Recognition and enforcement of decisions in the revised Brussels II*bis* Regulation

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Abstract

In contrast to the current legal framework in which no exequatur is required for only the enforcement of so-called 'privileged decisions', the Recast abolishes the exequatur with respect to all decisions on parental responsibility. This is one of the most relevant changes introduced by the Recast. The Regulation has thereby become another EU private international law instrument in the area of family law and matters closely related thereto that abolishes the exequatur. Amongst issues addressed in this article is an assessment and a critical view of the degree of the consistency in unifying the rules on enforcement at the EU level in these matters. Further, it analyses various aspects of the new regulatory scheme relating to the enforcement of decisions, in particular changes concerning child abduction and the so-called 'overriding mechanism'. It thereby assesses to what extent the amendments are likely to remedy the previously identified flaws and difficulties encountered in the application of the Regulation.

1. Introduction

As a number of shortcomings were encountered in practice, the Brussels II*bis* Regulation,[1] 'the cornerstone of Union judicial cooperation in matrimonial matters and matters of parental

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1 Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (OJ L 338/1) (hereinafter: the Brussels II*bis* Regulation or the Regulation).

responsibility',[2] underwent considerable changes. The Recast[3] introduces just a few changes that affect matrimonial matters. Most relevant is an inclusion of private agreements in matters falling within the scope of the Recast, thus also certain types of private divorces. On the other hand, it substantially amends provisions on parental responsibility and child abduction.[4] An express provision on the opportunity of the child to express his or her views, rules on the placement of a child in another Member State, expanded rules on the circulation of authentic instruments and agreements and abolishing the exequatur for all decisions within its scope can be mentioned as just a few major additions and alterations. The changes are aimed, *inter alia*, at enhancing the efficiency of proceedings, more appropriately incorporating the best interests of children[5] and strengthening the role of Central Authorities. This contribution solely analyses a new regulatory scheme for the recognition and enforcement of decisions.

The revised Regulation will apply as of 1 August 2022 in all EU Member States except Denmark. As far as the rules on enforcement are concerned, the Recast will apply to decisions on matrimonial matters and parental responsibilities given in legal proceedings instituted on or after 1 August 2022, authentic instruments formally drawn up or registered, as well as agreements which have become enforceable on or after that date.[6] Thus, after the Recast becomes

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2 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, p. 1 (hereinafter: 2016 Commission's Proposal). For commentaries on the 2016 Commission's Proposal see: P. Beaumont, L. Walker and J. Holliday, 'Parental Responsibility and International Child Abduction in the proposed Recast of the Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings', *International Family Law* 2016, pp. 307-318. See also, *Recasting the Brussels IIa Regulation*, Workshop 8 November 2016, PE 571.383. For recommendations to revise the Brussels II*bis* Regulation on the basis of the Commission's Proposal, see, V. Lazić et al., *Recommendations – To Improve the Rules on Jurisdiction and on the Enforcement of Decisions in Matrimonial Matters and Matters of Parental Responsibility in the European Union*, as part of the final output of the project entitled 'Cross-Border Proceedings in Family Law Matters before National Courts and CJEU', funded by the European Commission's Justice Programme (GA – JUST/2014/JCOO/AG/CIVI/7722), https://www.asser.nl/media/4662/m-5796-ec-justice-cross-border-proceedings-in-family-law-matters-10-publications-00-publications-on-asser-website-recommendations.pdf.

3 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (*OJ* 2019, L 178/1) (hereinafter: the Brussels II*ter* Regulation, the Recast or the revised Regulation).

4 For an overview of the changes, see B. Musseva, 'The recast of the Brussels IIa Regulation: the sweet and sour fruits of unanimity', *ERA Forum* (21) 2020, pp. 129-142, https://doi.org/10.1007/s12027-019-00595-5. For an overview of the changes relating to matters of parental responsibility, see A.N. Koukoulis and N. Kakos, 'Parental Responsibility Affairs under Regulation (EU) 1111/2019 with some Aspects of the Greek Civil Code', *Evrigenis Yearbook of International & European Law* (2) 2020, pp. 149-167.

5 On the manner in which the best interest of the child is incorporated in the Recast, see L. Carpaneto, 'Impact of the Best Interest of the Child on the Brussels II *ter* Regulation', in: E. Bergamini and C. Ragni (eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge: Intersentia 2019, pp. 265-286, available at https://doi.org/10.1017/9781780689395.016.

6 Art. 100(2) of the Recast, providing that the current Regulation 'shall continue to apply to decisions given in legal proceedings instituted, authentic instruments formally drawn up or registered and to agreements which have become enforceable in the Member State where they were concluded before 1 August 2022 and which fall within the scope of that Regulation'.

applicable, the decisions, authentic instruments and agreements within its substantive, temporal and personal (*ratione personae*) scope will be recognised and enforced in all Member States except Denmark according to the provisions of the Recast.

A considerably amended framework accompanied by a significantly increased number of provisions, mostly those relating to enforcement, are likely to present a challenge for legal practitioners. This is especially so considering that there will often be a need to apply multiple private international law instruments dealing with closely related matters, such as maintenance,[7] succession,[8] protection measures,[9] matrimonial property regimes and the property consequences of registered partnerships.[10] Rules on enforcement are not unified in a completely consistent manner in all of these matters. Newly introduced enforcement schemes in the Recast add to the current diversity as will be addressed in greater detail *infra*, under 2.

Most important amongst numerous changes is an extension of abolishing the exequatur to all decisions in matters on parental responsibility. Thus, the Recast herewith follows the general trend of abolishing the exequatur aimed at further facilitating the free circulation of judgments. Instead of the need to obtain a declaration of enforceability in the Member State of enforcement, under the Recast the decisions appropriately certified in the Member State of origin are enforceable in other Members States in the same manner as their domestic decisions. The Recast maintains distinct regimes for the enforcement of so-called 'privileged decisions' and other decisions in matters of parental responsibility.

Regrettably, the so-called 'overriding mechanism', whereby a court in the Member State of the child's last habitual residence may overturn a 'non-return order' of the court in the country

7 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 (*OJ* 2009, L 7/1-79) (hereinafter: Maintenance Regulation).

8 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 (*OJ* 2012, L 201/107-134) (hereinafter: Succession Regulation).

9 Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (*OJ* 2013, L 181/4-12).

