



Assessment report on the progress towards the commitments in international legal protection of children in cooperation with the Kingdom of Spain

(as of 1 July 2016)

1. Parental responsibility

1.1 Relevant legal framework

1.1.1 European Union Law

Matters of parental responsibility are governed by 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 (the “Brussels IIa Regulation”). The Brussels IIa Regulation generally defines the basic terms in Article 2:

“For the purposes of this Regulation:

1. *the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;*

[...]

7. *the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;*

[...]

9. *the term "rights of custody" shall 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;*

11. *the term "wrongful removal or retention" shall mean a child's removal or retention where:*

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment 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.

Article 8 of the Brussels IIa Regulation setting out the general international jurisdiction reads as follows:

The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

Article 11 of the Brussels IIa Regulation reads as follows:

“(1.) Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter “the 1980



Hague Convention"), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

[...]

- (3.) *A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.*

1.1.2 International multilateral conventions

The Hague Convention on the Civil Aspects of International Child Abduction (communication no. 34/1998 Coll., of the Ministry of Foreign Affairs, hereinafter the “1980 Hague Convention”) provides:

(Article 10)

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

(Article 11)

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

The Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (communication no. 141/2001 Coll. Int. Tr. of the Ministry of Foreign Affairs, hereinafter the “1996 Hague Convention”) provides:

(Article 30)

1. *Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.*
2. *They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.*

(Article 32)

On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,

a) provide a report on the situation of the child;

b) request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.

1.2 Breach of European Union law

1.2.1 International child abduction – a summary of cases

I. The case of M.

- (1) Concerning the case of M., the Office for International Legal Protection of Children (hereinafter the “Office”) as the Central Authority of the Czech Republic



- sent the Spanish Central Authority – Ministerio de Justicia – the father's application for return of the minor M.S. **of 9 February 2012.**
- (2) After three reminders, the Office received a response from the Ministerio de Justicia in a note dated **4 June 2012**, which contained undelivered e-mails to wrong e-mail addresses, including an e-mail dated 31 May 2012. In this email, Ministerio de Justicia says that **after almost four months** they are still assessing the documents sent to them by the Office.
 - (3) In a fax dated **10 July 2012**, the Ministerio de Justicia sent a list of documents whose delivery Ministerio de Justicia believed was necessary for the continuation of the case. One of the requirements was that the father appropriately demonstrates that he exercised the granted rights of custody by **paying maintenance** in favour of the minor.
 - (4) On **3 October 2012**, the Office sent the Ministerio de Justicia its opinion on the aforementioned condition, arguing, *inter alia*, that for the exercise of the rights of custody as defined in the relevant legislation in accordance with the 1980 Hague Convention (i.e. the law of the Czech Republic), the proper and timely fulfilment of maintenance duty is not legally relevant.
 - (5) Considerable delays in the exchange of current information on the case also occurred in other stages of the case. Ministerio de Justicia responded to the above opinion of the Office and the accompanying documents on **31 January 2013**, i.e. after nearly four months. The commencement before Spanish court of the return proceedings was still pending.
 - (6) Ministerio de Justicia repeatedly argued that it is impossible to apply for the return of the minor until all documentation is complete, that is, until the father has proved that he properly fulfilled his maintenance duty. The Ministerio de Justicia also referred the client to the possibility to file the application for the return of the child before the competent court himself, in accordance with the 1980 Hague Convention. Almost 12 months have passed since the submission of the application for return. In connection with the key time points set by the 1980 Hague Convention, the considerable delays in responses to the delivered documents contributed to the fact that later proceedings will not be successful and the child will no longer return to its original State of habitual residence. The interest of the child for the immediate return to her place of habitual residence was completely side-lined.
 - (7) In addition, on 20 March 2014, the Office requested the opinion of the Ministerio de Justicia pursuant to Article 54 of the Brussels IIa Regulation concerning the condition for the payment of maintenance and referred to the Guide to good practice to the 1980 Hague Convention. After that, the Office sent five reminders. Ministerio de Justicia responded on 29 May 2015, i.e. **after 13 months**, that the assessment depends on the State Legal Service, whether the conditions of the 1980 Hague Convention have been met.
 - (8) Ministerio de Justicia raised totally inadequate, unreasonable and therefore unlawful conditions for the mere referral of the application for the return of the child to the competent court (the appropriate State Legal Service), this case being the only one in which the Ministerio de Justicia requested a proof of the payment of maintenance.

II. The case of I.



- (1) The Office referred the mother's application for the return of the minor I. to Ministerio de Justicia on **10 September 2009**.
- (2) The Office received the first response to this case on **6 October 2009**.
- (3) On **21 December 2010**, Ministerio de Justicia informed the Office that already on 29 October 2009 the Department of Social Affairs in L. decided to entrust the custody of the minor to maternal grandparents and limited the exercise of parental responsibility of both parents.
- (4) Only on **14 February 2011** the Office received information that the Ministerio de Justicia referred the matter to the competent court for consideration.
- (5) In the course of the child-abduction case, difficulties arose with the localization of the minor's grandparents who committed the abduction. The grandparents were subsequently also sought by the Interpol. Ministerio de Justicia then itself arrived at the conclusion that there was no unlawful detention of the minor. Moreover, the Spanish authorities had to have the address of the maternal grandparents if the court in L. issued a decision regarding the custody of the child. However, the Ministerio de Justicia is not the authority competent to assess whether or not the abduction actually occurred. The failure to refer the application to the competent court unnecessarily prolonged the process.

