Cross-border parental child abduction in the European Union

EXECUTIVE SUMMARY
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Abstract

Upon request by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), this study aims at analysing the international, European and national legal framework applicable to cross-border parental child abduction, with a view to proposing recommendations for the improvement of the current system. In light of available statistics and case law, five recurrent scenarios giving rise to child abduction legal disputes have been identified. One common scenario is the wrongful removal of a child, which results in the reversal of the balance previously settled in a judicial decision for the exercise of parental rights. A judicial “fast track” through the “automatic” enforcement of foreign decisions on return prescribed by EU Regulation 2201/2003 can be said to have improved the regime of the existing Hague Convention on Child Abduction. In turn, case law shows that when child abduction takes the form of an “illegal transfer of a child’s primary residence abroad” by the primary care-giver, national courts tend to explore more in-depth the “best interests of the child”. The development of appropriate structures of mediation in order to organise the transfer of a child’s residence abroad with one of the parents should prevent “abductions” and improve, in most cases, the relationship between the parents having joint responsibility for the child. In addition to a preventive mediation scheme, a remedial mediation scheme is proposed. If, despite the preventive and remedial mediation schemes, a request return is brought to court in complex situations, it is important to avoid contradictory decisions by the EU judges in the jurisdiction of the present and the former place of residence of the child and to allow careful analysis of the overall situation of the child. To this end, a “joint-decision” reached through the active cooperation of specialised national courts within the EU is proposed. This involves special judicial training – with language and intercultural skills – for international family disputes.
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GLOSSARY

For the purposes of the present study, the following expressions are employed with the following meaning:

<table>
<thead>
<tr>
<th>Expression</th>
<th>Meaning</th>
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<tbody>
<tr>
<td>International Marriage</td>
<td>Unless differently described (for instance infra 2.2.), an international marriage is a marriage between persons of different nationalities</td>
</tr>
<tr>
<td>International Divorce</td>
<td>An international separation or divorce, unless differently described, is a separation or divorce of persons of different nationalities</td>
</tr>
<tr>
<td>Cross-border parental Child Abduction</td>
<td>Cross-border child abduction in the true sense is the kidnapping of a child by an adult, acting by surprise, resulting in the transfer of the child abroad and affecting his/her habitual residence. Child abduction in the broad sense includes illegal transfers of a child’s residence</td>
</tr>
<tr>
<td>Illegal transfer of a child’s residence</td>
<td>An illegal transfer of a child’s residence is the transfer of a child’s residence in violation of the other parent’s rights and duties in respect of the child (i.e. unlawful relocation with the child)</td>
</tr>
<tr>
<td>Parental Responsibility</td>
<td>The right/duty to participate in the upbringing of the child and to take legal decisions concerning the child. It includes financial responsibility and liability for the child</td>
</tr>
<tr>
<td>Custody</td>
<td>The right/duty to house the child in the place of the child’s primary residence</td>
</tr>
<tr>
<td>Inchoate Rights of Custody</td>
<td>The “Rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned” (Re B (A Minor) (Abduction) [1994] 2 Family Law Reports 249).</td>
</tr>
<tr>
<td>Primary caregiver</td>
<td>A primary caregiver is a person addressing the child’s material needs. The primary caregiver is sometimes named “residential parent”, or “custodial parent”.</td>
</tr>
<tr>
<td>Access rights</td>
<td>The right to spend time with the child and host him or her on the basis of a periodical routine - also called visiting or access rights</td>
</tr>
<tr>
<td>Non-residential parent</td>
<td>A non-residential parent is a parent whose primary residence differs from that of the child.</td>
</tr>
<tr>
<td>Left behind parent</td>
<td>A left-behind parent is a parent whose rights/duties of parental responsibility have been impaired following a child abduction or an illegal transfer of the child’s residence abroad.</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY AND RECOMMENDATIONS

This study was requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) in order to provide the European Parliament and the Mediator for International Parental Child Abduction with an analysis of the practical implementation of the legal framework in force, "but also [to] propose additional recommendations as to how to change existing practices and/or legislation in order to solve any identified practical or legal problem".

It aims at clarifying the grounds and the objectives of the available legal framework regulating the phenomenon of “child abduction”.

The rich and intricate legal framework in force stems from the 1980 Hague Convention on Child Abduction. The Convention is in force since 1 December 1983 and today is being applied in 93 States of the world, among which all European Member States.

