
# Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment

FINAL REPORT

Evaluation

Deloitte.

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*May - 2015*

*Justice and Consumers*

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Directorate-General for Justice and Consumers

Directorate Civil Justice

Unit A.1

*E-mail: JUST-CIVIL-COOP@ec.europa.eu*

*European Commission*
*B-1049 Brussels*

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2015

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# 1 Introduction to the report

The present report constitutes the Final Report of the "Study on the assessment of Regulation (EC) No 2201/2003 ('Brussels IIa' Regulation) and the policy options for its amendment", carried out by Deloitte on behalf of the European Commission, Directorate-General for Justice.

It presents the completed **Evaluation** of the Brussels IIa Regulation, which looks into the *Relevance*, *Coherence*, *Effectiveness*, *Efficiency*, as well as *EU added value and utility* of this instrument. The assessment of *Effectiveness* in the main body of the report is conducted at the level of the specific and general objectives. A more detailed analysis of this evaluation criterion, at the level of the operational objectives, is presented in the separate volume of Analytical annexes.

The Impact Assessment on the Regulation, which was conducted within the framework of the same assignment, and was based on this Evaluation, is provided in another separate volume.

The present **Evaluation report's structure** is the following:

- Chapter 2: Objectives and scope of the Evaluation and the Impact Assessment Study;
- Chapter 3: Evaluation of the Brussels IIa Regulation.

The following **annexes** are presented **in a separate volume**:

*Analytical annexes*

- Annex 1: Analysis of the effectiveness of the Brussels IIa Regulation at the level of the operational objectives;
- Annex 2: Context of the Brussels IIa Regulation;
- Annex 3: Contextual factors and unsubstantiated issues;
- Annex 4: Analysis of the public consultation;
- Annex 5: Assessment of the impacts of options proposed for non-priority legal issues;
- Annex 6: Quantitative analysis;
- Annex 7: Compliance costs and stress.

*Methodological annexes*

- Annex 8: Main elements of the methodology for the Evaluation and Impact Assessment of the Brussels IIa Regulation;
- Annex 9: Potential modifications to the Regulation to address non-prioritised legal issues;
- Annex 10: Assumptions and formulas used for the hypothetical cases;
- Annex 11: Data concerning the application of the Brussels IIa Regulation.

# 2 Objectives and scope of the Evaluation and the Impact Assessment Study

**This chapter presents the objectives and scope of the Evaluation and Impact Assessment Study of the Brussels IIa Regulation.**

## 2.1 Objectives of the Evaluation and the Impact Assessment Study

In line with the Terms of Reference (ToR), the objectives of the study were to carry out an **evaluation and impact assessment study of the application of the Brussels IIa Regulation**.

The main objectives of the study were thus:

- *To evaluate the application of the Brussels IIa Regulation.*

  The study evaluates the Brussels IIa Regulation as it is in force today. In particular, it examines the relevance, coherence, effectiveness, efficiency, EU added value and utility of the Regulation as it exists today.

- *To identify and assess practical problems encountered by citizens, courts and practitioners, as well as the impacts of identified policy options to address the problems.*

  The study identifies and assesses the problems currently experienced by citizens, courts and practitioners. Based on the problem assessment and taking account of the findings of the evaluation of the Regulation, various policy options are developed with a view to addressing the problems identified. Legislative as well as non-legislative actions are considered. The impacts of the different policy options for the future of the Regulation is assessed relative to the status quo, based on a common set of assessment criteria, in compliance with the Commission's Impact Assessment Guidelines. The preferred option is identified based on a comparison of the options.

## 2.2 Scope of the Study

The scope of the study was largely determined by the **scope of the Brussels IIa Regulation**. This said, certain aspects that are not covered by the Regulation, such as standards in relation to parental responsibility decisions, were relevant for examination. This was in line with the ToR.

The Regulation establishes provisions concerning judicial cooperation in civil matters having cross-border implications. Within this framework, the material scope of the study is:

- Civil matters relating to the breaking of marriage links in terms of divorce, legal separation and marriage annulment (matrimonial matters); and
- Civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility.

The term 'parental responsibility' is to be understood broadly, referring to all rights and duties relating to the child or the property of a child. It includes rights of custody and rights of access. In relation to the child's property, the Regulation is limited to protective measures that need to be taken with regard to that property, such as the appointment of a person or a body to assist and represent the child with regard to the property.

In terms of the provisions established by the Regulation, the following broad areas are covered:

- The general scope of the instrument;
- Jurisdiction in matrimonial matters (relating to the breaking of the marriage link) and in matters of parental responsibility;

- Recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility; and
- Cooperation between central authorities.

The rules in applicable law concerning matrimonial matters and matters of parental responsibility are not analysed.

The relationship with other legal instruments has been taken into account.

The geographical scope of the study is all EU Member States with the exception of Denmark.

# 3 Evaluation of the Brussels IIa Regulation

**This chapter contains the evaluation of the Brussels IIa Regulation. The evaluation is structured according to its five evaluation criteria: relevance, coherence, effectiveness, and efficiency, as well as EU added value and utility. The assessment of effectiveness in this chapter is conducted at the level of the specific and general objectives. A more detailed analysis of this evaluation criterion at the level of the operational objectives is presented in Annex 1.**

## 3.1 Relevance

This section presents the findings on the relevance of the Brussels IIa Regulation. The following evaluation questions guided this work, and are dealt with in turn in the next sub-sections:

- In what way has the initial problem evolved?
- To what extent does the scope of the legislation still match the current needs or problems faced by EU citizens?

***Our key finding is that the number of international couples and families affected by the Regulation remains significant and the Regulation remains relevant in light of both this statistical evolution and in view of the qualitative assessment of the evolution of the initial problem.***

The Brussels IIa Regulation was adopted to address challenges faced by 'international' married and unmarried couples, and families (i.e. couples with or without children). At the time the Regulation was adopted this was becoming more common as a result of the growing mobility of EU citizens.

More specifically, it was recognised at the time that when international couples want to break their marriage link, ***the spouses could face a number of practical and legal difficulties due to the differences in legislation across the Member States***. These issues were identified as hindering the free movement of persons and judgments, and thus to be at odds with the goal of setting up an area of freedom, security and justice:

- It was **unclear which courts had jurisdiction** to handle the divorce, legal separation or marriage annulment of international married couples, as the competent court is determined in different ways in the Member States.
- It was **unclear which national law was to be applied** to these cases.[1]
- The differences in determining the competent court and conflict-of-law rules led to **issues over recognition and enforcement** of judgments, authentic instruments and agreements.
- When the spouses or unmarried couples had children, issues arose with regard to **cross-border rights of access to children**. Further problems were also faced in relation to parental responsibility, with additional complications and sensitivities e.g. in cases of child abduction[2].

[1] This was determined by means of the conflict-of-law rules of the Member State where the action was filed, using, for example, factors such as nationality or habitual residence. As the conflict-of-laws rules are legally very complex and vary among the Member States, the applicable law can differ depending on where the action is filed and the outcome is difficult to foresee. This could have serious repercussions given the vast differences in substantive law. For example, the possible grounds for divorce vary, and some Member States have introduced a higher threshold than others. Furthermore, not every Member States recognises the concepts of legal separation and annulment.

[2] Which was identified as being the cause of "appalling distress to the children and parents concerned", c.f. Commission press release on the 2002 proposal: "Commission proposes EU-wide recognition of family law rulings to tackle child abduction", IP/02/654, Brussels, 3 May 2002, http://europa.eu/rapid/press-release_IP-02-654_en.htm?locale=en.

The Brussels IIa Regulation included provisions to address all but the second problem identified above. The Regulation set out common jurisdiction rules, as well as provisions on the mutual recognition and enforcement of judgments, authentic instruments and agreements for matrimonial matters and matters of parental responsibility[3].

It did not establish harmonised conflict-of-law rules. This was addressed in Council Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation[4] ("Rome III Regulation"), which was adopted in 2010. This instrument provides a uniform set of rules on the law applicable to divorce and legal separation and is applicable in 15 Member States[5].

### 3.1.1 Evolution of the initial problem

**High levels of mobility of citizens across Europe**[6] coupled with international migration are believed to be leading to a constant increase in the number of international couples, as well as of international families[7], and hence substantiate the relevance of the Brussels IIa Regulation.

The number of international divorces and legal separations has increased over the last decade and has been stable (with slight fluctuations) between 2008 and 2012.

Our analysis shows that every year from 2008 to 2012, approximately 200,000 citizens in **international** marriages **divorced**.

While the **number of children affected by international divorces** decreased steadily from 2008 to 2012 (-4%), we observe that the **number of children born outside marriage** and thus affected by parental responsibility proceedings under the Regulation has increased by 10%.

Finally we note that an estimated **175,000 to 240,000 international families are affected by the Regulation**.

The modern trend in of family law is to encourage the parties to reach mutual agreement and party autonomy is supported.[8] **The Regulation currently does not seem to take this trend into account.**

[3] A previous Regulation (EC) No 1347/2000 of 29 May 2000 (the 'Brussels II Regulation'), which was first EU instrument adopted in the area of judicial cooperation in family law matters, introduced rules on jurisdiction, recognition and enforcement of judgments on divorce, separation and marriage annulment as well as judgments on parental responsibility for the children of both spouses. In terms of jurisdiction, the amendment of the scope of the convention in Regulation (EC) No 2201/2003 resulted in a change in the structure of Chapter II. This is now divided into three sections: the first on jurisdiction in matters relating to divorce, legal separation and marriage annulment, the second on jurisdiction in matters of parental responsibility, and the third on provisions common to both. In terms of the recognition and enforcement of judgments, the inclusion of provisions on parental responsibility made it necessary to include enforcement provisions in Regulation (EC) No 1347/2000. This is why Regulation (EC) No 2201/2003 has a Section 1 on recognition, a Section 2 on declaration of enforceability and a Section 3 on common provisions.

[4] OJ L 343, 29.12.2010, p. 10–16, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:EN:PDF.

[5] Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. The Rome III Regulation has been applied in Lithuania only since 22 May 2014 (OJ L 323, 22.11.2012, p. 18). It will apply in a sixteenth Member State, Greece, from 29 July 2015 (OJ L 23, 28.1.2014, p. 41).

[6] In 2011 there were 33.3 million foreign citizens resident in the EU-27, 6.6% of the total population. There were 48.9 million foreign-born residents in the Union in 2011, 9.7% of the total population (Statistics in Focus, 31/2012: "*Nearly two-thirds of the foreigners living in EU Member States are citizens of countries outside the EU-27*", Eurostat) http://ec.europa.eu/eurostat/en/web/products-statistics-in-focus/-/KS-SF-12-031.

[7] According to a 2012 Eurostat study ("Merging populations. A look at marriages with foreign-born persons in European countries", Giampaolo Lanzieri), across Europe, for the period 2008-10, on average one in 12 married persons was in a mixed marriage. The study shows wide differences in the prevalence of mixed marriages across Europe. The range is from about one mixed married couple out of five in Switzerland and Latvia, to almost none in Romania. However, for most countries, there is an increase over time, while the geographic distribution suggests a North-West/South-East divide, with some exceptions such as the Baltic countries. In general, countries in which immigration is a more recent phenomenon or is less relevant show lower values. The study is available at: bookshop.europa.eu/en/merging-populations-pbKSSF12029/.

This can be demonstrated *inter alia* by the absence of choice of court for the parties in matrimonial matters.[9] The problem has evolved therefore because of the lack of flexibility given to parties who issue proceedings under the Regulation.

***The objectives of the Regulation are still relevant to the problem as it has evolved. This is supported by comments made by the stakeholders consulted for this study. In short, the problem as it has evolved consists of a larger number of international couples and issues related to the application of the Regulation, such as 'forum shopping', delays, costs and threats to the well-being of the child and family relationships.*** While the objective of the Regulation to reduce the additional costs of cross-border cases as compared to the costs of domestic cases is therefore still relevant, the potential positive effects of the Regulation, are not always achieved.

### 3.1.2 The relevance of the scope of the Regulation in view of the current needs or problems faced by EU citizens

In accordance with Article 2, the Brussels IIa Regulation applies to "matrimonial matters" in terms of measures that are related to breaking the marriage link. This includes divorce, annulment and legal separation. The Regulation only deals with the breakig of the marriage link, and not the actual conclusion of the marriage contract. Hence 'marriage' is not defined by the Regulation.

It does not include any matter relating to prior circumstance or consequences, such as the grounds for divorce or the property consequences.[10] As indicated above, the Regulation does not establish substantive or applicable law rules. Its scope is limited to conflict of jurisdiction, and provisions on free movement of judgments, authentic instruments and agreements.

Our interviewees and national experts generally perceived the scope as being **rather clear and appropriate**. Expert panel members also regarded the scope of the Regulation for matrimonial matters as **functioning well overall**.[11]

#### *Matrimonial matters – potential coverage of same sex-marriages, registered partnerships and declaratory judgments*

On the issue of the coverage of ***same-sex marriages***, interviewees and expert panel members highlighted that the fact that the Regulation does not specify whether or not same-sex marriages are covered by its scope. This means that there is currently no legal basis for same-sex couples to divorce if they move to a Member State where same-sex marriages are not recognised.[12]

This point was brought up in the expert panel. The panel participants agreed that leaving the coverage of same-sex marriages undefined in the Brussels IIa Regulation allows Member States to apply the Brussels IIa Regulation to same-sex marriages, while not forcing them to do so (e.g. if this is

[8] "The trend in recent Union instruments in civil matters is to allow for some party autonomy (see, for instance, the 2008 Maintenance Regulation or the 2012 Successions Regulation)", page 5 of the Commission's Application Report (Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0225).

[9] Indeed, before the adoption of the Brussels IIa Regulation two possible starting points were taken into consideration for determining jurisdiction in matrimonial matters, (and neither of them included party autonomy): either to incorporate uniform rules of jurisdiction in matters of divorce, providing a limited number of alternatives without any hierarchy, or, taking the opposite approach, to incorporate no rules of jurisdiction but simply establish permissible grounds of jurisdiction. Article 3 of the Brussels IIa Regulation (Article 2 of the previous Brussels II) followed the first approach. The decision to include a number of specific grounds reflected their existence in the legal order of various Member States and their acceptance by the other Member States.

[10] More details on the contextual factors found important for the scope of the Regulation are spelt out in Annex 3.

[11] For information on the role these groups played in arriving at our findings, please see Annex 7.

[12] More details on the issue of same-sex marriages in the context of the Regulation is spelled out in Annex 3.

against their public policy). Expert panel participants felt that an explicit inclusion of same-sex marriages within the scope of the Brussels IIa Regulation would be too politically sensitive.

The same is broadly true of **registered partnerships**. As discussed in further detail in Annex 3, very different rights and administrative procedures apply to the dissolution of the registered partnerships that exist in some Member States. Nevertheless, in some Member States registered partnerships actually provide a status very similar to marriage, and EU citizens are increasingly entering into registered partnerships. This has led to uncertainty in these Member States as to whether or not registered partnerships should be deemed to be covered by the Regulation. Despite not explicitly being covered by its scope, some Member States' courts do apply the Regulation to registered partnerships.

We note that it is disputed in legal literature whether **declaratory judgments**[13] (on the existence or non-existence of a marriage) are covered by the Regulation,[14] or whether the material scope of the Regulation is restricted to proceedings aiming at an alteration of the status of the spouses.

Based on the national expert reports we note that the issue of whether or not declaratory judgments are covered by the Regulation does not seem to have come up in Member States' case law. However, according to our national experts, the subject itself has generated debate in several Member States, albeit without reaching any conclusion. Consequently, only a few of the national experts believed there was a need for declaratory judgments to be interpreted as covered by the Regulation. Similarly, most interviewees considered this issue to be of minor importance. (It was estimated that these judgments are seen in less than 1% of cases).

### *Parental responsibility – Coverage of children in all civil matters, grandparents, definition of "child" and custody rights*

Under the Regulation, the term 'parental responsibility' is to be understood broadly, referring to all rights and duties relating to the child or the property of said child[15]. It includes rights of custody and rights of access.[16]

Interviewees and expert panel participants generally considered the scope of the Regulation in matters of parental responsibility to be **rather clear and appropriate.** There were comments, in particular, that the inclusion of children in relation to all civil matters and not only children of

[13] I.e. legal determination by a court resolving legal uncertainty for the parties, e.g. regarding the existence of the marriage.

[14] Daphne-Ariane Simotta refers to German literature and concludes – after illustrating both points of view – that declaratory judgments are not covered by the Brussels IIa Regulation. In: Fasching/Koneceny, *Kommentar zu den Zivilprozessgesetzen*, 2nd edition, 2010, Article 1 Brussels IIa Regulation marg. No. 9 *et seq*. Furthermore, some commentators maintain that the Regulation should not be limited by excluding declaratory judgments if accepted in another Member State. Siehr goes as far as saying that recognition of these types of declaration could lead to a "necessary liberalisation" of marriages: Kurt Siehr in Ulrich Magnus and Peter Mankowski (eds) Brussels II bis Regulation (2012) European Law Publishers. Cited Dornbluth (fn. 1) pp. 60-62; Hau, FamRZ 1999, 485; id., FamRZ 2000, 1333; Gruber, FamRZ 2000, 1130; Schack (fn.1) p. 620; Vogel, MDR 2000, 1046; contra Helms (fn. 3) p. 259; Spellenberg, (fn. 1) pp. 125-126; ei., in: Festschrift Ekkehard Schumann (2001) p. 99.

[15] Concerning the child's property, the Regulation is limited to protective measures that need to be taken with regard to the child's property, such as the appointment of a person or a body to assist and represent the child with regard to the property. In contrast, other measures that relate to the child's property, not concerning the protection of the child, are not covered by the Regulation, but by Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation"). In this context, we draw attention to the Regulation on mutual recognition of protection measures in civil matters adopted in 2013 Regulation (EU) No 606/2013.

[16] In this regard, it is worth nothing that the repealed Brussels II Regulation only applied to matters of parental responsibility when they were raised in matrimonial proceedings. Under Brussels IIa, the scope was extended to all matters relating to parental responsibility, regardless of whether or not the parents are/were married and regardless of whether both are the biological parents.

divorcing parents as previously was a "much needed" expansion of the law[17]. Overall the Regulation is perceived to be responding rather well to the needs of holders of parental responsibility. [18] However, **some issues were identified that are currently not covered or not clearly specified in the Brussels IIa Regulation.**

Two issues were identified relating to the scope of the concept of 'parental responsibility'. First, a number of national experts (AT, BE, CZ, IE, IT, FI, LU, NL, PL, RO) pointed to cases where courts had difficulties in deciding whether specific situations would be covered by the **term** '**parental responsibility'** (e.g. it was not clear, whether issues of grandparent's contacts with grandchildren were covered).

Second is the **absence of definition of the term 'child'** in the Regulation. Ambiguities arise across the Member States in identification of who is to be considered a "child" under the Regulation. Since the definition of the term 'child' differs across the Member States, as well as in third countries,[19] this may result in legal uncertainty[20] and may affect the well-being of the child.

Finally, two members of the expert panel raised some issues in relation to two other concepts – custody rights and access rights, on the one hand, and parenthood recognition, on the other. One expert stated that the terms ***custody rights*** and ***access rights*** in the Brussels IIa Regulation stem from the Hague Convention on the Civil Aspects of International Child Abduction, but are not clearly defined in the Brussels IIa Regulation. This has led to difficulties due to the fact that the understanding of these concepts varies across the Member States, causing legal uncertainty. Another expert noted that the issue of ***parenthood recognition*** is closely related to the Brussels IIa Regulation, but dealt with by the jurisdiction rules of other instruments. The expert stressed that while recognition of parenthood is already excluded from the scope of the Brussels IIa Regulation, the Regulation does not sufficiently highlight the fact of the exclusion, thus creating confusion.

[17] c.f. http://www.familylawweek.co.uk/site.aspx?i=ed347: Peter Stone perceived this as "the most important advance made by the Brussels IIa Regulation" in EU Private International Law: Harmonization of Laws (2006) Edward Elgar Publishing p. 404.

[18] The analysis of the public consultation found that the majority of respondents (66%-78%) regard the Regulation as "helpful" in matters concerning parental responsibility. See Q6-Q8 of analysis in Annex "*Analysis of the European Commission's public consultation*".

[19] From a comparison of national laws, it was noted that not all Member States have a definition of "child". Where this is not the case, usually the age eighteen is crucial in determining whether a person is to be considered a child (or a minor) or not. However, there are differences as regards the possibility of being considered an adult earlier than that. For an overall treatment of this issue, see: *"Different interpretations of the term "child" across the Member States"*, Annex 3.

[20] Peter Stone regards the omission of an indication as to the ages at which a person ceases to be a child "very regrettable" in EU Private International Law: Harmonization of Laws (2006) Edward Elgar Publishing p. 405.

## 3.2 Coherence

This section presents the findings on the **coherence** of the Brussels IIa Regulation with other EU policy objectives in the area of judicial cooperation in civil matters.

The following sub-sections present the findings related to the assessment of the coherence of the Brussels IIa Regulation with other EU policy objectives. The analysis was based on the following indicators:

- Extent to which there are practical difficulties in relation to delineation of scope with other EU instruments;
- Extent to which there are overlaps in scope in combination with conflicting provisions between the Regulation and the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1996 Hague Convention on the International Protection of Children; and
- Extent to which there are practical difficulties in relation to the interrelationship with the Nordic Convention of 6 February 1931 on private law.