III. The case of M.

- (1) The Office referred the father's application for the return of the minor M. on **2 September 2010**.
- (2) Ministerio de Justicia responded to the second request for acknowledgement of receipt of an application on **6 October 2010**.
- (3) In its e-mail dated **21 December 2010**, Ministerio de Justicia stated that the proceedings before the court for violence against women, whose parties included both parents of the minor, is ongoing and that the Ministerio de Justicia will refer the application for the return of the child to the State Legal Service only if the court acquits the father.
- (4) Then the Ministerio de Justicia stated that the State of habitual residence cannot be clearly determined. With regard to this reasoning and to the need for budget cuts and to prioritize certain cases and, finally, with regard to its opinion that the case does not meet the requirements of the 1980 Hague Convention, the Ministerio de Justicia refused to pursue the case further. Again, it considered the question of habitual residence itself, although the authoritative consideration of this matter lies only with a court.
- (5) The father then had to use the services of a private lawyer to initiate the return proceedings. On 17 May 2011, the Court of First Instance no. 93 in Madrid granted its application and ordered the return. The appellate court subsequently reversed this decision and rejected the return of the minor to the Czech Republic. The decision has not been delivered. Ministerio de Justicia provided no information.
- (6) On 30 June 2012, the Office informed Ministerio de Justicia of the fact that the father, as the applicant, was not heard by the Court of Appeal as foreseen by Article 11(5) of the Brussels IIa Regulation; for this reason, it was not possible to reject the return of the child. The Office expressed doubts about the fulfilment of the principles laid down by the 1980 Hague Convention and the Brussels IIa Regulation. On 7 September 2012 the Office sent a reminder.



- (7) On 18 September 2012 Ministerio de Justicia responded that the parties are not heard during the appeal. It pointed out that the father was summoned to the Court of First Instance but did not appear. The father was informed of the date of the hearing 5 days in advance.
- (8) On 8 September 2015, the Office inquired about the decision of the Court of First Instance no. 93 in Madrid of 31 March 2015, whereby the father was to be relieved of his parental responsibility. The Office especially inquired whether the decision was issued in connection with the assumption by the Spanish courts of the jurisdiction to hear the case in accordance with Article 15 of the Brussels IIa Regulation. The Office also inquired of the legal effects of that decision – whether it was a provisional measure or a decision on the substance of the matter. The Office has so far received no response, despite three reminders. Ministerio de Justicia therefore failed to provide information pursuant to Article 55 (ii) and (iii) of the Brussels IIa Regulation.
- (9) On 7 December 2015, the Office also filed a request for cooperation in the examination of the minor's situation. The response to this request is also yet to be received. In order to ensure the examination of the minor's situation and obtain current information on the minor, the Office also approached the Spanish correspondent of the International Social Service (on 17 March 2016).
- (10) On 1 July 2016, the Ministerio de Justicia announced the closing of the file, without having settled questions regarding the legal effects of the decision before the Spanish courts or the request for the social enquiry.

IV. The case of S.

- (1) The Office referred to the Ministerio de Justicia an application for ensuring access of the father to child of **27 March 2013**.
- (2) Following a reminder, Ministerio de Justicia responded on **3 July 2013**, stating that in a previous case of child abduction a Spanish court had already decided not to return the minor, and that after five years from the date of this decision there is no longer a state of urgency and as a result it is not possible to apply the 1980 Hague Convention. The Ministerio de Justicia referred the client to standard enforcement procedure.
- (3) After several e-mail messages and an exchange of various legal opinions, Ministerio de Justicia sent an email dated **11 December 2013** stating that the State services cannot provide assistance to clients in cross-border disputes in preference to national proceedings concerning family matters.
- (4) In this case, Ministerio de Justicia has so far failed to provide another constructive solution, even after the Office proposed on **18 June 2014** the recognition and enforcement of the judgment, subject to the conditions laid down in Brussels IIa Regulation and asked Ministerio de Justicia for assistance. Ministerio de Justicia merely referred the client to seek the services of a commercial lawyer or to apply for free legal aid.
- (5) Therefore, on 7 August 2014 the Office requested a list of lawyers who could assist the client, a link to a specific national regulation and also the place of residence of the child and examination of the child's situation.
- (6) The Office sent a total of 8 e-mail reminders for a reply. On 2 December 2015, i.e. after **16 months**, Ministerio de Justicia said that the case is closed, without



having answered the questions of the Office and without having responded to the application pursuant to Article 55 of Brussels IIa Regulation.

V. The case of T.

- (1) The Office sent an application for return on **22 July 2014**. It took two reminders for Ministerio de Justicia to confirm the receipt of the application on 2 October 2014, informing that the search for the minor and the mother has started through Interpol.
- (2) Based on the instructions of Ministerio de Justicia, further details were added to the application on 4 December 2014. Simultaneously with the addition, the Office sent documents on the current school attendance of the minor in Spain and the Social Security number.
- (3) On **16 January 2015**, Ministerio de Justicia merely reiterated that there is an Interpol search for the minor and the mother, and afterwards the application will be forwarded to the State Legal Service for further process.
- (4) On 1 April 2015 the Office informed Ministerio de Justicia that the Court of First Instance entrusted the minor into the custody of the father; the mother received correspondence through her general agent. On 6 May 2015, the Office requested information on the current state of the search for the mother and the minor.
- (5) On 2 June 2015, Ministerio de Justicia sent the statement of the State Legal Service, which requested updated information on the whereabouts of the mother of the minor. It also requested information on the outcome of the custody proceedings.
- (6) On 11 June 2015, the Office sent an updated information on the whereabouts of the mother, provided information on the outcome of the appeal and asked about the possibilities of enforcement of a judgment. Ministerio de Justicia sent its comment on the course of the enforcement of custody judgment on 24 June 2015.
- (7) On **30 October 2015**, i.e. **after 15 months**, Ministerio de Justicia informed the Office that the State Legal Service will no longer deal with the case, since there is no possibility to order the return in accordance with the 1980 Hague Convention. It recommended the father to use the services of a private lawyer and seek the recognition and enforcement of a judgment in accordance with the Regulation.
- (8) The Office disagreed with this opinion, to which Ministerio de Justicia responded that the father has known the whereabouts of the mother from the beginning, despite the fact that the Spanish authorities searched for the mother and never said whether they managed to find the minor child and the mother and confirm the whereabouts.