Following a French initiative, EU Regulation 2201/2003 was drafted in order to enhance the “return mechanism” created by the Hague Convention within the European Area of Freedom, Security and Justice. Thus, with the exception of Denmark, European rules are applicable in Member States in addition to the Hague rules.

In addition to ratifying the Hague Convention, several Member States concluded bilateral agreements aimed at easing cooperation to solve child abduction cases. These bilateral conventions have been concluded by EU Member States with several Arab countries: i.e. Belgium has bilateral agreements with Morocco and Tunisia; France with Algeria, Egypt, Lebanon, Morocco and Tunisia; Sweden with Egypt and Tunisia. Furthermore, three Member States – Croatia, the Czech Republic and Romania – also apply the Strasbourg Convention on Contact concerning Children of 15 May 2003, drafted within the Council of Europe.

The analysis of the legal framework in force seeks to assess the efficiency of the “return mechanism” created by the Hague Convention and enhanced by the following legislation, in particular EU Regulation 2201/2003. In light of our findings, several recommendations are proposed to better prevent cross-border parental child abduction, to improve the effectiveness of judicial remedies to child abductions and to promote non-judicial remedies leading to an amicable settlement of child abduction cases.

A. Statistical data and possible reasons explaining the increasing number of applications for the return of a child

Statistics point to a constant increase in child abduction legal disputes within the European Area of Freedom, Security and Justice.

The following statistical assessment (chapter 2) has found that, in most countries, the number of requests for the return of children brought or retained abroad by a parent or relative is increasing.

In light of the available data, however, it is not possible to assert if “parental kidnapping” is increasing per se or if the increase concerns simply the number of requests to Central Authorities, since parents are more and more aware of the protection awarded by the Hague Convention on child abduction. Interestingly, the statistical survey highlights a direct correlation between the number of return request treated by Central Authorities, on the one hand, and their experience – also based on the years elapsed since ratification of the Convention – and efficiency in handling Convention applications, on the other hand.

Other correlations exist between the number of incoming and outgoing requests on the one hand and, on the other, the number of foreigners present in a country and, in turn, the number of international couples and resettlement abroad after the international family’s breakdown.
The link between the exercise of the European freedom of movement of workers and child abduction is paradigmatically shown by the national reports of Member States having acceded the EU in 2004: after the enlargement of the European Union in 2004, Central and Eastern European Member States witnessed a very sharp increase in “child abduction” cases.

The increased mobility of families contributes to the increase in divorces and separations with cross-border implications.

In this respect, the first assumption that the study verifies is related to the circumstance that a large majority of child abduction cases rise in the context of high-conflict dissolutions of unions between the father and the mother of one or more children with transnational implications (typically a marriage between citizens of different States).

Accordingly, case law shows that most abductions take place in the course of legal proceedings which involve opposing fathers and mothers of different citizenship litigating over their respective rights and duties over the child.

Other – although less frequent – cases of “qualified” child abduction occur in many other contexts and scenarios.

For a better understanding of the phenomenon – with a view to elaborating preventive measures - the study recommends the collection of information, as some countries already do, on the reasons for the abduction, whether it relates to a previous, intolerable impairment of the taking parent’s contact rights, whether the taking parent was seeking to protect the child from domestic violence, etc. This could also be achieved through the development of a European database on child abduction.

Moreover, it is foreseeable that child abduction disputes will increase consistently in connection with the current legal evolution and the sociological context of European countries, in particular as a consequence of the following factors (see amplius in paragraph 1.2.1.):

i) the growing mobility of European citizens (i.e. the “international factor”);

ii) the growing number of transnational family dissolution proceedings (i.e. the “judicial factor”), aggravated by the increased inequivalence of the legal rules applicable to family dissolutions, in its turn linked to the fragmentation of family law in different types of family models (marriage, registered partnership, non-registered partnership);

iii) the broadening of the legal notion of parenthood and the increasing number of adults to whom rights over a child are awarded (i.e. the “right to maintain contacts with the child”).

B. Case-studies emerging from case-law

A first finding of the study consists of identifying typical cases giving rise to disputes characterized as “child abduction” in courts (see the relevant case-law in par. 3.1.2.).

