free to determine whether, according to their applicable law, they can allow the form of relief being requested.³⁵

2.1.2.1 Divorce

The complete dissolution of a marriage through a decision by a judicial or administrative authority is now a universal legal process amongst the Member States.³⁶ The Regulation applies to every type of divorce judgment emanating from a judicial or administrative authority, regardless of the form of or grounds for divorce.³⁷ Proceedings involving the conversion of a legal separation into divorce also fall within this ambit.³⁸

2.1.2.2 Legal separation

This process constitutes a weakening of the marriage bond through a decision by a competent authority that leads to the spousal obligations (e.g. to cohabit) and consequences of marriage (e.g. the division of property) being redefined. This mechanism is not present in all Member States, and tends to arise in legal traditions that emerged from the Romanic legal family and where the influence of canon law is strong.³⁹ In certain Member States, such as Italy, it is in fact a prerequisite step to obtaining a divorce.⁴⁰

For the purposes of the Regulation, legal separation is to be distinguished from factual separation, which does involve a change in status and therefore does not fall within the scope of this instrument.⁴¹

2.1.2.3 Marriage annulment

The possibility to declare a marriage void or voidable based on a legal defect is present in all Member States except for Sweden and Finland.⁴² There has been a debate as to whether declaratory judgments concerning whether a marriage is to be considered *ipso iure* null and void (e.g. if one of the purported spouses lacks the necessary capacity to conclude a marriage) would fall within the scope of the Regulation.⁴³ Arguably, no annulment process is needed in these circumstances, since any declaration would not be constitutive.

In this regard, the Lithuanian National Reporter indicated that the Court of Appeal has ruled that judgments which do not positively create or alter interests do not fall within the scope of Brussels IIbis.⁴⁴ However, the other reports do not indicate the national positions on this

³⁵ See Ní Shúilleabháin, M., *Cross-border divorce law: Brussels IIbis* (OUP 2010), pp. 103-105, paras 3.30-3.33.

³⁶ Since the introduction of the possibility to divorce under Maltese law following a referendum in 2011.

³⁷ Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 42.

³⁸ *Ibid.*

³⁹ *Ibid.*, pp. 69-70, para 48.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, p. 66, para 37.

⁴² *Ibid.*, p. 70, para. 50.

⁴³ Impact Assessment, p. 7.

⁴⁴ National Report Lithuania, question 15.

issue, and in the absence of an autonomous definition of annulment developed by the CJEU, this issue remains unresolved.⁴⁵

Moving on to the question of the potential inclusion of a posthumous annulment by one of the spouses or a third party, the Borrás Report stated that the original Convention would not apply to such cases.⁴⁶ In contrast to this previous stance, the CJEU has recently ruled that an action for a marriage annulment instigated by a third party after the death of one of the spouses falls within the scope of the Regulation.⁴⁷

Neither the Regulation, nor documentation such as the Borrás Report, establishes a stance on whether third party nullity proceedings during the lifetime of the spouses are included. It has been argued that this matter is unlikely to be covered by Brussels Ibis, since by mentioning the ‘applicant’ and ‘respondent’ in Article 3(1) fifth and sixth indents, there would otherwise be a risk of conferring jurisdiction on a state to which neither of the spouses was connected.⁴⁸

However, the CJEU pointed out in the case of *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki*⁴⁹ on a posthumous annulment that a third party could only rely on the grounds of jurisdiction that were designed to ensure a genuine link with the spouses, therefore excluding Article 3(1) fifth and sixth indents for these purposes. This step appears to defuse the previously mentioned argument against the possibility of Brussels Ibis applying to nullity proceedings undertaken by a third party during the lifetime of the spouses.

The CJEU case of *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* addressed the question of whether an action for the annulment of a marriage brought by a third party after the death of one of the spouses fell within the scope of Article 1(1)(a) of Brussels Ibis. Edyta Mikołajczyk had brought an action before the Regional Court in Warsaw seeking to annul the marriage of Stefan Czarnecki (deceased) to Marie Louise Czarnecka, which had been entered into in 1956 in France. The applicant stated that she was the heir to the estate of Zdzisława Czarnecka, Stefan Czarnecki’s first wife, who had died in 1999. She maintained that the marriage of Stefan Czarnecki to Zdzisława Czarnecka (contracted in 1937 in Poland) had not been dissolved at the time when the marriage between Stefan Czarnecki and Marie Louise Czarnecka was contracted, and that therefore the second marriage was bigamous and should be annulled.⁵⁰ The Court of Appeal referred a preliminary question to the CJEU concerning whether it had international jurisdiction to rule in this case in view of doubts as to whether this form of an action for annulment falls within the scope of Brussels Ibis. It referred to the Borrás

⁴⁵ For a further discussion concerning whether declaratory judgments are included within the scope of the Regulation see: Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 51 and 34-35, and Ní Shúilleabháin, *op. cit.*, pp. 119-121, paras 3.55-3.57.

⁴⁶ Borrás Report, para. 27. See also Ní Shúilleabháin, *op. cit.*, p. 122, para. 3.58.

⁴⁷ CJEU Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* [2016] ECLI:EU:C:2016:772.

⁴⁸ Ní Shúilleabháin, *op. cit.*, p. 122, para 3.58.

⁴⁹ CJEU Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* [2017] ECLI:EU:C:2016:772.

⁵⁰ *Ibid.*, paras 11-12.

Report excluding from the scope of the Brussels II Convention⁵¹ those instances in which the validity of a marriage is considered on the basis of a petition for its annulment following the death of one or both spouses.⁵² The CJEU found that Article 1(1)(a) must be interpreted to include an action for a marriage annulment brought by a third party following the death of one of the spouses. In establishing this, it pointed to the unqualified inclusion of a marriage annulment in Article 1(1)(a)⁵³ and the lack of an exclusion of this particular type of request for a marriage annulment in Article 1(3),⁵⁴ as well as the negative effect that a judgment excluding this instance would have upon the creation of an area of freedom, security and justice, which would give rise to legal uncertainty due to the lack of an alternative regulatory framework.⁵⁵

Further, the CJEU found that the fifth and sixth indents of Article 3(1)(a) of Brussels Ibis must be interpreted as meaning that a person other than one of the spouses who brings an action for the annulment of a marriage may not rely on the grounds of jurisdiction set out in those provisions.⁵⁶ The fifth and sixth indents do not specifically refer, in contrast to the other jurisdictional bases, to the spouses. However, in order to protect the interests of the spouses and to ensure a genuine link between at least one of these parties and the state concerned, the CJEU established that under these rules the ‘applicant’ does not refer to any person other than the spouses.⁵⁷ It was pointed out that this interpretation does not deprive a third party of access to the courts, since they may rely on other grounds of jurisdiction provided for in Article 3.⁵⁸

2.1.2.4 Matrimonial property issues

The exclusion of matrimonial property matters from the scope of Brussels Ibis Regulation was dealt with on a residual basis in the recent CJEU case of *Todor Iliev v Blagovesta Ilieva*,⁵⁹ which primarily concerned the Brussels Ibis Regulation.⁶⁰ The facts of this case involved a consideration of whether proceedings concerning the liquidation of property acquired during a marriage after a divorce had taken place fell within the scope of the Brussels Ibis Regulation. The Bulgarian District Court requested clarification on three questions in this reference for a preliminary ruling which, taken together, essentially asked:

Whether Article 1(2)(a) of the Brussels Ibis Regulation (No. 1215/2012) must be interpreted as meaning that a dispute relating to the liquidation of property — acquired during marriage by spouses who are nationals of a Member State but domiciled in

⁵¹ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1995] OJ C 316/49 (hereinafter also the Brussels II Convention).

⁵² CJEU Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* [2017] ECLI:EU:C:2016:772, para 18.

⁵³ *Ibid.*, para 27.

⁵⁴ *Ibid.*, paras 29-30.

⁵⁵ *Ibid.*, paras 32-34.

⁵⁶ *Ibid.*, para 53.

⁵⁷ *Ibid.*, paras 49-50, 52.

⁵⁸ *Ibid.*, para 51.

⁵⁹ CJEU Case C-67/17 *Todor Iliev v Blagovesta Ilieva* [2017] ECLI:EU:C:2017:459.

⁶⁰ 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 judgements in civil and commercial matters (recast) [2012] OJ L 351/1 (hereinafter – the Brussels Ibis Regulation).

another Member State — after a divorce has taken place falls within the scope of this Regulation or whether it comes within the scope of matrimonial property regimes and, consequently, within the exclusions listed in Article 1(2)(a) of the Brussels Ibis Regulation.⁶¹

In reply to these questions the CJEU referred to its judgment concerning the 1968 Brussels Convention⁶² in *de Cavel*⁶³, in which it found the following:

Disputes relating to the assets of spouses in the course of divorce proceedings may therefore, depending on the circumstances, concern or be closely connected with one of the following three categories: (1) questions relating to the status of persons; or (2) proprietary legal relationships between spouses resulting directly from the matrimonial relationship or the dissolution thereof; or (3) proprietary legal relations existing between them which have no connection with the marriage, and that, whereas disputes of the latter category come within the scope of the Brussels Convention, those relating to the first two categories must be excluded therefrom.⁶⁴

Even though the judgment does not directly concern the interpretation of the Brussels Ibis Regulation, it is relevant for its interpretation. Namely, both Regulations exclude matrimonial property matters from its substantive scope, so that the same line of reasoning may be applied in the context of the Brussels Ibis Regulation. Thus, in finding that a dispute concerning the liquidation of property acquired during a marriage after a divorce is to be qualified as a matter falling under the matrimonial property regime and therefore within the scope of the exclusions contained in Article 1(2)(a) of the Brussels Ibis Regulation,⁶⁵ the judgment referred in passing to the express exclusion of the property consequences of marriage by Recital 8 of the Brussels Ibis Regulation.

2.2 Matters of parental responsibility – Article 1(1)(b) and Article 1(2)

The Regulation also establishes uniform rules on the jurisdiction, recognition and enforcement of judicial or administrative decisions in cross-border matters of parental responsibility. This term is to be interpreted broadly, with a view to the context and objectives of the instrument.⁶⁶ In order to ensure equality amongst children in its application,⁶⁷ matters of parental responsibility are to be considered independently of matrimonial proceedings.⁶⁸

⁶¹ CJEU Case C-67/17 *Todor Iliev v Blagovesta Ilieva* [2017] ECLI:EU:C:2017:459, para 22.

⁶² Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32 (hereinafter – the 1968 Brussels Convention).

⁶³ CJEU Case C-143/78 *Jacques de Cavel v Louise de Cavel* [1979] ECLI:EU:C:1979:83, para 7.

⁶⁴ *Ibid.*, para 29.

⁶⁵ *Ibid.*, paras 31-32.

⁶⁶ CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilija Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, para 27 and CJEU Case C-435/06 C. [2007] ECR I-10141, para 49.

⁶⁷ See the Brussels Ibis Regulation, Recital 5 and CJEU Case C-92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, para 64.

⁶⁸ Ensuring equality between children under the Regulation regardless of the marital status of those who hold parental responsibility. This was not the case under the Brussels II Regulation, which only addressed matters of parental responsibility in connection with the dissolution of a marriage.

As a starting point in establishing the scope of matters of ‘parental responsibility’ for the purposes of the Regulation, one can refer to Article 2(7), which states that it should be taken to 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. The term shall include rights of custody and rights of access’.

This summation is supplemented by a non-exhaustive list of inclusions set out in Article 1(2), along with the establishment of a number of express exclusions concerning the material scope of the Regulation in Article 1(3), which will be analysed in greater detail in the subsequent sections.

One general point of perceived difficulty that was highlighted by several of the National Reporters concerned the difference between the conception of ‘parental responsibility’ in their domestic law and that employed by the Regulation. The French Reporter stated that there was no equivalent to this concept in domestic law, particularly since French judges are not familiar with the notion that persons other than the parents (or guardians) can be holders of parental responsibility. This gives rise to the risk that the term will be confused with the more restrictive concept of ‘parental authority’.⁶⁹ The Finnish Reporter stated that difficulties may sometimes arise as a result of the mismatch between parental responsibility, and the concepts of custody and guardianship that are used in domestic law.⁷⁰ The Spanish Report opined that the understanding of parental responsibility was wider than the closest concept in domestic law,⁷¹ whilst according to the Croatian Reporter, the opposite was true in the Croatian legal system.⁷²

However, despite these highlighted concerns, given the generally high degree of elaboration already provided by Article 1(2) and (3), it has to be concluded that such difficulties are more likely the result of a lack of judicial familiarity with the Regulation, rather than the poor drafting of the instrument itself.