VI. The case of L.

- (1) The Office sent the application for return on **24 September 2015**. Ministerio de Justicia confirmed the receipt on 8 October 2015. At that time, it was not clear whether the child is in Spanish territory, as the mother had gainful employment in the UK. The mother also opened the custody proceedings in Spain.
- (2) The Office asked about the current status on 24 November 2015. On 7 December 2015 a reminder was sent in the case.



- (3) On **11 December 2015** Ministerio de Justicia sent a statement of the mother with attachments (approx. 20 pages of the statement and 34 pages of attachments) stating that the mother's documents show that the child was born in Spain and therefore the habitual residence is not in the Czech Republic, although these circumstances are not directly related.
- (4) Therefore, on **15 December 2015** the Office asked about the date for which the court hearing is scheduled. The e-mail was demonstrably delivered and its receipt confirmed on 17 December 2015.
- (5) Subsequently, on 15 January 2016, the Office informed Ministerio de Justicia that the father is preparing his statement and documents pointing out to the contradictions in the mother's claims and to the fact that the habitual residence was in the Czech Republic. At the same time, the Office asked whether the whereabouts of the child in Spain were found, and asked again about the scheduled date of the court hearing.
- (6) On 1 February 2016, the Office sent a comprehensive statement of the father with all attachments by e-mail. Everything was subsequently sent physically with a translation on **9 February 2016**. The Office also referred the application of the father for a preliminary measure regarding the father's access to the child until the decision on return.
- (7) On 18 February 2016, the Office sent another reminder in the case.
- (8) On 26 February 2016 the Office received information that **the custody proceedings were not suspended in Spain despite the clearly stated obligation of signatory States to suspend the proceedings on care until a decision on the return of the child, as follows from Article 16 of the 1980 Hague Convention**. Therefore, the Office strictly requested an explanation of how this is possible, and demanded a remedy of this situation.
- (9) The Office sent five reminders regarding the response, and also attended a bilateral meeting concerning the case. On **27 May 2016** Ministerio de Justicia announced that the case is closed because it does not meet the conditions of the 1980 Hague Convention. After the Office requested a reason for the dismissal and voiced its strong opposition to this approach if the dismissal of the application for the return of the child due to the failure to fulfil the conditions of the 1980 Hague Convention pursuant to Article 27 of the Convention is to be forthwith, Ministerio de Justicia responded again that after the closure of the case it will take no further action in this matter.

1.2.2 Removal of children and examination of the situation – a summary of cases

I. The case of P.

- (1) On 24 November 2014 the Office requested the investigation and determination of the child's situation pursuant to Article 55 of the Brussels IIa Regulation, because it received information that the minor was allegedly removed from mother's custody and placed in an institution.
- (2) On 11 February 2015, the Office added the whereabouts of the mother, because Ministerio de Justicia claimed that without knowing the specific address it could not take any action, as it stated in an e-mail dated 29 January 2015.



- (3) On 6 March 2015 the Office also sent a phone number to the institution in which the minor was allegedly placed, also providing information on the territorially competent social service dealing with the case.
- (4) After three reminders concerning the state of the matter, on 2 September 2015 Ministerio de Justicia informed the Office that since 29 October 2015 it had not received any additional information. On the same day, the Office repeatedly provided all available information on the whereabouts of the mother, the institution of the minor and the competent social service.
- (5) Despite additional reminders and confirmation of the receipt of the e-mails by the Spanish authority, **after more than 19 months** Ministerio de Justicia provided no response to the Office. However, the Office received information from the embassy in Madrid that the minor is no longer in the institution but in the care of foster parents.

II. The case of F.

- (1) On **23 September 2015** the Office asked Ministerio de Justicia for cooperation and the referral of contact information of the Office due to the fact that the minor child was removed from the custody of parents with Czech nationality; the father expressed interest in the placing the boy to the custody of the paternal grandmother, with which the grandmother agrees. The Officer proposed procedure pursuant to Articles 56 and 15 of the Brussels IIa Regulation.
- (2) On 25 September 2015 Ministerio de Justicia pointed to the jurisdiction of Spanish courts, summarized the matter and stated that the case is currently considered by the Court of First Instance no. 16 in Z.
- (3) On 29 September 2015 the Office inquired whether Ministerio de Justicia had any experience with the process under Article 56 and asked for an indication of the steps the father should take. It also asked for information about the steps that will be taken by the social services in this matter.
- (4) On 8 October 2015 the Office asked the Ministerio de Justicia on the provision of the translation of the social examination to the competent social services.
- (5) On **17 November 2015** Ministerio de Justicia informed that the child's situation is dealt with in proceedings before the court in Z. and by the local social services. With regard to the fact that the child's habitual residence is in Spain, Ministerio de Justicia can take no further action and closes the file. Ministerio de Justicia therefore did not refer any documents sent by the Office to the competent social service and did not help in establishing cooperation with the competent authority.

III. The case of P.

- (1) On 15 September 2014 the Office requested social enquiry. The mother of the minor was allegedly in police custody and the relatives of the minor told the father that they intend to place the child in an institution. The father initiated custody proceedings before a Czech court in accordance with Article 12(3) of the Brussels IIa Regulation.
- (2) On 5 March 2015 the Office added information about the possible current whereabouts of the mother; on 21 July 2015 the Office informed about the new address of the mother. Until then, there was no response from the Ministerio de Justicia. The Office subsequently sent two more reminders.