Scenario A – kidnapping or wrongful retention by a relative

A child is kidnapped by a member of his/her family who has no custody, nor parental rights over him (a grandparent, an uncle/aunt).

Scenario B – kidnapping or wrongful retention by a parent

After the dissolution of a family, the child continues to live with one of the two parents and the other parent maintains contacts with the child through the exercise of visiting rights.

During a visit to the non-custodial parent, the child is removed or retained abroad.

Statistics show that, in this scenario, the return request is more often filed by mothers.

Scenario C – transfer of residence abroad before a judicial decision on custody
The child is removed by one of his parents and brought abroad with the intention to resettle without the other parent. The removal coincides with the dissolution of the family, and the rights and duties related to parenthood, in the moment of the removal, are not grounded on a judicial decision but on the law applicable to the parental relation.

**Scenario D** – transfer of the residence of the custodial parent

After the dissolution of a family, the child continues to live with one of the two parents and the other parent maintains contact with the child through the exercise of visiting rights.

The parent who lives with the child transfers his or her residence with the child abroad.

The reasons to resettle might be linked to a new partner; work-related or be grounded in a better social network, i.e. members of the parent’s family who are in a position to support a better work/life balance in the best interest of the child.

Statistics show that, in this scenario, the return request is more often filed by fathers.

**Scenario E** – flight from domestic violence

In the context of domestic violence – where a violent parent is endangering the physical or psychological health or, indeed the life of the child – the other parent flees abroad illegally with the child.

Statistics show that, in this scenario, the return request is more often filed by mothers.

At present, these five scenarios - extracted from case law – are subject to the same legal rules. It is possible that the following sixth scenario will appear frequently in the future as a variation of Scenarios B and D: where a kidnapping or an illegal transfer of the child’s residence takes place in the hypothesis of shared-custody (garde alternée).

The behaviour of the person taking the child abroad is wrongful in Scenarios A, B and D, it can be wrongful – depending on the law applicable to parental rights - in Scenario C and it is never wrongful in Scenario E since the fundamental right to self-defence comes into play.

C. Social changes affecting the operation of the Hague Convention on child abduction

In principle, according to the intentions of the drafters of the Hague Convention on child abduction, the phenomenon to be addressed and internationally counteracted was, in the first instance, an “abduction” akin to that featured in Scenarios A and B. In light of that need, the remedy of art. 12, prescribing the return of the child in six-week time set by art. 11, was elaborated.

Moreover, the objective of the Hague Convention was, in the first instance, that of counteracting the disruption – resulting from a kidnapping - of the household and social environment of a child, in violation of a previous judicial - or in any event legal – settlement as regards the residence of the child. For these reasons, and to a certain extent, Scenario C benefits from the protection granted by art. 12.

Art. 12 orders the immediate return of the child, even though it allows the judge to consider any relevant circumstance of the case justifying a deviation from the rule of return.

The Hague Convention also includes, in Art. 21, provisions for the protection of “access rights” of parents in order to prevent (and react to) the impairment of their right to maintain ties with their children.

However, in light of the evolution of family law (see in particular par. 1.2.2. and 3.1.3. below), the protection of the parents having “access rights” has shown itself to be ineffective and has required correction.

It is the implementation of the rules in practice which has corrected the imbalance created by the Hague Convention between the protection of residential and non-residential parents
via the assimilation of the aforementioned situations – the kidnapping and the illegal transfer of the child’s primary residence – as “child abductions”.

However, the idea of restoring the status quo ante through the return of the child to his/her original habitual residence only makes sense as a reaction to a kidnapping (especially in Scenario A and B): in those cases, the child is immediately brought back to the residence from which s/he was illegally removed. S/he is thus re-integrated in his/her habitual environment and daily routine.

In Scenarios C and D, if a parent has resettled abroad, moved house, changed jobs and made arrangements for the education of the child, the return mechanism may not always amount to a “return”.

To the contrary, the remedy offered by art. 12 of the Convention forces that parent to re-create a household at his/her previous place of residence: find a new house and, possibly, a new job etc. In this case, the “return” of the child amounts to a “new transfer” and confronts the parent seeking to re-organise his/her life after the previous settlement with the other parent with the need to, again, change his/her residence and re-organise the child’s life in the exercise of his/her rights/duties. It amounts to a forced re-transfer of residence, rather than a return.