2.2.1 Non-exhaustive list of inclusions

Article 1(2) sets out a list of specific inclusions within the scope of ‘parental responsibility’ in the context of the Regulation. It is emphasised that this list is non-exhaustive and is to be considered as a guide that outlines examples of matters that fall within this category.⁷³ Those categories set out in Article 1(2) that have given rise to particular discussions are considered below.

⁶⁹ National Report France, question 19.

⁷⁰ National Report Finland, question 19.

⁷¹ National Report Spain, question 19.

⁷² National Report Croatia, question 3.

⁷³ CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilija Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, para 27 and CJEU Case C-435/06 *C.* [2007] ECR I-10141, para 30.

2.2.1.1 Rights of custody and rights of access

In addition to addressing all proceedings involving custody and rights of access between parents, the Regulation should also extend to decisions on the right of access of third persons such as grandparents or siblings, as it is suggested in the literature⁷⁴. The CJEU in a very recent decision⁷⁵ also ruled that the concept ‘right of access’ encompasses grandparents. The details of this case are presented *infra* under 2.3 ‘Difficulties in application – CJEU Case law’.

2.2.1.2 The placement of the child in a foster family or in institutional care

There is a potential overlap between the placement of children in secure institutional care and the exclusion of measures taken as a result of criminal offences committed by children. On this point, the CJEU has held that the placement of a child in a secure institution providing therapeutic and educational care in another Member State, entailing a deprivation of liberty for the child’s own protection, falls within the material scope of the Regulation by virtue of this express inclusion.⁷⁶ The court noted, however, that in accordance with the exclusion of measures for criminal offences set out in Article 1(3)(g), such deprivation of liberty must not be intended to punish the child.⁷⁷

2.2.1.3 Measures for the protection of the child relating to the administration, conservation or disposal of the child's property

Elaborating upon this inclusion, Recital 9 of the Regulation states that decisions involving the assistance or representation of the child with regard to his or her property fall within the scope of the Regulation when these are made in pursuit of the protection of the child. It goes on to exemplify proceedings involving the designation of the child or body responsible for administering the child’s property.

On the other hand, decisions relating to the general organisation of the child’s property that occur independently of a measure of child protection fall within the scope of the Brussels Ibis Regulation. It is left to the courts to decide whether the matter in question involves an issue of parental responsibility.⁷⁸

2.2.2 Express exclusions

The inclusions set out above are supplemented by an enumeration of express exclusions that apply to the Regulation as a whole. Since the exclusions involved in delineating matrimonial matters have already been discussed *supra* under 2.1.1 ‘Admissible relationships’, this section will focus exclusively on the manner in which these exclusions serve to define parental

⁷⁴ Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 70.

⁷⁵ CJEU Case *Neli Valcheva v Georgios Babanarakis* C-335/17 [2018] ECLI:EU:C:2018:359.

⁷⁶ CJEU Case C-92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, para 56-66.

⁷⁷ *Ibid.*, para 65.

⁷⁸ Practice Guide 2015, pp. 20-21, para 3.1.1.4.

responsibility. Continuing with the approach of the previous section, the following will only deal with those exclusions that have given rise to discussions.

2.2.2.1 Decisions on adoption, measures preparatory to adoption, or the annulment or relocation of adoption

There is a slight overlap here with regard to the express inclusion of foster care in Article 1(2)(d). In order to delineate the inevitably blurred boundaries between adoption and foster care, it has been proposed that placement with a foster family in preparation for a later adoption be excluded from the Regulation's scope of application.⁷⁹ However, given the often uncertain nature of the road from foster care to adoption, it may be difficult to impose such an exclusion in practice.

2.2.2.2 Emancipation

In addition to the exclusion of decisions on emancipation, the Practice Guide 2015 states that decisions made with regard to emancipated persons do not, in principle, fall within the scope of the Regulation (even those decisions involving persons under the age of 18).⁸⁰

2.2.2.3 Maintenance obligations

As mentioned above with regard to the delineation of matrimonial matters, the material scope of the Regulation does not extend to (ancillary) decision-making on maintenance obligations. However, a connection is made between proceedings involving the subject matters covered by Brussels IIbis and the Maintenance Regulation⁸¹ by way of Article 3(c) and (d) of the latter instrument, which provides that if the application for maintenance is ancillary to proceedings involving either the separation or weakening of a marital link or a matter of parental responsibility, the Member State court which is competent to rule on one of the latter matters shall have jurisdiction. It should also be noted that where both of the aforementioned proceedings are occurring in tandem in different Member States, the Member State in which proceedings concerning parental responsibility are being conducted is competent to rule on a maintenance matter concerning the minor concerned.⁸²

2.2.2.4 Trusts or succession

Trusts fall within the scope of the Brussels I Regulation (Article 5(6)), whilst the EU unified rules on succession are contained in a separate regulation which was introduced in 2012. However, notwithstanding the exclusion of this latter matter, an application to a Member State court to approve an agreement for the distribution of an estate concluded by a guardian *ad litem* on behalf of minor children was found to constitute a measure relating to the exercise of parental

⁷⁹ Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 72.

⁸⁰ Practice Guide 2015, p. 19, para 3.1.1.1.

⁸¹ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1 (hereinafter Maintenance Regulation).

⁸² CJEU Case C-184/14 A v B [2015] ECLI:EU:C:2015:479.

responsibility, within the meaning of Article 1(1)(b) of Brussels Ibis rather than falling within the scope of the Succession Regulation.⁸³ The Court stated that the need to obtain approval from the court dealing with guardianship matters is directly connected with the status and capacity of the minor children and constitutes a protective measure for the child relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of Articles 1(1)(b) and 2(e) of the Regulation.⁸⁴

2.3 Difficulties in application – CJEU case law

There may be circumstances in which it may be difficult to assess whether the dispute may be qualified as a matter covered by the Regulation. Regarding matrimonial matters, the cases of *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* and *Ilieva* have already been addressed.⁸⁵

As for the matters of divorce, the CJEU recently added some clarity to the issue of whether the so-called 'private divorces' (i. e., those which are pronounced without the involvement of a State authority) fall under the scope of the Regulation. Although the case of *Soha Sahyouni v Raja Mamisch*⁸⁶ concerned the application of the Rome III Regulation, in addressing the issue CJEU explicitly refers to the interpretation and understanding of 'divorce' in Article 1(1)(a) relating to the scope of application and Article 2(4) concerning the definition of the 'court' in the Regulation Brussels Ibis.⁸⁷ The issue in the latter case was whether a divorce resulting from a unilateral declaration made by one of the spouses before a religious court falls under the scope of the Rome III Regulation. The Court argued that as at the time of the adoption of the Rome III Regulation public bodies alone were able to adopt legally valid decisions in the sphere of divorce, by adopting the Rome III Regulation the EU legislature had in mind only situations in which divorce is pronounced by a national court or by another public authority. The Court supported this argument by referring to the concept of 'divorce' in the Brussels Ibis Regulation. According to the Court, the reading of Article 1(1)(a) and 2(4) of the Brussels Ibis implies that a divorce should be pronounced by a national court or by (or under the supervision of) a public authority. CJEU emphasised that [i]t would be inconsistent to define in different ways the same term 'divorce' used in those two regulations and thus to make the respective scopes of those regulations diverge.⁸⁸ Considering the above, the Court concluded that 'private divorces' do not fall under the scope of the Rome III Regulation. As the Court stressed that the synergy of the Rome III and the Brussels Ibis is required⁸⁹, the scope of the

⁸³ Council Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107 (hereinafter Succession Regulation), CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653.

⁸⁴ CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653, para 31.

⁸⁵ *Supra* in this Chapter, under 2.1.2.3 'Marriage annulment' and 2.1.2.4 'Matrimonial property issues' respectively.

⁸⁶ CJEU Case C-372/16 *Soha Sahyouni v Raja Mamisch* [2017] ECLI:EU:C:2017:988.

⁸⁷ *Ibid.*, para 41.

⁸⁸ *Ibid.*, para 42.

⁸⁹ As indicated in Recital 10 of the Rome III Regulation.

Brussels Ibis should also be interpreted in a way that the Regulation does not cover divorces pronounced without the involvement of a State authority. There are also a number of cases decided by the CJEU which clarify the substantive scope of application concerning 'parental responsibility' under Article 1(1)(b).

The CJEU judgment in the case of *Matoušková*⁹⁰ concerned a request for a preliminary ruling submitted by the Czech Supreme Court in proceedings brought by Ms. Matoušková in her capacity as a court commissioner. The question sought to determine whether an agreement on the distribution of an estate concluded on behalf of a minor by his or her guardian *ad litem* requires the approval of a court in order to be valid. A further question was whether such a court decision is to be qualified as a measure within the meaning of Article 1(1)(b) or a measure within the meaning of Article 1(3)(f) of the Regulation. If it is a measure within the meaning of Article 1(1)(b) then it falls within the Regulation's substantive scope of application. In contrast, if this is to be considered as a matter under Article 1(3)(f) it is then excluded from the Regulation's scope.

The facts of the case can be summarised as follows. On 8 May 2009 Ms. Martinus, a Czech national, died in the Netherlands, leaving a spouse and two minor children, the heirs, who resided in the Netherlands. Ms. Matoušková, a notary in the Czech Republic, was authorised to act as a court commissioner in the succession proceedings. She established that the deceased was a citizen of the Czech Republic who was living in Brno (in the Czech Republic) at the time of her death. The Brno Municipal Court appointed a guardian *ad litem* to represent the interests of the minor children so as to avoid a conflict of interest. The participants to the proceedings declared that no succession proceedings were pending in the Netherlands. On 14 July 2011, the heirs concluded an agreement on the distribution of the estate. During the notarial inheritance proceedings on 2 August 2012 new facts came to light. Namely, it appeared that Ms. Martinus had resided in the Netherlands at the time of her death and that succession proceedings were already ongoing in the Netherlands. An attestation to that effect was submitted on 14 March 2011.

Ms. Matoušková submitted for approval the agreement on the distribution of the estate to the court in the Czech Republic dealing with guardianship matters. The Court returned the file without having examined the substance of the dispute. It held that the minor children were long-term residents outside the Czech Republic so that it could not decline jurisdiction or refer the case to the Supreme Court in order to determine which court had jurisdiction. Following this, Ms. Matoušková applied to the Supreme Court with a request to designate the court with local jurisdiction to decide the matter of the approval of the agreement on the distribution of the estate at issue in the main proceedings. The Supreme Court then decided to stay its proceedings, taking the view that an interpretation by the CJEU was necessary.

⁹⁰ CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653.

In its consideration, the Court agreed with AG Kokott⁹¹ that legal capacity and the associated representation issues had to be assessed in accordance with their own criteria and were not to be regarded as preliminary issues dependent on the legal acts in question. Therefore, it had to be held that the appointment of a guardian for the minor children and the review of the exercise of her activity were so closely connected that it would have been inappropriate to apply different jurisdictional rules, which would vary according to the subject matter of the relevant legal act.⁹²

Therefore, the fact that approval had been requested in succession proceedings could not be regarded as decisive concerning whether the measure should fall within the scope of the law on succession. The need for approval was a direct consequence of the status and capacity of the minor children and constituted a protective measure for the child relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of Articles 1(1)(b) and 2(e) of the Brussels Ibis Regulation.