- (3) Ministerio de Justicia sent the first response only on 19 November 2015, **i.e., after 14 months**, in which Ministerio de Justicia said that the habitual residence of the minor is in Spain, and therefore the application for the regulation of custody must be brought before the Spanish courts. It provided no information on the examination of the situation nor did it perform any enquiry. Also, Ministerio de Justicia ignored the conditions for the jurisdiction of Czech courts pursuant to Article 12(3) of the Brussels IIa Regulation and took into account only the jurisdiction of the Spanish courts pursuant to Article 8 of the Brussels IIa Regulation.

1.2.3 Legal analysis

- (1) In the above cases, we can identify several issues concerning the manner they were handled which led to the Kingdom of Spain breaching the duty to properly apply the provisions of the Brussels IIa Regulation, other legal acts of the European Union and international treaties. These issues involve a violation of the principles of the return procedure and steps leading to the proceedings, in particular the principles of speed, lack of judicial consideration of the child's habitual residence, conflicting interpretation of the enforcement of the rights of custody and violation of the fundamental principles derived from the Charter of Fundamental Rights of the European Union.
- (2) Time is a crucial factor in cases of international child abductions; therefore, in addition to the prevention of child abduction, the aim of the Brussels IIa Regulation is the effort to establish procedures that ensure the prompt return of the child in order to minimize any adverse impact on the child. It can therefore be said that speed is an essential condition for progress towards the child's return to his place of habitual residence.
- (3) The Brussels IIa Regulation contains several references indicating this principle. In Recital 17, the Regulation provides that in “[c]ases of wrongful removal or retention of a child, the return of the child should be obtained **without delay**, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11”. Moreover, the European Commission itself states in the Report on the application of the Brussels IIa Regulation¹ that this regulation is complementary to the 1980 Hague Convention. It is the 1980 Hague Convention that stipulates the obligation of State Parties to act in the fastest possible way to ensure the fulfilment of the objectives of this Convention.
- (4) Although the Brussels IIa Regulation does not explicitly provide the principle of speed for the procedures of Central Authorities in connection with the return of the child, the very nature of the return proceedings and its commencement implies that there should be no undue delays in submitting the application to the competent court in a Member State. The Brussels IIa Regulation defines only the cooperation between the Central Authorities of the Member States in Chapter IV, in particular in Article 55. The activities of Central Authorities in matters relating to parental responsibility can therefore be considered instrumental for access to justice and for the actual operation of the courts, since the tasks defined in paragraphs (a) to (e) are mostly related to judicial proceedings. The structure of the 1980 Hague Convention shows that the

¹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no. 1347/2000, issued on 15 April 2014, COM (2014) 225 final.



activity of Central Authorities of the contracting States is crucial to ensuring the return of the child who had been abducted from their country of habitual residence. Central authorities are obliged to initiate or facilitate the initiation of legal proceedings for the return of the child in accordance with Article 7(f) of the 1980 Hague Convention, because their work creates conditions for the action of court authorities.

- (5) The Hague Conference on Private International Law concerning issues of activities of Central Authorities developed a Guide to Good Practice under the 1980 Hague Convention and focused on the tasks of the Central Authorities.² Taking into account the fact that the Brussels IIa Regulation follows on from the Hague Convention and elaborates it in terms of the European Judicial Area, these procedures and principles of activity can also be regarded relevant for the right application and achievement of the objectives of the Brussels IIa Regulation. The Guide provides that the effective fulfilment of the role of a Central Authority is to ensure sufficient resources, trained personnel and competences of the Central Authority, including modern means of communication, so that it can perform its functions effectively and efficiently. The communication with Ministerio de Justicia gives the impression that this Central Authority has insufficient technical and personal competences. Additionally, a fundamental prerequisite to fulfilling the purpose and meaning of the 1980 Hague Convention is cooperation based on good communication, which is timely, clear and targeting the questions and uncertainties. As presented in individual cases, the mutual cooperation and communication do not meet these essential conditions. Central authorities should cooperate both in general and in specific cases, including cooperation to support the amicable resolution of family disputes, as provided in Recital 25 of the Brussels IIa Regulation. The specific duties of the Central Authorities are reflected in Article 54 of the Brussels IIa Regulation by the Central Authorities taking measures to improving the application of the Regulation to strengthen cooperation. In several of the above cases, however, such cooperation is virtually non-existent. The Office considers it alarming that it has received no adequate response to its request for the provision of information on national legislation and a legal opinion on the course of action in individual cases. Conversely, Ministerio de Justicia responded either with one sentence, or stated that it had closed the file. Any strengthening of cooperation with Spain and improving the application of the Regulation, as foreseen in Article 54 of the Brussels IIa Regulation, is impossible.
- (6) Article 11 of the Brussels IIa Regulation provides an obligation of the court in which the application for return was submitted to act expeditiously and employ the most expeditious procedures available in national law. Although the Brussels IIa Regulation does not regulate the activity of the Central Authority or authorities competent to submit the application for return, expedited handling of the case only by the competent court without the assistance of other authorities would not materialize the objective of the regulation.
- (7) In this respect, one can argue that the obstruction to the actual submission of the application in cases involving the Central Authorities of the Member States is contrary to the aim and purpose of the Brussels IIa Regulation. The Regulation will then lose its *effet utile* if it is not possible to effectively achieve the return of the child due to lack of cooperation by the Central Authority when submitting the application for return or, due to laxity or refusal to refer the application for return of a child to the competent court.

² Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 2003, available at: https://assets.hcch.net/upload/abdguide_e.pdf.