These circumstances are taken into account by national courts whenever they are confronted by scenarios C, D and E. However, the evaluation of the overall situation in the best interest of the child has had the side-effect of potentially impairing the operation of the Hague Convention.

This evolution seems, however, unfortunate and the elaboration of appropriate rules addressing on an ad hoc basis the different scenarios emerging from case law would allow a better protection of the best interests of the child.

D. A more balanced protection of the respective parental rights of former partners

An efficient safeguard of the rights of a non-residential parent living abroad must include all aspects necessary to “fill” the distance between the new residence of the child and the residence of the non-custodial parent. In particular, the role of Central Authorities with a view to implementing Art. 21 of the Hague Convention involves addressing the issue of responsibility for the new financial burdens in connection with the transfer of residence; the improvement of inter-cultural communication whenever the linguistic and/or cultural barriers are important; and all necessary measures guaranteeing the non-residential parent de facto active participation in the successful upbringing of the child and similar considerations.

All potential impairments of parental rights need specific attention within the European Area of Freedom, Justice and Security, especially in light of the development of the national rules on custody.

These considerations lead us to identify another possible factor in explaining the increase of child abductions cases in Europe. It can be found in the on-going processes of reform of national rules on custody. These are related to the socio-economic changes that have blurred the distinction between the respective parenting roles of fathers and mothers.

Not all judicial settlements of divorces and separation allow, at present, the making of a clear distinction between a residential and a non-residential parent, especially when a shared residence is ordered in respect to a child.

Moreover, even in those cases in which it is still possible to identify the residential parent and the parent enjoying visiting rights, the “right to determine the child’s residence” has been withdrawn from the scope of the right of custody in most European countries. Consequently, the transfer of residence by “residential parents” without the consent of the non-residential parent is characterized as “child abduction”, regardless of whether the parent has kidnapped the child or prepared and carried out a transfer of residence abroad.
Many authors have indicated that these developments in the national rules of custody have the indirect consequence of creating a potential obstacle to the mobility of separated and divorced persons, in particular when they are primary caregivers.

A **compulsory mediation scheme**, with a view to reach an amicable settlement on the transfer of a parent’s residence abroad – with or without contextual transfer of the child’s residence – could be tested to prevent unilateral and unexpected actions. Moreover, it would allow better organisation of the multiple relevant issues raised by the move (practical and economical).

The legal framework in force, requesting a prompt and immediate return and a restrictive interpretation of the exceptions to return performs well in cases where the removal has reversed a judicially established balance of parental rights and return does not amount to a re-settlement of the child (as in scenarios A and B). In this respect, the **effectiveness and timeliness of judicial remedies** seem essential for preventing as well as for reacting to the phenomenon.

The automatic return prescribed by art. 11(4) of EU Regulation 2201/2003 is a welcome step forward in this respect. However, the phrase “if adequate arrangements have been made to secure the protection of the child after his or her return” does not provide appropriate safeguards in cases of domestic violence and should therefore be amended (see below).

No deterring effect nor remedies are needed in scenario E, where the removal is apparently wrongful but justified by the exercise of the right to self-defence.

In scenarios where the transfer is illegal but does not reverse the organisation of the care of the child (as, in particular, in scenario D), a more active role for Central Authorities in evaluating non-judicial remedies, including lawyer-supervised agreements and mediation, should be promoted in order to measure the possibility of reconciling the parents and to have them collaborate in parenting.

These conclusions stem from a critical interpretation of the Hague Convention on Child Abduction – with an historical and teleological canon – in conjunction with a critical analysis of the case law, the statistical observations and relevant literature.

### E. Recommendations to the European Parliament

The following amendments and recommendations have been elaborated with a view to improving the mechanisms of the Hague Convention on Child Abduction within the European Area of Freedom, Justice and Security, where the principle of **mutual trust** applies together with the right of Union citizens and their family members **to move and reside freely** within the territory of the Member States.

In addition to the urgent need for strategies to tackle the issue of cross-border parental child abduction, the following recommendations take into account specific **European policies** aimed at **reducing family litigation through mediation**, in conformity with the objectives set in the Stockholm Program of the European Council, in the Commission’s Action Plan Implementing the Stockholm Programme and with the EU Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (see 3.5.2.). The latter explicitly acknowledges, in its art. 7, the vulnerability of children involved in judicial proceedings; a concern that is particularly acute whenever the child’s main attachment figures, his or her parents, are pitted against each other.