Just as it is excluded from the Brussels Ibis Regulation, succession must, in principle, be excluded from the 1996 Hague Convention. However, if the legislation governing the rights to succession provides for the intervention of the legal representative of the child who is an heir, that representative must be designated in accordance with the rules of the Convention, since such a situation falls within the area of parental responsibility.⁹³ This view is also confirmed by the Succession Regulation. Article 1(2)(b) of this Regulation excludes from its scope the legal capacity of natural persons. That Regulation governs only aspects relating specifically to the capacity to inherit under Article 23(2)(c) and the capacity of the person making the disposition of property upon death to make such a disposition in accordance with Article 26(1)(a). This interpretation is also consistent with the case law of the CJEU which is designed to avoid overlap and a legal vacuum between the different instruments.⁹⁴

The CJEU concluded that the Brussels Ibis Regulation must be interpreted as meaning that the approval of an agreement for the distribution of an estate concluded by a guardian *ad litem* on behalf of minor children constituted a measure relating to the exercise of parental responsibility, within the meaning of Article 1(1)(b) of that Regulation and thus fell within its scope. Consequently, it is not a measure relating to succession within the meaning of Article 1(3)(f) which is excluded from the scope of application of the Brussels Ibis Regulation.⁹⁵

⁹¹ *Ibid.*, Opinion of Advocate General Kokott, para 41.

⁹² CJEU Case C-404/14 *Matoušková*, [2015] ECLI:EU:C:2015:653, para 30.

⁹³ *Ibid.*, para 32; Lagarde, P., Explanatory Report on the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1998).

⁹⁴ CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653, paras 33 and 34; see, by analogy, CJEU Case C-157/13 *Nickel & Goeldner Spedition* [2014] ECLI:EU:C:2014:2145, para 21 and the case law cited.

⁹⁵ CJEU Case C-404/14 *Matoušková* [2015] ECLI:EU:C:2015:653, para 38.

The case of *Bohez v Wiertz*⁹⁶ is another example of difficulties that may arise in connection with delineating the substantive scope of application between Brussels I⁹⁷ (or Ibis) and Brussels Ibis. The courts in Finland expressed different views on the nature and enforceability of an order for the payment of a penalty to ensure that one of the parents complied with the access rights of the other parent. For a better understanding of the legal reasoning, the facts of the case are detailed hereunder.

Mr Bohez and Ms Wiertz were married in Belgium with two children. They divorced in 2005 and Ms Wiertz moved to Finland. On 28 March 2007, the Belgian court delivered a judgment concerning custody, residence, rights of access and maintenance with regard to the two children. In order to ensure compliance with the right of access granted to Mr. Bohez, the Belgian court supplemented its judgment with a penalty payment if the access right would be infringed. Mr Bohez applied to the Finnish courts for an order requiring Ms Wiertz to pay him the penalty payment imposed in the judgment of 28 March 2007, or for a declaration that the judgment was enforceable in Finland because multiple visits had not taken place, leading up to a fine exceeding the maximum amount. Ms Wiertz contended that the order for a penalty payment had not been definitively confirmed by the Belgian courts and that the judgment of 28 March 2007 was therefore unenforceable. In its judgment of 8 March 2012, the Court at first instance (Itä-Uudenmaan käräjäoikeus) found that Mr Bohez's application did not relate to the enforcement of a judgment on the rights of access. Instead, in the view of the Court, it only related to the enforcement of a penalty payment imposed to ensure compliance with that judgment. Since the order issued by the Belgian court was a judgment laying down a monetary obligation, the Court at first instance held that it fell within the scope of the Brussels Ibis Regulation. However, the judgment of 28 March 2007 provided only for a periodic penalty payment, the amount of which had not been finally determined. As such, it was contrary to the requirements of Article 49 of the Brussels Ibis Regulation. Consequently, the Court held that the application for enforcement was inadmissible. The Helsinki Court of Appeal (*Helsingin hovioikeus*) upheld the inadmissibility of the claim, but for different reasons. It held that the application fell within the substantive scope of the Brussels Ibis Regulation. The Appellate Court concluded that it followed from Article 47(1) of the Brussels Ibis Regulation that the enforcement procedure was to be governed by Finnish law. Mr. Bohez appealed and the Supreme Court (*Korkein oikeus*) submitted a number of questions to the CJEU. Whether the application for the enforcement of the judgment imposing the penalty payment fell under the Brussels Ibis Regulation or the Brussels Ibis Regulation was amongst the questions submitted.

After referring to *Realchemie Nederland*⁹⁸, the CJEU held that 'the nature of that right of enforcement depends on the nature of the subjective right, for infringement of which enforcement was ordered'.⁹⁹ In the case at hand, the order for a penalty payment was intended

⁹⁶ CJEU Case C-4/14 *Bohez v Wiertz* [2014] ECLI:EU:C:2015:563.

⁹⁷ COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L 12/1 (hereinafter – the Brussels I Regulation).

⁹⁸ CJEU Case C-406/09 *Realchemie Nederland* [2011] ECR I-09773, para. 42.

⁹⁹ CJEU Case C-4/14 *Bohez v Wiertz* [2014] ECLI:EU:C:2015:563, para. 34.

to ensure the effectiveness of the right of access. The CJEU concluded that consequently the recovery of a penalty payment formed part of the same scheme of enforcement as the judgment concerning the right of access that the penalty safeguarded. Thus, the latter therefore had to be declared enforceable in accordance with the rules laid down by the Brussels Ibis Regulation.¹⁰⁰

In the present case, the penalty payment whose enforcement was sought in the main proceedings had been imposed by the court which, under the Brussels Ibis Regulation, had jurisdiction to decide on the merits concerning to right of access. This meant that the enforcement of the penalty was directly linked to the enforcement of the principal obligation and therefore could not be considered in isolation. Recovery of the penalty payment therefore had to fall under the same scheme of enforcement as the rights of access which were to be ensured, namely the rules laid down in Articles 28(1) and 41(1) of the Brussels Ibis Regulation.¹⁰¹ The Court went on to explain that if the scheme for the enforcement of penalty payments were separated from the scheme which was applicable to the right of access, this would amount to allowing the court of enforcement to verify whether there had been a breach of the right of access. Such a review would breach the principle of mutual trust.

On the question of the enforceability of a periodic penalty payment, the CJEU concluded that such a payment is enforceable ‘only if the amount of the payment has been finally determined by the courts of the Member State of origin’.¹⁰² This part of the reasoning is addressed in great detail *infra* in Chapter 9, under 6.2 ‘*Difficulties in application of Section 4 – CJEU case law*’.

The CJEU judgment in *Gogova*,¹⁰³ illustrates that there are circumstances in which it may appear difficult to determine the nature of the claim for the purposes of applying the Regulation. In this case a request for a preliminary ruling was submitted by the Bulgarian Supreme Court. The request concerned, *inter alia*, the issue of whether an application to the court to replace the parents’ lack of a common agreement on a child being allowed to travel abroad and to allow for a passport to be issued in the child’s name was a question pertaining to ‘parental responsibility’ within the meaning of Article 1(1)(b) in conjunction with Article 2(7) for the purposes of determining jurisdiction under Article 8(1) of the Regulation. The fact that the question involved the issuing of a passport raised doubts as to the nature of the claim: is this a ‘civil matter’ or an ‘administrative matter’. In the latter case, it would fall outside the Regulation’s scope. If it is a civil matter, the Regulation will apply so that the court in the Member State of the habitual residence of the child has jurisdiction. The decision of the court rendered in such proceedings is meant to replace the legal act which is crucial within the administrative procedure for issuing a child’s passport in a Member State of the child’s nationality which is not the Member State where the child habitually resides. The facts are

¹⁰⁰ *Ibid.*, para 53.

¹⁰¹ *Ibid.*, paras 48-50.

¹⁰² *Ibid.*, para 61.

¹⁰³ CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710.

briefly outlined for the purpose of gaining a better understanding of the legal reasoning of the CJEU.

The parents, both of whom were Bulgarian nationals residing in Italy, lived apart. The child was also a Bulgarian national and resided with her mother in Italy. In order to be able to travel with her daughter to Bulgaria, the mother had to renew the child's passport by filing a request before the competent authorities in Bulgaria. According to Bulgarian law, the common agreement of both parents is needed for a decision on a minor travelling abroad and for obtaining a passport in the child's name. Also, an application for a passport for a minor must be submitted to the competent administrative authorities in Bulgaria by both parents. Since the father did not cooperate in obtaining a new passport for their child, the mother filed the motion with the District Court in Petrich (*Rayonen sad*, Petrich, Bulgaria) to resolve the disagreement between her and the father concerning their daughter's ability to travel abroad and the issuing of a new passport to her. As the document instituting the proceedings could not be served upon the father as he could not be found at the reported address, a legal representative was appointed by the Court. The representative did not raise an objection based on the Bulgarian courts' lack of jurisdiction and suggested that the dispute should be resolved in accordance with the best interests of the child. The Court issued an order declaring its lack of jurisdiction to hear the case and closed the proceedings. The decision was based on the conclusion that the application concerned parental responsibility for a child within the meaning of Article 8 of the Regulation. Consequently, jurisdiction lay with the court of the Member State of the child's habitual residence, which was Italy. The mother appealed against this decision to the Regional Court (*Okrazhen sad – Blagoevgrad*, Bulgaria). The Court concurred with the judgment and closed the proceedings. After this unsuccessful appeal the case reached the Supreme Court of Cassation (*Varhoven kasatsionen sad*). The latter considered that the outcome of the appeal depended on whether or not the judicial proceedings in the case at hand fell within the substantive scope of application of the Brussels IIbis Regulation. In particular, the Supreme Court considered it questionable whether such proceedings concerned 'parental responsibility' within the meaning of Article 2(7), especially bearing in mind that the judgment rendered in these proceedings would have to be submitted to the administrative authorities in Bulgaria which were to render a decision on whether the child was to be authorised to travel abroad or issued with a passport. If the proceedings in the case at hand were to be considered as an issue of parental responsibility, the jurisdiction of the courts had to be determined on the basis of the provisions of the Regulation which would consequently imply that the courts in Italy as a Member State of the child's habitual residence were competent.

The CJEU first addressed the substantive or material scope of application in Article 1(1)(b) of the Regulation holding in this context that 'the expression "civil matters" must not be understood restrictively but as an autonomous concept of EU law'. As such it covers 'in particular all applications, measures or decisions in matters of "parental responsibility" within the meaning of that regulation, in accordance with the objective stated in recital 5 in its preamble'.¹⁰⁴ It further held that for the purposes of determining whether an application falls

¹⁰⁴ *Ibid.*, para 26, referring to CJEU Case C-435/06 C. [2007] ECR I-10141, paras 46 to 51.

within the scope of the Regulation ‘the focus must be on the object of the application’.¹⁰⁵ The Court concluded that the object of the action in the case at hand was a matter pertaining to the exercise of parental responsibility within the meaning of Article 1(1)(b) in conjunction with Article 2(7) of the Regulation. This conclusion by the CJEU was supported by the argument that the action was aimed at obtaining a ruling from the competent court on the child’s need to obtain a passport, on the parent’s right to apply for it and the parent’s right to travel abroad with the child without the agreement of the other parent.¹⁰⁶ The Court further reasoned that the concept of ‘parental responsibility’ extends to cases in which an action relates to a particular aspect of parental responsibility and not necessarily to all conditions for the exercise of ‘parental responsibility’.¹⁰⁷

The fact that a court ruling is intended to be used in an administrative procedure for obtaining a passport does not affect the nature or the object of the action, as it is not itself an application to issue a passport. The Court concluded that ‘an action in which one parent asks the court to remedy the lack of agreement of the other parent to their child travelling outside his Member State of residence and a passport being issued in the child’s name is within the material scope of Regulation, even though the decision in that action will have to be taken into account by the authorities of the Member State of which the child is a national in the administrative procedure for the issue of that passport’.¹⁰⁸

Thus, the action in the case at hand did fall within the substantive scope of application of the Regulation for the purposes of establishing jurisdiction. Consequently, the courts in Italy where the child had her habitual residence were competent for the application in the present case according to the general rule on jurisdiction contained in Article 8. This is not affected by the fact that a decision rendered in Italy to replace the lack of agreement of the other parent would subsequently be used in administrative proceedings to issue a passport in Bulgaria, a Member State of the child’s nationality.