### 3.2.1 Delineation of scope with other EU instruments

***Our analysis shows that the multitude, complexity and interrelationship of Union instruments in family law (e.g. the Brussels IIa Regulation, the Maintenance Regulation (4/2009), the Brussels I Recast Regulation (1215/2012), the Rome III Regulation (1259/2010), etc.) have led to practical difficulties, such as the lack of understanding on the part of citizens and practitioners, or confusion on the extent of jurisdiction of the competent court pursuant to the Brussels IIa Regulation on the part of the parties.***

There are a number of EU instruments in the field of judicial cooperation in civil matters, which are closely related to the Brussels IIa Regulation (e.g. the Maintenance Regulation, the Rome III Regulation, Brussels I Recast Regulation). While most national experts did not identify any practical difficulties in relation to the delineation of the scope of the Brussels IIa Regulation with other Union instruments, our national experts for DE, FI, HR, IT, LU, LT and PL pointed to general problems related to **the multitude and complexity of EU instruments in family law** – in particular when combined with domestic law, bilateral agreements and multilateral conventions. Several interviewees also described the relationship with other regulations in the area of judicial cooperation in civil matters as problematic.

In addition, most of our expert panel participants also agreed that the multitude and complexity is creating practical problems for citizens and legal practitioners – such as non-use due to a lack of knowledge, misinterpretations and additional costs for specialised legal advice.

Furthermore, we note the **absence of clear practical guidance** for practitioners on the interrelationship of the Brussels IIa Regulation, the Maintenance Regulation, and the Rome III Regulation. This results in problems for practitioners and citizens in understanding these three instruments well and quickly. Overall, several of our interviewees and respondents to the public consultation concluded that as more and more Regulations enter into force, it becomes more and more difficult for practitioners and citizens to understand the system of EU civil procedure. This not only results in them incurring extra costs, but it causes frustration for the parties that (in absence of a **single procedure**) **divorce is not necessarily dealt with the same way** (i.e. by the same court, within the same procedure) as the other procedures they regard as integral part or consequence of their divorce (i.e. parental responsibility, maintenance (of spouse and child), matrimonial property consequences).

Similarly, expert panel members argued that citizens want family law issues to be solved in “one package” (approaching one single lawyer and one single court in one single proceeding), but that the

multitude and non-harmonisation of Union instruments makes this impossible. In line with this argumentation, our national expert for Luxembourg indicated that the parties generally (wrongly) assume that the court with jurisdiction over matrimonial matters also has jurisdiction over maintenance obligations. Luxembourg courts have pointed out that there is a fragmentation of jurisdiction and that the court which has jurisdiction over matrimonial matters pursuant to the Brussels IIa Regulation does not necessarily have jurisdiction over maintenance obligations.[21]

The delineation of scope also seems to be problematic in matters of recognition and enforcement.

**Case example: Interrelationship of Brussels IIa Regulation with other Union instruments (Luxembourg)**

In a case from 2009, a judgment on maintenance obligations was declared enforceable pursuant to the 1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations.[22] The respondent lodged an appeal against the decision and raised several grounds for non-recognition on the basis of multiple instruments, including the Brussels I Regulation (44/2001), the Brussels IIa Regulation and the 1973 Hague Convention on the Recognition and Enforcement of Decisions.

The Luxembourg Court of Appeal stated that it was '*inconceivable*' that the foreign decision had to fulfil the requirements of several instruments cumulatively in order to be recognised. Firstly, the court ruled that maintenance obligations were excluded from the scope of the Brussels IIa Regulation pursuant to Article 1 para 3 lit. e). Therefore, the decision was not subject to the grounds of non-recognition established by the Brussels IIa Regulation. Secondly, the Court stated that the 1973 Hague Convention prevailed over the Brussels I Regulation. The national expert for Luxembourg concluded that this decision shows that the **multiplicity of EU instruments in the field of family matters is causing difficulties** for parties.

The interplay between the Brussels IIa Regulation and the **Maintenance Regulation** is not fully understood by practitioners. In particular, uncertainties were reported relating to the application of the **system of certificates** contained in the Brussels IIa Regulation in relation to those in the **Maintenance Regulation**. The Maintenance Regulation refers to grounds of grounds of jurisdiction that are based on the Brussels IIa Regulation. Therefore, proceedings related to custody and to maintenance should generally be handled by the same court.[23] However, in some cases, court officials were not sure which certificates to use in cases in which both the Maintenance Regulation and the Brussels IIa Regulation play a role. In Estonia, court officials are advised to use partial certificates. They use the Brussels IIa certificates for custody cases and the Maintenance Regulation certificates for maintenance obligations. This system works, but it needs clarification.

The interplay with the **Maintenance Regulation** also seems to be problematic in relation to the residual jurisdictional basis of **sole domicile or nationality** (i.e. Article 3(1)b). Although residual jurisdiction may be used for a divorce, it is not available for maintenance and therefore is rarely used by an applicant for maintenance.

**Case example: Interplay between the Brussels II and the Maintenance Regulations (Ireland)**

Our **Irish** national expert highlighted that in *O'K v A* [2008] 4 IR 801, the High Court observed that "[i]n our law judicial separation is inextricably linked to "proper provision" for dependant [*sic*] children and divorce under Article 41 of the Constitution is also inextricably linked to "proper

[21] *Tribunal d'arrondissement de Luxembourg, 17 June 2008, case no 11341' and 113949*
[22] *Cour d'appel, 30 April 2009, case no 32999; Cour d'appel, 11 March 2010, case no 34352*
[23] In Estonia, divorce matters, custody matters, and maintenance matters can all be dealt with in one proceeding.

provision". It is difficult to envisage how these matters can be properly separated." It is therefore notable that Buckley (2012) has observed that since the enactment of the **Maintenance Regulation**[24], "[t]he fact that different aspects of the same relationship may be dealt with in different jurisdictions, or under the law of different Member States, increases rather than decreases confusion. The separation of marital status from marital property claims is not suited to a regime such as Ireland's, where divorce is dependent on a particular standard of provision. Furthermore, the separation of support and property issues appears highly artificial in the Irish context, given that Irish legislation makes no such distinction and seeks only an overall fair or "proper" outcome. Such an outcome will often depend on ***trading off various aspects of provision against one another***[25]**—**for instance, claims for spousal support or a share in pension rights or in the family business might be exchanged for an additional share of the family home or other property. This type of trade-off may prove highly dangerous under the new jurisdictional rules, as the court ruling on one aspect of provision may have no overview or understanding of what has been determined elsewhere. Indeed, under the relevant applicable law, such intended exchanges may be entirely irrelevant to the case at issue. This in turn undermines the overall standard of provision."

A Slovakian interviewee highlighted the issue that the Maintenance Regulation grants the same court jurisdiction that has jurisdiction in matters of parental responsibility. It is possible that a court has jurisdiction under Article 12 of the Brussels IIa Regulation, but not under the Maintenance Regulation. This would arise in cases where Article 12(1) does not apply. Under the Brussels IIa Regulation, the court could in that case only decide on matters of divorce. Under Slovak law, matters relating to breaking the marriage link, maintenance and parental responsibility have to be decided in one proceeding. However, according to the Slovakian interviewee, as Article 12(1) prohibits jurisdiction in matters of parental responsibility, this is not possible. The interviewee stressed that in the Slovak judicial system, the concept of *forum non conveniens* does not exist, so as the courts have to exercise jurisdiction. This has led to confusion in the past.

According to a German interviewee, there is a need to allow couples that are not married to decide on prorogation of jurisdiction in accordance with Article 12 in cases where **maintenance** proceedings are on-going.

Our national expert for Germany pointed to **difficulties in relation to the delineation of scope between the Brussels IIa Regulation and Regulation (EU) No. 606/2013 on the recognition of protective measures in civil matters** in relation to **provisional measures** under Article 20 of Brussels IIa.. He stated that as Article 20 has priority over protection measures adopted under Regulation No. 606/2013 (see Article 2 para 3 of that Regulation), there is a lack of clarification with regard to the type of measures that could be ordered provisionally under Article 20 in matrimonial matters.

Other procedures stemming from a divorce (maintenance, property consequences etc.) do not require a **declaration of enforceability**. Interviewees reported that maintaining this procedure for Brussels IIa does not make sense for citizens and hence creates frustration for them. A specialised French lawyer and some respondents to the public consultation[26] highlighted the problem that the **rules on jurisdiction** are not **harmonised across Union instruments in family law** (Brussels IIa, Rome III, Maintenance Regulation, etc.) The current situation with different criteria for determining jurisdiction is creating unnecessary complexity and often requires ad hoc solutions in practice. Similarly, a Spanish judge noted that habitual residence is used as the main criterion for jurisdiction under Rome III and the Maintenance Regulation, while the Brussels IIa Regulation provides a number of specific alternative (rather than hierarchical) grounds to determine jurisdiction in matrimonial

[24] Emphasis added.
[25] Emphasis added.
[26] This point is referred to with the general term "some" due to the fact that it cannot be accurately quantified. It was repeated on a general level across the body of responses to different open questions of the public consultation.

matters (Article 3), and a general jurisdiction rule based on the habitual residence of the child (Article 8) for matters of parental responsibility.

Some interviewees indicated that the fact that the **choice of court** is not possible under the Brussels IIa Regulation is inconsistent with other EU instruments. A Bulgarian interviewee indicated in particular the inconsistency of there being are possibilities for choosing the court in other situations, but not for divorce. Indeed, 85% of the respondents to the public consultation[27] complained that the Regulation does not include the possibility for spouses to choose the court responsible by common agreement.

The national expert for Croatia noted that **many judges** in Croatia are **not sufficiently trained in differentiating the sectoral scope of application of the various Union instruments**. He explained that all the judges finished law school at a time when EU law was not part of the curricula.

### 3.2.2 Interrelationships between the Regulation and relevant Conventions

***Despite the rules laid down in Article 60 on relations with certain multilateral conventions, the interrelationship of the Brussels IIa Regulation with international conventions and bilateral agreements appears still to be very complex. In some cases it is not fully clear for practitioners which instrument applies and there are conflicting provisions/interpretations, which are hampering the practical operation of the Brussels IIa Regulation.***

While Article 59 provides for general guidance on the **relationship with other instruments**, Article 60 specifies that the Brussels IIa Regulation shall take precedence in relation to the specific Conventions it lists.

It has been argued that – despite the rules laid down in Article 60 – it is in some cases not fully clear which instrument to apply[28]. Indeed, the national experts of BG, DE, ES, HR, IE, IT, LU, LT and SE reported some **lack of clarity**, **conflicting provisions** or **practical difficulties** in relation to the interrelationship of the Brussels IIa Regulation and other instruments in their countries.

An issue relating to the **1961 Hague Convention** on the protection of minors was, for example, reported by the national expert for Germany. According to Article 60(a) the Regulation has priority over the Hague Convention on the protection of minors, but only "*between the Member States*". The interpretation of this rule is controversial in German legal literature if the Contracting State of the Hague Convention involved is not an EU Member State.[29] The problem is particularly relevant in the relationship between Germany and Turkey.

In this regard, the French expert pointed out that the Convention might be applicable under a residual competence rule under Article 14 of the Brussels IIa Regulation if third states are involved. However, there was also one case where the courts used the Convention as a basis for jurisdiction although the habitual residence of the child was in France.

Furthermore, the national expert for Luxembourg concluded that five cases from 2013[30] demonstrate that given the **fragmentation of the private international law rules in different instruments**, Luxembourg courts had to apply Portuguese law to the divorce and Luxembourg law to parental responsibility matters. This fragmentation and the **lack of synchrony between the laws applicable**

[27] i.e. 139 of 163 respondents.

[28] Dieter Martinv notes that conflicts and difficult questions of competence have arisen with the Hague Conventions. See 'Is Unification of Family Law Feasible or even Desirable?' in: *Towards a European civil code*, (2011), p. 429-458

[29] Hausmann, IntEuSchR B No. 255, 256

[30] Tribunal d'arrondissement de Luxembourg, 13 June 2013, case no 124754; Tribunal d'arrondissement; 13 June 2013, case no 130507; Tribunal d'arrondissement, 13 June 2013, case no 101915; Tribunal d'arrondissement de Luxembourg, 4 July 2013, case no 122093; Tribunal d'arrondissement de Luxembourg, 11 July 2013, case no 142027 and 1142633; Tribunal d'arrondissement de Luxembourg.

**make the proceedings more complex for the parties and the practitioners, as well as the courts**. More precisely, the five cases reported dealt with the interrelationship between the Brussels IIa Regulation and the **1961 Hague Convention**.

In all the cases, Luxembourg courts had jurisdiction over parental responsibility issues pursuant to Article 12 of the Brussels IIa Regulation. In other words, the Luxembourg courts had jurisdiction over both matrimonial and parental responsibility matters. As for the law applicable to divorce, the Luxembourg courts ruled that pursuant to Luxembourg conflict-of-law rules, Portuguese law should apply (as the law of the nationality of both spouses).

With regard to the law applicable to custody matters, the Luxembourg Courts expanded on the interrelationship between the 1961 Hague Convention and the Brussels IIa Regulation. Firstly, the Courts of First Instance referred to Article 60 of the Brussels IIa Regulation, which states that the Regulation should prevail over the 1961 Hague Convention. Secondly, the Luxembourg Court of First Instance mentioned the scope of each instrument and emphasised the fact that the Brussels IIa Regulation does not contain rules on the applicable law. Consequently, the Luxembourg court ruled that the **prevalence of the Brussels IIa Regulation did not apply to the provisions on the law applicable established by the 1961 Hague Convention**. As a result, Article 2 of the 1961 Hague Convention applied to determining the law applicable to parental responsibility, which was determined to be Luxembourg law.

With regard to the **1980 Hague Convention**, 51%[31] of respondents to the public consultation were of the view that the rules governing its relationship with the Regulation do not work satisfactorily. Respondents pointed out that there is room for improvement in particular by simplifying the rules, that confusion arises with a parallel reading of the two instruments. A number of respondents mention that the rules in relation to return orders are particularly unclear between the two instruments. It was also pointed out that the Regulation suffers from the absence of up-to-date practical guidance which takes into account the case law which has been established in this area. The national experts (BG, HR, LT, SK, UK) and stakeholders interviewed also identified issues relating to the application of the instruments (implying that mistakes have arisen in application due to a lack of knowledge on the part of practitioners. According to our Bulgarian national expert, **there were cases[32] where Bulgarian courts have disregarded Article 60 of the Brussels IIa Regulation** and **applied the 1980 Hague Convention** without taking into consideration the fact that the case involved two EU Member States and the factual situation occurred in 2013, i.e. when the Republic of Bulgaria was already a EU Member State. Similar observations were made by the Slovakian and French[33] national expert.

**Case example: Interrelationship between Brussels IIa and the 1980 Hague Convention (Bulgaria)**

The national expert for Bulgaria reported that some Bulgarian courts disregard Article 60 lit. e of the Brussels IIa Regulation and apply the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

In one case (*Decision № 6011/02.08.2013, Case № 5581/2013, Sofia City Court*), the court did not take into consideration the fact that the case was connected to two EU Member States (Bulgaria and Spain) and that the factual situation occurred after the accession of the Republic of Bulgaria to the EU. The case concerned a child abduction, where the mother – a Bulgarian national residing in Spain, moved her child from Spain to Bulgaria without the consent of his father, a Spanish national with habitual residence in Spain.

[31] i.e. 76 of 148 valid responses.

[32] Decision № 6011/02.08.2013, Case № 5581/2013, Sofia City Court, Decision № 6019 /02.08.2013, Case № 4848/2013, Sofia City Court, Decision № 6168/14.08.2013, Case № 3043/2013, Sofia City Court.

[33] Civ 1, 29 February 2012 n°11-15613.

The Bulgarian court not only disregarded the application of Brussels IIa, but also did not take into consideration the hierarchy and the ratio between national legislation, the EU acts and the general international treaties. As a result, instead of applying first the EU act (i.e. the Brussels IIa Regulation), the court applied the Child Protection Act of Bulgaria "*in connection with*" (quotation) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Obviously, the court should not have applied the Hague Convention but the Regulation in view of Article 60 lit. e of the Brussels IIa Regulation. When referred to the Brussels IIa Regulation, the court again referred first to the Child Protection Act of Bulgaria "*in connection with*" the Brussels IIA Regulation.

The same approach was taken in *Decision № 6019 /02.08.2013, Case № 4848/2013, Sofia City Court*, and a similar approach was taken in *Decision № 6168/14.08.2013, Case № 3043/2013, Sofia City Court,* with an almost identical factual situation involving a child abduction between Bulgaria and Belgium which took place after 2009.

Similar observations were made by the Slovakian expert as well as a German judge interviewed.

Related to these issues, the Lithuanian and the UK national experts noted that the precedence of the Regulation was not sufficiently clear for practitioners. This was supported by the expert for the UK. He indicated that Nigel Lowe, a legal scholar, had identified certain ambiguities. As Lowe comments[34], the two fundamental questions of whether or not the Brussels IIa Regulation applies on the basis of Article 60(e) and, if so, how, are not always straightforward. In terms of jurisdiction, the Brussels IIa Regulation can apply to children who are habitually outside the EU.

In terms of how the Brussels IIa Regulation might apply, questions arose whether it is even permitted to use the Hague Convention to enforce a return order. In contrast to this perception, other experts were of the opinion that the Regulation is clear on this matter (e.g. CY, HR).

Our Irish national expert indicated that the Irish court faced difficulties in one case because the father did not have custody rights within the meaning of Article 3 of the Hague Convention, but did have custody rights under the Brussels IIa Regulation, as the latter is to be interpreted in the light of Article 8 of the European Convention on Human Rights (ECHR).

In 2010, the Austrian Supreme Court rendered a judgment on the impact of a provisional measure within the meaning of Article 20 of the Brussels IIa Regulation – taken in the Member State where the child is actually resident – on the enforcement according to the Hague Convention on child abduction of 1980.[35] Generally, custody decisions are prohibited in the state of enforcement (Article 16 Hague Convention on child abduction of 1980). If such a decision is rendered nonetheless, this decision does not constitute grounds for refusing enforcement (Article 17 Hague Convention on child abduction of 1980). According to the Supreme Court's case law, this provision also applies if provisional measures within the meaning of Article 20 of the Brussels IIa Regulation are taken in the Member State of enforcement. Hence, such provisional measures do not hinder the enforcement of a decision according to the Hague Convention on child abduction of 1980.

With regard to the **1980 Hague Convention on the Civil Aspects of International Child Abduction**, a few respondents to the public consultation highlighted an issue relating to the coordination between Article 11(4) of the Brussels IIa Regulation and Article 13 of the Hague Convention. An academic from the UK highlighted the fact that, while according to the rules set out by Article 13(1)(b) of the Hague Convention the court is not obliged to order the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm, or place the child in an intolerable situation, the rules set out by Article 11(4) of Brussels IIa Regulation on refusing a return application

[34] *International Family Law* [2013] pp. 114-118.
[35] Judgment of 11.02.2010, Oberster Gerichtshof, 5 Ob 260/09k.

are not sufficiently clear. The respondent stated that the automatic return of the child set by Article 11(4) should therefore be interpreted as a less rigid principle as the child's welfare still has to be safeguarded. A judge from Austria stressed that, to prevent the return of the child from being ordered even though it could put the child at risk, the return cannot be ordered automatically.[36]

In relation to the **1996 Hague Convention**, 46%[37] of respondents to the public consultation indicated that the rules governing its relationship with the Regulation do not work satisfactorily. Conflicts were also outlined by the national expert for Germany regarding cases in which the child moves from a participating state of the Brussels IIa Regulation to a state that does not apply the Brussels IIa Regulation, but the Hague Convention. If, for example, a Danish child whose habitual residence is in Germany moves to Denmark after one parent has initiated legal proceedings on parental responsibility before a German court, jurisdiction continues to lie with the German court under Article 61 lit. a and Article 8 para 1 of the Brussels IIa Regulation. Under Article 5 para 2 of the Hague Convention, on the other hand, the Danish courts have jurisdiction as soon as the child has established habitual residence in Denmark. Therefore, Germany by relying on Article 8 para 1 of the Regulation and the principle of *perpetuatio fori*, violated its international obligations to Denmark when ratifying the Hague Convention.[38] The same issue was raised by the French national expert. Similarly, a representative of the Czech Ministry of Justice noted that the Brussels IIa principle of *perpetuatio fori* is not recognised in the 1996 Hague Convention – a situation that may lead to jurisdictional conflicts.

The Swedish expert also identified difficulties. He raised the question as to which instrument should be used to transfer a case to a court of a third state better placed to hear the case when the child is habitually resident in a Member State. Article 15 of the Regulation only allows for a transfer to a court of another Member State. Article 10 of the 1996 Hague Convention would allow to transfer a case to third state that has ratified the Convention. However, according to Article 61 of the Regulation, the 1996 Hague Convention should not apply, as the Brussels IIa Regulation takes precedence.

A Romanian expert stated that the **non-ratification of the 1996 Hague Convention by Italy** is creating many problems in practice when it comes to the establishment of the applicable law. In such cases, Romanian courts apply Romanian law, which may be less predictable for the parties.