10 Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (both in *OJ* 2016, L 183/1-56) (hereinafter jointly referred to as: Regulations on Property Regimes of Marriages and Registered Partnerships).

of refuge, has been maintained.[11] As a result of widespread criticism in the literature[12] prompted by relevant CJEU case law[13] illustrating the serious deficiencies of the 'overriding mechanism', the rules have been substantially changed in the Recast. They are an important improvement in mitigating the flaws of the current framework which upholds the rigid prevalence of the principle of mutual trust over the best interests of the child.[14]

In general, there is an improved structure as all rules on the recognition and enforcement are now consolidated in Chapter IV consisting of 5 Sections. General provisions on recognition and enforcement are contained in Section 1. The revised Regulation partially unifies the rules of the enforcement procedure in Section 3, even though the enforcement procedure will in principle be governed by the law of the Member State of enforcement.[15] To what extent general provisions apply to the enforcement of authentic instruments and agreements is determined in Section 4. The latter further specifies the conditions for issuing, rectifying and withdrawing certificates and the grounds for the refusal of enforcement. Specific rules relating to certain privileged decisions – those granting a right of access and those ordering the return of the child within the 'overriding mechanism' – are consolidated in Section 2 of Chapter IV. Amendments to the provisions concerning translations are amongst the adjustments aimed at further simplifying the formalities in the enforcement procedure.

The definitions provided in Article 2 of the Recast are crucial for recognition and enforcement, since they define, *inter alia*, the decisions, authentic instruments and agreements which may be enforced according to the scheme of the Recast. Compared with Article 2(1) of the current Regulation, the Recast expands the types of decisions which fall within its scope of application both with respect to those given in matters of parental responsibility and in matrimonial matters.[16]

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11 The present author criticized the 'overriding mechanism' in a number of earlier publications. See, V. Lazić, 'The Rights of the Child and the Right to Respect for Family Life in the Revised Brussels II bis Regulation', in: S.I. Sánchez and P.M. González (eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice*, Cambridge: CUP 2021, pp. 192-210; V. Lazić (ed.), *Brussels IIbis: Guide for Application*, result of the Research Project entitled 'Cross-border Family Law Matters before national Courts and CJEU', funded by the European Commission's Justice Programme (GA – JUST/2014/JCOO/AG/CIVI/7722), 2018, 340 p., https://www.asser.nl/projects-legal-advice/cross-border-proceedings-in-family-law-matters-2016-2018/guide-for-application-of-the-brussels-iibis-regulation/.

12 T. Kruger and L. Samyn, 'Brussels IIbis: successes and suggested improvements', *Journal of Private International Law* (12/1) 2016, pp. 132-168, at p. 155; P. Beaumont, L. Walker and J. Holliday, 'Conflict of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU', *Journal of Private International Law* (12/2) 2016, pp. 211-260, at p. 258, doi: 10.1080/17441048.2016.1206708.

13 CJEU 1 July 2010, Case C-211/10 PPU, ECLI:EU:C:2010:400, *NIPR* 2010, 384 (*Povse* v. *Alpago*); CJEU 22 December 2010, Case C-491/10 PPU, ECLI:EU:C:2010:828, *NIPR* 2011, 4 (*Aguirre Zarraga* v. *Pelz*); CJEU 11 July 2008, C-195/08 PPU, ECLI:EU:C:2008:406, *NIPR* 2008, 159 (*Rinau*), para. 76.

14 Lazić 2021, pp. 206-209 (*supra* n. 11).

15 Art. 51(1) of the Recast.

16 See *infra*, under 3.2 and 4.1.

2. Abolition of the exequatur

The major change in the Recast is the abolition of the exequatur for all decisions within its substantive, territorial and temporal scope. Consequently, there is no need to obtain a declaration of enforceability in an intermediate procedure. Instead, decisions rendered by courts in EU Member States accompanied by appropriate certificates will be recognised[17] and enforceable[18] in other Member States in the same manner as their domestic decisions.[19] The abolition of the exequatur is justified by mutual trust in the administration of justice in the EU and is aimed at cross-border litigation concerning children becoming less time consuming and less costly.[20]

Even though obtaining a declaration of enforceability is no longer required, an application for the refusal of enforcement can be made in accordance with the procedure provided in the Recast and/or the national law of the Member State of enforcement insofar as the procedure is not covered by the Recast.[21] The list of grounds for the refusal of recognition and enforcement that exist under the current framework has largely been retained both in matrimonial matters and in matters of parental responsibility. With respect to the latter, it has even been expanded, as will be addressed *infra*, under 4.4. Besides, the Recast substantially amends the existing system of the so-called 'overriding mechanism' both with respect to the rules on jurisdiction and the enforcement regime.[22]

The exequatur has already been abolished in a number of Regulations that deal with the enforcement of judgments. However, they do not thereby follow an entirely identical approach. The EU legislator in the Recast has opted to follow the pattern used in the Brussels I*bis* Regulation.[23] Moreover, there are other provisions which are drawn along the same lines as in the Brussels I*bis* Regulation, such as the inclusion of certain provisional measures under the definition of a 'decision', as will be discussed *infra*, under 4.1. Although coherence amongst legal sources is generally to be met with approval, it is not continuously carried out in a consistent manner. In particular, it is not always clear which line of reasoning is applied by the EU legislator in choosing a pattern to be followed. An example can be found in Article 20(4) of the Recast on reversing the priority in deciding on jurisdiction within the *lis pendens* rule in cases relating to the choice of court. This approach has been replicated from the Brussels I*bis* Regulation and the provision is modelled along the lines of Article 31(2) thereof.[24] It is not easy to understand

17 Art. 30 of the Recast.

18 Art. 34(1) of the Recast.

19 Recital (58) of the Recast.

20 Recitals (54) and (58) of the Recast.

21 Art. 59(1) of the Recast.

22 See *infra*, 4.5.1 and 4.5.2.

23 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ* 2012, L 351/1). It follows from Commission Staff Working Document Impact Assessment (Brussels, 30 June 2016), SWD(2016) 207 final; S. Corneloup and T. Kruger, 'Le règlement 2019/1111, Bruxelles II: la protection des enfants gagne du ter(rain)', *Revue critique de droit international privé* 2020, p. 215, at p. 235; S.A. Kramar, 'The Voice of the Child: Are the Procedural Rights of the Child Better Protected in the New Brussels II Regulation?', *Open Journal for Legal Studies* (3) 2020, p. 87.

24 For an analysis and a criticism of this rule in the Brussels I*bis* Regulation by the present author, see in V. Lazić and S. Kruisinga, S., 'Prorogation of Jurisdiction: Validity Requirements and Methods of Interpretation',

the rationale for introducing such a rule in the Recast considering the very different nature and underlying purpose of choice of court agreements in the two instruments. Moreover, the justification for introducing the rule in the Brussels I*bis* Regulation, which was the need to enhance the effectiveness of prorogation clauses contained in an underlying predominantly commercial transaction, can hardly be transposable to family law relationships. Recital (38) does refer to the 'effectiveness' of choice of court agreements but gives no further explanation. It is likely that this rule will have no or little relevance in practice, as it is hardly conceivable that a choice of court agreement would be concluded before a dispute has arisen.