In another case the CJEU has very recently ruled on the scope of ‘right of access’ in terms of persons whose rights of access to a child are to be considered as falling under the scope of the Regulation. The case of *Neli Valcheva v Georgios Babanarakis*¹⁰⁹ concerned the right of access by grandparents to grandchildren. The Court agreed with the Opinion of Advocate General Szpunar¹¹⁰ that the Regulation does extend to a request concerning rights of access by grandparents. The Court supports his position *inter alia* by the reference to Article 2(10), which defines ‘rights of access’ broadly and which does not impose any limitation in regard to the persons who may benefit from those rights of access. The Court also referred to Article 2(7),

¹⁰⁵ *Ibid.*, para 28. The CJEU referred to the interpretation of the ‘status of or legal capacity of natural persons’ under Article 1(2) of the Brussels I Regulation in CJEU Case C-386/12 *Schneider* [2013] ECLI:EU:C:2013:633, paras 29 and 30 and the interpretation and application of the concept of ‘social security’ in the same Regulation in CJEU Case C-271/00 *Baten* [2002] ECR I-10489, paras 46 and 47.

¹⁰⁶ *Ibid.*, para 29.

¹⁰⁷ *Ibid.*, para 32.

¹⁰⁸ *Ibid.*, para 35.

¹⁰⁹ CJEU Case C-335/17 *Neli Valcheva v Georgios Babanarakis* [2018] ECLI:EU:C:2018:359.

¹¹⁰ CJEU Case C-335/17 *Neli Valcheva v Georgios Babanarakis* [2018] ECLI:EU:C:2018:242, Opinion of Advocate General Szpunar.

which defines the concept of parental responsibility as meaning 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.

The CJEU case of *Health Service Executive*,¹¹¹ which will be dealt with extensively *infra* in Chapter 10, under 5.2 ‘*Difficulties in application – CJEU case law*’ concerned a Reference for a Preliminary Ruling that had been submitted by the Irish High Court. The request had been made on an urgent basis (in accordance with Article 104b of the Court’s Rules of Procedure), with the facts involving a decision to place an extremely vulnerable young person, who was habitually resident in Ireland, in a secure care institution in England.¹¹² The placement of the child took place at the request of the Health Service Executive, the statutory authority which is responsible for children taken into public care in Ireland. Although all relevant parties (except the child) were in agreement regarding this decision, the referring court had a number of concerns with regard to the usage of Article 56 in this process.¹¹³ Firstly, for the purposes of the Regulation’s scope of application,¹¹⁴ the Irish High Court wished to clarify whether the judgment in case *A*¹¹⁵, which provides for the detention of a child for a specified time in another Member State in an institution providing therapeutic and educational care, falls within the material scope of the Regulation. In answering this question in the affirmative, the CJEU referred to several provisions that, taken in conjunction with one another, evidenced the applicability of the Regulation. It stated that parental responsibility within the meaning of Brussels IIbis was to be given a broad definition, and taken to include decisions on the right of custody regardless of whether custody is to be transferred to an administrative authority.¹¹⁶ Although Article 1(d) and Article 56 do not explicitly refer to the placement of a child in institutional care in another Member State where that placement involves a period of deprivation of liberty for therapeutic and educational purposes, they do exemplify the placement of a child in institutional care in another Member State. Furthermore, it was previously found in the case of *C*¹¹⁷ that the list of inclusions within the scope of the Regulation is not intended to be exhaustive.¹¹⁸ Drawing on the requirement to ensure equal treatment for all children (Recital 5), the Court proceeded to state that not interpreting the Regulation as covering placement in secure care would mean that its benefit would be lost to vulnerable children and would therefore be contrary to this purpose.¹¹⁹

One point that was, however, emphasised in the CJEU’s judgment was that, in accordance with the express exclusion in Article 1(3)(g) of ‘measures taken as a result of criminal offences

¹¹¹ CJEU Case C-92/12 *Health Service Executive* [2012] ECLI:EU:C:2012:255.

¹¹² *Ibid.*, paras 22-29.

¹¹³ *Ibid.*, para 36.

¹¹⁴ There were other separate questions regarding Article 56 of the Regulation.

¹¹⁵ CJEU Case C-523/07 *A*. [2009] ECR I-2805.

¹¹⁶ *Ibid.*, para 59.

¹¹⁷ CJEU Case C-435/06 *C*. [2007] ECR I-10141.

¹¹⁸ *Ibid.*, para 63.

¹¹⁹ *Ibid.*, para 64.

committed by children', deprivation of liberty only falls within the scope of the Regulation where it is intended to protect (as opposed to punish) the child.¹²⁰

The CJEU judgment in *C*¹²¹ addressed the definition of parental responsibility within the meaning of the Regulation. It considered the question of whether taking children into care and placement in a foster home, which was defined as a measure of public law by the domestic law in question, was nevertheless to be treated as civil law for the purposes of the applicability of Brussels Ibis.

The facts of this case involved the removal of two children which had been ordered by the Swedish Social Welfare Board on 23 June 2005. Following the issuing of this order the children and their mother relocated to Finland. The Swedish authorities sought to have their order enforced through cooperation with their Finnish counterparts. However, the mother of the children appealed against the Finnish police's order to hand over the children. This first appeal was dismissed, and the mother of the children subsequently appealed to the Finnish Supreme Administrative Court, which stayed the proceedings and made a Reference for a Preliminary Ruling to the CJEU on the basis of whether taking a child into care, which is defined as a matter of public law in Finland, should fall within the scope of Brussels Ibis.

With regard to the question of the Regulation's material scope of application, the referring court made the following enquiries:¹²²

- (a) Does Regulation No. 2201/2003 apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into care of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;
- (b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;
- (c) and, in the latter case, is Regulation [No. 2201/2003] applicable to a decision on placement contained in one on taking into care, even if the latter decision, on which the placement decision is dependent, is itself subject to legislation, based on the mutual recognition and enforcement of judgments and administrative decisions that has been harmonised in cooperation between the Member States concerned?

In answer to the above questions, the CJEU acknowledged that taking a child into care is not expressly mentioned amongst the matters listed as relating to parental responsibility in Article 1(2).¹²³ However, it stated that this list is not intended to be exhaustive (as shown by the use of the words 'in particular').¹²⁴ It drew on the fact that Recital 5 of the Regulation covers all decisions on parental responsibility, including measures for the protection of the child.

¹²⁰ *Ibid.*, para 65.

¹²¹ CJEU Case C-435/06 *C*. [2007] ECR I-10141.

¹²² There were, however, two additional questions concerning the interplay with the Nordic Council and the application of Brussels Ibis *ratio temporis* which will not be considered here.

¹²³ CJEU Case C-435/06 *C*. [2007] ECR I-10141, para 28.

¹²⁴ *Ibid.*, paras 29-30.

Furthermore, it highlighted the linkage between taking a child into care and decisions on custody (Article 1(2)(a))¹²⁵ and the placement of a child in foster care (Article 1(2)(d)).¹²⁶

The Court then turned to the question of whether a public law measure could fall within the scope of the Regulation. It firstly stated that ‘civil matters’, as used in the Regulation, is an autonomous concept¹²⁷ that should be interpreted in light of the objectives of this instrument. It went on to establish that if the categorisation of a particular measure as a public law matter by national law was the only reason for refusing the applicability of the Regulation, this would compromise the purpose of mutual recognition and the enforcement of decisions in matters of parental responsibility. Neither the judicial organisation of the Member States, nor the conferral of powers on administrative authorities should affect the scope of the Regulation or the definition of ‘civil matters’.¹²⁸

In conjunction with emphasising the broad definition to be attached to ‘parental responsibility’ within the meaning of the Regulation,¹²⁹ the CJEU established ‘that ‘civil matters’ must be interpreted as capable of extending to measures which, from the point of view of the legal system of a Member State, fall under public law’, and that therefore the taking of a child from his or her original home and his or her placement in foster care was to be considered as a ‘civil matter’ if this decision was made in the context of public law rules relating to child protection.¹³⁰ In light of its answer to Question 1(a), the Court opted not to answer Question 1(b) and (c).¹³¹

A similar question to that of the above case arose in a later Reference for a Preliminary Ruling that had again been made by the Finnish Supreme Court in *A*.¹³² Alongside the brief explanation of the facts *infra*, a more elaborate summary is included in Chapter 3, under 4.3 ‘*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*’. This instance involved a challenge by a mother against the decision by the Finnish authorities to take into care and place in a foster family three children who had previously been living in Sweden and appeared to be residing in Finland on a temporary basis.¹³³ The mother argued that the Finnish authorities lacked the competence to take such measures in this instance, since the children were Swedish nationals who were permanently resident in Sweden.¹³⁴ The Finnish Supreme Court wished to clarify a number of questions,¹³⁵ the first of which was essentially a reiteration of the question posed in C:

¹²⁵ *Ibid.*, para 33.

¹²⁶ *Ibid.*, para 34.

¹²⁷ *Ibid.*, para 46.

¹²⁸ *Ibid.*, para 45.

¹²⁹ *Ibid.*, para 49.

¹³⁰ *Ibid.*, paras 51 and 53.

¹³¹ *Ibid.*, para 55.

¹³² CJEU Case C-523/07 *A*. [2009] ECR I-2805.

¹³³ *Ibid.*, paras 14-15.

¹³⁴ *Ibid.*, para 19.

¹³⁵ It also posed questions concerning the definition of habitual residence and the use of protective measures under Article 20 of Brussels IIbis – see para. 20 of the judgment.

1. (a) Does ... [the] Regulation ... apply to the enforcement, such as in the present case, of a public-law decision made in connection with child protection, as a single decision, concerning the immediate taking into care of a child and his or her placement outside the home, in its entirety,

(b) or, having regard to the provision in Article 1(2)(d) of the regulation, only to the part of the decision relating to the placement outside the home?¹³⁶

In recalling its reasoning in the previous decision,¹³⁷ the CJEU answered that the Regulation would apply to both the taking into care and placement of a child outside the home where that decision was adopted in the context of public law rules on child protection.¹³⁸

3. Definitions

The Regulation defines a number of issues in Article 2. Each issue defined presents ‘an autonomous concept which is independent of the law of Member States’. In general, the jurisprudence of the CJEU attaches great importance to the principle of an autonomous and uniform interpretation of European Union law whereby no express reference is made to the law of the Member States for the purposes of determining the meaning and scope of EU law.

The subsections below seek to establish the nature of the proceedings that take place within the remit of Brussels IIbis by firstly examining the definition of a court or tribunal for these purposes (3.1), before considering the meaning of a ‘judge’ within this context (3.2).

3.1 Court or tribunal

Article 1(1) states that the Regulation applies in cases involving the subject matter discussed above ‘whatever the nature of the court or tribunal’. Proceedings conducted by both judicial and non-judicial authorities fall within the scope of this Regulation, with administrative proceedings held to be included provided that they are officially recognised in the Member State.¹³⁹ The Romanian National Report exemplified the breadth of the scope assigned to this definition by stating that judgments issued by state courts, notaries, registrars, government offices and welfare authorities were recognised in cases involving Brussels IIbis that come within its jurisdiction.¹⁴⁰

Despite this, a number of the National Reporters mentioned that they perceive a lack of clarity as to whether certain administrative proceedings fell within the scope of the Regulation.

¹³⁶ *Ibid.*, para 20.

¹³⁷ *Ibid.*, para 22.

¹³⁸ *Ibid.*, para 29.

¹³⁹ See the clear inclusion established by the Explanatory Memorandum accompanying the Proposal for the Brussels II Regulation, COM(1999) 220 final, p. 11, para 4.3: ‘Administrative procedures officially recognised in a Member State are therefore included’. See also Ní Shúilleabháin, *op. cit.*, pp. 123-124, paras 3.61-3.62 and Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 4.

¹⁴⁰ National Report Romania, question 3.

The commentators cited the inclusion of administrative divorce¹⁴¹ and decision making by social work bodies¹⁴² as potential points of interpretational difficulty within their jurisdictions.

In line with the changes to Article 1(1) in the present 2016 Commission's Proposal (from 'court or tribunal' to 'judicial or administrative authority'), it is suggested that the new Regulation should adopt wording that emphasises the expansive interpretation to be assigned to the body which conducts proceedings in this setting.

Another issue arises from the fact that it is not entirely clear whether proceedings undertaken by a private or religious authority concerning the dissolution or weakening of the marital bond (e.g. the *get* procedure before a Jewish rabbinic court in a Member State or a divorce performed by a *mufti* under *sharia* law) are excluded from the scope of this Regulation. Whilst such proceedings were expressly excluded from the Brussels II Regulation, the position of the current Regulation has not been enunciated.