In conclusion, the study recommends to the EP: to improve scientific research and data collection at EU level (I); to encourage Member States to centralise child abduction cases in specialised courts and, at the same time, to promote specific training for mediators and judges dealing with transnational proceedings involving children (II); to amend Regulation 2201/2003 so as to: prevent “child abductions” via a mediation scheme allowing to organise
a licit transfer of the child’s residence from one Member State to another; ensure the protection of the best interests of the child through an enhanced cooperation between European judges with the aim of reducing the length of “child abduction” proceedings (III).

I. Improvement of scientific research

I.1. Development of a European public database

The Hague Conference of Private international law has created a “Child Abduction Section” within its website, in order to monitor the implementation of the Hague Convention on child abduction by State Parties as well as, more in general, the phenomenon of child abduction and the legal and judicial responses to it. The Section hosts two notable databases to that end: INCADAT and INCASTAT. In addition the will to introduce “a more efficient system for dealing with international child abduction” led to the creation of the software “ichild”. The aim of these databases is to collect, respectively, judicial decisions, statistics and both as regards to child abduction cases. However, these databases are not easy to update since they are mainly based on the work of national correspondents.

In this respect, the EU could build a specific database in order to better acknowledge the number and relative percentage of high-conflict dissolutions of unions between the father and the mother of one or more children with transnational elements on the basis of an exchange of information through national statistical authorities, that are already operating and collecting data at the national level.

Indeed, the study reveals the need to further develop the collection of data by Central Authorities and the harmonisation of their publication.

On the one hand, a categorization of the requests according to the reasons for abduction would allow a better understanding of the “typical cases”. On the other hand, possible correlations between migratory patterns and child abduction applications need to be highlighted.

A public database updated in real time or a 2.0 platform available to Central Authorities would be useful to monitor the evolution of the socio-economic reality of the phenomenon.

I.2. Development of a strategy to prevent high-conflict separations, divorces and the disruption of families with children

As a second step, it would be important to identify the most frequent reasons behind the escalation of “judicial violence” between former partners, in the context of which child abduction takes place.

This study suggests that gender studies and studies on intercultural communication may offer, in this respect, key elements in order to identify situations at risk and elaborate a strategy to prevent high-conflict dissolution of families.

A deeper knowledge of the phenomenon would improve mediation schemes and allow recourse to mediation before a potential child abduction or an illegal transfer of a child’s residence occurs, in high risk situations.
II. Development of specialised courts and creation of a network of trained mediators for transnational proceedings involving children

II.1. Development of a European network of specialised mediators

In order to counteract child abduction and to solve child abduction cases, private persons have created NGOs and associations of “family mediators” that are, to a certain extent, already grouped in transnational networks (see e.g. the network of cross-border mediators initiated by the Belgian NGO Child Focus, the German Mikk and the Leuven Institute of Criminology of the Katholieke Universiteit Leuven).

After the adoption of the European code of conduct for mediators on 2 July 2004 and Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, a network of EU-trained and/or EU-authorised mediators for transnational proceedings involving children could be specifically developed and act under the auspices of the European mediator for child abduction. The network could serve the following different purposes.

First, as suggested above, it would be important to propose – in the context of family dissolution proceedings and whenever it is possible to assess risks of unilateral actions impacting the right of the child to maintain contacts with both parents – a mediation scheme, with a view to reach an amicable settlement on the transfer of a parent’s residence abroad – with or without contextual transfer of the child’s residence. The number and importance of the issues at stake in case of a transfer abroad requires communication between the parents. Communication supervised by mediators could prevent unilateral action and facilitate the relationship between the persons involved in the upbringing of the child.

Secondly, after the illegal transfer of a child’s residence from one Member State to another, expert mediators from the countries involved in the move could offer professional help with a view to finding an amicable settlement with regard to the residence of the child and the modalities to exercise parental rights.

II.2. Judicial training and development of specialised courts

The elaboration of strategies preventing family litigation shall include specific training to lawyers and judges assisting transnational judicial proceedings arising in the context of family dissolutions, in order to prevent aggressive judicial litigation.

In this respect, those Member States that do not yet have specialised courts for the implementation of the Hague Convention on Child Abduction should be encouraged to centralise litigation in a few specialised courts.