In a similar vein, it cannot be said with certainty what is the rationale for using the Brussels I*bis* model of abolishing the exequatur. Presumably, the purpose is to maintain the existing list of grounds for the refusal of enforcement, as well as to maintain a comparable enforcement scheme in both legal instruments. This is not surprising considering that both are 'core' EU legal instruments, covering identical private international law issues, each within its own substantive scope. Thereby, however, the Recast departs from approaches taken in some other closely related legal instruments, in particular the Maintenance Regulation.[25] The latter reduces the reasons justifying a refusal of enforcement to the irreconcilability of judgments and a loss of the right of enforcement by the effect of prescription or the limitation of action.[26] It is up to the court in the Member State of origin to ensure that the requirements of due process are met. Therefore, when a judgment is rendered in default, a defendant may apply for a review in the country of origin if a failure to enter an appearance was a result of an improper service, *force majeure* or another extraordinary circumstance without any fault on the part of the defendant.[27] By no means may decisions of the court of origin be the subject of a review, even when the requirements of 'due process' and the fairness of proceedings are at stake.[28] Following a similar pattern the exequatur has been abolished in the enforcement schemes of a number of EU legal instruments in the field of civil and commercial matters.[29]

In addition to the multiplicity of approaches in abandoning the exequatur in different EU private international law instruments, the Recast itself maintains distinct enforcement schemes for ordinary decisions on parental responsibility and so-called 'privileged decisions', as will be

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in: Ch. Benicke and S. Huber (eds.), *National, international, transnational: harmonischer Dreiklang im Recht: Festschrift für Herber Kronke zum 70. Geburtstag*, Bielefeld: Gieseking Verlag 2020, pp. 269-274.

25 On the relationship between the Brussels II*bis* and the Maintenance Regulation, see P. Beaumont, 'Interaction of the Brussels IIa and Maintenance Regulations with (Possible) Litigation in Non-EU States: Including Brexit Implications', in: I. Viarengo and F.C. Villata (eds.), *Planning the Future of Cross Border Families. A Path Through Coordination*, Studies in Private International Law, Vol. 29. Oxford: Hart Publishing 2020, pp. 331-343.

26 Art. 21(2) of the Maintenance Regulation.

27 Art. 19 of the Maintenance Regulation.

28 See also, I. Viarengo, 'The Enforcement of Maintenance Decisions in the EU: Requiem for Public Policy? Family Relationships and the (Partial) Abolition of Exequatur', in: P. Beaumont et al. (eds.), *The Recovery of Maintenance in the EU and Worldwide*, Oxford: Hart Publishing 2014, p. 473.

29 See, e.g., Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (*OJ* 2004, L 143/15); Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (*OJ* 2007, L 199/1); and Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (*OJ* 2006, L 399/1).

addressed with more particulars *infra*, under 4.5.[30] Last but not least, the trend in abolishing the exequatur has not been followed in a number of other EU Regulations in the area of family law and related matters. Thus, the Succession Regulation, as well as the Regulations on the Property Regimes of Marriages and Registered Partnerships still require exequatur. Such a diversity of enforcement schemes is likely to make their application quite a challenge for judges, central authorities and other legal practitioners.[31]

3. Recognition of decisions in matrimonial matters

The recognition of decisions is dealt with in Section 1 Subsection 1 of Chapter IV of the Recast. It contains provisions on the types of recognition, the documents to be submitted and the conditions for a stay of proceedings in which a decision is invoked. Grounds for the refusal of recognition are dealt with together with the grounds for the refusal of recognition and the enforcement of decisions in parental responsibility in Subsection 3 of Chapter IV of the Recast.

3.1 General remarks, grounds for refusal and procedure

An interested party may invoke a decision of the court of a Member State on matrimonial matters in another Member State whereby no special procedure is required. Three types of the recognition of decisions in matrimonial matters are taken over in the Recast: 1) recognition where no procedure is required with the purpose of updating the civil records on the basis of a decision involving a matrimonial matter which may no longer be appealed against in the Member State of origin (Art. 30(2)), 2) a request for an incidental recognition of a decision given in one Member State within another procedure before a court of another Member State (Art. 30(5)), and 3) an application for a decision that there are no grounds for the refusal of recognition provided in Articles 38 and 39 for decisions in matrimonial matters and parental responsibility respectively (Art. 30(3)).

When an interested party applies for a decision that there are no grounds for refusal according to Article 30(3), the same procedure is followed as in the case of an application for the refusal of enforcement. Thus, Articles 59 to 62, as well as Section 5 and the General Provisions of Chapter VI are to be relied upon.[32] The local jurisdiction is determined by the law of the Member State of recognition. In accordance with Article 103 every Member State has to communicate the local jurisdiction to the Commission.[33] A party has to submit a copy of the decision and the appropriate certificate.

A party opposing the recognition may initiate proceedings claiming that recognition should be refused according to the same procedure as for the refusal of enforcement. Thus Articles

30 For a critical view on the current Brussels II*bis* framework, see Kruger and Samyn 2016, p. 132 (*supra* n. 12).

31 In a similar vein, inconsistencies can be found on the level of protecting the procedural position of consumers amongst various EU private international law instruments. See V. Lazić, 'Multiple Faces of Mutual Recognition: Unity and Diversity in Regulating Enforcement of Judgements in the European Union', in: M. Fletcher, E. Herlin-Harnell and C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice*, London/New York: Routledge 2017, pp. 337-357.

32 Art. 30(3) of the Recast.

33 Art. 30(4) of the Recast.

59 to 62, as well as Section 5 and the General Provisions of Chapter VI are relevant.[34] The same holds true for the local jurisdiction.[35] The use of certificates and requirements concerning translations will be briefly addressed *infra*, under 6.

Grounds for the refusal of recognition in Article 38 have remained unchanged – the public policy exception, a violation of due process and irreconcilability with a domestic or an earlier foreign decision recognizable in the Member Sate of recognition. Those grounds under Article 39 relating to decisions on parental responsibility are merely slightly altered as will be addressed *infra*, under 4.4.

3.2 Decisions, authentic instruments and agreements within the scope of the Recast

The term 'judgment' has been replaced by a 'decision' throughout the Recast Regulation, including in its title. A 'decision' in Article 2(1) is broadly defined so as to include any type of decision given by a court of a Member State in matters within its substantive scope of application, regardless of how it is termed – a decree, an order or a judgment. Further, in order to qualify as a decision for the purpose of enforcement, the definition of a 'court' is provided in Article 2(2)(1). It is merely a slight adjustment to the wording of the definition under the current Regulation. Recital (14) clarifies that the term 'court' should be given a broad meaning. Thus, a broad interpretation should include administrative and other authorities, such as notaries when exercising jurisdiction over matters within the Regulation's scope. It thereby conveniently incorporates the relevant CJEU case law,[36] which will certainly prove useful for legal practitioners when applying the revised Regulation.