There are contrasting opinions on this matter evidenced in the National Reports. According to the National Report of the Czech Republic, private decisions of religious bodies are excluded unless such bodies have been expressly given powers by the law to pronounce a divorce.¹⁴³ The French report holds that if the religious authority pronouncing the divorce has jurisdiction to do so in the Member State, its decision will fall under Brussels IIbis for the purposes of recognition.¹⁴⁴ The Greek National Report states that religious decisions or decisions of a private nature are excluded from the scope of the Regulation except for those that are recognised as equivalent to the decisions of judicial authorities.¹⁴⁵ The Irish Report simply holds that religious decisions cannot be recognised.¹⁴⁶ This patchwork approach can be regarded as problematic in terms of legal certainty, as it has been reported that even where religious decisions have been verified and given civil effect by a Member State court, recognition has nevertheless been refused.¹⁴⁷

In contrast to the confusion brought about by the above discussion, it is however clarified in Article 62 of the Regulation that concordats and other agreements between Italy, Malta, Portugal, Spain and the Holy See do fall within the scope of the Regulation for the purposes of the recognition and enforcement of decisions.

Given the degree of contradiction documented in the National Reports with regard to proceedings undertaken by a private or religious authority, it is suggested that the recast and/or

¹⁴¹ National Report Spain, question 3.

¹⁴² National Report Slovenia, question 3.

¹⁴³ National Report the Czech Republic, question 15.

¹⁴⁴ National Report France, question 15.

¹⁴⁵ National Report Greece, question 15.

¹⁴⁶ National Report Ireland, question 15.

¹⁴⁷ Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 12. See the example cited here of a German court refusing to recognise a divorce decision which was originally pronounced by a *mufti* under *sharia* law, but which was subsequently approved and given civil effect by a Greek court. It stated that this was not a judgment within the scope of the Regulation because it deemed that the Greek civil court was not exercising control over the mufti's decision (OLG Frankfurt, 16 January 2006, FamRBint, 2006, 77).

accompanying documentation further elaborate upon the nuances of the approach to be taken by national courts in this regard.

3.2 Judge

The term 'judge' is to be taken to mean the judge, or an official having powers equivalent to those of a judge, who is competent in matters falling within the scope of the Regulation.¹⁴⁸ This category includes members of a court, officers of a court, and officials of administrative and social bodies with the power to make decisions in matrimonial or parental responsibility matters.¹⁴⁹ In addition, the report of Spain also indicates the possibility of notaries being included in this definition¹⁵⁰.

3.3 Definitions of 'Member State', 'Member State of Origin' and 'Member State of Enforcement' – Articles 2(3), 2(5) and 2(6)

The Regulation is an instrument which is binding on all Member States of the European Union, with the exception of Denmark. Accordingly, the term 'Member State' refers to all Member States with the exception of Denmark.¹⁵¹

The term 'Member State of origin' in Article 2(5) refers to the Member State in which the judgement to be enforced was issued. The term 'Member State of enforcement' in Article 2(6) refers to the Member State where the enforcement of the judgement is sought. The term is used so that the Regulation reads more easily.¹⁵² According to the National Reports, there appears to be no case law which is relevant either for the definition of the 'Member State of origin' or the 'Member State of enforcement'.¹⁵³

3.4 Definition of Judgement – Article 2(4)

For the purpose of this Regulation, the term 'judgement' refers to a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility pronounced by a

¹⁴⁸ Brussels Ibis Regulation, Article 2(2).

¹⁴⁹ Magnus/Mankowski/Pintens, *op. cit.*, Article 2, note 5.

¹⁵⁰ National Report Spain, question 3.

¹⁵¹ Under Title IV of the EC Treaty, Article 69 EC. Articles 1-3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty of Amsterdam. Denmark, Ireland and the UK are not participating in Community action; however, Ireland and the UK reserved an opt-in possibility and have made use of this. The Protocol on the position of Denmark does not have an opt-in clause, but at any time Denmark may inform the other Member States that it no longer wishes to avail itself as part of this Protocol.

¹⁵² Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in the matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance, COM (2002) 222 final/2, p. 7.

¹⁵³ National Report Austria, question 3; National Report Belgium, question 3; National Report Bulgaria, question 3; National Report Croatia, question 3; National Report Cyprus, question 3; National Report Estonia, question 3; National Report Finland, question 3; National Report France, question 3; National Report Germany, question 3; National Report Greece, question 3; National Report Hungary, question 3; National Report Ireland, question 3; National Report Italy, question 3; National Report Latvia question 3; National Report Lithuania, question 3; National Report Luxembourg, question 3; National Report Malta, question 3; National Report The Netherlands, question 3; National Report Poland, question 3; National Report Portugal, question 3; National Report Romania, question 3; National Report Slovenia, question 3; National Report Spain, question 3; National Report Sweden, question 3; National Report the United Kingdom, question 3.

court of a Member State.¹⁵⁴ This term should be interpreted broadly and cover decrees, orders or decisions,¹⁵⁵ as Article 2(4) expressly states. The same follows from the definition of a ‘court’ in Article 2(1) referring to ‘all authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1.’ Moreover, the judgment must have the legal effect of *res judicata*.¹⁵⁶

3.5 Definition of ‘parental responsibility’ – Article 2(7)

The Brussels IIbis Regulation applies to matters which, *inter alia*, relate to the attribution, exercise, delegation, restriction or termination of parental responsibility.¹⁵⁷ Parental responsibility is defined as *all* rights and duties relating to the person or property of a child which are given to a natural or legal person by a judgement, by operation of law, or by an agreement having legal effect, including rights of custody and rights of access. The scope of the Regulation, as opposed to previous legislation, is no longer defined by reference to specific categories of parent-child relationships or specified categories of children. Instead, it is defined by a general reference to the existence of rights and duties with regard to children. In this approach the nature of the relationship with the ‘holder of parental responsibility’ is no longer relevant.¹⁵⁸

The expression ‘parental responsibility’ has a wide scope and certainly covers custody and access orders or their national equivalents.¹⁵⁹ The concept is given a broad definition so that it includes all rights and duties relating to the person or the property of a child which are given to a natural or legal person by a judgement, by operation of law or by an agreement having legal effect.¹⁶⁰ Such rights may belong to a natural or legal person. The right of custody and the right of access are expressly mentioned as falling within the expression ‘parental responsibility’. There are circumstances in which it may appear difficult to determine the ‘extent’ of this expression for the purposes of determining jurisdiction. This is so when multiple legal proceedings that are related to the child are or will be conducted in different Member States. This is especially so when a decision rendered in the proceedings in one Member State will have to be used or may be relied upon or the judgment rendered merely serves as a condition for initiating the proceedings in another Member State. The facts surrounding the request for a preliminary ruling submitted by the Bulgarian Supreme Court in the CJEU case

¹⁵⁴ See e.g., CJEU Case C-281/15 *Soha Sahyouni v Raja Mamisch* [2016] ECLI:EU:C:2016:343, para 21.

¹⁵⁵ Provisional orders should be interpreted according to Article 20, and orders as to costs according to Article 49 of the Regulation.

¹⁵⁶ Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 11.

¹⁵⁷ See also CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710, para 26; Boele-Woelki, K. and Gonzalez Beilfuss, C., ‘Impact and Application of the Brussels IIbis Regulation: comparative synthesis’ in: Boele-Woelki, K. and Gonzalez Beilfuss, C. (eds) *Brussels IIbis: Its Impact and Application in the Member States* (Intersentia 2007), pp. 31.

¹⁵⁸ Practice Guide 2015, p. 19.

¹⁵⁹ Lowe, ‘Some moot points on the 1980 Hague abduction convention’ (2015) 46 3 *Victoria University of Wellington Law Review*, 683, p. 694, available at: <<http://search.informit.com.au/documentSummary;dn=670492968170800;res=IELHSS>> ISSN: 1171-042X, accessed 24 February 2017.

¹⁶⁰ CJEU Case C-435/06 A [2009] ECR I-10141, para 49; CJEU Case C-92/12 *Health Service Executive* [2012] ECLI:EU:C:2012:255, para 59.

of *Gogova v Iliev*¹⁶¹ are illustrative. The facts of this case and the legal reasoning of the CJEU are explained in great detail *supra* in this Chapter, under. 2.3 ‘*Difficulties in application – CJEU case law*’.

Expanding on that, it is interesting to note that Advocate General Villalon interpreted Articles 2(7), 2(9), 2(11) and Articles 10 and 11 of the Brussels IIbis Regulation as meaning that a ‘court of a Member State may be an “institution or other body” within the meaning of those provisions, to which rights of custody may be granted for the purposes of the provisions of that regulation, in so far as the legislation of that Member State provides for the grant of those rights of custody by operation of law’.¹⁶²

Because children can no longer be seen as incidental happenings of the free movement of their parents, children must be regarded as the bearers of rights. The Brussels IIbis Regulation takes a child-friendly approach so as to use wording such as ‘parental responsibility’ rather than ‘parental authority’ and to refer to the best interests of children.¹⁶³

3.6 Definition of the ‘holder of parental responsibility’ – Article 2(8)

The term ‘holder of parental responsibility’ refers to any person having parental responsibility over a child. The Regulation no longer refers to ‘parents’ but to ‘holders of parental responsibility’ because it no longer concerns solely ‘traditional parents’. It is therefore suggested that, for example, rights of access of grandparents or former partners of the parent also fall within the scope of the Regulation.¹⁶⁴ Additionally, both a natural person and a legal person can be holders of parental responsibility.¹⁶⁵

Furthermore, any person who has obligations and rights towards a child can qualify as a holder of parental responsibility, even if they are holders of only one element of parental responsibility. For example, a person holding access rights, e.g. a grandparent, is also a holder of parental responsibility,¹⁶⁶ as well as an administrative authority.¹⁶⁷

¹⁶¹ CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710.

¹⁶² CJEU Case C-497/10 PPU *Mercredi v. Chaffe* [2010] ECR I-14309, Opinion of Advocate General Cruz Villalon, para 147. The Court, however, went on to dismiss the second question of this Case as Articles 10 and 11 were not applicable to the situation at hand.

¹⁶³ Kruger, T. and Samyn, L. ‘Brussels IIbis: successes and suggested improvements’ (2016) 12:1 *Journal of Private International Law*, pp. 132-168, p. 155.

¹⁶⁴ Swennen, F., ‘Atypical families in EU (private international) family law’, in Meeusen, J., Pertegas, M., Straetmans, G., Swennen, F. (eds), *International family law for the European Union* (Intersentia 2007) p. 418.

¹⁶⁵ Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 19.

¹⁶⁶ *Ibid.*, Article 1, note 23.

¹⁶⁷ CJEU Case C-435/06 *C.* [2007] ECR I-10141, paras 47-48; Carpaneto, L., ‘On the recast of the Brussels IIbis Regulation: a few proposals de jure condendo’ p. 258, in Queirolo, I., Heiderhoff, B., (eds.), *Party Autonomy in European Private (and) International Law- Tome I* (Arachne 2015), p. 258.

3.7 Definition of ‘rights of custody’ – Article 2(9)

The term ‘rights of custody’ includes rights and duties relating to the care of the person of a child, and in particular the right to determine the child’s place of residence. This term is defined in the same way in Article 3 of the 1996 Hague Convention.¹⁶⁸

Custody shall be considered to be exercised jointly when, pursuant to a decision or by operation of law, one holder of parental responsibility cannot decide on the child’s place of residence without the consent of another holder of parental responsibility. This definition is similar to Article 3 of the Convention.