The training of judges sitting in such Courts shall include: the development of appropriate language skills favouring the communication between them and foreign judges specialised in child cases; the ability to cooperate with each other without national and gender prejudices (intercultural communication skills); the capacity to deal expeditiously with child abduction cases and with cases of illegal transfers of a child’s residence; the ability to cooperate with recognised mediation centres.

III. Changes in the legislation in force

III.1. Developing a two-track strategy in order to address timely child abduction and to promote cooperation among Member States’ judges

In order to ease the identification of the most serious breaches of the rights of parents and children, a dividing line needs to be made between cases where the best interest of the child to return may be presumed (fast track) and cases where the best interest of the child requires in concreto analysis and prevention of implicit discrimination based on nationality.

In doing so, hypothetical national biases interfering in a negative manner with justice administration within the EU and with the rights of the child need to be explored.
To illustrate these biases, let us take one recurrent case: that of a German woman marrying a Spanish man, as in the cases *Aguirre Zarraga v. Simone Pelz* (C-491/10 PPU, of 4 December 2010) and *Bianca Purrucker v Guillermo Vallés Pérez* (C-256/09, of 15 July 2010 and C-296/10, of 9 November 2010).

In both of these cases a German woman had moved to Spain to live with a Spanish man. In both cases, children were born to the couple, the couple broke up and the German women involved were willing to resettle in Germany with the Spanish-German children.

Judicial proceedings were pending in Spain and in Germany. It seems obvious that a Spanish man living in Spain has a deeper knowledge of the Spanish language, culture and legal system when compared to a German woman recently immigrated; he is certainly better integrated in his home country. The same can be said for the German woman bringing her case to a German court. These differences create a *de facto* *inequality of arms* throughout the whole process of litigation; from finding a suitable lawyer to explaining the complexity of the family situation to the judge.

This inequality is “reciprocal”, so to say, since it benefits citizens in their homeland and *de facto* harms foreigners in the partner’s land.

A second factor creating a national bias concerns the *position of the judge*.

As shown by case law, whenever the case is not that of Scenario A and B above, the judge tends to take into account the circumstances of the case more in detail. There is no need or any intention to cast a malicious doubt on the impartiality of European judges: it suffices to observe that the point of view of a Spanish judge is that of the Spanish legal order and there is no guarantee that his German colleague – interpreting the same facts from a German perspective – would pronounce the same decision.

These circumstances have been acknowledged by the European Parliament and the Council having led to art. 15 of EU Regulation 2201/2003 which prescribes the judge to “consider [if] a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction […]."

This mechanism may be adapted in order to allow a joint or bi-national decision whenever the dispute between parents involves, at the same time, two opposing European legal orders.

To this end, the courts of Member States involved in the family dispute should cooperate from the early stages of the judicial proceedings, in particular through the channel of the European Judicial network.

Moreover, a binational task force of mediators could be actively engaged in the process of encouraging an amicable settlement of the dispute (below at III.2). If mediation fails, the best guarantee to find a fair solution is to allow a joint-decision by the courts of Member States involved in the move.

If the binational court is not able to agree on a co-decision of the case, only the decision of a supranational court, such as the General Court of the European Union, could solve the dispute between parents from a perspective that is equally distant from the parties.

Details on the content of recommended amendments follow.

**III.2. Suggested amendments to EU Regulation 2201/2003**

In light of the above, Arts. 2, 10 and 11 of EU Regulation 2201/2003 should be amended and two new articles should be added, as suggested in bold:

**Article 2**

**Definitions**
For the purposes of this Regulation:

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

2. the term "judge" shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;

3. the term "Member State" shall mean all Member States with the exception of Denmark;

4. the term "judgment" shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

5. the term "Member State of origin" shall mean the Member State where the judgment to be enforced was issued;

6. the term "Member State of enforcement" shall mean the Member State where enforcement of the judgment is sought;

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

8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;

9. the term "rights of custody" shall include rights and duties of the holder of parental responsibility who is entrusted with the care of the person of a child, and in particular the right to house the child in his or her primary residence in conformity with a judgment or by operation of law or by an agreement having legal effect under the law of the Member State where that residence is;

10. the term "rights of access" shall include in particular the right to take a child to a place other than his or her habitual primary residence for a limited period of time;

11. the term "illegal transfer of a child's residence" is the transfer of the primary residence of a child by the parent having a right of custody in breach of rights of another holder of parental responsibility.