- (8) Given that European Union has directly applicable regulations of secondary European Union law, the whole issue may also be viewed as a violation of the Charter of Fundamental Rights of the European Union (the “Charter”). The principles and fundamental rights laid down in the Charter and the safeguarding of these rights are also referred to in Recital 33 of the Brussels IIa Regulation. The relevant provision is Article 24 of the Charter, whose second paragraph provides that “[i]n all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”. Using the rules of interpretation laid down in Article 51 of the Charter, i.e. applying the provisions of the Charter in cases where Member States apply EU law, we can even conclude that it is possible to apply the basic principle of Article 41 of the Charter, which lays down the right of every person to have his or her affairs handled within a reasonable time. In matters concerning the return of children removed to or retained in a State other than the State of their habitual residence, the aspect of the interests of the child and the principle of handling the affair within a reasonable time are closely interrelated. In abduction cases, fulfilling the principle of handling the affair within a reasonable time is very intensive, and as such it is therefore only a general principle to the special provision on handling the affair by a judicial or administrative authority within six weeks.
- (9) Once again, one can refer to the Report on the application of the Brussels IIa Regulation³ which mentions the case-law of the European Court of Human Rights. It provides that the right to family life is violated if the Member States do not make sufficiently adequate and effective efforts to ensure the child’s return. The right to family life is regulated by both the Charter and the European Convention on Human Rights and Fundamental Freedoms (the “Convention”). Pursuant to Article 52 of the Charter, the aim and scope of the right to family life are therefore identical to that granted by the European Convention. The case-law of the European Court of Human Rights is in this case relevant to the interpretation of this right
- (10) In the case of T., after several months of searching for the mother and the minor, and after considerable time after the submission of the application and making additions to the application, Ministerio de Justicia paradoxically refused to initiate return proceedings, never confirmed the whereabouts of the minor and mother and referred the father to pursue the enforcement of a judgment. As a result, it questioned the purpose of the procedure under the 1980 Hague Convention, because *ad absurdum* it assumed that if the abandoned parent knows the whereabouts of the other parent, he or she may file an application for the enforcement of a judgment, thereby denying him or her the opportunity to act in accordance with the 1980 Hague Convention. However, if the abandoned parent does not know the whereabouts of the abductor and the child, Ministerio de Justicia cannot assist him or her and take further action – i.e. refer the application to the State Legal Service. Ultimately, this puts into question the purpose of utilizing the application for return as a means to handle the case with maximum expeditiousness, leaving the abandoned parents with only the option to go through the classical method of enforcement procedure under the Brussels IIa Regulation, which does not particularly emphasise the expeditiousness of the process.
- (11) For a comprehensive assessment of the areas in which the Ministerio de Justicia fails to fulfil its obligations under the European Union Law and international treaties, it is appropriate to focus on the individual conditions for the classification of the acts of

³ (p. 12 of the Report on the application of the Brussels IIa Regulation).



- parents as a wrongful removal or retention of a child, i.e. the rights of custody and subsequently the habitual residence of the child.
- (12) Regarding the assessment in the case of M., the requirement to demonstrate the fulfilment of the maintenance obligation and thus the rights of custody are in conflict with the definition of the rights of custody under Article 2(9) of the Brussels IIa Regulation. Judgment of the Court of Justice of the European Union of 5 October 2010 in case *J. McB. v L. E.*, C-400/10 PPU, paragraph 41, elaborates on the question of custody as follows: “[s]ince ‘rights of custody’ is thus defined by the [Brussels IIa] Regulation, it is an autonomous concept which is independent of the law of Member States. It follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law 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 Union, having regard to the context of the provision and the objective pursued by the legislation in question (C-66/08 *Kozłowski* [2008] ECR I-6041, paragraph 42 and case-law cited).”
- (13) The Brussels IIa Regulation as procedural regulation does not lay down the conditions for the granting of the rights of custody, but merely specifies three possible forms of determining the right of custody: by a court decision, by means of a statute and by a valid agreement. Neither the Brussels IIa Regulation nor the 1980 Hague Convention does not specify which parent should have the rights of custody of the child. This question is therefore a matter of national law in the State of habitual residence. In addition, “Article 2(11) of Regulation [Brussels IIa] also contains a rule on conflict of laws. It determines the law applicable to the definition of rights of custody in the context of wrongful abduction of children. Of the various possibilities, the choice made by the regulation falls on the law of the Member State where the child was habitually resident immediately before the removal or retention”.⁴ If we determine that the rights of custody lie with the father under the law of the Czech Republic, the actual exercise of this right should also be interpreted under this law. Logically, the rights of custody could not be exercised without determining the person with whom the rights of custody lie.
- (14) As provided by Advocate General Jääskinen,⁵ the rights of custody are not necessarily identical with the notion of parental responsibility within the meaning of the Brussels IIa Regulation. The right of custody therefore rather constitutes an immanent part of the concept of parental responsibility, but not the only one. However, the Spanish law does not recognize the concept of parental responsibility and the regulation of this concept in the Brussels IIa Regulation is different from the concept *patria potestad* used by the Spanish Civil Code.^{6,7} One could argue that the custody of a child under the concept of *patria potestad* provided for in Article 154 of the Spanish Civil Code also involves the duty to maintain the child. Even if we ignore the independent interpretation of the rights of custody under Brussels IIa Regulation, Recital 11 explicitly declares that it does not apply to maintenance obligations. The

⁴ Opinion of Advocate General Nii Jääskinen of 22 September 2010 concerning case *J. McB. v L. E.*, C-400/10 PPU. Article 3(a) of the 1980 Hague Convention also provides that the rights of custody are assessed in accordance with the law of the State where the child was habitually resident immediately before the removal or retention.

⁵ *Ibid.*

⁶ Añoveros, Beatriz, SPAIN in Boele-Woelki, Katharina a González Beilfuss, Cristina (eds), *Brussels II bis: Its Impact and Application in the Member States*, Intersentia, Anwerpen – Ofrod 2007, s. 279 an.

⁷ For more details, see the report of Cristina González Beilfuss: <http://ceflonline.net/wp-content/uploads/Spain-Parental-Responsibilities.pdf>, p. 6, paragraph 8a.