According to the relevant case law, the ‘rights of custody’ are an ‘autonomous concept which is independent of the law of the Member States.’¹⁶⁹ The terms of a provision of the law unified on the EU level which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU.¹⁷⁰

In case C¹⁷¹ the CJEU pointed out that taking the child into care limits the exercise of parental responsibility if the right to determine the child’s place of residence is transferred to the authorities under the applicable law. The right to determine the child’s place of residence is an integral element of parental responsibility.¹⁷² Thus, taking the child into care may affect the exercise of rights of custody which specifically includes the right to determine the child’s place of residence according to Article 2(9). According to Article 1(2)(a), rights of custody constitute one of the matters relating to that responsibility.¹⁷³

3.8 Definition of ‘rights of access’ – Article 2(10)

‘Rights of access’ are an aspect of parental responsibility which designate in particular the ‘right to take a child to a place other than his or her habitual residence for a limited period of time’¹⁷⁴ along with rights relating to the care of the person of the child.¹⁷⁵ According to the Practice Guide 2015, the Regulation applies to any ‘access rights’, irrespective of the beneficiary. In accordance with national legislation, access rights may be attributed to the parent who does not reside with the child, or to other family members, such as grandparents or third persons. As already explained above, the latter question was submitted to the CJEU in the case *Neli*

¹⁶⁸ Magnus/Mankowski/Pintens, *op. cit.*, Article 1, note 24.

¹⁶⁹ CJEU Case C-400/10 PPU *McB* [2010] ECR I-08965, para. 41.

¹⁷⁰ *Ibid.*

¹⁷¹ CJEU Case C-435/06 C. [2007] ECR I-10141; see *supra* in this Chapter, under 2.3 ‘Difficulties in application – CJEU Case law’ for the details of the case.

¹⁷² Dutta, A. and Schulz, A. ‘First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive’ (2014) 10:1 Journal of Private International Law, 1-40, p. 5.

¹⁷³ CJEU Case C-435/06 C. [2007] ECR I-10141, para 33.

¹⁷⁴ Brussels IIbis Regulation, Article 2(10).

¹⁷⁵ CJEU Case C-92/12 PPU *Health Service Executive* [2012] ECLI:EU:C:2012:255, para 59.

*Valcheva v Georgios Babanarakis*¹⁷⁶, in which the Court ruled that the concept of ‘rights of access’ encompasses grandparents. Additionally, the Practice Guide 2015 as defined ‘rights of access’ in a broad way and designates them to include, for instance, contact by telephone, skype, the internet or e-mail.¹⁷⁷

3.9 Difficulties in the application of Article 2(1)-(10) – National Reports

With respect to the definitions in Article 2(1)-(6) the National Reports do not demonstrate any significant difficulties in the interpretation or application of these provisions.

As for difficulties in the application of Article 2(7)-(10), a clear majority of the National Reporters mention that their respective Member States have had no difficulties in interpreting the term ‘parental responsibility’.¹⁷⁸

However, some National Reports do mention certain exceptions. Thus, the Finnish National Reporter indicates that at times the national courts have encountered difficulties in interpreting and applying the definition of ‘parental responsibility’. This is not a concept that has a place in the Finnish national child law system and which operates with a general concept called ‘custody of the child’. This raises the question of how the differing terminology must be dealt with when trying to find the true meaning of the foreign concept.¹⁷⁹ A similar difficulty has been encountered in France as the concept of ‘parental responsibility’ has no equivalent in French law. Thus, French judges are not familiar with the idea that persons other than the parents (or substitutes) can also be the holders of parental responsibility. Therefore there is a risk of confusion with the more restrictive national concept of ‘parental authority’ which can be problematic for the application of rules which necessitate the agreement of all ‘parental responsibility holders’.¹⁸⁰ Polish courts face the same prospective issue as Polish national law does not include the term ‘parental responsibility’, using ‘parental authority’ instead. Other National Reports do not indicate any difficulties in interpretation.¹⁸¹

In the UK, in the *Re B*¹⁸² case the applicant parent lacked parental responsibility despite playing a significant role in the child’s life, on the basis that she was neither a spouse, civil partner, nor in possession of a Residence Order.¹⁸³

¹⁷⁶ CJEU Case *Neli Valcheva v Georgios Babanarakis* C-335/17 [2018] ECLI:EU:C:2018:359.

¹⁷⁷ Practice Guide 2015, p. 43, para 3.6.2.

¹⁷⁸ National Report Austria, question 19; National Report Belgium, question 19; National Report Bulgaria, question 19; National Report Croatia, question 19; National Report Cyprus, question 19; National Report Estonia, question 19; National Report Germany, question 19; National Report Greece, question 19; National Report Hungary, question 19; National Report Ireland, question 19; National Report Italy, question 19; National Report Latvia, question 19; National Report Lithuania, question 19; National Report Luxembourg, question 19; National Report The Netherlands, question 19; National Report Portugal, question 19; National Report Romania, question 19; National Report Slovenia, question 19; National Report Spain, question 19; National Report Sweden, question 19.

¹⁷⁹ National Report Finland, question 19.

¹⁸⁰ National Report France, question 19.

¹⁸¹ National Report Poland, question 19.

¹⁸² *Re B (a child)* [2016] UKSC 4.

¹⁸³ National Report the United Kingdom, question 19.

In Malta, national legislation provides that both parents are deemed to be trusted with the care and custody of the children which means that both parents are to decide on what is in the child's best interests, unless a court decree stipulates otherwise.¹⁸⁴

The Belgian case law does not reveal any difficulties relating to the interpretation of the terms 'parental responsibility', 'holder of parental responsibility', 'right of custody' and 'rights of access'. However, some clarifications of the terms appear in Belgian case law. The Supreme Court of Belgium has held that, according to Articles 1(1) and 2 of the Brussels Ibis Regulation, the Regulation applies to all civil cases concerning the attribution, exercise, delegation, restriction or termination of parental responsibility, regardless of the nature of the court. Furthermore, the Court stated that the fact that a specific issue of parental responsibility is part of public law according to domestic law does not pre-empt the application of the Brussels Ibis Regulation when the measure taken relates to entrusting the minor to one of his or her parents.¹⁸⁵

In Romania, the determination of the holder of parental responsibility and its attribution, exercise, delegation, restriction and termination will be made according to the law designed by the choice of law rules established by the 1996 Hague Convention. The determination of the parents (normally the holders of parental responsibility) will be made according to the choice of law rules regarding filiation or adoption.¹⁸⁶

Other National Reporters have not encountered noticeable difficulties in their interpretation and application of Article 2(8), although in many countries the concept of 'parental responsibility' does not in fact exist (Spain, Finland, France, Hungary, and Poland).

3.10 Difficulties in the application of Article 2(1)-(10) – CJEU case law

In the majority of cases submitted to the CJEU the problems were in connection with the substantive scope of application under Article 1(1)(b). Within that context, the definitions of 'parental responsibility' and 'rights of custody' were involved.

In the case *McB*¹⁸⁷ the CJEU stated that the 'rights of custody' are an 'autonomous concept which is independent of the law of the Member States.'¹⁸⁸ In the case of *C* the CJEU held that the right to determine the child's place of residence is an integral element of parental responsibility. The exercise of parental responsibility is thus limited by taking the child into care if the right to determine the child's place of residence is transferred to the authorities under the applicable law¹⁸⁹

¹⁸⁴ National Report Malta, question 19.

¹⁸⁵ Cour de Cassation 21 November 2007, *Revue@dipr.be* 2008/1, 78; National Report Belgium, question 19.

¹⁸⁶ National Report Romania, question 19.

¹⁸⁷ See *infra* in this Chapter, under 3.11.2 'Difficulties in application – CJEU case law' for the details of the case.

¹⁸⁸ CJEU Case C-400/10 PPU *McB* [2010] ECR I-08965, para 41.

¹⁸⁹ CJEU Case C-435/06. *C.* [2007] ECR I-10141, para 33.

In the case of *Gogova*¹⁹⁰ the CJEU was asked to clarify several key issues relating to the scope of the Regulation, also including the definitions in Article 2(7). The CJEU has pointed out that “*The concept of ‘parental responsibility’ is given a broad definition in Article 2(7) of Regulation No. 2201/2003, in that it includes 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. Where an action requires the national court to rule on the child’s need to obtain a passport and the applicant parent’s right to apply for that passport and travel abroad with the child without the agreement of the other parent, the object of that action is the exercise of ‘parental responsibility’ for that child within the meaning of Article 1(1)(b) in conjunction with Article 2(7) of Regulation No. 2201/2003.*”¹⁹¹

3.11 Definition of ‘wrongful removal or retention’ – Article 2(11)

The ‘wrongful removal or retention’ under the Regulation is largely modelled along the lines of the definition in Article 3 of the 1980 Hague Convention.¹⁹² In accordance with both Articles, the term ‘wrongful removal or retention’ refers to situations where the child is removed or retained in breach of rights of custody, provided that, at the time of the removal or retention, those rights were actually exercised, or would have been exercised, had the removal or retention not taken place. The only addition is the second sentence of Article 2(11)(b) of the Regulation which defines when custody is considered to be exercised jointly by the holders of parental responsibility.¹⁹³ Thereby the right to decide on the child’s place of residence is determinative for understanding joint custody: when one holder of parental responsibility is not permitted to decide on the child’s place of residence without the consent of the other holder of parental responsibility. As a result, removing a child from one Member State to another without the consent of the other holder of parental responsibility constitutes child abduction under the Regulation. If the removal is lawful under national law, Article 9 of the Regulation may apply.¹⁹⁴ The definition of ‘wrongful removal’ as provided in the Regulation applies instead of

¹⁹⁰ This case has been explained in greater detail *supra* in this Chapter, under 2.3 ‘*Difficulties in application – CJEU Case law*’.

¹⁹¹ CJEU Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev* [2015] ECLI:EU:C:2015:710; National Report Bulgaria, question 19.

¹⁹² Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 1980 Hague Convention or 1980 Hague Child Abduction Convention). Article 3 of the 1980 Hague Convention reads: The removal or the retention of a child is to be considered wrongful where:

‘(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.’

¹⁹³ Lowe, N., Everall, M. and Nicholls, M., *The New Brussels II Regulation: a supplement to International Movement of Children* (Jordan Publishing 2005), p. 155.

¹⁹⁴ *Ibid.*

the definition under the 1980 Hague Convention, because the former overrides the Convention insofar as they concern matters governed by the Regulation.¹⁹⁵

According to Article 2(11)(a) the right of custody must be acquired by a judgment or by operation of law or by an agreement. The law of the Member State where the child had his or her habitual residence¹⁹⁶ immediately before his or her removal or retention is determinative for the legal effects and consequences of these sources on which the right of custody can be based.¹⁹⁷

3.11.1 Difficulties in application – National Reports

The predominant view of the National Reporters is that there are relatively few or no difficulties in applying the definition of ‘wrongful removal or retention’.¹⁹⁸ In some Member States no cases have been reported where this issue has arisen. In other Member States where the courts have had cases in which the definition was an issue, they experienced no difficulties when applying the definitions as such. Rather, the problems that had been encountered concerned the application of the definition in connection with other sources, in particular the 1980 Hague Child Abduction Convention without applying the Regulation itself.¹⁹⁹ The National Report of Estonia refers to difficulties caused by a ‘poor translation’ of the Convention,²⁰⁰ but the required guidance in that respect was provided in the case law of the Supreme Court.

In the United Kingdom, the need to both promote and protect the best interests of the child is stressed, as is the obligation to comply with international law interpretations of the concept of habitual residence.²⁰¹ When looking at Belgian cases concerning parental abduction, it becomes clear that the Belgian courts often only look at the place where the child is registered, the place of the school where the child is enrolled and the consent of the parent left behind. In October 2013, for example, the Court of First Instance in Antwerp decided that the place of

¹⁹⁵ Brussels IIbis Regulation, Article 60(e).

¹⁹⁶ On the meaning of ‘habitual residence’: Lowe, ‘Some moot points on the 1980 Hague abduction convention’, *op. cit.*, p. 694; Gallagher, E., ‘A House is not (necessarily) a home: a discussion of the common law approach to habitual residence’ (2014) 47 N.Y.U. J. Int’l L. & Pol., pp. 463 et seq.; Beaumont, P., Holliday, J., ‘Recent developments on the meaning of “habitual residence” in alleged child abduction Cases’ in Župan, M. (ed.) *Private International Law in the Jurisprudence of European Courts – Family at Focus* (Osijek 2015) pp. 37 et seq.

¹⁹⁷ CJEU Case C – 376/14 PPU C. v M. [2014] ECLI:EU:C:2014:2268, para 47, stating that ‘[i]t follows from that definition that the identification of a wrongful removal or retention within the meaning of Article 2(11) of the Regulation presupposes that the child was habitually resident in the Member State of origin immediately before the removal or retention and that there is a breach of rights of custody attributed under the law of that Member State’.