Definitions of an 'authentic instrument' and an 'agreement' in Article 2(2)(2) and 2(2)(3) respectively, accompanied by Section 4 of Chapter IV, imply important innovations to the Brussels II*bis* enforcement scheme.[37] The most relevant novelty is the inclusion of certain types of 'private divorces' or, more generally, private agreements concerning matters within the scope of the Recast.[38] Such agreements will freely circulate amongst the EU Member States, provided that they meet the conditions defined in Article 2(2)(3). The latter requires that they are at least registered with a competent public authority to be communicated by each Member State to the Commission in accordance with Article 103. Such public authorities may 'include notaries reg-

34 Art. 40(1) of the Recast.

35 Art. 40(2) of the Recast.

36 CJEU 20 December 2017, C-372/16, ECLI:EU:C:2017:988, *NIPR* 2018, 2 (*Sahyouni*), para. 45, where the CJEU referred to a 'divorce (…) pronounced by a national court or by, or under the supervision of, another public authority'.

37 Art. 46 of the Brussels II*bis* Regulation is the only provision relating to authentic instruments or agreements. It merely provides that authentic instruments that have been formally drawn up, or registered and enforceable in one Member State, as well as agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments in the Member State of enforcement.

38 For a commentary on this topic, see M. Kramme, 'Private Divorce in Light of the Recast of the Brussels IIbis Regulation', *Zeitschrift für das Privatrecht der Europäischen Union* (18/3) 2021, pp. 101-106; M. Bianchi et al., 'Agreements concluded by spouses in the matter of divorce or legal separation: the "dogma" of recognition and enforcement within the European area', *Themis Annual Journal* (1/1) 2019, pp. 108-135, at pp. 123-126.

istering agreements, even where they are exercising a liberal profession'.[39] Accordingly, purely private agreements concluded without any involvement of a public authority are not within the scope of the Recast.[40] Nevertheless, they may be the subject of enforcement according to the national rules of the Member States.

The definition of an 'authentic instrument' in Article 2(2)(2) closely follows the definition provided in Regulation Brussels I*bis*. For the purposes of enforcement, it is of no significance whether a relevant document is to be qualified as an 'authentic instrument' under Article 2(2)(2) or an 'agreement' as defined in Article 2(2)(3). Namely, the same rules on enforcement contained in Section 4 of Chapter IV equally apply to both 'authentic instruments' and 'agreements.'

What may appear more relevant is whether a particular document, the enforcement of which is requested in an EU Member State, qualifies as a 'decision' as defined in Article 2(1) or is instead to be considered as an 'authentic instrument/agreement' within the meaning of Article 2(2)(2) and 2(2)(3). In that respect Recital (14) suggests that the nature of the 'court' involvement is decisive for qualifying a document as a 'decision' or as an 'authentic instrument/agreement'. If the approval of an agreement by the court would be based on an examination of the *substance* according to national law and procedure, then such an agreement should qualify as a 'decision' for the purposes of recognition or enforcement. In contrast, if the agreements acquire a binding nature in a particular Member State after a public authority has exercised merely a *formal intervention* or merely *registration*, they should be subjected to the Recast's rules on the recognition and enforcement of authentic instruments and agreements.

Thus, the following 'types' of private divorces, as well as agreements on any other issue within the substantive scope of the Recast, may freely circulate within the EU Member States, i.e., may be recognised or enforced under the Recast: 1) an agreement approved by a court or other competent authority if the involvement of the court or other public authority presumes an examination as to the substance of the agreement so that it can be qualified as a 'decision', 2) an agreement which includes a 'formal' intervention by the competent public authority of an EU Member State communicated to the Commission so that it can qualify as an authentic instrument, 3) agreements which are neither a decision nor an authentic instrument, but have been registered by a public authority.

A number of EU Member States have introduced 'private divorces' or more generally the possibility for the parties to reach arrangements in matters of family law.[41] Considering the legislative differences amongst the Member States, difficulties and differences in the 'qualification' of private agreements may be expected. As far as the grounds for refusing enforcement are concerned, it does not make much difference in practice whether a document is to be characterised as a 'decision', on the one hand, or as an authentic instrument or an 'agreement' on the other, since the grounds for refusing enforcement are largely overlapping. There are only insignificant

39 Recital (14) of the Recast.

40 Ibid.

41 For a comparative overview, see V. Lazić and I. Pretelli, 'Revised Recognition and Enforcement Procedures in Regulation Brussels II*ter*', *Yearbook of Private International Law* (22) 2020/2021, pp. 155-182, at pp. 160-164 (forthcoming). See also, K. Bogdzevič, N. Kaminiskienė and L. Vaigò, 'Non-judicial Divorces and the Brussels IIbis Regulation: To Apply or not Apply?', *International Comparative Jurisprudence* (7/1) 2021, pp. 31-39, http://dx.doi.org/10.13165/j.icj.2021.06.003.

differences, such as the absence of a violation of 'due process' from the list of reasons for refusing the recognition or enforcement of authentic instruments and retaining the 'hearing of the child' without adaptations.

Yet practical difficulties may arise in the Member State of origin when deciding whether to certify a document as a 'decision' or as an 'agreement'. More importantly, a qualification in the Member State of origin could limit or rather exclude the applicability of the Recast in the Member State of enforcement in view of Article 64 entitled 'Scope'. It expressly provides that Section 4 applies to 'authentic instruments (…) formally drawn up or registered, and to agreements registered, in a Member State assuming jurisdiction under Chapter II'. Thus, it is possible that a competent authority in the Member State of enforcement refuses to apply the Recast when an authentic instrument or an agreement is drawn up or certified by an authority in a Member State with no international jurisdiction according to the Recast rules. Thereby, the fact that jurisdiction is incorrectly assumed is not amongst the grounds for refusing recognition or enforcement. Yet it does result in excluding the authentic instrument and the agreement from the scope of the Recast.

No such possibility exists in the case of the recognition or enforcement of a 'decision': according to Article 2(1), the Recast applies to all decisions given by the 'courts' of the Member States. There is thereby no possibility of controlling whether they have properly applied the Recast's rules on jurisdiction. There is no limitation to the definition of a 'decision' corresponding to Article 64. Although it may seem to maintain 'double standards' of mutual trust in the Recast, such an additional assurance may be explained by the diversity of forms of private divorces amongst Member States, as well as the fact that they have only recently been introduced.

In addition to the requirements concerning the types of private divorces and the limitation of their scope under Article 64, only authentic instruments and agreements 'which have binding legal effect in the Member State of origin' may be recognised under the scheme of the Recast.[42] It further ensures that purely private divorces are not to benefit from the enforcement scheme of the Recast. In a similar vein, authentic instruments and agreements in matters of parental responsibility 'which have binding effect and are enforceable in the Member State of origin' may be recognised and enforced according to the provisions of the Recast.