- same is also provided in the negative list of areas regulated by the Regulation in Article 1(3)(e).
- (15) If we take into account the general regulation of the rights of custody at the international level, we can alternatively refer to the regulation of this concept in Articles 1 and 3 of the 1996 Hague Convention.⁸ Council of Europe documents also state that the maintenance obligation is a legal consequence of parenthood independent of the existence of parental responsibility. It is therefore neither an obligation nor a right included in the concept of parental responsibility.⁹ If we use an *maiori ad minus* argument, we can, therefore, conclude that the fulfilment of the maintenance obligation is not linked to the exercise of parental responsibility by exercising the rights of custody.
 - (16) It follows from the foregoing that the Ministerio de Justicia (State Legal Service), entirely without justification and against the text and the meaning of the Brussels IIa Regulation, confuse two distinct legal concepts which, although linked together, are regulated separately by two legal institutions.
 - (17) Turning to the second condition – the child's habitual residence, the Ministerio de Justicia conducted a test of the State in which the child had his or her habitual residence. Brussels IIa Regulation does not explicitly define habitual residence; this term, and especially its content, however, was interpreted by the Court of Justice of the European Union, for example in its judgment of 2 April 2009 in case A., C-523/07, and then in its judgment of 22 December 2010 in case *Mercredi*, C-497/10 PPU.
 - (18) If the Central Authority assesses the justification of the application, acting as the first “filter”, doubts arise about the evaluation criteria. The criteria for the rejection of an application are very narrowly defined in Article 27 of the 1980 Hague Convention. That provision provides for the possibility not to accept the application for return if such an application is not well founded or if the requirements of the Convention are not fulfilled. At the same time, however, it provides for promptness. If a Central Authority considers an application not to be well founded or not to fulfil the requirements, it must forthwith inform the Central Authority through which the application was submitted of its reasons. In the case L., the application was rejected after nine months without providing any reasons. A brief note that the application is unclear cannot be regarded as adequate to meet the obligation of the Central Authority arising from that provision.
 - (19) In Spain there are apparently two filters for assessing whether an application is well founded: first, by the Central Authority, and consequently by the State Legal Service, which files an application with the court on behalf of the parent – applicant. If the State Legal Service concludes that an application might not have a chance to succeed, it does not file it. This cannot be appealed. Thereby, Spain excludes all applications which require a thorough assessment of the essential conditions for the exercise of the rights of custody and of habitual residence. By not filing the

⁸ Article 1 [...] 2. For the purposes of this Convention, the term ‘parental responsibility’ includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

[...] Article 3 The measures referred to in Article 1 may deal in particular with -

a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;

[...] Article 4 The Convention does not apply to: [...] e) maintenance obligations.

⁹ For more details see the Explanatory Memorandum of the Council of Europe: Working Party Of The Committee Of Experts On Family Law Tasked To Draft One Or More Legal Instruments On The Rights And Legal Status Of Children And Parental Responsibilities of 8 October 2010, CJ-FA-GT3 (2010) 6.



applications with the court as the competent authority, Spain deepens the legal uncertainty of parents – applicants for return, denying them access to justice. This way, the activities of the Central Authority are actually confined to a narrow part of cases and prevent the applicants from applying the 1980 Hague Convention and the Brussels IIa Regulation. One cannot accept the argument that the parent – applicant may himself/herself approach the competent judicial authorities if acting through the Ministerio de Justicia was unsuccessful, because the delays in its activity were so substantial that the chances of success of the application are dramatically reduced. As a consequence, Ministerio de Justicia *via facti* helps the abducting parent and gives him/her the advantage of the passage of time during which the child is wrongfully retained outside his/her State of habitual residence. Arguments citing the option under Article 29 of the 1980 Hague Convention in most cases gives the impression that the Central Authority is virtually non-functional. Furthermore, this course of action brings potential negative connotation of determining the jurisdiction in deciding on child custody, for example according to Article 10 of Brussels IIa Regulation. However, Ministerio de Justicia interpreted Article 27 of the 1980 Hague Convention too extensively and refuses to refer some applications to the court, claiming that it is not convinced that the child was habitually resident in the Czech Republic. Given that the views of both Central Authorities of the State of habitual residence of the child differed already in two cases, this issue should have been examined by a court. Such a practice is contrary to established procedures and consistent interpretation of key terms of abduction law.

- (20) In paragraph 44 of its judgment in case A., the European Court of Justice clearly declared that it is “*for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case*”. No provisions of the Brussels IIa Regulation or the 1980 Hague Convention give the Central Authority any power to assess (even preliminarily) whether the condition of habitual residence has been fulfilled. The Central Authority as such is not the body of a Member State with a competence to decide, that is, to make decisions which are recognisable and enforceable in another Member State.¹⁰ Moreover, the structure of the Brussels IIa Regulation and the wording of the 1980 Hague Convention show that both legal instruments understand Central Authorities as distinct from the judicial/administrative authorities which are competent to decide or assess the merits of the case.
- (21) Grounds for rejecting an application for return concerning shortage of funds and the need to prioritize only cases that are completely clear grossly violate the principle of equality, non-discrimination and good administrative practice, and ultimately also the objective of the Brussels IIa Regulation to act in the best interests of the child. The clarification of the status of the child, and whether the child was habitually resident in the State of his/her former residence in the period before the alleged unlawful removal or retention is all the more important in unclear cases. The practice of Central Authorities in the spirit of the above approach would create a space completely void of any transparency of the whole process and above all of any legal certainty for the holders of parental responsibility that their case will be impartially heard by an independent body.
- (22) Furthermore, one cannot agree with the approach of the Ministerio de Justicia and handling the cases falling within the framework of cooperation of Central Authorities under Article 54 et seq. of the Brussels IIa. Regulation. In cases where a child was

¹⁰ Judgment of the Court dated 23 March 1982 in the case Nordsee, C-102/81. <http://curia.europa.eu/juris/liste.jsf?language=cs&jur=C,T,F&num=C-102/81&td=ALL>



removed from parental custody (P. and F.), any intervention by the Office and its assistance for parents and the Spanish authorities in choosing the most appropriate course of action to solve the situation (including the possible placement of the child in the custody of his/her extended family, foster care or an institution in the Czech Republic) was made impossible. As a result, it was impossible to effectively fulfil the tasks of Czech and Spanish authorities arising from Article 55(c) and (d) of the Brussels IIa Regulation (i.e. referral of the case to a more appropriately placed court and the placement of the child in another Member State). The Office would like to point out that in the case of Spain, court within the meaning of the Brussels IIa Regulation also means administrative bodies which adopt measures to protect minors. It is, therefore, crucial that the Office can cooperate with those bodies directly. However, the Ministerio de Justicia is in no way forthcoming in establishing cooperation with those bodies.