¹⁹⁸ National Report Germany, the complete answer to this question can be found under question 30; National Report Latvia, question 32; National Report Lithuania, question 32; National Report Luxembourg, question 32; National Report Malta, the complete answer to this question can be found under question 30, National Report Poland, question 32; National Report Sweden, question 32; National Report Ireland, question 30; National Report Greece, question 32; National Report Austria, question 32; National Report Hungary, the complete answer to this question can be found under question 30 and National Report Slovenia, the complete answer to this question can be found under question 30.

¹⁹⁹ National Report Spain, question 32.

²⁰⁰ National Report Estonia, question 32.

²⁰¹ National Report the United Kingdom, question 32; See also *Re B (A child)* [2016].

habitual residence of a 15-year old boy was located in the Netherlands because the boy had attended school in the Netherlands since September 2011 and his father had never filed a complaint against the boy's stay in the Netherlands.²⁰² Once the place of habitual residence becomes clear, the court seised will examine whether both parents enjoy custody rights under the law of that State. In cases where the habitual residence of the child is located in Belgium, both parents automatically enjoy custody rights, irrespective of their marital status and regardless of whether they cohabit or not.²⁰³ If the habitual residence of the child is outside Belgium, the court will have to look at the national law of that State in order to determine whether both parents enjoy custody rights.²⁰⁴

In Romania, custody rights breached by the removal or retention must not necessarily be granted by a judgment or by an administrative decree, but may result as an operation of law. In a case from 2009 regarding a child habitually resident in Hungary, the Bucharest Court of Appeal stated that the child's retention in Romania by the mother must be considered wrongful (within the meaning of Article 3 of the 1980 Hague Convention) when both parents had custody by virtue of the law and the father did not consent to this retention.²⁰⁵ One can speak of an 'abduction' when one of the holders of custody rights has moved the child to another state without the consent of the other holder; the wrongful character of the removal does not derive from an act which is illegal by law, but from an infringement of the other holder's rights, equally protected by law and whose normal exercise was disrupted.²⁰⁶ The courts also distinguish between displacement (which may be legal) and retention, stating that an abduction can only exist if the child is retained without the consent of the parent left behind. When both parents are holders of parental responsibility, and one of them refuses to return the child after the expiration of the period agreed by the other to be spent abroad, the refusal to return is wrongful.²⁰⁷ In a decision from 2014, the Bucharest Court of Appeal further clarified the circumstances for an abduction: it expressly stated the irrelevance of the fact that prior to the removal in Romania the children did not live with the father, the only relevant factors being their habitual residence in Hungary, the joint parental responsibility of the parents (according to Hungarian applicable law), and the retention by the mother, on Romanian territory, without the father's consent.²⁰⁸

²⁰² National Report Belgium, question 32; Court of First Instance 23 October 2013, No. 13-3627-A, unpublished but discussed in S. Den Haese, 'Parentale ontvoeringen: de rol en positie van het kind' (Master's Thesis in Law, Ghent University, 2015-2016), p. 130.

²⁰³ National Report Belgium, question 32; Article 373-374 Belgian Code Civil.

²⁰⁴ *Ibid.*

²⁰⁵ National Report Romania, question 32; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no.1695 from 9 December 2009. For similar decisions, see Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 148 from 4 February 2010; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 71 from 21 January 2010.

²⁰⁶ *Ibid.*; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 311/A/16 July 2014; Bucharest Court of Appeal, 3rd Juvenile and Family Division, decision no. 316 from 22 March 2011.

²⁰⁷ *Ibid.*; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 874 from 11 September 2015; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 211 from 15 February 2010; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 231 from 18 February 2010.

²⁰⁸ *Ibid.*; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, decision no. 300/A from 09 July 2014.

3.11.2 Difficulties in application – CJEU case law

In case *C v M*²⁰⁹ the CJEU provided guidelines on a number of issues relating to the application of the definition in Article 2(11). Considering that the facts and circumstances are rather complicated but are still relevant for the legal reasoning, they are briefly presented.

After a deterioration in the couple's relationship in which a child was born, a British wife (M.) brought an action for divorce on 17 November 2008 in France.²¹⁰ The divorce judgment was issued by the *Tribunal de grande instance d'Angoulême* on 2 April 2012. It declared that the divorce should be effective as from 7 April 2009 and it also:

'ordered that parental authority in respect of the child be exercised jointly by the two parents, determined the habitual residence of the child to be with the mother as from 7 July 2012 and organised access and accommodation rights for the father in the event of disagreement between the parties, by providing for different arrangements depending on whether the mother established residence in France or left France in order to live in Ireland. That judgment provides that the mother is permitted to 'set up residence in Ireland' and states, in its operative part, that the judgment is 'enforceable as of right on a provisional basis as regards the provisions concerning the child'.²¹¹

The divorce judgment was provisionally enforceable under French law. The father's request for a stay on the provisional enforceability of the divorce judgment was dismissed by the First President of the *Cour d'appel de Bordeaux* on 5 July 2012. The mother moved with the child to Ireland on 12 July 2012 and since then they have lived there. The divorce judgment was overturned by the *Cour d'appel de Bordeaux* on 5 March 2013, which ordered the residence of the child to be in France and provided for the mother to have access and accommodation rights.²¹² On 7 January 2014 the mother brought an appeal on a point of law against that judgment which was currently pending before the French *Cour de cassation* whereas the father applied to the High Court in Ireland for the enforcement of the judgment of 5 March 2013 of the *Cour d'appel de Bordeaux* relying on Article 28 of the Regulation. Additionally, the father brought an action on the 29th of May, before the High Court, seeking an order, under Article 12 of the 1980 Hague Convention, Articles 10 and 11 of the Regulation and the Child Abduction and Enforcement of Custody Orders Act, 1991 for the return of the child to France and a declaration that the mother had wrongfully retained the child in Ireland. The Irish court

²⁰⁹ CJEU Case C-376/14 PPU *C. v M.* [2014] ECLI:EU:C:2014:2268, para 20.

²¹⁰ Thereafter both parents instituted a series of proceedings concerning the child in France, both before and after the judgment in divorce litigation was delivered, but they are irrelevant for the present discussion and are therefore omitted.

²¹¹ CJEU Case C-376/14 PPU *C. v M.* [2014] ECLI:EU:C:2014:2268, para 20.

²¹² The father subsequently sought and obtained 'the transfer to him exclusively of parental authority the return of the child to his home on pain of penalty and a prohibition on the child leaving France without the permission of her father' in the decision of 10 July 2013 by the Family Court of the Tribunal de grande instance de Niort.; CJEU Case C-376/14 PPU *C. v M.* [2014] ECLI:EU:C:2014:2268, para 24.

submitted a number of questions to the CJEU for a preliminary ruling. An interpretation of the definition of ‘wrongful removal or retention’ proved to be crucial.

The reasoning of the court can be summarised as follows:

(a) A removal or retention, before being considered wrongful within the meaning of the Regulation, must have been taken in breach of custody rights. Rights of custody must be acquired by a judgment or operation of the law or an agreement having legal effect under the law of the Member State of the child’s habitual residence immediately before the wrongful removal or retention;

(b) The identification of whether a removal or retention was wrongful presupposes that the child had his or her habitual residence in the Member State of origin and that there is a breach of custody rights attributed under the law of that Member State;

(c) The Court concluded that it follows from Article 11(1) that the provision of Article 11(2)-(8) applies when it is requested that the child is to return to the Member State of his or her habitual residence immediately before the removal or retention. Thus, it does not apply if the child did not have a habitual residence in the country of origin, i.e., in the country to which the return of the child is requested. When determining the habitual residence, the standards following from the relevant CJEU case law are to be applied. The Court stated that an order for the return of the child ‘must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention’. When assessing this fact ‘it is important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it.’²¹³

The court reasoned further as follows:

‘... in circumstances where the removal of a child has taken place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment fixing the child’s residence at the home of the parent living in the Member State of origin, the failure to return the child to that Member State following the latter judgment is wrongful and Article 11 of the Regulation is applicable *if it is held that the child was still habitually resident in that Member State immediately before the retention*. If it is held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on that provision is without prejudice to the application of the rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State.’

Thus, the Court clearly distinguishes between a decision not to return the child because the child is considered not to have a habitual residence in the Member State to which the return is

²¹³ Conclusion no. 1 of the judgment.

requested from the decision on the recognition of the decision on parental responsibility. Thus, a non-return order has no relevance for the enforcement of the judgment of the *Cour d'appel de Bordeaux* on 5 March 2013. The Irish court in the present case had to decide on the basis of relevant provisions of the Regulation under Chapter III of the Regulation, in particular Articles 28 and 23, the latter containing the reasons for which the enforcement may be refused.

Also in the *McB* case,²¹⁴ the CJEU was in a position to interpret Article 2(11). Mr McB and Ms. E lived together as an unmarried couple in Ireland and had three children. After their relationship had deteriorated in 2009, the mother took her children to England. In November 2009 Mr McB brought an action before the High Court of England and Wales for the return of the children to Ireland. He subsequently filed an action before the Irish High Court to obtain a decision declaring that the removal of the children was wrongful within the meaning of Article 3 of the 1980 Hague Convention. This request was dismissed on the ground that the removal was not wrongful because under Irish law the natural father of the children did not have automatic rights of custody.²¹⁵ The father appealed and the Irish court decided to stay its proceedings and to request a preliminary ruling from the CJEU. The question submitted was whether the Regulation precluded a Member State from providing in its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court which would award such rights of custody to him. Such an award of custody would present the basis on which the removal or retention of the child by its mother may be considered wrongful, within the meaning of Article 2(11) of that regulation.²¹⁶

The Court emphasised that Article 2(9) represents an autonomous definition of 'rights of custody'. It defines them so as to include 'rights and duties relating to the care of the person of a child, and in particular the *right to determine the child's place of residence*' (emphasis added).²¹⁷ It is an autonomous concept which is independent of the law of the Member States. Accordingly, rights of custody include, in any event, the right of the person with such rights to determine the child's place of residence.

The Court went on to say that the Regulation does not determine which person has such rights of custody which is determinative in qualifying a child's removal or retention as wrongful within the meaning of Article 2(11). Instead, for that purpose the Regulation refers to the law of the Member State where the child was habitually resident immediately before his or her removal or retention to determine whether a person does or does not have such rights of custody. In other words, it is the law of that Member State which determines the conditions under which the natural father acquires rights of custody in respect of his child, within the meaning of Article 2(9) of the Regulation. Thus, the law of that Member State may provide that the acquisition of such rights is dependent on obtaining a judgment from the competent national court. The Court

²¹⁴ CJEU Case C-400/10 PPU *McB* [2010] ECR I-08965.

²¹⁵ *Ibid.*, para 48.

²¹⁶ CJEU Case C-400/10 PPU *McB* [2010] ECR I-8965, para 39.

²¹⁷ *Ibid.*, para 40.

concluded that the Regulation must be interpreted as meaning that whether a child's removal is wrongful for the purposes of applying that regulation is entirely dependent on the existence of rights of custody. The conditions for obtaining these rights are determined by the relevant national law, in breach of which that removal has taken place.²¹⁸

Additionally, the Irish Court asked whether the Charter of Fundamental Rights, and in particular Article 7 thereof, affects this interpretation of the Regulation. The CJEU concluded that the Regulation must be interpreted as not precluding a Member State from providing under its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction to award such rights to him, on the basis of which the removal of the child by his or her mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11).²¹⁹ Articles 7 and 24 of the Charter do not exclude or forbid such an interpretation of the Regulation.²²⁰

3.12 No Definition of a 'child'

Like the previous legislation on the matter, the Brussels IIbis Regulation fails to give a definition of a 'child',²²¹ in particular by limiting its scope to minors or to a maximum age.²²² Some authors uphold this as an autonomous concept which should be limited to persons under 18 (who are not emancipated); however, in the absence of an express limitation,²²³ others refer to the applicable national law.²²⁴ Even if the provision of a specific age limit might be considered to be an undue interference with national law, it might be useful given the express provision of such limits in other relevant instruments of international law concerning children. Examples are the 1996 Hague Convention which applies to children under 18²²⁵ or the 1980 Hague Convention which applies to children under 16.²²⁶ Moreover, the 1980 Hague Convention applies only in relation to children under the age of 16 who have been wrongfully removed from, or retained in, another Contracting State.²²⁷

²¹⁸ *Ibid.*, paras 43-44.