In conclusion, a private divorce falls within the scope of the Recast if the following conditions are met: 1) it must be an agreement concluded with an involvement of a public authority or at least registered with such an authority; 2) it must have binding effect in the Member State of origin; 3) it must have been drawn up or registered by an authority in the Member State that has jurisdiction under the rules in Chapter II of the Recast.

The Recast does not codify the CJEU case law concerning posthumous and third-party nullity procedures.[43]

4. Parental responsibility – general remarks

Under the current scheme of the Brussels II*bis* Regulation there is no requirement of exequatur for so-called privileged decisions. The Recast goes a step further and abolishes the exequatur

42 Art. 65(1) of the Recast.

43 CJEU 13 October 2016, Case C-294/15, ECLI:EU:C:2016:772, *NIPR* 2016, 365 (*Edyta Mikołajczyk* v. *Marie Louise Czarnecka and Stefan Czarnecki*).

also for all decisions on parental responsibility. Yet it maintains a dual enforcement framework – one for privileged decisions and another for all other decisions in matters of parental responsibility.[44] The distinction is particularly relevant with respect to the grounds that may be invoked against enforcement.

As is the case in other EU legal instruments, abolishing the exequatur entails that a decision given by a court of an EU Member State may be directly and immediately enforced in the same manner as a domestic decision. Thus, it is no longer required that a decision has to be first declared 'enforceable', i.e., 'incorporated' through an intermediate procedure – exequatur in the Member State of enforcement before an actual enforcement procedure can be initiated. The exequatur is thereby replaced by a certificate accompanying the decision issued by the court of origin. The decision so certified may be requested to be enforced according to the same procedure that applies to domestic judgments in the Member State of enforcement.

The Recast retains all the grounds for refusal with merely slight adjustments. Regrettably, it retains the so-called 'overriding mechanism' in child abduction cases but introduces a number of substantial changes in order to remedy serious shortcomings encountered in practice. In addition, it clarifies and extends the scope of application by introducing a number of definitions in Article 2.

4.1 Decisions within the scope of the recast – definition in Article 2

Important additions in Article 2 such as definitions of an 'authentic instrument' and an 'agreement' in Article 2(2)(2) and 2(2)(3) have already been addressed in the context of matrimonial matters, *supra*, under 3.2. These considerations apply in equal measure to 'agreements' concerning children as far as they are permissible under national law. In addition, the Recast further extends the types of decisions in matters of parental responsibility that fall within its scope for the purposes of enforcement.

Thus, an important improvement[45] is enlarging the scope of the Recast so as to include decisions on the return of a child pursuant to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter the 1980 Hague Convention) as a 'decision' enforceable in other Member States under Chapter IV of the Recast.[46] Recitals (5) and (16) clarify that return proceedings are not proceedings on the substance of parental responsibility but are closely related thereto. They are not taken as a determination on the merits of parental responsibility in accordance with Article 19 of the 1980 Hague Convention and the relevant CJEU case law.[47] Therefore decisions on the return of a child according to the Convention should benefit from the enforcement scheme under Chapter IV of the Recast when their enforcement is needed in another Member State because of a further abduction after the return order has been made.[48]

Another improvement is a clarification as to which decisions on provisional measures are enforceable in other Member States. The Recast appropriately does so in a manner that is simi-

44 See also, Kramar 2020, p. 93 (*supra* n. 23).

45 See also, Musseva 2020, p. 130 (*supra* n. 4).

46 Art. 2(1)(a) of the Recast.

47 CJEU *Rinau* (*supra* n. 13).

48 Recital (16) of the Recast.

lar to the definition in the Brussels I*bis* Regulation. In comparison to the latter, the convenient reference to Article 15 relating to provisional measures in Article 2(1)(b) facilitates easier application in practice.[49] Thus, provisional including protective measures issued by a court that has jurisdiction on the merits of the case are enforceable under Chapter IV of the Recast. Further, included is a provisional measure issued by the court ordering the return of the child under Article 27(5), with the purpose of protecting the child from a grave risk within the meaning of Article 13(1) of the 1980 Hague Convention. This is a significant improvement since the measures of protection will 'follow the child' when returning to the Member State of his/her habitual residence immediately before a wrongful removal or retention and will be enforceable there as domestic decisions.[50]

Provisional measures ordered by a court in a Member State which does not have jurisdiction as to the substance of the matter are not given extraterritorial effect. Their effectiveness is limited to the territory of that Member State, i.e., they will not freely circulate under the Recast. Specifying which type of decision on provisional measures will have effect in other Member States is a substantial development as it does away with the remaining uncertainties on that matter ensuing from the relevant CJEU case law. A decision given in *ex parte* proceedings falls within the scope of the Recast, provided that the decision on the measure is served on the respondent prior to enforcement.

4.2 Application for recognition and enforcement

The general provisions of Section 1 relate to, *inter alia*, the issuing and the use of certificates accompanying decisions, documents to be produced for the recognition and enforcement of different types of decisions, as well as the grounds for refusing recognition and enforcement. With respect to the procedure for an application that there are no grounds for refusing recognition[51] and an application for the refusal of recognition,[52] the partially unified procedure in Section 3 applies, as well as provisions of Section 5 and the General Provisions of Chapter VI. The recognition and enforcement of certain privileged decisions is dealt with separately in Section 2.

Documents to be submitted for recognition and for enforcement are determined in Section 1 in Articles 31 and 35 respectively. In principle, only a copy of the decision and appropriate certificates issued according to Article 36 need to be produced.[53] If the enforcement of a provisional measure is requested, the appropriate certificate has to confirm the enforceability of the decision, as well as certifying that the court of origin had jurisdiction as to the merits of the case or that the provisional measure has been issued in order to protect the child from a grave

49 The present author and the research team in their comments to the 2016 Commission Proposal already expressed their preference for following the approach used in the Brussels I*bis* Regulation with the necessary adjustment needed to ease application in practice in Lazić et al., *Recommendations*, p. 17 (*supra* n. 2).

50 See also B. Jurik, 'Le "nouveau" Règlement Bruxelles II ter: le changement, ce n'est pas pour maintenant!', *Journal d'actualité des droits européens*, 30 October 2019, https://revue-jade.eu/article/view/2934.