12. the term "child abduction" shall mean the removal or retention of a child in a Member State other than the one of his or her primary residence in breach of rights of custody.

"Wrongful removal or retention" shall mean a child's removal or retention where:

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

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

New article * [between art. 2 and 3 of Regulation 2201/2003]

Mediation and Cooperation between courts in cases of transfer of a child's residence from one to another Member State

1. Central Authorities of Member States shall see to the establishment of a network of experts and institutions that are in a position to provide advice, to carry out conciliation or mediation, to represent individual children, and that are capable of acting expeditiously, when requested to prevent,
organise or remedy the breach of parental rights in conformity with arts. 9, 10 and 11.¹

2. Where proceedings relating to child abduction or transfer of a child’s residence between the same parties are brought before courts of different Member States, the courts shall cooperate with a view to ensuring the child such protection and care as is necessary for his or her well-being in conformity with art. 3 of the Convention on the Rights of the Child.

To this end, they shall, acting directly or through their respective Central Authorities, take all appropriate steps to:

(a) collect and exchange information:
   (i) on the situation of the child;
   (ii) on the reasons behind the will or the action of taking the child abroad;
   (iii) on decisions taken concerning the child;

(b) facilitate agreement between holders of parental responsibility through Central Authorities, mediation or other means, and facilitate cross-border cooperation to this end.²

New article ** [between art. 9 and 10 of Regulation 2201/2003]
Lawful transfer of the child’s residence

1. Where the holder of custody rights plans to move the primary residence shared by him or her with the child from one Member State to another and another holder of parental responsibility does not authorise the transfer of the child’s residence, a request may be filed to the Central Authorities of the Member States affected by the move [that of the present residence and that of the planned new residence].

2. The Central Authorities requested shall appoint a committee of certified mediators belonging to both Member States within [2] weeks from the request [nb. authorities to be entrusted to certify and appoint].

3. The bi-national committee of certified mediators shall:
   a) hear [all persons] involved in the dispute over the transfer of residence of the child;
   b) request the parties to reach an amicable settlement as regards the residence of the child and the organisation of parental rights and duties thereof;

4. In case an amicable settlement is reached, it shall be immediately enforceable in both countries.
In case an amicable settlement is not reached within [six weeks] from its appointment, the bi-national committee of mediators issues a report on the case.

5. The party seeking the transfer of the child’s residence may notify the report to the competent courts [that of the habitual residence or that of the planned new residence]. Paragraphs 8 and 10 of art. 11 shall apply.

² From art. 55 of EU Regulation 2201/2003.
Article 10

Jurisdiction in cases of child abduction

In case of wrongful removal or retention of the child abduction, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention of the child abduction shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

Article 11

Procedure in cases of child abduction and illegal transfer of a child’s primary residence

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "the 1980 Hague Convention"), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 10 shall apply.

2. 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.

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

In child abduction cases, without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

In cases of illegal transfer of a child’s primary residence, paragraphs 8 to 10 shall apply.

4. A court cannot refuse to return a child victim of child abduction on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return unless the removal is grounded on the right to self-defense.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant
documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention abduction have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

8. The court seised by the return request in conformity of paragraph 1 or by the transfer request in conformity of art. ** shall, except where exceptional circumstances make this impossible, issue an interim decision on the temporary residence of the child no later than [six weeks] after the application is lodged.

9. The interim decision shall be immediately notified to the court of the other Member State having jurisdiction according to par 5 of art. **. The court shall be requested to assume joint jurisdiction. Art. 15, par. 2 shall apply.

10. With the collaboration of Central Authorities, the courts seised of a return request shall entrust a bi-national committee of mediators. Paragraphs 2 to 5 of art. ** shall apply.

11. The courts shall issue a final decision on the return request or on the transfer request jointly within [three months] from the submission of the report by the bi-national committee of mediators, except where exceptional circumstances make this impossible.

The decision shall concern the respective rights and duties of the holders of parental responsibility with a view to ensuring the child such protection and care as is necessary for his or her well-being in conformity with art. 3 of the Convention on the Rights of the Child.

12. If the judges sitting in the two courts fail to take a joint decision, the case shall be decided by the General Court of the European Union within [four months].
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