While a large majority of national experts did not identify any **other issues relating to the relationship with other legal instruments**, the national experts for BG, HR and SK pointed to practical difficulties linked to the application of bilateral agreements and the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

More specifically, according to the national experts for Croatia and Slovakia, there is very often uncertainty as to whether **bilateral conventions with third countries** regulating jurisdiction in matrimonial and parental responsibility matters can be applied. For instance, Croatia has ratified numerous bilateral agreements with neighbouring non-EU States which do not clearly differentiate which one is applicable. In a case heard by the Court of First Instance of Rijeka[39], the court first found its grounds in a bilateral agreement, and then shifted over to a multilateral agreement.

In Bulgaria, some lack of clarity emerged about the interrelationship between the Brussels IIa Regulation and the **Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents**.

[36] To support his point, this respondent to the public consultation mentioned the case *Neulinger and Shuruk vs. Switzerland* of the ECtHR, stating that the return of the child cannot be ordered automatically, and that the effects of the time limit elapses since the child moved to another country.
[37] I.e. 65 out 142 valid responses.
[38] See Hausmann, IntEuSchR B No. 260 with further references to the German legal debate.
[39] *No. P.-1278/13 of 10 October 2013.* – final.

**Case example: Interrelationship between Brussels IIa and the Apostille Convention (Bulgaria)**

In Bulgaria, the Supreme Administrative Court (*Decision № 15903/12.12.2012, Case No 4237/2012*) held that the certificate attached to a foreign divorce decision of a court of a Member State in conformity with Article 39 of the Brussels IIa Regulation (which is a standard form set out in Annex I) should bear an *apostille* (i.e. an international certification comparable to notarisation in domestic law). The Court correctly applied Article 21 para 1 of the Regulation and did not adopt any special procedure for the recognition of the decision in question. Furthermore, it acknowledged that Article 21 should apply in conformity with Article 37. As Article 52 of the Regulation does not include certificates (referred to in Article 39) in the list of documents that do not need legalisation or other similar formalities (documents referred to in Articles 37, 38 and 45), the Court inferred that in conformity with the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (5th October 1961, The Hague, the "Apostille Convention") this certificate needs to bear an apostille. The Court substantiated this by further underlining that the Brussels IIa Regulation does not exempt certificates under Article 39 of the Regulation from the requirement for an apostille and that all EU Member States are parties to the Apostille Convention. As a result, the divorced parties were forced to apply for an apostille in the Member State of origin of the certificate.

### 3.2.3 Interrelationship with the Nordic Convention

***No major practical difficulties were identified in interrelationship with the Nordic Convention have been identified.***

The **Nordic Convention** (referred to in Article 59 of the Brussels IIa Regulation) could potentially impact on national procedures in Sweden and Finland.

While the national expert for Finland did not identify any practical difficulties, the national expert for Sweden noted that the **rules of jurisdiction in the Nordic Convention**, in accordance with the requirement in Article 59 (2)(c), are **modelled on the previous Brussels II Regulation**, i.e. Regulation 1347/2000, and **only cover decisions handed down in connection with a divorce decision**. The Nordic Convention needs to be amended to reflect the present wording of the Brussels IIa Regulation.

According to the experts interviewed and stakeholders in Sweden and Finland, no practical issues have, however, been identified in relation to the Nordic Convention. A Swedish judge pointed out, in particular, that Nordic decisions are generally enforced without a declaration of enforceability.

## 3.3 Effectiveness

This section presents the findings on the **effectiveness** of the Brussels IIa Regulation at the level of the specific and general objectives.

The following evaluation questions have guided this work, and are dealt with in the sub-sections below:

- To what extent have the core objectives been achieved?
- Is the Regulation applied smoothly in the Member States?

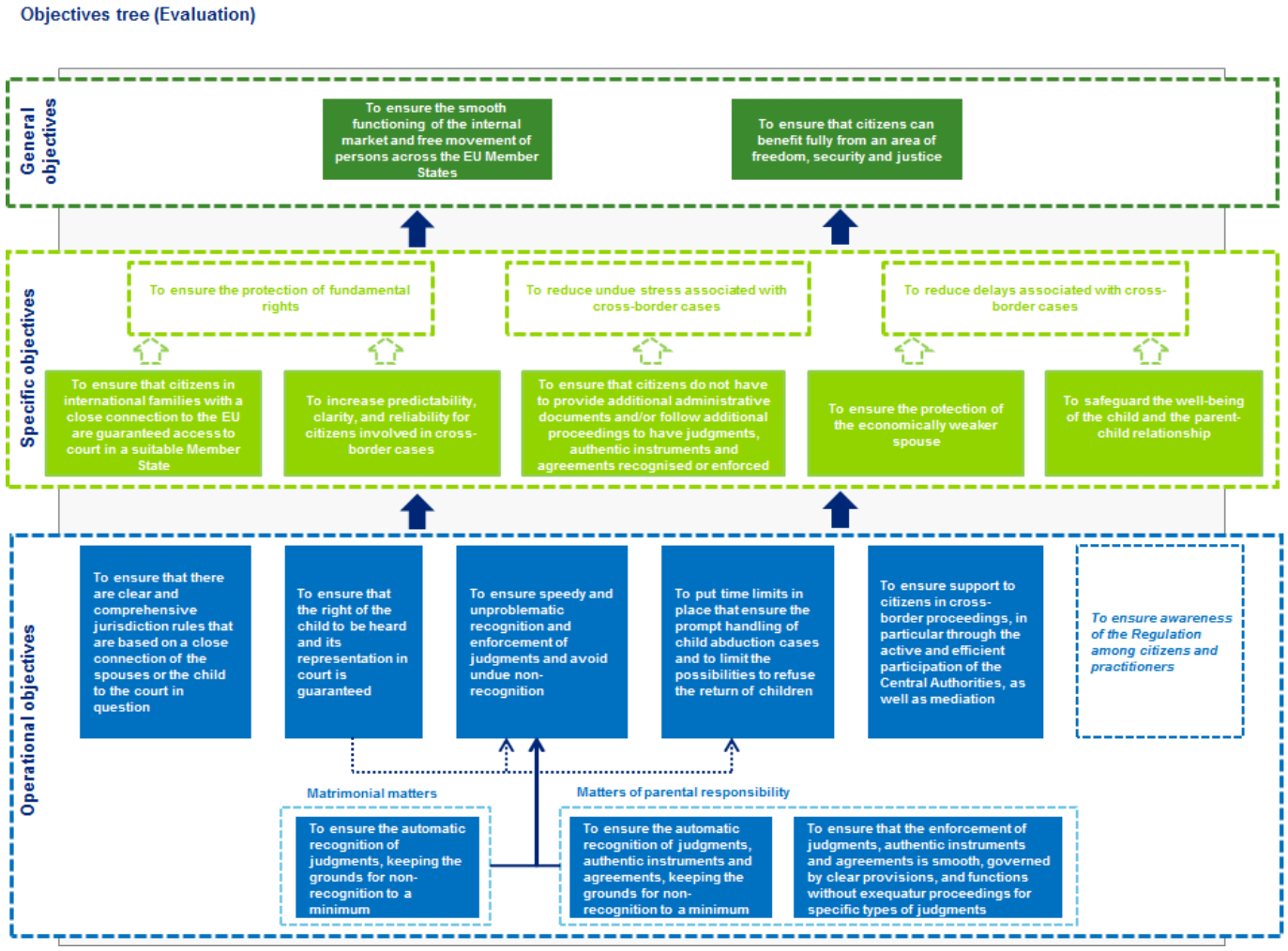
A systematic analysis of the Brussels IIa Regulation's core objectives and its ability to achieve these guided the assessment of the instrument's effectiveness. The **core objectives** of the Brussels IIa Regulation were identified at three levels:

- ***General objectives*** are derived from Treaty-based goals (and therefore constitute a link with the existing policy-setting) at the level of impact indicators.
- ***Specific objectives*** relate to the specific domain and nature of the intervention under consideration. The specific objectives correlate with result indicators. Defining these is also crucial as they set out in detail what the Commission wants to achieve with the intervention.
- ***Operational objectives*** relate to deliverables or actions and have a close link with output indicators.

The figure below outlines the objectives identified, illustrated by means of an 'objectives tree'. The figure flows from bottom to top.

The assessment of effectiveness in this chapter is conducted at the level of the specific and general objectives. A more detailed analysis of this evaluation criterion, at the level of the operational objectives, is presented in Annex 1.

**Figure 1: Objectives tree – Matrimonial matters and parental responsibility**




*Source: Deloitte*

### 3.3.1 Achievement of the specific objectives

This section presents the findings on the **effectiveness** of the Brussels IIa Regulation at the level of the specific objectives. The table below displays the five specific objectives as well as the shortened denominations, which have been used as headings in the sub-sections below.

**Table 1: Specific objectives and their shortened denominations**

| Specific objective | Shortened denominations |
|---|---|
| **Specific objective 1:** ***To ensure that citizens in international families with a close connection to the EU are guaranteed access to court in a suitable Member State*** | Access to court for citizens in international families with a close connection to the EU |
| **Specific objective 2:** ***To increase predictability, clarity, and reliability for citizens involved in cross-border cases*** | Predictability, clarity, and reliability for citizens involved in cross-border cases |
| **Specific objective 3:** ***To ensure that citizens do not have to provide additional administrative documents and/or follow additional proceedings to have judgments recognised or enforced*** | Smooth recognition and enforcement of judgments, authentic instruments and agreements |
| **Specific objective 4:** ***To ensure the protection of the economically weaker spouse*** | Protection of the economically weaker spouse |
| **Specific objective 5:** ***To safeguard the well-being of the child and the parent-child relationship*** | Well-being of the child and parent-child relationship |

As depicted in the objectives tree in the previous section, the achievement – or potential barriers to the achievement – of these objectives in turn has an impact on the **protection of fundamental rights**, as well as the levels of **stress and delays faced by citizens**. Impacts on the other specific objectives related to the protection of fundamental rights, reduction in stress and delays, are dealt with in Annex 7. Impacts on the costs are dealt with in the section on efficiency (Section 3.4) and in Annex 7.

The analysis of the achievement of the specific objectives presented in this chapter builds on the detailed analysis that was carried out at the level of the operational objectives (presented in Annex 1). For each of the operational objectives, a number of legal issues were identified, which hamper the achievement of the operational objectives and, in turn, the specific objectives. The table below shows the link between the high-priority legal issues identified for each operational objective and the specific objectives of the Regulation. In addition, the table identifies whether the legal issues relate only to matrimonial matters, only to parental responsibility matters, if they are horizontal in character and thus refer to both, or if they refer to other specific issues (see the column 'type of issue'). The legal issues listed below were identified to be particularly significant[40] and given high

[40] The criteria for defining the high priority issues were as follows: (1) The legal issue requires a substantial modification to the Regulation; (2) The legal issue refers to fundamental rights; and (3) A significant number of people are affected. The list of issues and their prioritisation were agreed with the European Commission.
Please refer to the section "*What are the legal issues under the Regulation?*" in Annex 8 for an explanation of the methodological approach used for the identification and prioritisation of the issues affecting the application of the Brussels IIa Regulation.

priority status throughout the analysis. The full list of legal issues identified is provided in Annex 1 of the present report.

For each of the high-priority legal issues in the table below, the specific objective which is most impacted has been identified and marked in dark green. Other specific objectives on which a legal issue has a clear, but lesser, impact are marked in light green. In the analysis of the achievement of the specific objectives that follows, a detailed discussion of each legal issue has been included only under specific objective where the legal issue has been marked with dark green, in order to avoid repetition. Cross-references are provided within the sections to the other specific objectives.

**Table 2: Links between specific objectives, operational objectives and identified high priority issues**

| Operational objectives (OO) | Barriers to achieving the objectives | | Specific Objective (SO) | | | | |
|---|---|---|---|---|---|---|---|
| | Type of issue | Description of issue | Access to court for citizens in international families with a close connection to the EU (SO1) | Predictability, clarity, and reliability for citizens involved in cross-border cases (SO2) | Smooth recognition and enforcement of judgments, authentic instruments and agreements (SO3) | Protection of the economically weaker spouse (SO4) | Well-being of the child and parent-child relationship (SO5) |
| Jurisdiction Rules (OO1) | Matrimonial matters | Potential for 'rush to court'/'forum shopping' on the basis of the alternative grounds of jurisdiction | | | | | |
| | | The current jurisdiction rules do not sufficiently promote a common agreement between spouses | | | | | |
| | Parental responsibility | Different interpretations of the term 'habitual residence' | | | | | |
| | Horizontal issues | Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court | | | | | |
| Hearing of the child and its representation in court (OO2) | Hearing of the child | Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments) | | | | | |
| | Representation of the child in court | Different practices related to the representation of the child in court | | | | | |
| Recognition and enforcement (OO3) | Parental responsibility | Different interpretations of the term 'recognition' leading to differing practices as to which judgments require a declaration of enforceability | | | | | |
| | | Exequatur proceedings are still in place for some types of judgments | | | | | |

| Operational objectives (OO) | Barriers to achieving the objectives | | Specific Objective (SO) | | | | |
|---|---|---|---|---|---|---|---|
| | Type of issue | Description of issue | Access to court for citizens in international families with a close connection to the EU (SO1) | Predictability, clarity, and reliability for citizens involved in cross-border cases (SO2) | Smooth recognition and enforcement of judgments, authentic instruments and agreements (SO3) | Protection of the economically weaker spouse (SO4) | Well-being of the child and parent-child relationship (SO5) |
| | | Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement | | | | | |
| Provisions specific to child abduction cases (OO4) | Return procedure under Article 11(1) to (5) | Difficulties relating to the time limit for return (i.e. not clear and not effective) | | | | | |
| | | Questions on the practical application of Article 11(4) and ambiguity as regards the concept of 'adequate arrangements' under that provision | | | | | |
| | Hearings under Article 11(6) to (8) | The system stipulated in Article 11(6) to (8) may endanger the well-being of the child if a child is returned in spite of a risk that has been established in the return proceedings and possibly after a long time has passed | | | | | |
| | Enforcement of return orders | Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplication of the Regulation and reservations against the content of decisions | | | | | |
| Support to citizens in cross-border proceedings by Central Authorities (OO5) | Cooperation between Central Authorities | Rules relating to the obligation for Central Authorities to collect and exchange information on the situation of the child that are not specific enough, and thus cause practical problems | | | | | |
| | | Insufficiently specific provisions on the procedure for the placement of a child in another Member State | | | | | |
| | Involvement of social authorities | Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children | | | | | |

| Operational objectives (OO) | Barriers to achieving the objectives | | Specific Objective (SO) | | | | |
|---|---|---|---|---|---|---|---|
| | **Type of issue** | **Description of issue** | **Access to court for citizens in international families with a close connection to the EU (SO1)** | **Predictability, clarity, and reliability for citizens involved in cross-border cases (SO2)** | **Smooth recognition and enforcement of judgments, authentic instruments and agreements (SO3)** | **Protection of the economically weaker spouse (SO4)** | **Well-being of the child and parent-child relationship (SO5)** |
| | Mediation | The use of mediation is currently not promoted to a sufficient extent | | | | | |
| **Information and awareness (OO6)** | Horizontal issues | **Practitioners** are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions of the Brussels IIa Regulation | | | | | |
| | | **Citizens** are not sufficiently aware of the content of the Regulation and its implication for international proceedings on matrimonial matters, matters of parental responsibility or child abduction | | | | | |

The following sub-sections provide an overview of how the high-priority legal issues impact on the achievement of the specific objectives by causing various problems for citizens. A detailed legal analysis of all legal issues (i.e. of all levels of priority) is provided in Annex 1 on the achievement of the operational objectives.

The findings are based on the triangulation of data collected through various channels, including desk research, interviews, the expert panel, the 27 national reports produced by the network of national legal experts, a survey of Central Authorities, and the analysis of the responses to the European Commission's public consultation[41]. The relevant evidence is provided in Annex 1, while the present section focuses on the main insights and conclusions based on these sources. Quantitative estimates are provided in the chapter "*Quantitative analysis and hypothetical cases*". Additional analysis on costs, delays, stress and fundamental rights is also provided for each hypothetical case in the same section.

For each specific objective, we present the following information:

- A first box (with a blue frame) about the following elements:
  - How the topic addressed is important for citizens;
  - How the Regulation addresses this topic;
- Then a summary of the main findings in a free text; and
- Finally a table analysing for each **high-priority legal issue** the link with the specific objective; we invite the reader to focus on the lines that are marked as "dark green", inasmuch as the "light green" ones are then further explained in another specific objective (following the logic of Table 2); cross-references for the light green ones are indicated in order to facilitate the search for information.

### *Access to court for citizens in international families with a close connection to the EU*

**How is the topic important for citizens?**

**Citizens with a close connection to the EU who are in an international family conflict and want to obtain a divorce or a separation, or a ruling on parental responsibility expect to be granted access to a suitable court within the EU.** In this regard, the Charter of Fundamental Rights of the European Union[42], in its Article 47 (Right to an effective remedy and to a fair trial) guarantees the access to justice as well as legal aid where necessary.

**How does the Regulation address this topic?**

The Brussels IIa Regulation ensures access to court for citizens in international families with a close connection to the EU through clear **rules on jurisdiction** in international disputes on matrimonial matters and matters of parental responsibility.[43]

In addition to ensuring the access to court through clear jurisdiction rules, the provisions of the Brussels IIa Regulation aim at providing **access to the most suitable court** for each specific case:

- In matrimonial matters, jurisdiction can be established based on different alternative grounds, which are linked to the spouses' current or former habitual residence or their nationality. The alternative grounds provide some flexibility to the spouses to file their case before the most

[41] A detailed description of the study's methodology including the data collection activities is provided in the chapter "*Main Elements of the Methodology for the Evaluation and Impact Assessment of the Brussels IIa Regulation*".
[42] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF
[43] In this regard, please also refer to the analysis regarding the specific objective "*Predictability, clarity, and reliability for citizens involved in cross-border cases*" of the Brussels IIa Regulation.

suitable court.

- In matters of parental responsibility, jurisdiction is based on the criterion of proximity (i.e. the habitual residence of the child), subject to some flexibility. This ensures that the child's view can be taken into account without the child having to travel, that procedures relating to the collection of evidence (e.g. situation reports) can be completed as quickly as possible, and that the court has an understanding of the situation in the Member State the child lives in.

Furthermore, the Regulation provides **possibilities for grouping or transferring cases to more suitable courts.**[44]

Finally, Article 50 of the Brussels IIa Regulation aims to ensure that Member States provide **legal aid to those who need it**, thereby securing effective access to justice for vulnerable groups.[45] [46]

While the existing provisions on jurisdiction and legal aid are ensuring effective access to (a suitable) court for citizens in international families with a close connection to the EU in a very large majority of cases[47], three **legal issues** relating to **jurisdiction rules** are still leading to risks of citizens being excluded citizens from their fundamental right to access to a court within the EU or to situations, where the court that has been determined as having jurisdiction may not be the most suitable one to hear the case. The three legal issues are discussed in more detail in the table below.

**Table 3: High-priority legal issues under specific objective 1 "*Access to court for citizens in international families with a close connection to the EU*"**

| High-priority legal issues | **Specific objective 1: Access to court for citizens in international families with a close connection to the EU** |
|---|---|
| ***Jurisdiction rules*** | |
| The current jurisdiction rules do not sufficiently promote a common agreement between spouses | As discussed further under specific objective 4 "*Protection of the economically weaker spouse*", the **failure to enable the choice of court may prevent couples from access to the most suitable/convenient court** (from the parties' perspective).[48] |
| Potential exclusion of certain people with a close connection to | The jurisdiction rules of the Brussels IIa Regulation do not apply to families of different nationalities living in a third State. In these situations, **national rules are used to establish jurisdiction**.[49] In other words, the courts of the Member |

[44] A comprehensive analysis of these issues can be found in the sections *"Ambiguities in the interpretation of the rules on prorogation of jurisdiction"* and "*Limited actual use of the possibility to transfer a case*" in Annex 1.
[45] The provisions on legal aid are restricted to the main recognition and enforcement procedures: Article 21 (Recognition of a judgment), Article 28 (Enforceable judgments), Article 41 (Rights of access), Article 42 (Return of the child), Article 48 (Practical arrangements for the exercise of rights of access).
[46] A comprehensive analysis of this issue can be found in the section *Legal aid systems do not sufficiently take into account the specific needs and costs related to proceedings under the Brussels IIa Regulation* in Annex 1.
[47] A comprehensive analysis can be found in the section "Jurisdiction rules" in Annex 1.
[48] A comprehensive analysis of this issue can be found in the section "*Jurisdiction rules applicable to matrimonial matters"*, sub-section *The current set-up of jurisdiction rules does not sufficiently promote a common agreement between spouses* in Annex 1.
[49] Article 7 for matrimonial matters and Article 14 for parental responsibility

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| the EU from access to a suitable EU court | States may avail themselves of national rules of jurisdiction (so-called "**residual jurisdiction**").[50] In matrimonial proceedings, residual jurisdiction rules may be applied if the **spouses have nationalities of different EU Member States and their place of residence in a third country**. For matters of parental responsibility, the rules on residual jurisdiction are relevant for **children who are EU citizens and have their habitual residence in a third country**.<br><br>The national rules of jurisdiction are not harmonised, but based on different criteria, such as nationality, residence or domicile.[51] Indeed, the national rules to determine jurisdiction seem to vary widely. In about half the Member States the nationality of either a spouse or the child concerned is sufficient to bring proceedings in the EU irrespective of residence. **In the other half, it is not possible for residents of third countries to bring proceedings in the Member States' jurisdiction.**[52] The issue is thus very sensitive, as in those countries where the latter situation applies, the groups referred to above (couples and children with nationality of an EU Member State but residence in a third country) **may potentially be excluded from access to a court in the EU**, although they might have a close connection to a Member State by means of their nationality.<br><br>It appears that the non-harmonisation of rules on residual jurisdiction has not led to any major practical problems related to the exclusion of certain groups of people. While a theoretical risk of exclusion of EU citizens who have their residence outside the EU from access to court – mainly based on nationality – exists, it was not possible to identify any evidence on actual cases of this nature. Nonetheless, the respect of the fundamental right of access to justice (Article 47 of Charter of Fundamental Rights of the European Union) might be considered as jeopardised by the potential (i.e. theoretically possible) exclusion of certain groups of citizens to access to a court in the EU due to the non-harmonisation of rules on residual jurisdiction.<br><br>It is important to note that – unlike recent legislative instruments, such as the |

50 A comprehensive analysis of this issue can be found in the section *Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court* in Annex 1.