51 Art. 30(3) of the Recast.

52 Art. 40 of the Recast.

53 Arts. 31(1) and 35(1) of the Recast.

risk when the return of the child is ordered. If an *ex parte* provisional measure is issued, a party requesting its enforcement has to produce proof that the decision has been served.[54]

A competent court may in certain circumstances require the party to provide a translation or transliteration of the relevant part of the certificate and of the decision, and this will be briefly addressed, *infra*, under 6. Each Member State shall communicate to the Commission pursuant to Article 103 the competent court for the issuance of appropriate certificates under Article 36, the local jurisdiction of the court competent to decide upon an application that there are no grounds to refuse recognition,[55] the court before which the proceedings for non-recognition are to be brought,[56] the authorities that are competent for enforcement[57] and for the refusal of enforcement,[58] as well as the competent authority or the court with which a challenge or an appeal against the decision given on the application for refusal[59] or against the decision given on the challenge or appeal is to be lodged.[60]

4.3 Procedure for the enforcement, suspension and refusal of recognition and enforcement

Foreign decisions rendered by the courts of EU Member States are enforced in principle under the same *conditions* and in the same *procedure* as domestic decisions.[61] As for these conditions, the Recast indeed provides for the grounds for refusing enforcement and they will be addressed *infra*, under 4.4. Even though the *procedure* is generally governed by the law of the Member State of enforcement,[62] the Recast introduces a limited number of unified rules in Section 3 entitled 'Common provisions on enforcement'. They encompass provisions that relate to the enforcement procedure (Subsection 1) and those that deal with the suspension and refusal of enforcement (Subsection 2).

Subsection 1 includes, *inter alia*, a provision on the effects of partial enforcement,[63] arrangements for the exercise of rights of access[64] and the service of the certificate and the decision.[65] The latter requires that no enforcement measure may be taken before the appropriate certificate and the decision has been served on the person against whom enforcement is sought. The same holds true when a translation or transliteration of the decision or the translatable content of the free text sections of the certificate issued for 'privileged decisions' is requested. No enforcement measures may be taken, except for protective measures, until such translation has been provided to the person against whom the enforcement is requested. It is not required that the party seeking enforcement has a postal address in the Member State of enforcement. In a similar vein,

54 Art. 35(2) of the Recast.
55 Art. 30(4) of the Recast.
56 Art. 40(2) of the Recast.
57 Art. 52 of the Recast.
58 Art. 58 of the Recast.
59 Art. 61(2) of the Recast.
60 Art. 62 of the Recast.
61 Art. 51(1) of the Recast.
62 Ibid.
63 Art. 53 of the Recast.
64 Art. 54 of the Recast.
65 Art. 55 of the Recast.

such a party shall not be obliged to have an authorised representative unless this is a mandatory requirement under the law of the Member State of enforcement that applies irrespective of the nationality of the parties.[66]

Subsection 2 of Section 3 contains important provisions that relate to, *inter alia*, an application for the refusal of enforcement,[67] suspension[68] and the refusal of enforcement,[69] a challenge to or an appeal against a decision on the application for the refusal of enforcement[70] and a challenge to or an appeal against a decision given on the challenge or appeal.[71] In Article 59(1) the Recast provides that the procedure for submitting an application for the refusal of enforcement shall be governed by the law of the Member State of enforcement, as far as this is not regulated by the Recast. In paragraphs 2-5 it specifies what the application for the refusal of enforcement must contain or rather which documents have to be submitted. This is a common provision that applies to all decisions on parental responsibility, including privileged decisions. The applicant has to provide a copy of the decision and the appropriate certificate, as well as necessary translations or transliterations if the competent authority is unable to proceed without such translations.[72] Besides, it is required that the authority that is competent for enforcement acts expeditiously when dealing with an application for refusal.[73]

A challenge or appeal is available against the decision on the application for the refusal of enforcement before a competent court communicated to the Commission by each Member State.[74] Whether or not a further challenge or appeal is available is left to the Member States, always provided that the competent authority is communicated to the Commission.[75]

Amongst the unified rules in Section 3 there are important provisions on the suspension and refusal of enforcement proceedings in Article 56 and the stay of proceedings on an application for the refusal of enforcement and a challenge or appellate proceedings in Article 63. The provision of Article 56 entitled 'Suspension and refusal' primarily states the reasons for which enforcement may be suspended in paragraphs 1-4. Such a reason is a suspension of the enforceability of the decision in the Member State of origin, as well as the lodging of an appeal or the fact that the time limit for its lodging has not expired in the Member State of origin. Further, the enforcement may be suspended if an application for the withdrawal of the certificate issued for certain privilege decisions is submitted in the Member State of origin and if the refusal of enforcement is requested in the Member State of enforcement.[76] Finally, the enforcement proceedings may be suspended in exceptional circumstances 'if enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given or by virtue of any other significant

66 Art. 51(2) of the Recast.
67 Art. 59 of the Recast.
68 Art. 56(1)-(5) of the Recast.
69 Art. 56(6) of the Recast.
70 Art. 61 of the Recast.
71 Art. 62 of the Recast.
72 Art. 59 of the Recast.
73 Art. 60 of the Recast.
74 Art. 61 of the Recast.
75 Art. 62 of the Recast.
76 Art. 56(1) and (2) of the Recast.

change of circumstances'.[77] As soon as a grave risk of physical or psychological harm ceases to exist the enforcement proceedings shall be resumed.

Paragraphs 5 and 6 of Article 56, which bring about important alterations to the current enforcement scheme, will be addressed *infra*, under 4.4, since they concern the grounds for refusing enforcement.

4.4 Grounds for the refusal of enforcement[78]

The reasons for which the recognition of decisions in matters of parental responsibility may be refused as listed in Article 39 also present the grounds for refusing enforcement according to Article 41. The list of reasons in Article 39 is almost identical to those under the current enforcement scheme of the Brussels II*bis* Regulation. The Commission's suggestion in its Proposal of 2016 to omit a violation of procedure for placing a child in another Member State from the list of grounds has not been followed. Consequently, a violation of procedure according to Article 82 has been retained in the list of grounds in Article 39(1)(f).

The same holds true for a failure to hear the child. This has been retained despite the Commission's suggestions to omit it from the list of grounds. However, the possibility of invoking this reason has been somewhat limited. It cannot be relied upon if the decision only relates to the child's property and if giving an opportunity to express the child's view was not required in light of the subject matter or if 'there were serious grounds taking into account (…) the urgency of the case'.[79] Recital (57) refers to a number of examples that may point to the urgency of the case, such as an imminent danger to the child's life or physical and psychological integrity and 'any further delay might bear the risk that this danger materializes'.

Retaining the hearing of the child amongst the grounds for the refusal of enforcement is to be met with approval.[80] Omitting this ground from the list would probably result in inconsistences in application amongst the Member States. Considering that some Member States attach great importance to the hearing of a child, it can be expected that the courts in these Member States would be inclined to interpret a failure to hear the child as a violation of public policy.[81]

All other grounds in Article 39 have remained unchanged compared to the current legal framework of Article 23. They are the public policy exception, a violation of the principle of due process, the irreconcilability of the decision with a decision rendered later in the Member State of enforcement or in another Member State or in a third State of the child's habitual residence, provided that they fulfil the conditions for their recognition in the Member State of enforcement. A failure to provide an opportunity to be heard to a person claiming that the

77 Art. 56(4) of the Recast.

78 Sections 4.4 and 4.5 are partially based on the research presented in an earlier publication co-authored with Ilaria Pretelli: Lazić and Pretelli 2020/2021, pp. 155-182, at p. 169 (*supra* n. 41).