²¹⁹ *Ibid.*, para 44.

²²⁰ *Ibid.*, para 63.

²²¹ For an overview of other child-centred conventions see: Murphy, J., 'Other child-centred conventions' in Murphy, J., *International dimensions in family law* (Manchester University Press 2005), pp. 255 et seq.

²²² Hereto Pertegas Sender, M., '*La responsabilité parentale*', p. 6 as referred to in Swennen, *op. cit.*, p. 418.

²²³ Watte, N. and Boularbah, H, Storme, H, as referred to in Swennen, *op. cit.*, p. 418.

²²⁴ Stone, P. Solomon, D., as referred to in Swennen, *op. cit.*, p. 418. This is also the position of the Commission in the Practice Guide 2015, p. 19; See also Rauscher, T. 'Parental Responsibility Cases under the new Council Regulation Brussels IIa' *The European Legal Forum I-2005*, 37-45, pp. 37-38: 'Generally, there are two options: *minority* could be determined by reference to the applicable law under the conflict law of the court or *minority* could be given an autonomous definition to be applied by the courts in all Member States. The latter option should be given preference in order to ensure an efficient an equal application of the Regulation in all Member States and to avoid negative conflicts in competency. [...] Brussels IIa should adhere to [the model of Article 2 CPC]'.
²²⁵ 1996 Hague Convention, Article 2.

²²⁵ 1996 Hague Convention, Article 2.

²²⁶ Carpaneto, *op. cit.*, p. 255.

²²⁷ 1980 Hague Convention, Article 4; see also Beaumont, P., Walker, L., and Holliday, J. 'Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the effect of Brexit on Future Child Abduction Proceedings' (2016) 4 *International Family Law*, pp. 14.

An overwhelming majority of the National Reports expressed that the absence of a definition of the term ‘child’ does not raise difficulties in interpretation and application.²²⁸ Member States use national law or the Convention on the Rights of the Child²²⁹ as a guide in defining the ‘child’. Nonetheless, a few interesting opinions have been expressed by the National Reporters.

France raises the issue that there is uncertainty as regards the fact that the definition of a ‘child’ differs from that of a ‘minor’.²³⁰ And, in a more profound acceptance, the German Reporter points out the lack of clarity as to whether the term ‘child’ applies to cryopreservation or other human cells, or if it only applies from the moment of the birth of the child.²³¹ For Spain, the lack of a definition of a ‘child’ can pose some problems as it leads to the application of national conflict of law rules in order to determine if a person can be considered a minor.²³² The Slovenian Marriage and Family Relations Act does not include a definition of a child and, instead, the country has ratified the Convention on the Rights of the Child which provides this definition. The Slovenian national reporter supports the idea of including the definition of the term ‘child’, even though it does not cause any difficulties in Slovenia.²³³

In spite of the almost united voice of the National Reporters claiming that there are no difficulties with the interpretation and application of the concept of a ‘child’, the question remains whether it might be useful to provide a common definition of the concept in the recast of the regulation.

The Brussels IIbis Regulation is applicable to children under parental responsibility who are under the age of majority, an age which is fixed autonomously by each Member State. It could be argued that a definition of this concept would be an undue interference with national law and competences; however, this would be useful given the express provision of such limits in other relevant legislative instruments of international law concerning children, such as the 1996 Hague Convention (which applies to children under the age of 18) and the 1980 Hague Convention (which applies to children under the age of 16).²³⁴

Therefore, a uniform definition of a ‘child’ as a person under the age of 18 would be appropriate for the purposes of this Regulation. This would eliminate any possible discrepancies

²²⁸ National Report Austria, question 20; National Report Belgium, question 20; National Report Bulgaria, question 20; National Report Croatia, question 20; National Report Cyprus, question 20; National Report Estonia, question 20; National Report Greece, question 20; National Report Hungary, question 20; National Report Ireland, question 20; National Report Italy, question 20; National Report Latvia, question 20; National Report Lithuania, question 20; National Report Luxembourg, question 20; National Report Malta, question 20; National Report The Netherlands, question 20; National Report Poland, question 20; National Report Portugal, question 20; National Report Romania, question 20; National Report Slovenia, question 20; National Report Sweden, question 20; National Report the United Kingdom, question 20.

²²⁹ United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (hereinafter – the Convention on the Rights of the Child).

²³⁰ National Report France, question 20.

²³¹ National Report Germany, question 20.

²³² Spanish Civil Code, Article 9.1; National Report Spain, question 20.

²³³ National Report Slovenia, question 20.

²³⁴ Carpaneto, *op. cit.*, p. 254.

arising from the application of different age limits set at national levels, it would align the EU definition to the one contained in the 1996 Hague Convention, and it would extend the protection provided by the 1980 Hague Convention to children between 16 and 18 as well.²³⁵

3.12.1 Commission's Proposal

In its Proposal, the Commission introduced a new paragraph 2(7) which finally gives us a definition of a child to cover any person up to the age of 18.²³⁶ Recital 12 states that the provisions on child abduction continue to only apply to children up to the age of 16 as is the case with the 1980 Hague Convention.²³⁷

²³⁵ *Ibid.*, p. 255.

²³⁶ 2016 Commission's Proposal, p. 33.

²³⁷ Beaumont, *et al.*, 'Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the effect of Brexit on Future Child Abduction Proceedings', *op. cit.*, p. 14.

GUIDELINES – Summary

Geographical scope

All Member States, apart from Denmark, currently adhere to the Regulation.

Civil matters

This term is to be interpreted broadly, autonomously, and in view of the objectives and aims of the instrument. Matters exemplified in Article 1(2), but classed as public law according to national law, nevertheless fall within the scope of the Regulation.

Matrimonial matters: admissible relationships

Informal marriages (e.g. those concluded according to religious rules) are included within the scope of the Regulation if they are recognised as being equivalent to a formal marriage by the applicable law in the competent jurisdiction.

Neither Member State consensus nor a clear EU stance can be identified with regard to the applicability of Brussels IIbis to a same-sex marriage. In the absence of any concrete guidance on the EU level, the most prudent approach would be to hold that the Regulation does not generally apply to the dissolution of same-sex marriages. However, this does not stand in the way of Member States choosing to unilaterally recognise same-sex marriages in cases that fall within their judicial competence, as has been evidenced in the National Reports.

Although there are reported cases of Brussels IIbis rules being extended to the institution of a registered partnership, the CJEU has stated that a registered partnership cannot be assimilated with a marriage simply because it is treated as such by certain Member States' national rules. Thus, in view of the linguistic usage in the current regulation, it is proposed here that the regulation is only applicable to a marriage.

Matrimonial matters: types of decisions covered

The Regulation applies to judicial or administrative decisions that give rise to either the dissolution (divorce or marriage annulment) or the weakening (legal separation) of a marital status. Matters relating to the property consequences of the marriage, other ancillary measures or maintenance obligations are excluded.

The Regulation applies to every type of divorce judgment emanating from a judicial or administrative authority, regardless of the form of or grounds for divorce.

Legal separation ought to be distinguished from factual separation, which is not covered by the rules of the Regulation.

The CJEU has recently ruled that the Regulation applies to marriage annulment instigated by a third party after the death of one of the spouses. A third party can only rely on the grounds of jurisdiction that were designed to ensure a genuine link with the spouses, therefore excluding Article 3(1) fifth and sixth indents for these purposes. This ruling opens the door to applying the Regulation's rules to posthumous nullity proceedings instigated by a spouse, as well as possibly nullity proceedings instigated by a third party during the lifetime of the spouses.

Matters of parental responsibility

This term is to be interpreted broadly, with a view to the context and objectives of the instrument. In order to ensure equality amongst children in its application, matters of parental responsibility are to be considered independently of matrimonial proceedings.

In addition to addressing all proceedings involving custody and rights of access between parents, the regulation is also said to extend to decisions on the right of access of third persons.

The CJEU has held that the placement of a child in a secure institution providing therapeutic and educational care situated in another Member State, entailing the deprivation of liberty for the child's own protection, falls within the material scope of the Regulation. Notwithstanding this, the deprivation of liberty for punitive purposes is expressly excluded.

Decisions involving the assistance or representation of the child with regard to their property fall within the scope of the Regulation when these are made in pursuit of the protection of the child, whilst those that relate to the general organisation of the child's property that occur independently of a measure of child protection fall within the scope of the Brussels I Regulation. It is left to the judicial authority to determine which category a decision falls into for these purposes.

Decisions made with regard to emancipated persons do not, in principle, fall within the scope of the Regulation (even those decisions that involve persons under the age of 18).

Although (ancillary) decisions involving maintenance obligations are generally excluded from the scope of the Regulation, a connection is made between proceedings involving the subject matters covered by Brussels IIbis and the Maintenance Regulation by way of Article 3(c) and (d) of the latter instrument. It should be noted that where the respective proceedings occur in different Member States, the Member State in which proceedings concerning parental responsibility are being conducted is competent to rule on a maintenance matter involving the minor concerned.

Notwithstanding the exclusion of succession from the Regulation, the CJEU has found that an application to a court to approve an agreement for the distribution of an estate concluded by a guardian *ad litem* on behalf of minor children is connected with the status and capacity of the minor children and constitutes a protective measure for the child relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of Articles 1(1)(b) and 2(e) of the Regulation.

Nature of proceedings

Proceedings conducted by both judicial and non-judicial authorities fall within the scope of this Regulation, with administrative proceedings held to be included provided they are officially recognised in the Member State.

Despite the general lack of clarity regarding the Regulation's applicability to proceedings undertaken by a religious authority, it is made clear by Article 62 of the Regulation that concordats and other agreements between Italy, Malta, Portugal, Spain and the Holy See do fall within the scope of the Regulation for the purposes of the recognition and enforcement of decisions.

The term 'judge' is broadly interpreted and is taken to mean the judge, or an official having powers equivalent to those of a judge (e.g. officers of the court, social bodies and notaries), who is competent in matters falling within the scope of the Regulation.

Interpretation of 'judgment'

'Judgment' refers to a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility pronounced by a court of a Member State. This

term should be interpreted broadly and covers decrees, orders or decisions. Additionally, the judgment must have the legal effect of *res judicata*.

Interpretation of 'parental responsibility'

The definition includes all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgement, by operation of law or by an agreement having legal effect.

Who can be a 'holder of parental responsibility'

The term 'holder of parental responsibility' refers to any person having parental responsibility over a child. Both a natural person and a legal person can be holders of parental responsibility. The literature suggests that any person who has obligations and rights towards a child can qualify as a holder of parental responsibility, for example, a grandparent, as well as an administrative authority. As for the access rights of grandparents to grandchildren the CJEU has also recently ruled in *Neli Valcheva v Georgios Babanarakis* case²³⁸ in favour of extending the access rights to grandparents.

Interpretation of 'rights of custody'

'Rights of custody' are an 'autonomous concept which is independent of the law of the Member States, as the Court stated in the case of *McB*.²³⁹ 'Rights of custody' include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence. Accordingly, rights of custody include, in any event, the right of the person with such rights to determine the child's place of residence. Additionally, it is the law of the Member State which determines the conditions under which the rights of custody are acquired, within the meaning of Article 2(9).

Interpretation of 'rights of access'

'Rights of access' are another aspect of parental responsibility and designate in particular the 'right to take a child to a place other than his or her habitual residence for a limited period of time' along with rights relating to the care of the person of a child.

Interpretation of 'wrongful removal or retention'

²³⁸ CJEU Case C-335/17 *Neli Valcheva v Georgios Babanarakis* [2018] ECLI:EU:C:2018:359.

²³⁹ CJEU Case C-400/10 PPU *McB* [2010] ECR I-8965.

The term 'wrongful removal or retention' refers to situations where the child is removed or retained in breach of rights of custody, provided that, at the time of the removal or retention, those rights were actually exercised, or would have been exercised, had the removal or retention not taken place. In the case of *McB* the Court explained that whether a child's removal is wrongful for the purposes of applying the Regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place.