[51] For an overview of the national rules on residual jurisdiction, please refer to the sub-section Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court of section "Horizontal issues" in the Chapter "Jurisdiction Rules" in Annex 1.

An overview of national rules on divorce prepared by the *European Judicial Network in Civil and Commercial Matters* is available at: http://ec.europa.eu/civiljustice/divorce/divorce_ec_en.htm

[52] The national rules on residual jurisdiction were reviewed in a study commissioned by the European Commission in 2007: Nuyts et al. (2007): *Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations, study commissioned by the European Commission*, pp. 94-97. For **matrimonial matters**, the study found that the citizenship of one spouse is not a valid ground of jurisdiction in the following Member States: BE, CY, DE, ES, FI, GR, LV, MT, NL, Scotland. In Croatia, which became a Member State in 2013, the citizenship of one spouse is not a valid ground of jurisdiction, except if the plaintiff is a citizen of the Republic of Croatia and the law of the state whose courts would have jurisdiction does not provide for the institution of dissolution of marriage (Articles 61-63 of the Croatian Private International Law Act). For **matters of parental responsibility**, the study found that citizenship of the child or of one parent is not a ground of jurisdiction in the following Member States: CY, DE, DK, FI, LV, MT, NL, PT, RO, Scotland, SE, SK, SI (however, the citizenship of both parents is a ground of jurisdiction). This information is subject to any legislative changes that may have occurred since 2007. An overview of national rules on divorce prepared by the *European Judicial Network in Civil and Commercial Matters* is available at: http://ec.europa.eu/civiljustice/divorce/divorce_ec_en.htm.

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| | Maintenance Regulation or the Succession Regulation (650/2012) – the Brussels IIa Regulation does not provide for a ***forum necessitatis***[53] – i.e. a forum which is provided to individuals to whom no other forum is available and where the dispute has a sufficient connection with the Member State concerned.[54] The absence of a *forum necessitatis* in the Brussels IIa Regulation in combination with the reliance on (non-harmonised) national rules to establish residual jurisdiction **may lead to situations where EU citizens are excluded from any jurisdiction on matrimonial matters and parental responsibility**, i.e. do not have access to court in the EU.[55] |
| Different interpretations of the term 'habitual residence' | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", there are difficulties in applying the **concept of habitual residence of the child**.[56] Based on the vagueness of the concept, there can be situations in which proceedings are held in a Member State that is not the best placed to hear the case. This is **detrimental to the objective of ensuring effective access to the most suitable court**. |

### *Predictability, clarity, and reliability for citizens involved in cross-border cases*

**How is the topic important for citizens?**

**When international married couples want to divorce or separate, or decisions must be made on the exercise of parental responsibility in international families, citizens expect predictable, clear and reliable rules as part of an internal market that is functioning effectively and a common judicial area.** Disputes on international family law issues are already very stressful for citizens and it is imperative that legal obstacles and ambiguity of applicable rules not cause further issues and stress.

**How does the Regulation address this topic?**

One of the core aims of the Brussels IIa Regulation is to offer EU citizens legal certainty and predictability in cross-border disputes through clear rules concerning jurisdiction (i.e. what court (in what country) is competent to handle the case), and the recognition and enforcement of judgments. The Brussels IIa Regulation provides a **comprehensive set of rules on international jurisdiction as well as recognition and enforcement of foreign judgments** in matrimonial matters and matters of parental

[53] Grounds of jurisdiction that allows, on an exceptional basis, a court of a Member State to have jurisdiction over a case which is connected with a third State, in order to remedy, in particular, situations of denial of justice, for instance where the proceedings prove impossible in the third State in question (for example, because of civil war); see Recital 16 of the Maintenance Regulation. It is traditionally considered, and has even been pointed out during parliamentary discussions in some Member States, that this jurisdiction "of necessity" is based on, or is even imposed by, the right to a fair trial under Article 6(1) of the European Convention on Human Rights –Study on Residual Jurisdiction, p. 64.
Such grounds of jurisdiction were demanded by the European Parliament in its legislative resolution of 15 December 2010 on the proposal for the Rome III Regulation; Resolution P7_TA(2010)0477, point 3.

[54] A comprehensive analysis of this issue can be found in the section *Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court* in Annex 1.

[55] Numerous stakeholders and experts as well as a large majority of the respondents to the European Commission's public consultation (77%) noted that the absence of a "*forum necessitatis*" hampers legal certainty and the assurance of EU citizens' fundamental right of access to court. Please refer to the section "*Quantitative analysis*" for an estimation of the number of citizens affected by this issue.

[56] See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term 'habitual residence'* in Annex 1.

responsibility. National substantive rules are not affected by the Brussels IIa Regulation.

Legal clarity, predictability and reliability are cross-cutting issues that concern all provisions of the instrument and are mainly ensured through detailed and unambiguous provisions, as well as coherent implementation in practice in all Member States. In some cases, additional clarifications have been provided through interpretations of the European Court of Justice (ECJ). In addition, to ensure support to citizens in cross-border proceedings relating to parental responsibility, all Member States have established **Central Authorities**. These bodies assist citizens in the understanding and use of the rules laid down in the Brussels IIa Regulation in specific cases of parental responsibility matters. Finally, various European Commission and Member State **soft measures** – such as training, information portals[57] or the publication of guides[58] and brochures – aim at improving the awareness and understanding of the functioning of the Brussels IIa Regulation among citizens and legal practitioners.

There is broad agreement among experts and stakeholders that – compared to the situation before the enactment of the Brussels IIa Regulation – the Regulation has brought about increased predictability, clarity and reliability for citizens involved in international disputes in matrimonial matters and matters of parental responsibility. Establishing common rules on international jurisdiction and recognition and enforcement, has smoothed the resolution of such disputes.

Nonetheless, a **series of remaining legal issues** are negatively affecting the predictability, clarity, and reliability for citizens involved in cross-border cases. These issues are discussed in the table below.

**Table 4: High-priority legal issues under specific objective 2 "*Predictability, clarity, and reliability for citizens involved in cross-border cases*"**

| High-priority legal issues | **Specific objective 2: Predictability, clarity, and reliability for citizens involved in cross-border cases** |
|---|---|
| ***Jurisdiction rules*** | |
| Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court | As discussed under specific objective 1 "A*ccess to court for citizens in international families with a close connection to the EU*", the Brussels IIa Regulation does not apply to families of different nationalities living in a third State. In these situations, national rules are used to establish jurisdiction (so-called "residual jurisdiction"). The national rules on jurisdiction are not harmonised, and in some Member States it is not possible for residents of third countries to bring proceedings in the Member State's jurisdiction. In addition, the Brussels IIa Regulation does not provide for a *forum necessitatis* – i.e. a forum which is provided to individuals to whom no other forum is available and where the dispute has a sufficient connection with the Member State concerned. The different treatment in different Member States of residents of third states may lead to situations where it is not clear to EU citizens whether they have access to a court in the EU. The **uncertainty on whether their fundamental right of access to court in the EU is guaranteed** can be a significant source of stress for citizens. |

[57] See for instance European e-justice portal: https://e-justice.europa.eu/content_family_matters-44-en.do

[58] See for instance the European Commission's practical guide for the application of the Brussels IIa Regulation, http://ec.europa.eu/civiljustice/publications/docs/guide_new_brussels_ii_en.pdf

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| Potential for 'rush to court'/'forum shopping' on the basis of the alternative grounds of jurisdiction | As discussed further under specific objective 4 "*Protection of the economically weaker spouse*", the jurisdiction rules of the Brussels IIa Regulation[59] leave room for '**rush to court' or 'forum shopping' behaviour**.[60] This behaviour **reduces predictability**, as spouses may feel pressured to act fast and file applications in different courts shortly after each other. This can be a significant source of stress for citizens. |
| The current jurisdiction rules do not sufficiently promote a common agreement between spouses | As discussed further under specific objective 4 "*Protection of the economically weaker spouse*", the jurisdiction rules of the Brussels IIa Regulation currently do not provide for a possibility for spouses to choose the competent court by common agreement (choice of court)[61] **preventing couples from predetermining the jurisdiction of potential divorce proceedings**. This **creates uncertainty** on the applicable jurisdiction and the **risk of a rush to court in case of divorce**. |
| Different interpretations of the term 'habitual residence' | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", the **vagueness of the concept of the habitual residence of the child** has in some cases led to challenges regarding the determination of jurisdiction in cases relating to parental responsibility matters.[62] The **vagueness** of the concept leaves room for **long debates** about it in court with **uncertain outcomes**. This may be very stressful for the parties involved. |
| ***Hearing of the child and its representation in court*** | |
| Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments) | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", the vagueness of provisions on the hearing of the child and the differences in national standards in this regard have led to **reservations and refusals of the recognition and enforcement of certain judgments**, thus **standing in the way of the legal certainty and predictability for citizens**. |
| Different practices relating to the representation of the child in court | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", the difficulties concerning the legal representation of the child in court are a source of **legal uncertainty for citizens due to different practices across the Member States and a lack of information on** |

[59] Notably Article 3 and 19 of the Brussels IIa Regulation.
[60] A comprehensive analysis of this issue can be found in the section *Potential for rush to court/forum shopping on the basis of the alternative grounds of jurisdiction* in Annex 1.
[61] A comprehensive analysis of this issue can be found in the section *Jurisdiction rules applicable to matrimonial matters*, sub-section *The current set-up of jurisdiction rules does not sufficiently promote a common agreement between spouses* in Annex 1.
[62] See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term 'habitual residence'* in Annex 1.

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| | **these practices**. The uncertainty for parents about whether and how their child will be represented in another Member State and how this will impact the court proceedings may be a significant source of stress. |
| ***Recognition and enforcement*** | |
| Different interpretations of the term 'recognition' leading to differing practices as to which judgments require a declaration of enforceability | As discussed further under specific objective 3 "*Smooth recognition and enforcement of judgments, authentic instruments and agreements*", there is currently **no uniform interpretation of the term 'enforcement',** leading to different practices in Member States on whether or not judgments require a declaration of enforceability.[63] On this basis, it is in some cases **difficult for citizens to predict whether or not they need go through exequatur proceedings**.[64] |
| Exequatur proceedings are still in place for some types of judgments | As discussed further under specific objective 3 "*Smooth recognition and enforcement of judgments, authentic instruments and agreements*", the so-called **exequatur procedure** for the enforcement of judgments on the exercise of parental responsibility has been abolished for some types of judgments but pertains for others. This may lead to **contradictory and unclear situations** where a judgment refers to different aspects relating to parental responsibility that are governed by different procedures (e.g. access rights and custody). |
| Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement | As discussed further under specific objective 3 "*Smooth recognition and enforcement of judgments, authentic instruments and agreements*", some decisions on parental responsibility are never enforced because of **practical obstacles during enforcement procedures**.[65] For **citizens involved in cross-border cases on parental responsibility**, this is a **considerable factor of uncertainty**, as they **cannot be sure whether a judgment will eventually be enforced**. |
| ***Provisions specific to child abduction cases*** | |
| Difficulties relating to the time limit for return (i.e. not clear and not effective) | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", a **lack of clarity** exists on the application of the six weeks' time limit. This may result in stress for citizens because they do not know when they can expect a wrongfully removed child to be returned. |
| Questions on the | As discussed further under specific objective 5 "*Well-being of the child and* |

[63] A comprehensive analysis of this issue can be found in the section *Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement* in Annex 1.
[64] COM(2014) 225 final, p. 10.
[65] A comprehensive analysis of this issue can be found in the section *Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement* in Annex 1.

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| practical application of Article 11(4) and ambiguity as regards the concept of 'adequate arrangements' under that provision | *parent-child relationship*", many experts and stakeholders reported that it is not clear how to interpret and apply the **concept of "adequate arrangements"** in Article 11(4). The **lack of clarity on the concept of 'adequate arrangements'** and what arrangements need to be made to fulfil this criterion lead to significant legal uncertainty for citizens. There is no guideline regarding the procedural and substantive requirements. This leads to a situation where it is **difficult for the party to know whether the measures taken will be sufficient**. In addition, it is currently not clear who has to implement the measures, both from a practical and financial perspective. Finally, the **lack of precision of the Article leaves open the possibility of a refusal of return being legitimised**. |
| Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplication of the Regulation and reservations against the content of decisions | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", in practice, **hurdles remain in connection with the actual enforcement of return orders**.[66] As enforcement procedures are subject to the law of the Member State of enforcement, the means of enforcement differ across Member States. In some Member States, **enforcement procedures can last for over a year** as enforcement courts re-examine the substance of the case, although return orders should be enforced immediately. In addition, the **actual enforcement of return orders is often delayed or not finalised at all**, leading to **serious doubts on the part of citizens with regard to the legal certainty, predictability and reliability of the instruments provided by the Brussels IIa Regulation**. |
| ***Support to citizens in cross-border proceedings by Central Authorities*** | |
| Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in the proceedings concerning children | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", **practical difficulties** have occurred regarding the **cooperation between Central Authorities and local authorities**. Given the practical roles of the latter authorities in cases on parental responsibility, **it is possible that cases are not handled correctly and/or that parents are not well informed**, e.g. on the possibilities for support offered by the Central Authorities. This can be a **significant source of uncertainty, delays and stress for citizens**. |
| ***Information and awareness*** | |
| **Practitioners** are not sufficiently aware of the Regulation, leading to the | Despite the measures taken by the European Commission and the Member States – such as training, information portals[67] or the publication of guides[68] and brochures – aiming at improving the **awareness and understanding of the functioning of the Brussels IIa Regulation among citizens and legal** |

[66] A comprehensive analysis of this issue can be found in the section *Problems regarding the actual enforcement of return orders* in Annex 1.
[67] See for instance European e-justice portal: https://e-justice.europa.eu/content_family_matters-44-en.do
[68] See for instance the European Commission's practical guide for the application of the Brussels IIa Regulation, http://ec.europa.eu/civiljustice/publications/docs/guide_new_brussels_ii_en.pdf

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| misapplication of certain provisions<br><br>**Citizens** are not sufficiently aware of the content of the Regulation and its implication for international proceedings on matrimonial matters, matters of parental responsibility or child abduction | **practitioners**, several interviewees noted that awareness levels among citizens and legal practitioners are low.[69] **Citizens are often not aware of their rights and obligations** under the Brussels IIa Regulation. For instance, parents are very often not aware that they cannot bring their child to their country of nationality without the consent of the other parent. **Insufficient information and awareness on the part of citizens can lead to unintended illegal behaviour** (e.g. child abduction) and result in legal proceedings. Furthermore, it was reported that even many lawyers, judges and public child protection services are not aware of the basic provisions of the Brussels IIa Regulation, e.g. the automatic recognition of (most types of) judgments. Courts outside the capital are also generally in need of information. In some cases, this leads to non-application or misapplication of (certain provisions of) the Regulation and is thus detrimental to legal certainty and predictability for citizens. |

### *Smooth recognition and enforcement of judgments, authentic instruments and agreements*

**How is the topic important for citizens?**

Citizens involved in cross-border conflicts need to hold proceedings in a Member State other than the Member State where they live. If a judgment is taken relating to divorce or matters of parental responsibility, citizens need this judgment to be valid ('recognised') also in the Member State where they live. Otherwise, several practical consequences of a decision cannot be implemented. The change of status caused by a divorce will need to be registered by the competent authorities in the Member State and civil status records need to be updated. In addition, a divorce potentially has consequences, for example, in relation to property or to taxes. A judgment on parental responsibility may specify who will be the main holder of custody rights, where the child will live, and the modalities of visits by the other parent. In some cases relating to parental responsibility matters, judgments do not only need to be recognised, but also enforced in order to ensure that all parties comply with the decision. In addition, it is possible that decisions relating to parental responsibility are not specified in a judgment, but in a different form. For example, visiting rights and arrangements could also be agreed in written form as a result of mediation sessions. Such agreements are referred to as 'authentic instruments and agreements'. Cross-border family conflicts are already very stressful and costly for the parties involved, and sometimes take several years. It is thus of great importance for citizens that the process of recognising, and possibly enforcing, a judgment be as smooth as possible and not entail any additional delays or additional costs.

**How does the Regulation address this topic?**

The need for smooth recognition and enforcement across the EU is addressed by the Regulation in different ways. The Regulation states that, in line with the general priorities of the EU[70], judgments,

[69] A comprehensive analysis of issues related to the information and awareness of citizens and legal practitioners can be found in the section "*Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States*".

[70] The Tampere European Council, which took place before the adoption of the Regulation in 1999, underlined that certain judgments on family matters should be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement'.(see http://www.europarl.europa.eu/summits/tam_en.htm)

authentic instruments and agreements should as far as possible be recognisable and enforceable without extensive intermediate procedures.[71] For both matrimonial matters and matters of parental responsibility, the following applies with regard to the recognition of judgments:

- Judgments are automatically recognised and the effects, such as updating the civil status records, can be initiated without any additional procedure or request being necessary;[72] and
- There are only a few grounds for which the recognition of judgments may be refused in order to ensure that the majority of judgments are recognised without any difficulties.[73]

The rules on enforcement are only relevant for matters of parental responsibility, because the aspects of matrimonial matters that are covered by the Regulation do not need to be enforced.[74] For parental responsibility matters, the Regulation aims to ensure that the enforcement of judgments, authentic instruments and agreements is as smooth as possible:

- In some cases, it is necessary for citizens to apply to a court that can 'declare a judgment enforceable'. With such a declaration, a judgment can then be implemented in practice. The Regulation streamlines this procedure to ensure that it is as fast as possible and that most judgments will be enforced due to a limited number of grounds for refusing enforcement;[75] and
- For specific types of decision, including on rights of access and specific decisions on the return of the child, intermediate proceedings on enforcement have been abolished. These decisions are thus immediately enforceable on the basis of a certificate issued by the court that is responsible for the judgments.[76]

The evidence collected as part of this study suggests that the Brussels IIa Regulation has made it easier for citizens to have judgments recognised and enforced across borders. Administrative costs related to procedures for recognition and enforcement of judgments (e.g. court fees, legal advice, costs for submission of documents) and delays related to lengthy procedure for the recognition and enforcement have been reduced. Most stakeholders consider that the automatic recognition of *all* judgments and the abolition of intermediate proceedings on enforcement (exequatur) for *most* judgments are very valuable improvements introduced by the Brussels IIa Regulation. In addition, the fact that there are only few grounds for refusing the recognition or enforcement of a judgment is welcomed. The national experts and practitioners consulted could identify no or few cases, where the recognition of a judgment was refused and indicated that the majority of judgments are recognised.

However, some issues remain and lead to situations in which citizens still need to go through intermediate proceedings to have judgments recognised or enforced. This is associated with additional costs, delays and stress for citizens. While data on costs and delays in proceedings are scarce, it is estimated that the **costs** of exequatur proceedings that are not appealed is around EUR 1,000. Where they are appealed, the associated costs are higher.[77] As far as potential **delays** in the proceedings are concerned, data on the Brussels I Regulation shows that the average duration of exequatur proceedings ranges from one week in Austria to up to seven months in Greece. In general, however, the majority of delays in legal procedures occur where one of the parties appeals. The average length of such appeal procedures ranges from one to two months in England and Wales to

[71] See Recitals (22) - (24).
[72] Article 21.
[73] Articles 22 and 23.
[74] Other aspects that might be related to a divorce or legal separation and that might need enforcement are, for example, decisions on the property of spouses or assets. These aspects are not covered by the Regulation.
[75] Chapter III, Section 2 of the Regulation.
[76] Chapter III, Section 4 of the Regulation.
[77] These estimates are based on the 2007 Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union (available at: https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do) and on Expert judgment.

up to three years in Malta.[78] On this basis, citizens face **stress** because they need to put additional effort into having their judgments recognised or enforced, and cannot be certain of the outcome. In cases related to matters of parental responsibility, the delays can also negatively affect the **well-being of the child** (cf. the introduction to the specific objective 5 "*Well-being of the child and parent-child relationship*").

The main legal issues that affect this specific objective and the associated problems for citizens are discussed in the table below.