79 Art. 39(2)(b) of the Recast.

80 More generally on this reason to refuse recognition and enforcement, see, M. Hazelhorst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial*, The Hague: T.M.C. Asser Press 2017, p. 49.

81 This was also suggested by the research team in Lazić et al., *Recommendations*, p. 31 (*supra* n. 2).

decision infringes upon his or her parental responsibility has also been retained amongst the reasons for the refusal of enforcement.

Besides the grounds listed in Article 39, Article 41 of the Recast refers to an additional reason to refuse enforcement provided in Article 56(6). If the enforcement would expose the child to a grave risk of physical or psychological harm due to the impediments defined in paragraph 4, the suspended enforcement of the decision may be refused if such impediments have become of a lasting nature. This presents a very significant alteration to the current enforcement scheme of the Brussels II*bis* Regulation. Even though it may seem to undermine mutual trust, the idea of protecting the best interests of the child justifies extending the list due to the reason contained in Article 56(6). However, some concerns have been expressed in the literature to the effect that introducing this additional ground may result in further delays and may weaken the efficiency of return proceedings.[82]

The wording of paragraph 5 of Article 56 suggests that a decision on the refusal of enforcement under paragraph 6 should be taken after a thorough examination and assessment of the relevant circumstances. Most importantly, it requires that the authority that is competent for enforcement 'shall take appropriate steps to facilitate the enforcement in accordance with national law and in best interest of the child'. Before a decision to refuse enforcement is reached, efforts should be made to ensure that the decision is implemented. In this respect the assistance of professionals, such as social workers or psychologists, may be employed. Furthermore, the authority in question in the Member State of enforcement should try, whenever possible, to overcome any impediments created by a change of circumstances. Enforcement should only be refused if disregarding the subsequently changed circumstances would 'amount to a grave risk of physical or psychological harm for the child'.[83]

Finally, the reasons for the suspension or refusal of enforcement under the law of the Member State of enforcement will apply as far as they are not incompatible with the grounds provided under the Recast. This holds true for all decisions on parental responsibility, including 'privileged decisions'.[84] A party opposing enforcement may challenge the enforcement 'in the procedure for enforcement and should be able to raise, within one procedure', those grounds under the Regulation and those available under national law for refusing such enforcement.[85]

In conclusion, the recognition or enforcement of a decision in matters of parental responsibility may be refused 1) for one of the reasons listed in Article 39, 2) due to the ground in Article 56(6), and 3) for reasons to refuse the enforcement as provided in the law of the Member

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82 M. Brosch and C. Mariottini, *Facilitating Cross-Border Family Life: Towards a Common European Understanding, Report on the International Exchange Seminar*, 20 December 2019, at pp. 17-18.

83 Recital (69). It provides the following as an example of such an impediment: the manifest objection of the child after the decision was rendered has been so strong that, if ignored, it would amount to such a grave risk. On the interpretation of this standard in the literature, see e.g., B. Tóth, 'The Revision of Brussels IIa Regulation on Questions of Parental Responsibility and Child Abduction', *European Integration Studies* (15/1) 2019, p. 84, at p. 94, referring to the 2016 Commission Proposal and stating that such incompatibility with the child's best interests should qualify as a reason for the refusal of enforcement if the strength of the child's objections or a change of circumstances attain a relevance which is comparable with the public policy exception.

84 Art. 57 referring to grounds in Arts. 41, 50 and 56.

85 Recital (63) of the Recast.

State of enforcement as long as they are not incompatible with the grounds provided under the Recast.

4.5 Privileged decisions – international child abduction

The so-called 'certain privileged decisions' – decisions granting a right of access and return orders within the context of the 'overriding mechanism' – are dealt with separately in Section 2 of Chapter IV of the Recast. It is outside of the scope of the present contribution to address all of the provisions relating to these 'privileged decisions'. Instead, the focus is on the most relevant alterations regarding the 'overriding mechanism' or the 'second chance procedure' in child abduction cases.

The 'overriding mechanism' laid down in Article 11(6), (7)-(8) of the Brussels II*bis* Regulation has often been the subject of criticism, *inter alia*, due to its potential impact on the protection of fundamental rights,[86] due to its undermining of mutual trust,[87] as well as proving to be inefficient in practice.[88] The 'overriding mechanism' has not only failed to attain its aims, but has proved to be counterproductive for those whose rights were meant to be protected.[89] The relevant CJEU case law such as *Zarraga*[90] and *Povse*[91] clearly illustrates the inefficiency and inappropriateness of the current framework.[92]

Despite its apparent shortcomings, it has been preserved in the Recast. Consequently, the courts in the requesting Member State have retained the right to 'override' a decision not to return the child issued by the court in the requested Member State, provided that such a non-return order is based on the reason provided under point (b) of Article 13(1) and (2) of the 1980 Child Abduction Convention, i.e., a grave risk of physical or psychological harm or other intolerable situation for the child. However, the Recast introduces some substantial amendments both with respect to jurisdiction and to the enforcement of 'overriding' decisions so that the far-reaching consequences of the current scheme are expected to be confined.

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86 M. Hazelhorst, 'The ECtHR's Decision on Povse: Guidance for the Future of the Abolition of Exequatur for Civil Judgments in the European Union', *NIPR* 2014, p. 27.

87 Kruger and Samyn 2016, pp. 158-159 (*supra* n. 12).

88 P. Beaumont, L. Walker and J. Holliday, 'Not Heard and Not Returned: The Reality of Article 11(8) Proceedings', *International Family Law* 2015, p. 124.

89 P. McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?', *Netherlands International Law Review* (62) 2015, p. 373. See also, Lazić et al., *Recommendations*, p. 31 (*supra* n. 2). Lazić 2021, pp. 192-210 (*supra* n. 11).

90 CJEU *Zarraga* (*supra* n. 13).

91 CJEU *Povse* (*supra* n. 13).

92 For a detailed analysis of these cases and a criticism of the consequences, see, V. Lazić, 'Family Private International Law Issues before the European Court of Human Rights – Lessons to be Learned from *Povse v. Austria* in Revising the Brussels IIa Regulation and its Relevance for Future Abolition of Exequatur in the European Union', in: Ch. Paulussen, T. Takacs, V. Lazić and B. Rompuy (eds.), *Fundamental Rights in International and European Law – Public and Private Law Perspectives*, The Hague: T.M.C. Asser Press 2016, pp. 161-185; V. Lazić, 'Legal Framework for International Child Abduction in the European Union – The Need for Changes in the Light of *Povse v. Austria*', in: M. Župan, (ed.), *Private International Law in the Jurisprudence of European Courts – Family at Focus*, Osijek: Faculty of Law Osijek 2015, pp. 295-317.