- (23) The actions of the Ministerio de Justicia are therefore contrary to Articles 30 and 32 of the 1996 Hague Convention, which requires that it provides cooperation between the Office and local social service and that it requires the competent social service to consider the need for measures to protect the child, also in accordance with the proposals of the Office for procedure pursuant to Article 56 and 15 of the Brussels IIa Regulation.
- (24) Although the Office made an effort to overcome the above problems in bilateral meetings within the European Judicial Network, there was no improvement in the cooperation between the Central Authorities. On 9 to 10 November 2015, and then on 25 and 26 April 2016, the Ministerio de Justicia attended bilateral meetings of the European Judicial Network in Luxembourg and Amsterdam, where it said that parents always know the whereabouts of the child if the child is removed, and are always notified of the reasons for the removal. The Ministerio de Justicia, therefore, does not understand why the Office asks for cooperation, because the parents know the answers to these questions and these questions are outside the scope of their duties. Thereby, the Ministerio de Justicia fails to fulfil its obligations pursuant to Article 55 of the Brussels IIa Regulation because the Central Authorities of the Member States cooperate in these matters at the request of a Central Authority, as well as at the request of a holder of parental responsibility. The Ministerio de Justicia, therefore, interprets the provisions of the Brussels IIa Regulation in a peculiar way and refuses to be of any more help. In order to identify the situation of minors, in addition to applications under the Brussels IIa Regulation the Office began to also use the possibility to carry out social investigation through a non-governmental organization – International Social Service, which is based on the legal framework of the 1996 Hague Convention. The use of this mechanism should, however, be exceptional and secondary to the application of the Regulation. Since in some cases, the reports about the situation of some of the children are not available even after nearly two years from application, this state is absolutely untenable.

2. Recovery of maintenance

2.1 Relevant legal framework

The matters of cross-border recovery of maintenance are currently governed by Council Regulation (EC) no. 4/2009 on jurisdiction, applicable law, recognition and enforcement of



decisions and cooperation in matters relating to maintenance obligations (hereinafter the “Maintenance Regulation”).

The cooperation between Central Authorities is governed by Article 49 et seq. of this Regulation. The Maintenance Regulation provides the general functions of Central Authorities as follows:

“Central Authorities

- (a) cooperate with each other, including by exchanging information, and promote cooperation amongst the competent authorities in their Member States to achieve the purposes of this Regulation;
- (b) seek as far as possible solutions to difficulties which arise in the application of this Regulation.”

Requests for specific measures are provided in Article 53 of the Maintenance Regulation, which reads:

“(1) A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under points (b), (c), (g), (h), (i) and (j) of Article 51(2) when no application under Article 56 is pending. The requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant in making an application under Article 56 or in determining whether such an application should be initiated.

(2) Where a request for measures under Article 51(2)(b) and (c) is made, the requested Central Authority shall seek the information requested, if necessary pursuant to Article 61. The requested Central Authority shall communicate the information obtained to the requesting Central Authority. Where that information was obtained pursuant to Article 61, this communication shall specify only the address of the potential defendant in the requested Member State. In the case of a request with a view to recognition, declaration of enforceability or enforcement, the communication shall, in addition, specify merely whether the debtor has income or assets in that State.

If the requested Central Authority is not able to provide the information requested it shall inform the requesting Central Authority without delay and specify the grounds for this impossibility. [...]“

Article 58 of the Maintenance Regulation governs the transmission, receipt and processing of applications and cases through the Central Authorities and states that: [...]

- (3) The requested Central Authority shall, **within 30 days** from the date of receipt of the application, acknowledge receipt using the form set out in Annex VIII, and inform the Central Authority of the requesting Member State what **initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information**. Within the same 30-day period, the requested Central Authority shall provide to the requesting Central Authority the name and contact details of the person or unit responsible for responding to inquiries regarding the progress of the application.
- (4) **Within 60 days** from the date of acknowledgement, the requested Central Authority shall inform the requesting Central Authority of the status of the application.
- (5) Requesting and requested Central Authorities shall keep each other informed of:
 - (a) the person or unit responsible for a particular case;
 - (b) the progress of the case;and **shall provide timely responses to enquiries**.
- (6) Central Authorities shall process a case as quickly as a proper consideration of the issues will allow.
- (7) Central Authorities shall employ the most rapid and efficient means of communication at their disposal. [...]”



Article 61 governing the access of Central Authorities to information reads as follows:

“(1) Under the conditions laid down in this Chapter and by way of exception to Article 51(4), the requested Central Authority shall use all appropriate and reasonable means to obtain the information referred to in paragraph 2 necessary to facilitate, in a given case, the establishment, the modification, the recognition, the declaration of enforceability or the enforcement of a decision.

[...]

The requested Central Authority shall, as necessary, transmit the information thus obtained to the requesting Central Authority.