**Table 5: High-priority legal issues under specific objective 3 "*Smooth recognition and enforcement of judgments, authentic instruments and agreements*"**

| High-priority legal issues | **Specific objective 3: Smooth recognition and enforcement of judgments, authentic instruments and agreements** |
|---|---|
| ***Hearing of the child and its representation in court*** | |
| Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments) | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", the Regulation is based on the principle that in cases involving a child, that child's views are to be taken into account.[79]<br>In particular, it is possible for Member States to refuse to recognise or enforce a judgment[80] on the grounds that the child was not given an opportunity to be heard.[81] The fact that the assessment of whether a child should be heard in a specific case (and how) may differ from court to court[82] has led to several cases where the **recognition of a judgment was refused** based on the fact that the child was not given an opportunity to be heard and make his/her views known in an effective way. This causes **delays and stress**. |
| ***Recognition and enforcement*** | |
| Different interpretations of the term 'recognition' leading to differing practices as to which judgments require a declaration of | As outlined in the Commission's application report on the Regulation and supported by the stakeholders we consulted, **there is currently no uniform interpretation of the term 'recognition'**.[83] Practitioners appear to have difficulties in distinguishing between the terms recognition, enforceability and enforcement. Although recognition should be automatic based on the Regulation, this is sometimes not understood with respect to cases on matters of parental responsibility. Therefore, certain Member States may |

[78] This is based on *European Commission; Commission Staff Working Paper SEC(2010) 1547 final* (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1547:FIN:EN:PDF).

[79] Recital (19), Brussels IIa Regulation.

[80] A comprehensive analysis of this issue can be found in the section *Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and enforcement of judgments)* in Annex 1.

[81] For example, if the judgment is considered to have been "*given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought*", Article 23(b). See also Article 41(2)(c), Article 42(1)(a) Brussels IIa Regulation.

[82] Examples of points where the assessment of two courts have differed as to if and how a child should be heard are provided under specific objective 5 "*Well-being of the child and parent-child relationship*".

[83] A comprehensive analysis of this issue can be found in section *Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement* in Annex 1.

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| enforceability | require a declaration of enforceability of a decision before it can be enforced whilst others recognise decisions automatically.<br>This has implications for the question whether citizens can benefit from the automatic recognition of the decision or if they need to initiate proceedings in order to have the decision recognised. For example, where a person is appointed as the guardian of a child by a Member State court and this guardian requests the delivery of a passport in another Member State, practices vary depending on the Member State. Some Member States only require the recognition of the judgment attributing the guardianship, whilst others consider that issuing the passport is an enforcement act and thus require citizens to go through intermediate proceedings (a declaration of enforceability of the guardianship decision) before the passport can be issued.[84] **Additional proceedings** may thus need to be initiated, depending on the Member State concerned. Citizens may face **costs and delays** associated with such procedures (cf. the introduction of this section). |
| Exequatur proceedings are still in place for some types of judgments | The fact that there are still **intermediate procedures for declaring some kinds of judgments enforceable hinders the smooth enforcement of judgments**. Several national experts and practitioners regretted this.[85] Although such proceedings are a way of exercising control, e.g. on whether a judgment is indeed in line with the best interests of the child, this controlling function is applied only to a limited extent, because in some Member States the enforcement of judgments is not decided on by judges, but rather by administrative personnel at courts or authorities. However, such proceedings cause problems with smooth enforcement by creating **significant costs and delays for citizens**, because there are still administrative formalities and judicial procedures to go through. As explained in the introduction to this section, delays can be quite significant depending on the Member State and circumstances of the case. There are many factors that hinder the expeditious conduct of such proceedings in the Member States. Obtaining the documents and, in particular, translations can take a long time. |
| Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement | Some decisions on parental responsibility are **never enforced due to practical obstacles during enforcement procedures**.[86] First, **delays** can ensue **at the stage of enforcement proceedings**. In particular, it was reported that the substance of judgments is sometimes reviewed at this stage. This is not in line with the Regulation, as Article 31(3) states that *under no circumstances may a judgment be reviewed as to its substance*. In addition, **appeals concerning** a declaration of enforceability can cause significant delays if they suspend enforcement. Second, **delays** may ensue **due to a lack of resources in the Member State** or because the parties involved, which could be court bailiffs, public social or welfare authorities, law enforcement authorities or other parties such as psychologists or mediators, are **not cooperating effectively**. For citizens involved in cross-border cases on parental responsibility, this is a **factor of uncertainty**, as they cannot be sure whether a judgment will |

[84] COM(2014) 225 final, p. 10.

[85] A comprehensive analysis of this issue can be found in the section *Exequatur proceedings are still in place for some types of judgments* in Annex 1.

[86] A comprehensive analysis of this issue can be found in section *Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement* in Annex 1.

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| | eventually be enforced. If a judgment is not enforced, the efforts put into the legal disputes will have been in vain. In addition, there are implications for the **well-being of the child and the parent-child relationship**, e.g. if the **stressful** status of uncertainty about the arrangements of parental responsibility is prolonged. |
| ***Provisions specific to child abduction cases*** | |
| Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplication of the Regulation and reservations against the content of decisions | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", particular obstacles **hindering the actual enforcement of judgments**[87] were reported **with regard to the return of the child** in cases of child abductions (where one of the parents moves abroad with the child without the other parent's consent). |
| ***Information and awareness*** | |
| **Practitioners** are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions of the Brussels IIa Regulation | As discussed further under specific objective 2 "*Predictability, clarity, and reliability for citizens involved in cross-border cases*", there is a lack of awareness about the Regulation among practitioners. While the (automatic) recognition of judgments in matrimonial matters and cases of parental responsibility functions well in practice, some practical issues, covering both matrimonial matters and matters of parental responsibility, were identified. These relate in particular to **ambiguities that have led to the Regulation being applied wrongly in the past**. For example, ambiguities exist with respect to the recognition of judgments: As noted above, the recognition of judgments and the updating of civil status documents should function automatically. However, in some Member States the provisions stipulating that recognition should be automatic[88] are interpreted differently way or not understood properly by the judges or public authorities responsible. As a consequence, there have been cases where citizens had to **produce additional documents to have a judgment recognised**, although this was not in line with the Regulation. Sometimes, such documents, which stem from a different Member State, also need to be translated to be considered valid. Thus, additional **costs** were incurred and the citizens faced **delays** as well as additional **stress.** |

[87] A comprehensive analysis of this issue can be found in the section *Problems regarding the actual enforcement of return orders* in Annex 1.
[88] These include in particular Article 21.

### *Protection of the economically weaker spouse*

**How is the topic important for citizens?**

**In the particularly stressful times of divorce or separation, or becoming adversaries in a parental responsibility case, the economically weaker spouse could be especially affected** (in addition to children, discussed under the separate specific objective 5). It is relevant in this regard that the Charter of Fundamental Rights of the European Union[89], in its Article 47 (Right to an effective remedy and to a fair trial) stipulates that "*legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*"

**How does the Regulation address this topic?**

The Brussels IIa Regulation contributes to the protection of the economically weaker spouse through **clear and fair rules on jurisdiction, and recognition and enforcement** in international disputes on matrimonial matters and matters of parental responsibility.[90] Such rules impede attempts to exploit the vulnerabilities of the economically weaker spouse, notably his/her relative difficulty in accessing professional legal advice. Furthermore, Article 50 of the Brussels IIa Regulation aims to ensure that Member States provide **legal aid to those who need it** in relation to some particularly important recognition and enforcement procedures[91] foreseen in the Regulation.

While the existing provisions on legal aid and the improved legal certainty and clarity for citizens (as compared to the situation before the enactment of the Regulation)[92] have contributed to the protection of the economically weaker spouse, **a series of legal issues** are still leading to situations where disadvantages persist. These legal issues are discussed in more detail in the table below.

**Table 6: High-priority legal issues under specific objective 4 "Protection of the economically weaker spouse"**

| High-priority legal issues | **Specific objective 4: Protection of the economically weaker spouse** |
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| ***Jurisdiction rules*** | |
| Potential for 'rush to court'/'forum shopping' on the basis of the alternative grounds of jurisdiction | The jurisdiction rules of the Brussels IIa Regulation[93] that allow for alternative grounds of jurisdiction, i.e. alternative possibilities on which courts are competent, have led to instances in which the spouses tried to beat each other in filing a claim in the Member State in which they expect the outcome will be most favourable to them (i.e. the so-called **"rush to court" or "forum shopping" phenomenon**).[94] Typically, **specialised legal advice is needed to** |

[89] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF

[90] In this regard, please also refer to the analysis regarding the specific objective "*Predictability, clarity, and reliability for citizens involved in cross-border cases*" of the Brussels IIa Regulation.

[91] Article 21 (Recognition of a judgment), Article 28 (Enforceable judgments), Article 41 (Rights of access), Article 42 (Return of the child), Article 48 (Practical arrangements for the exercise of rights of access).

[92] A comprehensive analysis can be found in the sections *"Jurisdiction rules"* and *"Support to citizens in cross-border proceedings by Central Authorities"* in Annex 1

[93] Notably Articles 3 and 19 of the Brussels IIa Regulation.

[94] A comprehensive analysis of this issue can be found in the section *Potential for rush to court/forum shopping on the basis of the alternative grounds of jurisdiction* in Annex 1.

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| | **take full advantage of the alternative grounds of jurisdiction (and rush to court/forum shopping) – a situation that may put the economically weaker spouse at a disadvantage, given that they may not be able to afford such advice.**[95] Indeed, rush to court/forum shopping is mainly exploited by wealthy spouses, who take advantage of legal advice to determine which court would entail the most advantageous outcome for them.[96] |
| The current jurisdiction rules do not sufficiently promote a common agreement between spouses | The jurisdiction rules of the Brussels IIa Regulation currently do not provide for a possibility for spouses to choose the competent court by common agreement (**choice of court**).[97] This can prevent couples having their divorce proceedings in the Member State of their common choice. That **makes it impossible to conclude agreements that could protect the economically weaker spouse from a rush to court/forum shopping** in case of divorce (by predetermining the jurisdiction by common agreement). On the other hand, several stakeholders and respondents to the public consultation noted that choice of court agreements could be misused in a way that placed the economically weaker spouse at a disadvantage as they might not be able to assess the consequences of agreeing to choose a certain jurisdiction. However, the EU legislator has already concluded in other family law instruments (such as the Rome III Regulation and the Maintenance Regulation) that choice-of-court agreements are overall beneficial for parties in cross-border proceedings. The absence of the possibility of choosing a court in divorce proceedings is therefore not in line with more recent EU instruments. |
| Different interpretations of the term 'habitual residence' | As discussed further under specific objective 5 "*Well-being of the child and parent-child relationship*", the **vagueness of the concept of habitual residence of the child** has in some cases led to prolonged disputes about jurisdiction for cases of parental responsibility matters.[98] In such cases, the **economically weaker spouse may be at a disadvantage by not being able to afford the necessary legal advice and representation to defend his/her interests adequately**. |
| ***Support to citizens in cross-border proceedings by Central Authorities*** | |
| The use of mediation is currently not promoted to a sufficient extent | The Central Authorities are required to contribute to the facilitation of an agreement between the parents, for example, through mediation (this is specified in Article 55 (e))[99]. While the effectiveness and efficiency of mediation as an alternative conflict resolution mechanism in international |

[95] N. A. Baarsma, *The Europeanisation of International Family Law* (Asser Press: 2011) 154

[96] Many interviewees and a majority of the respondents to the European Commission's public consultation (70%) believed that Brussels IIa does not sufficiently prevent rush to court/forum shopping behaviour in matrimonial matters.

[97] A comprehensive analysis of this issue can be found in the section *Jurisdiction rules applicable to matrimonial matters*, sub-section *The current set-up of jurisdiction rules does not sufficiently promote a common agreement between spouses* in Annex 1.

[98] See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term 'habitual residence'* in Annex 1.

[99] A comprehensive analysis of this issue can be found in the section *The use of mediation is currently not promoted to a sufficient extent* in Annex 1.

cases of matrimonial matters and parental responsibility is widely acknowledged[100], its **potential is currently not fully exploited, because it is not promoted to a sufficient extent**.[101] In general, it is regrettable that the recommendation for the use of mediation in the Brussels IIa Regulation is **limited to a sub-item of Article**, suggesting that the recommendation is of low importance. In addition, a number of specific weaknesses of the content of Article 55 (e) were identified that have led to an insufficient take-up and promotion of mediation in the Member States:

- The connection to the **Mediation Directive** (Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters) is not highlighted in the Brussels IIa Regulation;
- At EU level, there is no complete **overview of certified mediators** specialised in international cases of matrimonial matters and parental responsibility. Such a list has already been prepared by some Member States, such as France, and is a recommended practice of the Hague Conference Good Practice Guide on Mediation[102];
- **Judges do not always inform the parties** at the beginning of the proceedings about the possibility of mediation; and
- There are **ambiguities about the mutual recognition rule for mediation agreements** across all Member States, as this is not explicitly dealt with in the Regulation.

Based on the input received from some stakeholders consulted, it also appears that European Commission support for the practical implementation of Article 55 (e) – e.g. through the funding of training, certifications and awareness raising campaigns – is currently insufficient in scale in order to effectively promote mediation in international case of matrimonial matters and parental responsibility.

These insufficiencies affect citizens, who cannot benefit from the use of mediation. Mediation is generally less costly for the parties involved than traditional court proceedings. Moreover, a solution found under mutual agreement is often more acceptable and satisfying for the parties than a decision taken by a judge. Thus, citizens **currently face additional costs and delays that could potentially be reduced through mediation.** This can be considered of particular relevance for economically weaker spouses, who could benefit from the support of a mediator who tries to establish a solution that is acceptable for both parties. As regards parental responsibility proceedings, **mediation can help to improve the well-being of the child and the parent-child relationship.** If parents are striving to find an amicable solution, this is **less stressful for the child**, e.g. because he/she does not need to take sides. Furthermore, agreements that have been reached through mediation are often longer lasting and more sustainable compared to agreements reached before courts, because the mediator tries to ensure that

[100] The potential effects of mediation were underlined by the majority of stakeholders consulted for this study and were recently acknowledged in a study carried out by the European Parliament (available under: http://www.europarl.europa.eu/studies ). We note here that the effectiveness of mediation depends on the willingness of the parents to agree on a compromise in an amicable setting.

[101] A comprehensive analysis of this issue can be found in the section *The use of mediation is currently not promoted to a sufficient extent* in Annex 1.

[102] HCCH (2012): *Mediation – Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, http://www.hcch.net/upload/guide28mediation_en.pdf

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| | all the arguments and perspectives are taken into account. Thus future conflicts may potentially be avoided.[103] |

### *Well-being of the child and parent-child relationship*

**How is the topic important for citizens?**

**Children can be considered as a particularly vulnerable group in the context of cross-border family disputes**, including divorces that involve children as well as all cases on matters of parental responsibility. All (national and international) cases of separation or divorce of the parents are very stressful and emotional for children, who are often caught up in the conflict between the parents, have to cope with the absence of one of the parents, have to get used to new living arrangements and may face economic hardship.[104] If such conflicts involve different countries, these factors can be magnified. It is possible that the child will need to move to a different country, and solutions on visiting rights will be more difficult to find and implement in practice. Children are often powerless in such situations. Children involved in international abduction cases (where one of the parents moves abroad with the child without the other parent's consent) may face additional stress because the act of abruptly taking the child from his/her surroundings can have traumatising effects and the ensuing conflicts are usually very confusing for children.

The importance of the well-being of the child is recognised in the Charter of Fundamental Rights of the European Union[105]. Article 24 of the Charter stipulates in general terms that the well-being of children is to be ensured by providing the protection and care they need. It stipulates in regard to legal actions that concern children, thus including proceedings on matters of parental responsibility, that the child's view must be taken into consideration. Furthermore, any action by public or private institutions is to be based on the best interests of the child. Finally, it specifies that the parent-child relationship should be protected. In particular, children must have the right to maintain contact with both parents, unless this is not in line with their interest.[106]

**How does the Regulation address this topic?**

The Brussels IIa Regulation puts particular emphasis on ensuring the respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the EU.[107] On this basis, several principles and mechanisms were introduced to ensure the well-being of the child:

- The Regulation's rules on jurisdiction, i.e. the rules that decide where a case will be handled, are based on the principle that a case should be handled in the Member State with which the child has the closest connection. This means that the court in the Member State where the child lives (or is 'habitually resident') will by default be responsible, reflecting the **criterion of proximity**.[108] In addition, the Regulation allows for some limited flexibility to ensure that all

[103] This was explained during an interview with a mediator. This point is supported, for example, by Robert E. Emery, '*Renegotiating Family Relationships: Divorce, Child Custody, and Mediation*', 2012.

[104] Robert E. Emery, 'Renegotiating Family Relationships: Divorce, Child Custody, and Mediation', 2012;
By Paul R. Amato, Professor for Sociology in Journal Children and Divorce Volume 4 Number 1 Spring/Summer 1994, http://futureofchildren.org/publications/journals/article/index.xml?journalid=63&articleid=415&sectionid=2841

[105] http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[106] It can be noted in general terms that the **interpretation of the "best interest of the child"** varies significantly across countries, as pointed out by several interviewees. In addition, where the child is heard, the interpretation of what actually is in "best interests of the child" also depends significantly on the competence of the psychologist, social worker or judge responsible. Several interviewees highlighted the difficulty of assessing what is best for the child or for the parent-child relationship.

[107] See also Recital (33) Brussels IIa Regulation.

[108] Article 8. See also Brussels IIa Regulation, Recital (12).

cases can be handled in the most appropriate court, even if this might not be in the Member State where the child habitually lives.[109]

- Should one parent take the child to another Member State without the other parent's consent, the Regulation aims at ensuring that the child is returned as quickly as possible.
- The Regulation establishes a mechanism for the cooperation between and support of Central Authorities, with the aim of improving the handling of cases related to parental responsibility.
- The Regulation is based on the principle of requiring that the child's views be taken into account in cases concerning it.[110] It is possible for Member States to refuse to recognise or enforce a judgment on the grounds that the child was not given an opportunity to be heard.[111] In addition, the Regulation explicitly stipulates the requirement for a child to be heard in child abduction cases.[112]

In general terms, the evidence collected as part of this study suggests that the Brussels IIa Regulation has increased the extent to which the well-being of the child is safeguarded in cross-border cases. In particular, various stakeholders welcomed the provision in the Regulation of clear rules on jurisdiction that ensure that a case is handled in a Member State with which the child has a close connection. In addition, the involvement of the Central Authorities was considered to have contributed to a smoother handling of cases related to matters of parental responsibility.

However, a number of difficulties were identified that have negative consequences on this specific objective. While the concrete effects depend on the legal issues, some general remarks deserve to be made with respect to the negative effects of **delays**. Delays during proceedings or at the stage of recognition/enforcement prolong the time for which the child is affected by the conflicts between the parents and finds itself in circumstances that are unstable. Indeed, the child may not know where he/she will eventually live and how often he/she will see the parent who lives elsewhere. Moreover, contact with one of the parents may be hindered, in particular in relation to child abduction cases.

The main legal issues that affect this specific objective are discussed in the table below.

**Table 7: High-priority legal issues under specific objective 5 "*Well-being of the child and parent-child relationship*"**

| High-priority legal issues | **Specific objective 5: Well-being of the child and parent-child relationship** |
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| ***Jurisdiction rules*** | |
| Different interpretations of the term 'habitual | The jurisdiction rules of the Regulation for matters of parental responsibility are based on the criterion of proximity, which means that jurisdiction by default lies with the Member State of habitual residence of the child. In most |

[109] Article 12 provides holders of parental responsibility with the possibility of choosing a more suitable court under certain circumstances. Furthermore, the Regulation provides for a possibility of transferring a case or part of a case to another Member State if the latter is better placed to hear it and the transfer reflects the best interests of the child (Article 15).
[110] Recital (19), Brussels IIa Regulation.
[111] For example, if it considered that the judgment "*was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought*", Article 23(b). See also Article 41(2)(c), Article 42(1)(a) Brussels IIa Regulation.
[112] Article 11(2) Brussels IIa Regulation: „*When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity*".

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| residence' | cases, this is considered to be the Member State with the closest connection to the child.[113] However, the criterion of proximity is undermined due to difficulties relating to the concept of 'habitual residence'. There are, firstly, **difficulties in determining the court responsible** and, secondly, **situations in which a court is responsible that is not best placed to deal with a case**. More specifically, while the place of habitual residence of the child is the main factor that determines where a case will be dealt with, it is in some cases **very difficult to establish where the child has its habitual residence**,[114] it is in some cases **very difficult to establish where the child has his/her 'habitual residence'**,[115] because there is no definition of the concept. Based on existing case-law[116], the concept of 'habitual residence' is considered as often allowing for different conclusions. Particular challenges exist in complex cases, including in particular in the following situations:<br>➢ The child moved back and forth between two or more Member States.[117] It could be that the time between the countries is not equally divided or that the child spends an equal amount of time in two countries.<br>➢ The child's living situation changes while the proceedings are already ongoing.[118]<br>➢ Parents have concluded an amicable agreement about the residence of the child. Such agreements are not directly covered by the jurisdiction rules of the Regulation.<br>Although the ECJ has provided guidelines on the application of the principle, these are not always applied properly by the courts in the Member States. All the different groups of stakeholders consulted reported difficulties in establishing the child's habitual residence. These were regarded by many as one of the most severe challenges related to the application of the Regulation. It was reported by practitioners that there are cases where the habitual residence of the child is debated at length in the proceedings, thus leading to **undue delays** in some cases. Sometimes, appeals were based solely on the (potentially incorrect) determination of habitual residence. The ensuing delays prolong the situation in which the arrangements relating to parental responsibility remain unresolved. This is **detrimental to the objective of ensuring the well-being of the child**, as it prolongs a situation that is **very stressful** for the child. In addition, in some cases the fact that the determination of custody and access rights is pending might prevent or complicate contact between the child and the parents. In such situations, the **parent-child relationship may suffer** as well.<br>Additionally, in some cases, the lack of guidance on the concept of 'habitual |

[113] Recital (12) Brussels IIa.