4.5.1 Jurisdiction

Article 29 of the Recast deals with the procedure following a refusal to return the child under point (b) of Article 13(1) and (2) of the 1980 Child Abduction Convention. Even though the gist of the current scheme has remained in place, the Recast introduces a substantial clarification in paragraph 6 of Article 29, thereby overruling one of the negative effects of the CJEU *Povse* judgment.[93]

The major shortcoming of the *Povse* judgement is the reasoning that Article 11(8) of the Brussels II*bis* Regulation applies to 'any subsequent judgment which requires the return of the child'.[94] Unfortunately, it implies that this judgment does not necessarily have to be preceded by a final judgment by the same court concerning custody over the child.[95] In other words, it can be a decision by *any* court of the Member State from which the child was wrongly removed that can issue an order to return the child, and not necessarily a decision by the court which is competent to determine the right of custody. Clearly the latter court can subsequently render a decision that is incompatible with the return order issued by a court in the same Member State.

Article 29(6) remedies this shortcoming by expressly referring to 'any decision on the substance of rights of custody (…) which entails the return of the child', thereby reversing the current state of the law resulting from the CJEU *Povse* judgment. Thus, it is not 'any court' that may issue a decision on the return of the child as suggested in the CJEU *Povse* judgment. It is the court that is competent to decide on custody that can issue a return order in its decision on the custody of the child. Only such a decision qualifies as a 'privileged decision' that is enforceable under the conditions set out in Chapter IV of the Recast.

4.5.2 Recognition and enforcement

The revised rules on enforcement further minimise the flaws of the 'overriding mechanism'. A decision certified in accordance with Article 42 of the Brussels II*bis* Regulation is automatically enforced with virtually no possibility of opposing its enforcement.[96] The only reason for refusing enforcement is a subsequently rendered irreconcilable decision. In the *Povse* judgment the Court held that it was solely a subsequent judgment rendered in the 'country of origin', i.e., the Member State where the return order was issued,[97] that would present a reason to oppose enforcement under the current provision of Article 47(2). Consequently, there is virtually no possibility of examining, overruling or refusing the enforcement of such orders by any decision in a Member State of enforcement.

The Recast clearly alters the state of the law created by the CJEU *Povse* judgment. In Article 50, it specifies that the irreconcilability of a subsequent judgment refers to the 'Member State in which recognition is *invoked*'[98] or 'in another Member State or in the non-Member State of the

93 CJEU *Povse* (*supra* n. 13).

94 Ibid., para. 52.

95 Ibid., para. 67.

96 Art. 42(1) Brussels II*bis* Regulation.

97 CJEU *Povse*, para. 78 (*supra* n. 13).

98 Art. 50(a) of the Recast (emphasis added).

habitual residence of the child provided that the latter decision fulfils the conditions necessary for its recognition in the Member State where the recognition is invoked'.[99] When compared with the wording of Article 47(2) of the Brussels II*bis* Regulation, the amendment may seem like a mere clarification of the rule. However, when viewed in the context of the CJEU ruling in the *Povse* judgment, it presents a departure from the current state of the law. Contrary to the decision in *Povse*, this provision enables the court of a Member State of enforcement to refuse enforcement if its court renders a subsequent judgment which is irreconcilable with the return order rendered by the court of a Member State of origin.

Last but not least, the possibility to refuse enforcement under Article 56(6) further weakens the consequences of the 'overriding mechanism'. As one of the common provisions, it applies to the enforcement of all types of decisions under the Recast, including 'certain privileged decisions' such as overriding return orders.

It would have been a better option if the 'second chance procedure' or the 'overriding mechanism' had been entirely omitted from the Recast. However, the amendments do diminish the effects of the 'overriding mechanism' and hopefully will be sufficient to reduce the difficulties that have been encountered under the current legal framework.

5. Authentic instruments and agreements

The provisions on the recognition and enforcement of authentic instruments and agreements are contained in Section 4 of Chapter IV. As already briefly mentioned, there are a few negligible differences between the grounds for refusing the recognition and enforcement of decisions and those justifying the refusal of authentic instruments and agreements. The only difference is that a violation of 'due process', provided as a ground under Articles 38(b) and 39(1)(b) to refuse the recognition of decisions in matrimonial matters and in matters of parental responsibility respectively, is omitted from the grounds in Article 68. Another minor difference is that a failure to provide the opportunity for the child to express his or her views presents a reason to refuse recognition and enforcement without any further restrictions such as those provided in Article 39(2).

6. General Provisions – certificates and translations

Amendments to the provisions concerning translations are amongst the adjustments aimed at further simplifying the formalities in the enforcement procedure. Thus, the court of the Member State of enforcement may require a party to provide a translation or transliteration of the translatable content of the free text sections of the certificate only when such a translation or transliteration is necessary. A party may be requested to provide, together with the translation of the certificate, a translation or transliteration of the decision rendered in another Member State but only if the court before which the decision is invoked is unable to proceed without it. This also holds true for documents to be produced for recognition (Art. 31), enforcement (Art. 35), as well as for the enforcement of 'privileged decisions' (Art. 46). A person against whom the enforcement of a decision is sought may request a translation or transliteration of the decision

99 Art. 50(b) of the Recast.

in order to contest the enforcement, as well as the text of the certificate issued in a 'privileged decision' (Art. 55(2)). No enforcement measure may be taken before such a translation or transliteration is provided, unless a translated decision or certificate has already been served on the person against whom enforcement is sought (Art. 55(3) and (4)).

7. Conclusions

This consolidation of the provisions on recognition and enforcement in one Chapter – Chapter IV of the Recast – is expected to facilitate a smooth application in practice. However, such a substantial expansion of the provisions on enforcement may undermine the effectiveness and an easy application of the renewed legislative framework. Generally, the Recast is a further addition to the diversity of existing enforcement schemes in family and related matters: some still require exequatur, such as the matrimonial property regulation, while others, such as the Maintenance Regulation, have abolished the exequatur altogether. Besides, the Recast does away with exequatur in matters of parental responsibility but maintains and even expands the list of grounds for the refusal of enforcement. Last but not least, the Recast continues to maintain a separate enforcement scheme for privileged decisions that is distinct from the enforcement scheme for the enforcement of other decisions on parental responsibility.

Amendments reversing the negative consequences of the relevant CJEU case law relating to the interpretation and application of the 'overriding mechanism' are particularly beneficial. This especially holds true for the amendment which explicitly vests jurisdiction to 'override' a decision on the non-return of a child solely with the court which decides on the custody of the child. A further improvement is the expansion of the rules allowing the enforcement authorities to suspend and refuse enforcement in order to protect children from the grave risks of irreparable harm to which the enforcement would expose them. Finally, a welcome improvement is the clarification that a later irreconcilable decision rendered by the court of the Member State of enforcement, and not solely by the court in the Member State of origin, may be a reason to refuse an 'overriding' decision on the return of the child.