(2) The information referred to in this Article shall be the information already held by the authorities, administrations or persons referred to in paragraph 1. It shall be adequate, relevant and not excessive and shall relate to:

- (a) the address of the debtor or of the creditor;*
- (b) the debtor's income;*
- (c) the identification of the debtor's employer and/or of the debtor's bank account(s);*
- (d) the debtor's assets.*

For the purpose of obtaining or modifying a decision, only the information listed in point (a) may be requested by the requested Central Authority.

For the purpose of having a decision recognised, declared enforceable or enforced, all the information listed in the first subparagraph may be requested by the requested Central Authority. However, the information listed in point (d) may be requested only if the information listed in points (b) and (c) is insufficient to allow enforcement of the decision.

2.2 Legal analysis

- (1) The cited provisions of the Maintenance Regulation are targeting fast and effective cooperation between the Central Authorities of the Member States. To streamline and improve the cooperation, the Regulation sets deadlines, especially for the initiation of cooperation on individual cases.
- (2) The cooperation between the Office and the Ministerio de Justicia is strongly affected and impaired by the Ministerio de Justicia not respecting these deadlines. Recital 31 of the Maintenance Regulation mentions the facilitation of cross-border recovery of maintenance claims and the introduction of a system of cooperation between the Member States.
- (3) Since the applicability of the Maintenance Regulation, the response time of the Ministerio de Justicia has significantly increased, irrespective of the status of the case. After referring the application for recovery of maintenance, in 2011 it took Ministerio de Justicia nine months¹¹ to respond to the Office, in 2012 this time in some cases being up to 20 months¹²; in 2013, the first reaction came mostly after 10 months. With regard to the provisions of Article 58(3) of the Maintenance Regulation, which strictly provides a period of 30 days to send the appropriate acknowledgement of receipt, it is a flagrant violation of the Maintenance Regulation.
- (4) Only since the beginning of 2014, after 30 months from the entry into force of the Maintenance Regulation, the Ministerio de Justicia has been sending the

¹¹ Specifically, the cases concerned include the case of the Office file no. UMČ 212/11 (ALIMENTOS 71/2011 in the case of the Spanish authority).

¹² Ibid, specifically cases of the Office file no. UMČ 406/11 (VARIOS 100/2012 in the case of the Spanish authority), UMČ 490/11 (ALIMENTOS 193/2012 in the case of the Spanish authority), UMČ 114/12 (ALIMENTOS 245/2012 in the case of the Spanish authority).



acknowledgement of receipt pursuant to Annex VIII to the Maintenance Regulation. The Office has already received several acknowledgments of receipt, in some cases repeatedly. However, these acknowledgements contained information about the current state of recovery. It was a completely pointless use of a standardized form, reserved solely for the purpose of informing about the receipt of documents sent for the recovery of maintenance. Since November 2014, the Ministerio de Justicia used the acknowledgements to request further documents, in some cases even to inform about the steps it was going to take in this matter to ensure successful satisfaction of the claim. Therefore, although in many cases the Ministerio de Justicia still sends the acknowledgement with a delay, the response times are generally shorter in new cases and the Ministerio de Justicia already informs about the receipt of the requests and the first steps in the matter. In the case of older applications, however, the situation continues to be unsatisfactory. Likewise, the Ministerio de Justicia fails to provide updates on the cases once the acknowledgment of receipt has been sent.

- (5) The above conduct completely defeats the purpose for which the matter is regulated by a regulation. The obligee is therefore objectively unable to quickly recover the maintenance claim, and the actual determination of maintenance obligation imposed on the obligor by a court in one Member State becomes useless if it is not possible to effectively seek its recovery in another Member State and the obligee is referred to rely on other means of protecting his/her rights. Although the court in the requesting Member State determines the maintenance obligation and its amount, the principle of legal certainty is violated – this is because although the recognition and enforcement are legally possible, in practice the claim cannot be recovered and the obligee is in a situation where he/she is forced to turn to the courts of the requested Member State on his/her own. Then the question remains what costs the obligee incurs as a result. However, such a situation is completely against the interests of the obligees.
- (6) The Ministerio de Justicia responds to the requests for updates on the progress of the case very sporadically, typically **after four to eight reminders**, depending on the circumstances of the case. Such a significant delay with the response is inconsistent with the duty of Central Authorities to respond to requests for updates on progress of the case in a timely manner in accordance with Article 58(5)(b) of the Maintenance Regulation. A common problem that occurs during the handling of an application is locating the obligor. In most cases, although the Ministerio de Justicia receives the application and forwards it to the competent authorities, the obligor is not located and the request is not delivered to his/her address. In such a situation, the Ministerio de Justicia informs the Office that it has requested Interpol to find the obligor's whereabouts. The results of the identification of whereabouts are unfortunately often unknown even a year after the acknowledgement that the Ministerio de Justicia has taken this step. Ultimately this results in a situation where the judgment is not recognised and enforced.
- (7) Regarding the **request for specific measures under Article 53 of the Maintenance Regulation**, the Office encounters difficulties in verifying the property situation and earnings of the obligor. According to the Spanish national legislation and case-law, the Ministerio de Justicia is not entitled to request information about the property and earnings of the obligor because these matters fall within the sphere of privacy, and unless consent of that person is given, it is always necessary to have court approval. The Ministerio de Justicia is also not entitled to search for obligees and always requests information about the obligor although the obligor lives in the Czech Republic and there is no need to look for his/her whereabouts.
- (8) As a result, the Ministerio de Justicia makes the fulfilment of the objectives of the Maintenance Regulation impossible. Although the Office has repeatedly asked the



Ministerio de Justicia several times – both in correspondence and at personal bilateral meetings – to handle the cases with maximum expeditiousness and to respond within periods shorter than one year, there has so far been no significant improvement. It can, therefore, be argued that the Ministerio de Justicia constantly violates the obligation under Article 50(1)(b) of the Maintenance Regulation to seek as far as possible solutions to difficulties which arise in the application of this Regulation.

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