[114] See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term 'habitual residence'* in Annex 1.

[115] See Article 8 Brussels IIa Regulation. A comprehensive analysis of this issue can be found in the section *Different interpretations of the term 'habitual residence'* in Annex 1.

[116] Next to several national cases identified by our network of legal experts, this issue was also referred to the ECJ at different occasions, including in particular the cases *Mercredi v Chaffe* (C-497/10 PPU) and *Re A* (C-523/07). Further details relating to the relevant case-law can be found in in the section *Different interpretations of the term 'habitual residence'* in Annex 1.

[117] For example, in one case, a Belgian court was faced with a situation where a one-year-old child born in Belgium had been moving back and forth between England and Belgium with his mother as the two parents divided their time between various residences. According to the Belgian national expert, this case reveals the delicate nature of the assessment to be carried out.

[118] For example, the Irish expert reported that there were a number of Irish cases and that the approaches adopted by the courts were not always consistent. One of these cases was referred to the ECJ (Case C -376/14 PPU, C v M). Further details can be found in annex 1.

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| | residence' has in the end led courts to accept jurisdiction when they were in fact not best placed to hear a case.[119] If proceedings are held in a Member State that is not the centre of the child's life, the child may have to travel during proceedings, there may be **delays in collecting evidence**, and the court that has jurisdiction may not be able adequately to take the circumstances in the Member State where the child actually lives into account. |
| Potential exclusion of certain people with a close connection to the EU from access to a suitable EU court | As discussed further under specific objective 1 "A*ccess to court for citizens in international families with a close connection to the EU*", the **absence of a "*forum necessitatis*"** in the Brussels IIa Regulation in combination with the reliance on **(non-harmonised) national rules for establishing residual jurisdiction** may lead to situations where children who are EU citizens and have their habitual residence in a third country are not granted access to a court in the EU. Proceedings in a third country could be more difficult to hold and thus **more stressful**. For example, if the family does not speak the language of the relevant country fluently, it may be **more difficult to take the views of the child into account**, e.g. because an interpreter needs to be involved. Where one of the parents lives in the EU and the judgment would need to be recognised/enforced in the EU, there might be difficulties and delays, as the judgments taken in a third country would not be covered by the Regulation. Thus, there may be **delays** during the proceedings and until a judgment is recognised or enforced. During this time, the child may be in a **stressful** situation, in particular because the arrangements on parental responsibility are not resolved (cf. introduction to this section). |
| ***Hearing of the child and its representation in court*** | |
| Inconsistent practices across Member States related to the hearing of the child in parental responsibility proceedings and return procedures (leading to difficulties related to the recognition and | The provisions of the Regulation currently leave a considerable level of discretion to judges as regards the assessment of when it is considered appropriate to hear a child; this is left to the Member States. The **national rules and practices on hearing a child vary significantly**. For example, the age at which a child is considered sufficiently mature to represent his/her views ranges from 10 to 15. In some Member States, judges also hear children that are much younger (for example 2-3 years old) if they deem this appropriate in specific cases.<br>Distrust by practitioners towards the rules in other Member States has led to reservations and refusals of the recognitions and enforcement of judgments.[120] Indeed, as pointed out above, the different practices and ideas |

[119] In this regard it is interesting to note that the Regulation provides a possibility to remedy cases in which the responsible court is not or no longer considered the most suitable court. More specifically, there is an **option to transfer a case to a court that is better suited to deal with a case in light of the best interest of the child (Article 15)**. However, there was consensus among the stakeholders consulted that the current use of the article remains limited in the Member States. It was argued that the article is not sufficiently clear, which is why courts are currently hesitant to use it. **Thus, there may be cases in which proceedings are held in a Member State that may not be the most suitable in light of the situation of the child and that the possibility to transfer the case is not made use of.** A comprehensive analysis of this issue can be found in the section *Limited use at present of the possibility to transfer a case and lack of detail as concerns the procedural rules* in Annex 1.

[120] The national experts for Germany, Hungary and Italy indicated based on available national case law that doubts relating to the hearing of the child were the main reason why recognition of judgments was refused in the past. The Belgian national expert noted that courts in Belgium are quite reluctant to hear children and that this has led to recognition issues in Germany, where the standard is stricter (in Germany, courts are obliged to hear children who have reached the age of 14 years – subject to a limited number of exceptions – and children under the age of 14 have to be heard if the preferences, ties or intentions of the child are of relevance for the decision or if a hearing is deemed appropriate for other reasons). The German expert confirmed that German courts have refused to recognise judgments on this basis, but specified that the fact that the hearing did not take place before a judge but before a psychological expert is not

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| enforcement of judgments) | on the hearing of the child can **hinder the recognition and enforcement of judgments,** leading to additional **stress for children and parents**.<br>In addition, several interviewees and participants in the expert panel regretted that the importance of the hearing relating to all cases on matters of parental responsibility is not highlighted in the Regulation in general terms, but only in relation to return proceedings. If a judgment is taken without having conducted a hearing of the child, there is a danger **that the judgment may not take the best interest of the child into account to a sufficient extent**. |
| Different practices related to the representation of the child in court | **The legislation and practices in the Member States with regard to the representation of the child in court vary and the provisions in the Regulation are not sufficiently clear**.[121] In particular, differences exist with respect to the situations in which a guardian *ad litem* must be appointed, the persons that can act as guardian *ad litem*, the procedure of appointment and the competences of the guardian *ad litem*.[122] In addition, in some Member States[123] a guardian *ad litem* is not appointed in parental responsibility proceedings, because children are not considered to be parties to parental responsibility proceedings. The varying practices are **a source of legal uncertainty for citizens due to a lack of information on these practices.**<br>In addition, decisions could be appealed based on the fact that appropriate representation has not been appointed. **Appeal proceedings lead to delays and additional costs**. The delays affect the **well-being of the child and the parent-child relationship**. As noted before, it will be **stressful for the child** to endure an uncertain situation, in which he/she might potentially be prevented from having contact with one parent. |
| ***Recognition and enforcement*** | |
| Exequatur proceedings are still in place for some types of judgments | As discussed further under specific objective 3 "*Smooth recognition and enforcement of judgments, authentic instruments and agreements*", the requirement to undergo the exequatur procedure for certain types of judgments on parental responsibility leads to **delays**[124]. Delays can have severe consequences for the child, because of **uncertainty about the arrangements for parental responsibility**. In addition, the **relationship with the parent** who does not live with the child during the period during which a decision is not enforced may suffer. |

considered a sufficient grounds for non-recognition. The French national expert noted that French decisions might not be recognised in a Member State where the hearing of the child is more strictly assessed, especially in cases where the child is heard 'indirectly' by the French court, i.e. if the child does not state his or her views personally but through a third party such as a lawyer. The Slovenian national expert referred to a ruling of the Supreme Court of the Republic of Slovenia, in which the Court stated that if there was no conversation with a child capable of understanding the meaning of the procedure and the consequences, this would be a basis for the refusal of the recognition of a foreign judgment, because it would mean a violation of essential procedural principles of the Slovenian legal order.

[121] A comprehensive analysis of this issue can be found in the section *Different practices related to the representation of the child in court* in Annex 1.

[122] A comprehensive analysis of this issue can be found in the section *Different practices related to the representation of the child in court* in Annex 1.

[123] Some national experts (FI, GR, IT, NL, PL, UK) noted that the child is not usually involved in parental responsibility proceedings and therefore does not need representation (although there may be a possibility to appoint a guardian *ad litem*). In Finland, this is the case for custody and rights of access proceedings. There are possibilities for the child to participate in care proceedings.

[124] It is not necessary to go through intermediate procedures for decisions on access rights and certain decisions implying the return of a child, as outlined under specific objective 3 *Smooth recognition and enforcement of judgments, authentic instruments and agreements*

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| Decisions on matters of parental responsibility are often enforced late or not at all due to the use of inefficient means for enforcement or because judgments are reviewed at the stage of enforcement | As discussed further under specific objective 3 "*Smooth recognition and enforcement of judgments, authentic instruments and agreements*", **some decisions on parental responsibility are never enforced and thus not implemented due to obstacles at the stage of enforcement**. For the child, **delays** or the impossibility to enforce or implement decisions can have serious consequences. If a decision is taken formally, but not implemented this may be a **confusing and stressful** situation for the child, as he/she cannot be sure what will happen and where he/she will live. |
| ***Provisions specific to child abduction cases*** | |
| Difficulties relating to the time limit for return (i.e. not clear and not effective) | Cases on the return of the child are to be handled within six weeks. The **application of this time limit has been identified as being problematic**. Two main difficulties have been identified:<br>➢ **The time limit is not clear.** The interpretation of the six-week time limit set out in Article 11(3) seems to vary across Member States. In particular, it is not clear whether the six weeks refers to the time between an application and the final decision, or to each instance.<br>➢ **The time limit is not effective**. Only 15% of the applications between Member States are actually resolved within the six-week time limit.[125] **Delays** occur, for example, because not all Member States have introduced suitable structures to ensure that the judges dealing with cross-border child abductions have the necessary expertise and that cases can be handled smoothly. There are indications that concentration of jurisdiction (i.e. limiting the number of courts that deal with return applications) is a good method for ensuring that return applications are dealt with in a more efficient manner.[126] However, according to the Working Group, several Member States appear not to have implemented concentration of jurisdiction. As a result, judges in these Member States are not able to build up the necessary expertise and have less opportunities to receive specialised training, and are therefore less efficient.[127] A minority of stakeholders argues that the time limit is too short because it does not allow sufficient room for dealing with a case properly. However, it should be noted in this regard that six weeks is also considered to be an adequate target in the 1980 Hague Convention.<br>**Delays** in return proceedings can have **serious consequences for the well-being of the child and the parent-child relationship.** While the child is abroad with the abducting parent, he/she is separated from his/her regular |

[125] *'A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction'*: http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf

[126] Article 11 Working Group practice guide (https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en). The Article 11 Working Group was initiated by the Central Authorities to compile and disseminate information related to the application of relevant provisions on child abductions in the EU, including Article 11 of the Brussels IIa Regulation and to identify common practices and standards.

[127] Estonia, Latvia, Lithuania, Poland, Slovenia and Spain. Article 11 Working Group practice guide (https://e-justice.europa.eu/content_parental_child_abduction-309-en.do?clang=en). See also the section *The return procedure under Article 11(1) to 11(5)* in Annex 1.

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| | surroundings, including the left-behind parent. Moreover, if too much time passes before the child is returned, it may not be in the child's best interests any longer to return to the original place of habitual residence, because the centre of life for the child has already shifted to the other country. On the other hand, if a child is not returned, the relationship with the left-behind parent is impaired. |
| Questions on the practical application of Article 11(4) and ambiguity as regards the concept of 'adequate arrangements' under that provision | **Another problem reported relates to the possible refusal to return the child**. The return of a child can only be refused if it is not possible to demonstrate that 'adequate arrangements' have been taken to counter any possible risk associated with the return.[128] The Regulation refers to the steps that may be taken as "adequate arrangements to secure the protection of the child after his or her return". The findings of the evaluation suggest that this formulation is currently not clear. Courts have a wide margin of discretion when it comes to determining what types of protective measures could serve as 'adequate arrangements' and how they will be examined. The following points appear not to be sufficiently clear:<br>➢ According to many national experts, respondents to the public consultation and the interviewees, it is **not clear what the concept 'adequate arrangements' entails**, i.e. which measures could qualify as 'adequate arrangements'.<br>➢ According to several interviewees and respondents to the public consultation, there are **uncertainties about the procedural steps** to be taken to prove whether or not 'adequate arrangements' are in place. It is in particular not clear, which party has to prove whether or not adequate arrangements are in place and how the communication between the Member State where the proceedings are held and the Member States where the 'adequate arrangements' are to be enforced should function.<br>➢ According to the Central Authorities consulted, the **administrative steps to be observed are not always clear**. In some Member States, orders refusing the return of a child do not directly include the grounds of the refusal, which then makes it difficult to identify whether the case falls under Article 11(4) and **lengthens the procedure**.<br>These points lead to **uncertainty**, as it is difficult for the parties to know whether the steps taken are sufficient and will thus be recognised as adequate arrangements. In addition, these **ambiguities can lead to delays** if the court does not know how to assess the situation and to **costs for legal advice for the parties**. As outlined above, delays can have **serious consequences for the well-being of the child and the parent-child relationship.** In addition, **the well-being of the child could be endangered** if a proper test is not carried out.<br>Furthermore, in the event the court is not certain that 'adequate arrangements' are provided for in the Member States of enforcement, it may refuse the return order, since a non-return order can be issued whenever it is |

[128] See Article 11(4).

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| | not possible to establish, within six weeks, that 'adequate arrangements' have been taken.[129] This is in particular the case because the procedure currently has to involve court or authorities in both Member States. It is not possible for the court in the Member State of abduction to order certain **protective measures** that are considered a condition for the child to return safely. Rather, if it is not possible to establish that such conditions are met, e.g. because the courts/authorities in the Member State of origin react late, the court may refuse the return of the child. Therefore, the difficulties with this provision can cause a **higher number of refusals of return**. |
| The system stipulated in Article 11(6) to (8) may endanger the well-being of the child if a child is returned in spite of a risk that has been established in the return proceedings and possibly after a long time has passed | After a refusal on the return of the child based specifically under Article 13 of the 1980 Hague Convention, the courts in the Member State of origin can be asked by the left-behind parent to examine the question of who has custody over the child once again.[130] In addition, Article 11(6)-(8) provides a possibility for a new decision on the return, which must be taken in the Member State of origin and is directly enforceable if certified according to Article 42 of the Regulation.<br><br>The interplay of the initial return procedure and the subsequent hearings on a new decision return/on custody may result in a situation that is detrimental to the well-being of the child. The evaluation has identified several difficulties and shortcomings with respect to these provisions.<br><br>First, there are **ambiguities related to the application** of the article, which lead to **delays**. It is not clear whether it is possible to refer the question of custody to **a court that is specialised in return proceedings** instead of the court that was previously seised for parental responsibility proceedings. In general terms, specialisation of courts can contribute to a faster handling of return cases, as mentioned in the previous sub-section and the ECJ has recently rules that this is in principle possible also for hearings under Article 11(6)-(8).[131] Another practical problem relates to the **transmission of documents** to the original court which is prescribed in Article 11(6): whenever a court issues a non-return order, related documents including a copy of the judgment and a transcript of the hearing must be sent to the responsible court in the Member State of origin. It is currently not clear, which parts of these documents must be translated and by whom.<br><br>Second, there are several practical difficulties related to the application of the article. **Extensive delays** occur since the court of origin decides on custody or on a new return order, while the child and one of the parents are in another Member State. Under these circumstances it is often very **difficult to organise hearings**, because the child and the abducting parent have to travel to participate in a hearing. This is particularly difficult to organise if the abducting parent is not cooperating, which is likely because he/she may be afraid that the court in the Member State of origin favours the other parent. There are no prescribed procedures to deal with such situations. In practice, such cases have been resolved by persuading the parent or by conducting the |

[129] The Maltese national expert indicated that this is the reason that in spite of the stricter rules contained in the Regulation, Maltese courts have nevertheless issued a number of non-return orders. This was also noted by Eppler, J. (Forthcoming*): Grenzüberschreitende Kindesentführung – Zum Zusammenspiel des Haager Kindesentführungsübereinkommens mit der Verordnung (EG) Nr. 2201/2003 und dem Haager Kinderschutzübereinkommen*, Dissertation to be published by Peter Lang GmbH.

[130] See Article 11(6) to (8).

[131] This question was posed to the ECJ in Case C-498/14, David Bradbrooke v Anna Aleksandrowicz.

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| | hearing in the other country. However, this had to be paid for by the parties and was, therefore, associated with additional **costs and delays**. On this basis, such hearings can take years in some cases. Based on these delays, an eventual return of the child may risk taking the child from the new surroundings, which he/she has grown accustomed to in the meantime and may thus have **severe consequences for the well-being of the child**. In addition, for the time such custody hearings are being carried out, the child has to live with the **uncertain and stressful situation of not knowing where he or she will eventually live.** It also appears that **courts do not in all cases take sufficient account of the reasons why a return was initially refused**. Article 11(8) gives the court in the Member State of origin the possibility to order the return of the child, although the court in the Member State of abduction came to the conclusion that a return would endanger the well-being of the child. If the court in the Member State where the child was present decided to refuse the return of the child, but the court in the Member State of origin decides that the child should be returned nevertheless, this can have **negative consequences for the well-being of the child**. Finally, **Central Authorities are not equally involved** in such hearings, although they could potentially support the application of these provisions.<br><br>Finally, it can be questioned whether the provisions are at all useful. In fact, numerous stakeholders doubted the usefulness of these provisions, criticising that a decision on custody taken by the court of origin after proceedings on the return of the child are completed can potentially overrule the initial decision. Firstly, they have criticised that this can endanger the well-being of the child if courts do not take sufficient account of the reasons why a return was refused (cf. second bullet point above). In addition, parents may have to follow unnecessarily lengthy proceedings, first in the Member State where the child was abducted to, and then in the Member State of origin. The results of the second part of the procedure may render the first part of the procedure meaningless. This can antagonise parties, which may cause **additional stress for the child**. |
| Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplication of the Regulation and reservations against the content of decisions | The evidence collected for this study indicates that there are significant shortcomings relating to the enforcement of return orders. Indeed, the actual enforcement of return orders is considered by many respondents to the public consultation, interviewees, national experts and participants in the expert panel as **one of the most problematic areas related to enforcement**.[132] The procedures and means of enforcement differ across Member States and **delays** are common. In some Member States, enforcement procedures can take over a year as enforcement courts re-examine the initial decision that implied the return of the child. This is not in line with the objectives of the Regulation. There are several factors that can contribute to delays. Sometimes, enforcement can be hampered because the parent who abducted the child and the child are in hiding and the authorities are not able to locate them. In terms of the actors involved, it is regretted that Central Authorities are not involved to a sufficient extent because they could positively facilitate enforcement due to their experience with abduction cases |

[132] A comprehensive analysis of this issue can be found in the section *Return orders are often enforced late or not at all due to the use of inefficient means for enforcement or because of misapplications of the Regulation and reservations against the content of decisions* in Annex 1.

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| | and their involvement in the main proceedings. In addition, the coordination between the different parties involved does not always function properly. This can lead e.g. to a situation in which the parties involved are not informed of a risk relating to the child's well-being. Moreover, as there is no mechanism for ensuring a high level of competence to the same extent in all cases, there may be cases where enforcement is more stressful than it needs to be, e.g. because there is nobody with psychological expertise. Finally, in some cases it is not ensured to a sufficient extent that the child is prepared for the reunion with the left-behind parent.<br>Criticism was voiced in this regard that the Regulation does not include more detailed guidelines as to how expeditious enforcement can be achieved, e.g. through the involvement of Central Authorities. In addition, the lack of effective sanctions for non-compliance (i.e. if judgments are never enforced) was criticised by respondents to the public consultation, interviewees and participants in the expert panel. The delays have **severe consequences for the well-being of the child and the parent-child relationship**. |
| ***Support to citizens in cross-border proceedings by Central Authorities*** | |
| Rules relating to the obligation for Central Authorities to collect and exchange information on the situation of the child that are not specific enough, and thus cause practical problems | The Central Authorities are responsible for the collection and exchange of information on the situation of the child.[133] Reports about the (potential) living situation of children are often a required piece of evidence for judgments on matters of parental responsibility for both national and international cases. The difficulties identified generally lead to **delays in the procedure** that is used in international cases to obtain such reports. While employees at the Central Authorities explained that delays can ensue in both national and international cases, **specific factors contribute to additional delays in international cases**:<br>➢ There is currently **no deadline for Central Authorities to respond** to requests by other Central Authorities. Practitioners stated that this is one of the reasons for delays. Sometimes, it takes several months until a request is answered.<br>➢ **Difficulties relating to communication can at times slow down cooperation**. There are still language barriers between certain Member States, which are generally solved through translations of documents, emails etc. In addition, some Central Authorities do not make use of electronic means for communication. Thus, there may be delays, because letters take a long time to be delivered.<br>➢ There are **no guidelines on which types of information need to be attached to a case file that is exchanged across borders**. In some cases, there are disagreements as to which specific pieces of information need to be transmitted in response to requests. In some Member States, data protection requirements prevent the Central Authorities from sending personal data related to the child. Other Central Authorities may require this data to continue with a case. If the information submitted is not complete from the perspective of the receiving Authority, this can lead to **temporary standstill of a case**. |

[133] A comprehensive analysis of this issue can be found in the section "*Cooperation of and support by the Central Authorities"* in Annex 1.

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| | Courts are usually dependent on the reports that are prepared by the Central Authorities in order to make a decision on custody or access rights. Thus, a delay in the activities of the Central Authorities will also lead to a **delay in the procedure before the court**. As discussed above, delays can result in **negative consequences for the well-being of the child and the parent-child relationship.** |
| Insufficiently specific provisions on the procedure for the placement of a child in another Member State | Another task of the Central Authorities is to support courts when a child needs to be placed in institutional care or in a foster family in a different Member State.[134] Such placements could be necessary in cases where the child does not have anybody to look after him/her effectively or the child needs special support due to a mental or physical illness. Thus, such placements are usually required in order to ensure that the child experiences a sufficient level of protection in relation to his/her needs.<br>However, it appears that the relevant provisions in the Regulation do not function in a satisfactory manner. This was highlighted by a majority of respondents to the European Commission's public consultation[135] and other stakeholders.<br>First, the procedures are too **time consuming and not adapted to the urgency** of such decisions. Several factors contribute to delays:<br>➢ The Central Authority in the Member State where the child will be placed currently has to be asked for consent before a child may be sent to that Member State, but there is no rule that ensures a fast response. Thus, the approval can be **too time-consuming**, which is deleterious, as placing a child in institutional care or in a foster family is usually a matter of urgency. Thus, **a delay may have serious effects for the child's level of protection and/or health.**<br>➢ As with the general tasks, there are **difficulties relating to the communication** between Central Authorities, including in particular language barriers, a lack of clarity on the documents to be submitted to the requested Member State and a lack of clarity on which authority bears the costs of translation (cf. point (a)).<br>In addition, there are examples **where placements were carried out before consent is granted**, which can lead to additional complications. For example, if a child is placed in a foster family in a different Member State without consent, it is possible that the foster family could not be examined beforehand or that the modalities (e.g. who bears the costs) could not be clarified. This may affect the well-being of the child, because the child may need to move again or be sent back, which can cause **additional stress**. |
| Unclear division of roles in the context of the cooperation between Central Authorities and local authorities/child welfare authorities in | Social authorities play an important role in the application of the Brussels IIa Regulation. Generally, they fulfil, for example, the following tasks:<br>➢ Hold an interview with the child for the purposes of preparing a report on its well-being, living conditions etc., and ascertaining the child's best interests in the circumstances;<br>➢ Collect and provide to the Central Authority all relevant information concerning the child, its parents, etc.; and<br>➢ Facilitate the communication between the Central Authority and the |

[134] A comprehensive analysis of this issue can be found in the section *Not sufficiently specific provisions on the procedure for the placement of a child in another Member State* in Annex 1.
[135] 60%, i.e. 85 of 141 responses

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| the proceedings concerning children | child or the parents, etc.<br>Practical difficulties have been reported regarding the cooperation between Central Authorities and local authorities. Difficulties appear to be based on the fact that **the role of the competent authorities and the extent to which they should cooperate with the Central Authorities is currently not specified in the Regulation**,[136] although these authorities play an important role in relation to parental responsibility cases in practice. Indeed, cooperation currently does not always function well and several stakeholders, e.g. in the context of the public consultation, considered it as an area for improvement.<br>In some cases, it is not clear how the social authorities should cooperate with the Central Authorities under the Regulation. The following difficulties have been identified:<br>➢ First, there are often **delays** in the cooperation within one Member State, i.e. between a Central Authority and its national social welfare authorities. This concerns situations when **the Central Authority requested by another Central Authority needs to obtain information from its national welfare authorities**. For example, in the context of placement decisions, the Central Authorities need to obtain information from domestic registries or child welfare services. The cooperation internally between the requested Central Authority and its national welfare authorities is not regulated in the Regulation. Some stakeholders have raised problems relating to the cooperation between Central Authorities and local/social authorities in the same Member State. These mainly relate to inefficient procedures causing delays.<br>➢ Second, questions arose with respect to the potential cooperation between the social authorities of one Member State and the Central Authority of the Member State where the child should be placed. Although there is currently no legal basis for such forms of cooperation, there was a case in which the Czech Central Authority and foreign social or local authorities cooperated. In this situation, the parties involved faced **uncertainty** because a form of cooperation was started that is not legally regulated.<br>In addition, there seems to be a **lack of awareness within these authorities** of the content of the Regulation and the role of the Central Authorities. As a result, it is possible that cases are not handled correctly and/or that parents are not well informed, e.g. on the possibilities for support offered by the Central Authorities. **This can be a significant source of uncertainty and stress for citizens.** |
| The use of mediation is currently not promoted to a sufficient extent | As discussed further under specific objective 4 "*Protection of the economically weaker spouse*", the **take-up of mediation is currently not sufficiently promoted** because the provision in the Regulation[137] is not sufficiently strong and there are cases where mediation is in practice not promoted by the |

[136] A comprehensive analysis of this issue can be found in the section *Uncertainties relating to the cooperation between Central Authorities and local/child welfare authorities as well as to the role of social and local authorities* in Annex 1.
[137] Article 55(e) Brussels IIa.

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| | practitioners involved. This is of particular relevance from the child's perspective[138]. Proceedings on parental responsibility are very stressful for children, in particular if the parents fight to obtain a favourable solution. As regards the effects of mediation, it was argued that **mediation could help to further reduce delays as well as stress** and could, importantly, **help to improve the well-being of the child and the parent-child relationship**. If parents are striving to find an amicable solution, this is less stressful for the child, e.g. because he/she does not need to take sides. Furthermore, agreements that have been reached through mediation are often longer lasting and more sustainable compared to agreements reached before courts, because the mediator tries to ensure that all arguments and perspectives are taken into account. This may go beyond the matters that are covered by a legal dispute.[139] |
| ***Information and awareness*** | |
| **Practitioners** are not sufficiently aware of the Regulation, leading to the misapplication of certain provisions of the Brussels IIa Regulation<br><br>**Citizens** are not sufficiently aware of the content of the Regulation and its implication for international proceedings on matrimonial matters, matters of parental responsibility or child abduction | As discussed further under specific objective 2 "*Predictability, clarity, and reliability for citizens involved in cross-border cases*", there is a lack of awareness and understanding of the Regulation among practitioners and citizens. The lack of awareness and understanding mainly leads to **delays** which affect the **well-being of the child** in cases on matters of parental responsibility. The fact that citizens are not sufficiently aware of the content of the Regulation and its implication can have serious consequences. For example, it was pointed out by practitioners that parents are often not aware of the definition of child abduction and the consequences. Some parents have acted impulsively and taken a child to their home country after a fight with the other parent without knowing that this was an abduction. As soon as the child is abroad, the complex procedures for the return of the child might be initiated by the other parent and the child will thus need to go through these **stressful proceedings**. In some cases, such actions could possibly be avoided if the parents were aware of their actions and the far-reaching consequences. |

### 3.3.2 Achievement of the general objectives

This section evaluates the Brussels IIa Regulation's effectiveness in achieving its general objectives, namely:

- Ensuring that citizens can benefit fully from an area of freedom, security and justice; and
- Ensuring the smooth functioning of the internal market and free movement of persons across the EU Member States.

[138] A comprehensive analysis of this issue can be found in the section *The use of mediation is currently not promoted to a sufficient extent* in Annex 1.

[139] This was explained during an interview with a mediator. This point is supported, for example, by Robert E. Emery, 'Renegotiating Family Relationships: Divorce, Child Custody, and Mediation', 2012.

### *Ensuring that citizens can benefit fully from an area of freedom, security and justice*

The **Brussels IIa Regulation** has **contributed to building** a **European area of justice** in the domains of matrimonial matters and parental responsibility. It has facilitated the settlement of cross-border litigation in matrimonial and parental responsibility matters through a comprehensive system of jurisdiction rules, a system of cooperation between Member State Central Authorities, the prevention of parallel proceedings, and the free circulation of judgments, authentic instruments and agreements. The provisions on the return of the child complementing the 1980 Hague Convention aimed at deterring parental child abduction between Member States are regarded as particularly useful.[140]

While it is considered that the Brussels IIa Regulation is functioning well overall and is delivering value to EU citizens, the operational functioning of the instrument is at times hampered by a series of legal issues[141] as well as a lack of awareness and information on the part of both citizens and legal practitioners.

Due to these legal issues, the Regulation has not yet achieved its full potential with regard to the objective of an area of freedom, security and justice.

### *Ensuring the smooth functioning of the internal market and free movement of persons across the EU Member States*

The **increasing use of the rights of free movement of persons**, goods and services inevitably results in a high number of potential cross-border disputes, including on matrimonial matters and questions of parental responsibility.

The **Brussels IIa Regulation** contributes to **promoting trust in the internal market** by ensuring that citizens who move to another Member State (i.e. who make use of the internal market's fundamental principle of free movement of persons) can – in most cases (i.e. where not hampered by existing legal issues[142]) – rely on clear rules concerning jurisdiction, a functioning system of cooperation between Member State Central Authorities as well as the free circulation of judgments, authentic instruments and agreements. Were there no such rules and mechanisms this might potentially hamper EU citizens in exercising their right of free movement within the internal market because they might fear that potential cross-border disputes cannot be adequately solved. Nonetheless, the Brussels IIa Regulation could be more effective in promoting trust in the internal market if the numerous legal issues identified and the lack of awareness and information of both citizens and legal practitioners were to be addressed.

It is important to note at the same time, however, that the problems addressed by Brussels IIa (i.e. cross-border disputes in matrimonial matters and parental responsibility) are in part a consequence of the internal market, notably its core principle of free movement of persons.

### 3.3.3 Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States

While most stakeholders consulted concluded that the **Brussels IIa Regulation** is **generally applied smoothly in all Member States**, some issues were highlighted (in addition to the legal issues discussed in Annex 1 on the "*Achievement of the operational objectives*"), notably with regard to a

[140] European Commission (2014): *Report 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*, COM(2014) 225 final, p. 16.
[141] Discussed in the section on Effectiveness and in further detail in Annex 1 on the "*Achievement of the operational objectives*".
[142] Discussed in the section on Effectiveness and in further detail in Annex 1 on the "*Achievement of the operational objectives*".

lack of awareness and knowledge of the instrument (both among citizens and legal practitioners), insufficient training offerings as well as the complexity of the structure and provisions of the Brussels IIa Regulation. These issues are to some extent preventing the Brussels IIa Regulation from functioning well. Finally, Member States have implemented a few additional measures affecting the application of the Brussels IIa Regulation.

*(a) Lack of awareness and knowledge of the Brussels IIa Regulation*

An issue raised by many national experts and interviewees is the fact that there seems to be a **lack of awareness and knowledge about the Brussels IIa Regulation among practitioners**. As a consequence, the Brussels IIa Regulation is sometimes not applied at all when it should be or applied wrongly, as illustrated in the following case example.

**Lack of awareness hampering the application of the Brussels IIa Regulation (Poland)**

The national expert for Poland concluded that Brussels IIa plays a minor role in the Polish legal system. Only five decisions directly refer the Regulation: *V ACz 252/09, ACz 1719/1712, V CZ 37/09, IV CSK 566/10, V ACa 13/13*. In addition, a large part of the decisions taken refer to a situation in which the court of first or second instance did not apply the provisions of the Brussels IIa Regulation in general (*ACz 1719/12, IV CSK 566/10, I ACz 2057/12, Ca II 1152-1113*), or applied them incorrectly (e.g. in *V ACa 13/13*). Despite the applicability of the Brussels IIa Regulation, Polish courts have regularly made use of Polish law only.

Another issue raised by some interviewees is the fact that many **citizens do not seem to be aware** of the rules contained in the Brussels IIa Regulation. According to a German lawyer, parents are often not aware that a move to another country changes the place of habitual residence of the child and, therefore, directly influences jurisdiction for possible court proceedings. There have been cases where parents were shocked to learn that parental responsibility proceedings could not be held in the country of their nationality, because - on the basis of Article 8 of the Brussels IIa Regulation - the courts did not have jurisdiction.

Furthermore, several stakeholders pointed to a **lack of knowledge and awareness about international rules on child abduction**. Many parents are not aware that abduction can have serious consequences because complex international judicial machinery is initiated as soon as the other parent files an application for the return of the child. Moreover, according to a mediator from Poland, about 95% of all parents do not know what an abduction is, and what the consequences of an abduction are. Usually, they legitimise their behaviour because they want to protect the child. The Polish mediator noted that awareness needs to be raised, for example, by providing information at airports. In addition, she argued that insufficient training is provided to law enforcement authorities to ensure that they can identify critical situations and make the parents aware of the consequences of their actions.

More generally, increased migration within, to and from the EU is leading to a high number of potential disputes in matrimonial matters and parental responsibility with an international (intra-EU) dimension, and thus significant use of the Brussels IIa Regulation. As a result, the **awareness of and experience with the application of the instrument is slowly increasing over time**. However, most experts agreed that this effect is insufficient to overcome the significant lack of awareness and knowledge about the Brussels IIa Regulation among citizens and legal practitioners.

*(b) Insufficient training*

Closely linked to the low levels of awareness and knowledge on the Brussels IIa Regulation, the **insufficient availability of specialised training on the Regulation** for legal practitioners was

highlighted by a large majority of the national experts and interviewees. While training is provided both at EU and Member State levels, the training is often considered as insufficient for reaching all relevant legal practitioners.

**Insufficient training on the Brussels IIa Regulation (Slovenia)**

The national expert for Slovenia reported that despite the fact that the Brussels IIa Regulation has been used in Slovenia for one decade already, its presence and visibility are still at a low level. While the Brussels IIa Regulation is included in undergraduate as well as in post-graduate study programmes, its presence in Slovenian literature is very low; articles dealing concretely with the Brussels IIa Regulation are very rare, in spite of the almost ten years of use. There are some cases in which it is clear that decisions were taken (e.g. in case *IV Cp 1792/2007*) that can only be understood as a consequence of a lack of knowledge of the Regulation.

As a result of insufficient training, legal practitioners may also be reluctant to apply the Brussels IIa Regulation and they invoke other instruments, such as the Hague Convention, instead.

**Reluctance hampering the application of the Brussels IIa Regulation (Ireland)**

According to the national expert for Ireland, the lack of training has led to rather limited use of the Brussels IIa Regulation in Ireland, at least insofar as it is possible to document this. One key reason for this in the context of international child abduction proceedings is the significant overlap between the Hague Convention and the Regulation. For some time, practitioners did not seem especially inclined to invoke the Regulation in abduction proceedings. For example, in 2008, 173 applications (82%) were made under the Hague Convention, whereas just 21 applications (10%) were made under Brussels IIa and 16 applications (8%) under both instruments. There are signs that this is changing: the corresponding figures for 2010 were 117 (61%) for the Hague Convention, 30 (16%) under Brussels IIa and 46 (23%) under both. By 2012, this had shifted to 116 cases (42%) under the Hague Convention, 76 (28%) under Brussels IIa and 82 (30%) under both. Even so, in spite of the increasing reliance on Brussels IIa by practitioners, the judiciary remain somewhat reluctant to invoke the Regulation in their judgments unless it sheds a different light on the case than the Hague Convention. In cases where the legal frameworks have the same effect, judges tend to decide the case solely by reference to the Hague Convention, notwithstanding the fact that Brussels IIa had been pleaded by counsel.[143] Accordingly, Kilkelly (2008)[144] has observed that one of the primary effects of Brussels IIa in Ireland has been to unnecessarily complicate the law on international child abduction.

Due to the complexity of the rules (see below), it is not easy for generalist lawyers and judges, who only have a limited family law caseload, to participate in adequate training and receive enough practice in order to be able to apply the Brussels IIa Regulation correctly and with ease. For example, judges in very small courts in rural areas need to deal with all kinds of different subject matters and are not able to take the time that is necessary to understand the Brussels IIa Regulation correctly when this is only relevant for few of their cases.

**Training for specialised practitioners (Germany)**

In Germany, there has been a process of centralising return cases. Therefore, training can be offered to a targeted group that regularly deals with cases involving the Brussels IIa Regulation.

[143] See *RP v SD* [2012] IEHC 579, *LJ v VN* [2012] IEHC 307, *Li v La* [2009] IEHC 585, *N v N* [2009] IEHC 213, *PMP v KTP* [2007] IEHC 217 and *SR v MMR* [2006] IEHC 10, among many other examples.
[144] Kilkelly, U, *Children's Rights in Ireland: Law Policy and Practice* (Haywards Heath: Tottel, 2008).

As a result, the quality of the decisions taken in Germany has improved. Moreover, the number of cases where the six week deadline could be kept has increased (cf. Hague statistics).

*(c) Complexity of the Brussels IIa Regulation*

Furthermore, numerous stakeholders pointed to the **complexity of the structure** as well as a **lack of clarity of certain provisions** of the Brussels IIa Regulation.[145]

For instance, an Irish interviewee suggested that the **complicated structure of the Brussels IIa Regulation** could be the cause of mistakes in the application of the Brussels IIa Regulation in the Member States. According to the interviewee, the Regulation is cumbersome to understand. For example, enforcement is dealt with in different sections of the Regulation.

Typically, the application of the Brussels IIa Regulation was **perceived as being smoother** in Member States **where legal practitioners can specialise**. According to the stakeholders interviewed, the application of the Brussels IIa Regulation would benefit from specialised judges and lawyers.

*(d) Additional measures introduced by the Member States and their effects*

The main measures attributable to the Member States in the context of the Brussels IIa Regulation relate to **training and awareness-raising** efforts for legal practitioners and citizens. While no detailed data is available on the extent of these efforts, there is some indication that training and awareness-raising efforts are insufficient with a view to achieving fully effective functioning of the Brussels IIa Regulation (see above).

The Member States have engaged to a variable extent in **mutual exchange** on their fundamental principles of family law with a view to building a better understanding of national differences, **building mutual trust** and enabling the smooth resolution of potential conflicts of law. In some rare cases, an **approximation of substantive laws** between Member States has been achieved. For instance, the new **Common Franco-German Matrimonial Regime**[146] (applicable since 1 May 2013) provides an optional matrimonial regime for couples with a habitual residence in France or Germany. The instrument thereby overcomes legal differences in matrimonial matters between both Member States. Other countries are explicitly invited to join this instrument.

The extent to which Member States have ratified **bilateral agreements** and **multilateral conventions** that may facilitate the application of the Brussels IIa Regulation also varies. For instance, the protection of vulnerable groups is fostered by the *Hague Convention of 13 January 2000 on the International Protection of Adults*[147], which has so far been ratified by six Member States (AT, CZ, DE, FI, FR, UK).

[145] See assessment of the specific provisions under the evaluation of the operational objectives above.
[146] French version: *Décret n° 2013-488 du 10 juin 2013 portant publication de l'accord entre la République française et la République fédérale d'Allemagne instituant un régime matrimonial optionnel de la participation aux acquêts, signé à Paris le 4 février 2010*, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027533762
[147] http://www.hcch.net/index_fr.php?act=conventions.text&cid=71

## 3.4 Efficiency

This section assesses the efficiency of the Brussels IIa Regulation, i.e. in how far it has delivered its results that are 'good value for money' in terms of the resources used to obtain the actual effects. More specifically, this section addresses the following evaluation questions:

- What are the effects of the Brussels IIa Regulation on the additional costs of the cross-border cases covered by the Regulation compared to domestic proceedings?
- What were the costs the Regulation and how do they compare to the benefits?
- Could the same effects have been achieved at lower costs? Was the Regulation designed in an efficient way in terms of the types of measures included?
- To what extent could the Regulation be simplified?

### 3.4.1 Effects of the Brussels IIa Regulation on the additional costs of the cross-border cases covered by the Regulation compared to domestic proceedings

To assess this, it is of interest to differentiate between the general costs and delays of cross-border cases and those costs and delays that are specific to cases of matrimonial matters and cases of parental responsibility. These costs can be compared to the costs of purely domestic proceedings.

Quantitative estimates of the costs of proceedings under the Brussels IIa Regulation were developed based on nine hypothetical cases in Chapter 5 on "*Quantitative analysis*". These cases provide insights into the typical costs encountered by citizens in cases covered by the Regulation. The nine hypothetical cases cover all the high-priority issues identified and are structured according to the specific objectives of the Regulation (c.f. chapter on *Effectiveness*). In addition, Annex 8.2.3 provides an overview of the costs of the cross-border cases covered by the Regulation compared to domestic cases.

Many interviewees concluded that the **Brussels IIa Regulation** has typically **not augmented the additional costs of cross-border cases** (as compared to the costs of domestic cases), but has also **not significantly contributed to reducing them**. Some interviewees stressed that the costs and delays linked to international judicial cooperation (translations, provision of documents, etc.) should not be seen as a result of the Brussels IIa Regulation; on the contrary, the Regulation aims at facilitating this cooperation and reducing its costs.

It was also pointed out by several interviewees that the Brussels IIa Regulation is a rather **complex instrument** and that many practitioners do not fully understand it. In addition, there is a problem of a lack of awareness of citizens and legal practitioners. Therefore, the **potential positive effects** of the Regulation, such as reduced costs and delays, and increased legal certainty and predictability, are **not always fully realised in practice**.[148]

### 3.4.2 Costs of the Regulation

Regarding the costs of the Brussels IIa Regulation, there is a need to distinguish first between (1) **compliance costs**, i.e. those costs generated by measures undertaken to comply with the provisions of the Regulation, and then (2) **costs for citizens**, i.e. those costs that citizens face in international proceedings on matrimonial matters and matters of parental responsibility. Finally, this section concludes on the overall efficiency of the Brussels IIa Regulation.

[148] For a discussion of issues related to the awareness and information of citizens and legal practitioners regarding the Brussels IIa Regulation, please refer to the section "*Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States*".

#### *Compliance costs*

Compliance with the Brussels IIa Regulation has in itself generated **very limited costs.** What costs there are mainly relate to the operation of the Central Authorities as well as training of legal practitioners.

The **Central Authorities** of the Member States are generally operated by the national Ministries of Justice or related public bodies. Usually, the bodies designated as Central Authorities under the Brussels IIa Regulation are also in charge of international coordination tasks for similar international legal instruments in family law, such as the 1980 and 1996 Hague Conventions. The main costs related to the Central Authorities under the Brussels IIa Regulation are staff costs (generally between 2 FTEs and 4 FTEs per Member State), office space, outsourced translation services and supplies. No separate detailed cost data is available for each Member State.[149]

**Awareness-raising and training** on the Brussels IIa Regulation may be required for different types of legal practitioners affected by the Brussels IIa Regulation, such as judges (potentially, but not necessarily, in specialised courts dealing with family matters), lawyers (specialised in – international – family law), officials in Central Authorities, officials in public authorities responsible for children and mediators – and, potentially, citizens. While it was not possible to collect detailed data on the costs to Member States of awareness-raising and training activities, a large number of stakeholders consulted pointed to insufficient efforts of the Member States in this regard.[150]

#### *Costs for citizens*

The Brussels IIa Regulation[151] has not resulted in any costs for citizens.

#### *Conclusion on the efficiency of the Brussels IIa Regulation*

Overall, the analysis of the practical operation of the Brussels IIa Regulation (i.e. its effectiveness, c.f. previous chapter) and the assessment of the costs and delays generated by the instrument point to a good relationship between benefits and costs, i.e. a **satisfactory level of efficiency**. Indeed, as discussed above[152], the Brussels IIa Regulation has achieved satisfactorily the five objectives (access to court, predictability, smooth recognition, protection of the economically weaker spouse and the well-being of the child), facilitated the circulation of judgements within the Union and resolved problems of parallel jurisdiction at a very limited cost.

### 3.4.3 Could the same effects have been achieved at lower costs?

While most stakeholders consulted concluded that the Brussels IIa Regulation is designed in an efficient way, some suggested that the efficiency of the instrument could be further improved through (1) increased promotion of mediation as an alternative conflict resolution mechanism and (2) increased efforts to foster awareness and knowledge of the instrument among practitioners and citizens.

[149] A survey of the Central Authorities was conducted by the study team, but the responses received provided very limited insights into the costs and resources of Central Authorities. Please refer to Annex 8 for more information.

[150] For a discussion of issues related to the awareness and information of citizens and legal practitioners regarding the Brussels IIa Regulation, please refer to the section "*Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States*".

[151] Please refer also to the chapter "*Quantitative analysis*", which includes quantitative estimates of the costs and delays related to the application of the Brussels IIa Regulation based on a series of hypothetical cases, and also to annex 8.2.3 for a general discussion on costs.

[152] The costs of international cases in matrimonial matters and parental responsibility are discussed in detail in the section "*Costs of cross-border cases covered by the Regulation compared to domestic proceedings*".

For example, according to several interviewees, effective and efficient solutions in international cases of matrimonial matters and parental responsibility can often be found through mediation. **Mediation is generally a much cheaper method of conflict resolution** than judicial proceedings. Conflict resolution through mediation is typically shorter and less expensive, mainly because of more flexible procedures and the absence of legal assistance costs. Numerous stakeholders argued that the current efforts to promote mediation (in line with Article 55(e) of the Regulation) are insufficient to make best use of the potential of mediation. Nonetheless, some interviewees noted that not all conflicts can be solved by mediation as this requires some degree of good will on the part of the parties.[153]

Several interviewees noted that currently **insufficient information is provided to citizens** about the Brussels IIa Regulation.[154] As a result, citizens are often not aware of their rights and obligations under the Regulation. For instance, parents are very often not aware that they cannot bring their child to their country of nationality without the consent of the other parent. Better information of citizens could reduce costs for citizens by avoiding unintended illegal behaviour (e.g. child abduction) and the resulting legal proceedings. Better informed citizens might also require less specialised legal advice, thus also reducing the costs.

Finally, even **many legal practitioners are not aware** of basic provisions of the Brussels IIa Regulation, e.g. the existence of a Central Authority in their country. Courts outside the capital are also generally in need of information. Furthermore, it was reported to us that **public child protection services** do not know enough about the Brussels IIa Regulation. Several interviewees regretted that measures for raising **awareness** are only implemented at EU level (e.g. through the European Judicial Network) and not fully integrated in the national-level training of relevant legal practitioners (e.g. through an integration in national legal curricula).

In conclusion, it appears that while the Brussels IIa Regulation is considered as being relatively efficient, its efficiency in achieving its objectives could be further improved through increased promotion of mediation and increased efforts to foster awareness and knowledge of the instrument. The decrease of costs for citizens that could be achieved through such measures are generally considered by most experts and stakeholders to largely outweigh the costs for the implementation of these measures.

### 3.4.4 Possible simplification of the Regulation

According to several stakeholders interviewed, the Brussels IIa Regulation (and its application) could be simplified through the **integration of existing ECJ case law** within a revised version of the instrument.

More broadly, several experts interviewed and participants in the expert panel argued that the **different Union family law instruments** should be **merged into a single instrument** – a single EU family code including all existing Union instruments (Rome III Regulation, Brussels IIa Regulation, Maintenance Regulation etc.). In their view, this would simplify EU legislation and lead to more clarity and awareness among practitioners, thereby ensuring an effective implementation of the instruments. This option goes beyond the scope of the Brussels IIa Regulation and was therefore not assessed in this study.

[153] A comprehensive analysis of this issue can be found in the section "*Promotion of mediation"* in Annex 1.

[154] A comprehensive analysis of issues related to the information and awareness of citizens and legal practitioners can be found in the section "*Challenges and additional measures affecting the application of the Brussels IIa Regulation in the Member States*" above.

## 3.5 EU added value and utility

This section evaluates the EU added value and utility of the Brussels IIa Regulation, i.e. the potential advantages of EU action compared to action at national level, as well as whether the Regulation's effects correspond to the needs, by addressing the following evaluation questions:

- Added value – To what extent could the Member States have achieved the same results without EU intervention?
- Utility – To what extent do the effects of the Regulation correspond to the needs? Has the Regulation had any positive or negative unintended effects?

### 3.5.1 EU added value

Under the principle of subsidiarity laid down in Article 5 TFEU, in areas which do not fall within its exclusive competence, the Union should act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can be better achieved at Union level. This leads to the question of whether the objectives of the Brussels IIa Regulation could also be achieved without EU action, e.g. through Member State intergovernmental cooperation.

The objective of the Brussels IIa Regulation is to provide predictable, clear and reliable rules on jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. While this objective could in theory be achieved by convergence between the Member States' national conflict-of-law rules and substantive laws on matrimonial matters and matters of parental responsibility, there is currently no such convergence.[155] The **objective of providing predictable, clear and reliable rules on jurisdiction and recognition and enforcement of judgments** in matrimonial matters and matters of parental responsibility **can** therefore **be better achieved at EU level.** The action at Union level therefore has added value compared to action at Member State level.

### 3.5.2 Utility

As outlined in the chapters on the relevance and effectiveness of the Brussels IIa Regulation, **the objectives and the effects of the Regulation correspond to the needs of EU citizens**. According to most interviewees, the Regulation's core utility lies in the facilitation of the free movement of judgments in matrimonial matters and parental responsibility, the re-enforcement of the 1996 Hague Convention, and the development of mutual trust between the judicial systems of the Member States.

[155] For instance, there are considerable differences between the Member States' conflict-of-law rules concerning divorce. While in some Member States the rules applicable always correspond to their domestic laws ("*lex fori*"), the majority of Member States determine the applicable law on the basis of a scale of connecting factors that seek to ensure that the divorce is governed by the rules with which the spouse has the closest connection. The Rome III Regulation No 1259/2010 provides common rules for applicable law in divorce matters; however, only 16 Member States currently participate in this Regulation.
For more details, please refer to Annex II of the European Commission' Impact Assessment "*Annex to the proposal for a Council Regulation amending Regulation (EC) No2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters"*, Brussels, 17.7.2006, SEC(2006) 949.
Differences continue to exist in substantive law as well. For instance, due to the different family policies applied in the Member States and the disparate cultural values, significant differences exist between the Member States' divorce laws, both in relation to the grounds for divorce as well as the procedures. The differences between the substantive laws may mean that the conditions to be met for divorce (in terms of time, requirements of proof of separation periods, grounds for divorce - mutual consent; irreparable breakdown of the marriage; fault of one spouse -, etc.) change drastically from one Member States to the next. For more details, please refer to Annex I of the European Commission's Impact Assessment "*Annex to the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters"*, Brussels, 17.7.2006, SEC(2006) 949.

In addition, the Regulation safeguards the legitimate interests of EU citizens, who have certain expectations of the functioning of the internal market and an effective common judicial area. More specifically, the Brussels IIa Regulation contributes to **promoting trust in the internal market** by ensuring that citizens who move to another Member State (i.e. who make use of the internal market's fundamental principle of free movement of persons) can rely on clear rules concerning jurisdiction as well as free movement of judgments in the event of cross-border matrimonial and parental responsibility disputes. The absence of such rules and mechanisms would potentially hamper EU citizens in exercising their right of free movement within the internal market.

However, the Brussels II Regulation has also had an **unintended negative effect**, namely the occurrence of a rush to court or forum shopping in international disputes on matrimonial matters or matters of parental responsibility. Even though limited by the Rome III Regulation, these issues may lead to significant stress and costs for the parties involved and a possible disadvantage for the economically weaker spouse who may have limited access to specialised legal advice.[156]

No other (positive or negative) unintended effects of the Brussels IIa Regulation were identified.

## 3.6 Main conclusions of the evaluation

This section summarises the main conclusions of the evaluation of the Brussels IIa Regulation.

### 3.6.1 Relevance

Given that the overall number of international couples and families affected by the Brussels IIa Regulation is stable and in view of the qualitative assessment of the legal issues noted since its adoption, the **existence of and further improvement to the Regulation are relevant to the needs of citizens**.

The number of international couples and families affected by the Regulation remains significant and the Regulation remains relevant as well in view of the qualitative assessment of the evolution of the initial problem.

The objectives of the Regulation are still relevant to the situation as it has evolved since adoption of the Regulation, but we note that the Regulation does not reflect the international trend to grant more autonomy to the parties in civil law.

### 3.6.2 Coherence

The Regulation is **coherent with and fosters well-functioning free movement** of persons within the EU.

However, it appears that the **multitude, complexity and interrelationship of Union instruments in family law have led to practical difficulties**, such as the lack of understanding on the part of citizens and practitioners or wrong assumptions on jurisdiction.

The **interrelationship of the Regulation with international conventions and bilateral agreements also remains very complex**. It is not always clear for practitioners which instrument applies and there are conflicting interpretations which are hampering the practical operation of the Regulation.

### 3.6.3 Effectiveness

The **Regulation** has **contributed to building** a **European area of justice** in the domains of matrimonial matters and parental responsibility. It has facilitated the settlement of cross-border litigation in matrimonial and parental responsibility matters through a comprehensive system of jurisdiction rules, a system of cooperation between Member State Central Authorities, the

[156] A comprehensive analysis of this issue can be found in the section *Potential for rush to court/forum shopping on the basis of the alternative grounds of jurisdiction* in Annex 1.

prevention of parallel proceedings and the free circulation of judgments, authentic instruments and agreements.

The **Regulation** contributes to **promoting trust in the internal market** by, for the most part, ensuring that citizens who move to another Member State can – in most cases – rely on clear rules concerning matrimonial matters and parental responsibility.

The **Brussels IIa Regulation appears to build on the right measures** – i.e. uniform European rules to settle conflicts of jurisdiction between Member States and facilitate the free circulation of judgments, authentic instruments and agreements in the Union by establishing rules on their recognition and enforcement in another Member State – in order **to achieve its general and specific objectives**.

While the **Regulation** is **generally correctly applied** in all Member States, the **lack of awareness** and knowledge of the instrument (both among citizens and legal practitioners), **insufficient training** offerings as well as the **complexity of the structure and provisions** of the Regulation are to some extent preventing the the Regulation from functioning as well as it should.

While the Regulation is considered to be functioning well overall and to be delivering value to EU citizens, the operational functioning of the instrument is at times hampered by a series of legal issues as well as a lack of awareness and information on the part of both citizens and legal practitioners.

We summarise below the effects of the most important high-priority legal issues at the level of each of the five specific objectives of the Regulation.

### *Access to court for citizens in international families with a close connection to the EU*

While the existing provisions on jurisdiction and legal aid are ensuring **effective access to (a suitable) court for citizens in international families with a close connection to the EU** in a very large majority of cases, a series of legal issues are still resulting in **risks that citizens will be excluded from their fundamental right to access to a court** within the EU or to situations, where the court that has been determined as having jurisdiction may not be the most suitable one to hear the case.

- The impossibility of choosing the competent court by common agreement (**choice of court**) may prevent couples from access to the most suitable/convenient court for the parties.
- The **absence of a *forum necessitatis*** in the Regulation in combination with the reliance on (non-harmonised) national rules for establishing residual jurisdiction may lead to situations where EU citizens are excluded from access to a court in the EU in relation to matrimonial matters and parental responsibility.
- The **vagueness of the concept of habitual residence of the child** has in some cases been detrimental to the objective of ensuring effective access to the most suitable court, notably in the best interests of the child.

### *Predictability, clarity, and reliability for citizens involved in cross-border cases*

Compared to the situation before it was enacted, , the **Regulation has brought about increased predictability, clarity and reliability for citizens involved in international disputes** in matrimonial matters and matters of parental responsibility. By establishing common rules on international jurisdiction and recognition and enforcement, it has smoothed the resolution of such disputes.

Nonetheless, a **series of remaining legal issues** is negatively affecting the predictability, clarity, and reliability for citizens involved in cross-border cases.

- Potential exclusion of certain people due to the **non-harmonisation of rules on residual jurisdiction** and the **lack of a *forum necessitatis*** can generate significant uncertainty for citizens.
- The **uncertainty about the jurisdiction applicable in matrimonial matters** and the risk of a **rush to court** can be a significant source of stress for citizens.
- The **absence of** a possibility for spouses to choose the competent court by common agreement (**choice of court**) prevents couples from predetermining the jurisdiction of potential divorce proceedings by common choice and thereby reducing the uncertainty on the applicable law and the risk of a rush to court in case of divorce.
- The **vagueness of the concept of 'habitual residence' leaves room for long debates about it in court** as well as for conclusions that are not in the best interests of the child. This may be very stressful for the parties involved.
- **Significantly varying rules on hearing the child** have led to reservations and refusals of the recognition and enforcement of judgments, thus impeding the legal certainty and predictability for citizens.
- The **absence of common minimum standards** in the Regulation concerning the **legal representation of the child in court** is a source of legal uncertainty for citizens due to different practices across the Member States and a lack of information on these practices.
- The fact that Member States do not **interpret the term "enforcement"** in a uniform manner has led to differing practices, e.g. in terms of whether judgments require a declaration of enforceability, which are the source of significant costs and time delays for citizens.
- The **non-abolition of the** exequatur **procedure** for the enforcement of judgments on the exercise of parental responsibility in respect of a child (custody) has led to additional costs and time delays for citizens.
- **Practical obstacles during enforcement procedures** are a considerable factor of uncertainty for citizens involved in cross-border cases on parental responsibility, as they cannot be sure whether a judgment will eventually be enforced. Significant delays or even failures to enforce return orders in practice are leading to doubts on the part of citizens with regard to the legal certainty, predictability and reliability of the instruments provided by the Regulation.
- The **lack of clarity on the application of the six week time limit a**nd the overall duration of return proceedings may result in stress for citizens because they do not know when they can expect a wrongfully removed child to be returned.
- The **lack of clarity on the concept of "adequate arrangements"** and what arrangements need to be made to fulfil this criterion leads to significant legal uncertainty for citizens.
- In practice, **hurdles** remain in connection with the actual **enforcement of return orders**.
- **Practical difficulties** have occurred regarding the **cooperation between Central Authorities and local child welfare authorities**, leading to delays for citizens and uncertainty about the support they may obtain.
- **Citizens are often not aware of their rights and obligations** under the Regulation – a situation which can lead to unintended illegal behaviour (e.g. child abduction) and resulting legal proceedings. **Even many lawyers, judges and public child protection services are not fully aware of the basic provisions** of the Regulation – leading to a risk non-application or mis-application of the Regulation.

### *Smooth recognition and enforcement of judgments, authentic instruments and agreements*

The **Regulation has contributed to the smooth recognition and enforcement of judgments** across borders, in particular by establishing automatic recognition of *all* judgments and the abolition of

intermediate proceedings on enforcement for *most* judgments. However, a number of difficulties still remain:

- As concerns the **recognition of judgments for matrimonial matters and matters of parental responsibility**, the provisions of the Regulation are sometimes not applied or applied wrongly because of a lack of awareness of practitioners. As a consequence, additional costs, delays and stress are caused in cases where citizens have had to produce **supplementary documents** (including translations and apostilles) to have a judgment recognised.
- Additional hurdles remain with regard to the **recognition and enforcement of judgments on matters of parental responsibility**. In some cases, citizens cannot be sure whether or not a declaration of enforceability is needed due to the fact that there are different interpretations of the term "enforcement". Costs and delays with regard to enforcement still occur due to the fact that intermediate procedures (exequatur) have only been abolished for some types of decision but are still required for others. Furthermore, recognition and enforcement of judgments is not ensured in all cases. For the citizens involved, this is a factor of uncertainty, as they cannot be sure whether a judgment will eventually be enforced. The child not having been given an opportunity to be heard is an important reason for refusing the recognition and enforcement of judgments. Finally, s**ome decisions on parental responsibility are never enforced** due to practical obstacles during national enforcement procedures.

#### *Protection of the economically weaker spouse*

While the existing provisions on legal aid and the improved legal certainty and clarity for citizens (as compared to the situation before the enactment of the Regulation) have **contributed to the protection of the economically weaker spouse**, a **series of legal issues** are still leading to situations where this spouse is put at a disadvantage.

- The unequal access to expensive specialised legal advice is putting **economically weaker spouses on an unequal footing**, notably in complex and unpredictable cases caused by issues such as rush to court/forum shopping or the lack of common minimum standards on the hearing of the child and the representation of the child in court.
- The **impossibility for spouses to choose the competent court by common agreement** makes it impossible to conclude agreements that could protect the economically weaker spouse from a rush to court/forum shopping in the event of an intention to divorce.
- The **vagueness of the concept of habitual residence of the child** has in some cases led to prolonged disputes about jurisdiction in cases of parental responsibility matters. This can be particularly burdensome for the economically weaker spouse who may not be able to afford adequate legal advice and representation.
- Even though **mediation** is broadly acknowledged as a cost-effective way of finding sustainable solutions that are acceptable to vulnerable spouses in international family conflicts, it is insufficiently promoted by the Central Authorities.

#### *Well-being of the child and the parent-child relationship*

While the **Regulation has improved the situation for children in cross-border cases to some extent**, **several shortcomings** were still identified in this regard.

- As concerns the establishment of jurisdiction, **difficulties in assessing the child's habitual residence** in a State lead to delays and create uncertainty and stress in detriment to the well-being of the child. Furthermore, having a determination of custody and access rights pending, as well as holding proceedings in a Member State that is not the centre of the child's life, might prevent or complicate contact between the child and the parents.

- Difficulties related to the **hearing of the child and his/her representation in court** lead to uncertainty and to cases where judgments are not recognised or enforced because of doubts that the hearing of the child was carried out effectively.
- **Issues with enforcement**, such as delays or in particular non-enforcement of a return order following abduction, result in a particularly stressful situation for the child.
- The difficulties with the interpretation of the **time limit for return** in cases of child abduction is an important concern, as the longer the child is away, the greater becomes the possibility of irremediable consequences for the child's relationship to the left-behind parent.
- Delays and additional stress still occur because the involvement of **Central Authorities** and local child welfare authorities is not always efficient and effective, and alternative means of conflict resolution (in particular, mediation) are not used to a sufficient extent.

### 3.6.4 Efficiency

Compared to domestic cases, **international cases in matrimonial matters and parental responsibility** are **typically more cost- and time-intensive**. Additional costs and delays are regularly linked to factors such as travelling, translation and interpretation, a need for lawyers specialised in international family law, a need for specialised legal advice to deal with the unfamiliarity and unpredictability of foreign law systems, and potentially additional administrative paperwork (e.g. for the recognition of foreign judgments). Nonetheless, **if the Brussels IIa Regulation did not exist, these costs related to international proceedings would still arise** at a similar level.

The **Brussels IIa Regulation** itself has **generated very limited costs**, which are mainly related to the operation of the Central Authorities as well as the awareness-raising and training activities for legal practitioners and citizens.

Overall, the analysis of the practical operation of the Brussels IIa Regulation (i.e. its effectiveness) and the assessment of the costs and delays generated by the instrument point to a good relationship between benefits and costs, i.e. a **satisfactory level of efficiency**.

However, some evidence shows that the **efficiency of the Brussels IIa Regulation has not reached its full potential** due to insufficient promotion of mediation as an alternative conflict resolution mechanism, as well as to insufficient efforts to foster awareness and knowledge of the instrument among citizens and legal practitioners.

### 3.6.5 EU added value and utility

**There is nothing to indicate that the Member States could have achieved the same results without EU intervention**, i.e. without the Brussels IIa Regulation. The Brussels IIa Regulation is serving the legitimate interests of EU citizens, who have certain expectations of the functioning of the internal market and an effective common judicial area.

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