

European and International Law



**Reflections on the Abolition of Exequatur  
in the Cross-border Cases  
Regarding the Return of the Child**

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**Abstract:** Free circulation of judgments within the EU of the authentic instruments and agreements in matrimonial matters and in matters of parental responsibility is provided for in *Regulation (EC) no. 2201/2003 of the Council of 27 November 2003 concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility*, repealing Regulation (EC) no. 1347/2000. For two categories of judgments, this Regulation provides for the suppression of exequatur. In this article we intend to continue analyzing the suppression of the exequatur under the situation of judgments in family law matters, relating to the return of the child in the cross-border cases, on judgments passed in another Member State.

**Keywords:** Brussels II bis Regulation; cross-border cases; the return of the child; recognition of the judgment by law; execution of judgment

## 1. Argument

One of the objectives of the *Regulation (EC) no. 2201/2003 of the Council of 27 November 2003 concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) no. 1347/2000*<sup>2</sup> (here in after referred to as the “Regulation”),

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<sup>2</sup> Published in OJ L 338, 23.12.2003, p. 1. The Regulation applies in all Member States of the European Union except Denmark, from 1<sup>st</sup> of March 2005 (except art. 67-70, which entered into force on 1 August 2004). It is known in the literature as “Brussels II bis Regulation”. On this regulation, see Ioana Burduf et al., *Cooperarea judiciară în materie civilă și comercială, Manual/Judicial cooperation in civil and commercial matters, Manual*, pp. 140-158, available at: [http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201\\_Manual%20Civil.pdf](http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201_Manual%20Civil.pdf); (Buglea, 2013, pp. 222-225). Also, opinions on the free movement of people within the EU see Negrut (2013, pp. 5-12).

confirmed also by the Court of Justice of the European Union, in a decision<sup>1</sup>, is the prevention of child abduction between Member States and without delay the return of the child if the child abduction has occurred by moving from one Member State to another without the consent of the parent with whom the child is habitually resident.

Also, the European Court of Human Rights ruled that once it was found that a child has been wrongfully removed, the Member States should strive to ensure appropriate and effective return of the child and the failure of the efforts represents a violation of the right to family life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>2</sup>

This material is a continuation of the approach on the abolition of exequatur in family law cases regarding the exercise of the right of visitation in another Member State, which we performed in a previous issue of the journal (Lupșan, 2015, pp. 31-37) and where we promised to return on the situation analysis of judgments passed in a member state regarding the return of the child.

Briefly, we mention that the Regulation provides in article 21, paragraph (1) that decisions on divorce matters and in matters of exercising parental authority given in a Member State shall be recognized by *the operation of law* in other Member States (Pancescu, 2013, pp. 679-720), and in articles 40-45 there are provisions on the enforceability of certain judgments concerning the rights of visitation<sup>3</sup> and certain judgments ordering the child's return.

## 2. On the Decision of Returning the Child

The article 42, paragraph 1 of the Regulation has the following content: “*The return of the child referred to in article 40, paragraph 1, letter b, resulting in an enforceable judgment passed in a Member State is recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition in the case where the judgment*

<sup>1</sup> See case C-195/08 PPU *Rinau*, Rep. 2008, p. I- 05271, point 52.

<sup>2</sup> See, for example, causes *Šneerson and Kampanella / Italy* (application no. 14737/09), paragraph 85 (iv); *Iglesias Gil and AUI / Spain* (application no. 56673/00); *Ignaccolo-Zenide / Romania* (no. 31679/96), *Marie / Portugal* (application no. 48206/99); *PP / Poland* (application no. 8677/03) and *Raw / France* (application no. 10131/11).

<sup>3</sup> The notion of “right of visitation” has the meaning specified in art. 2, point 10 of the Regulation: “the right to take a child for a limited period in a place other than the child's habitual residence.” In relation to the right to visitation, see (Avram, 2013, pp. 470-472; Nicolae, 2014, p. 212)

*has been certified in the Member State of origin under paragraph 2*”, which means that the rule of the abolition of *exequatur* for a judgment of a court of a Member State of origin (according to article 2, point 5 of the Regulation, it is “the Member State in which the enforceable judgment was passed”) which decides upon the return of the child.

Technically, we are assuming the above in the following situation: due to the fact that a child has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident, the parent (or other person, institution or body into custody of the child<sup>1</sup>) shall apply for an application for the return of the child, on the basis of article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction<sup>2</sup>, to the court of the State where the child is located. Thus the court applied the provisions of this Convention and of article 11 of the Regulation, because, finally, after a trial conducted expeditiously, for a maximum period of six weeks, it is passed the judgment of returning the child immediately or non-returning the child.<sup>3</sup>

Only in the case where the **court’s decision is the non-return of the child**, there are applicable the provisions of Article 11, paragraphs 6-7 of the Regulation, which provide for the transmission, directly or through the central authorities of the two Member States, **to the Court of the State of origin** of the judgment, accompanied by the relevant documents from the file, because this court has to decide *whether the child’s return will take place or not*. The solutions of the court of origin could be:

- *a decision to close the file*, according to article 11, paragraph 7 of the Regulation, if within three months of notification, the parties do not communicate information related to the case to the court, including if they want for that court to judge the case;
- *a judgment of non-return of the child*, which means that the case will be closed and the jurisdiction to decide on the merits of the case is transferred to the courts of the Member State where the child has **been removed**.

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<sup>1</sup> The concept of “custody” has the meaning specified in article 2, point 9 of the Regulation: “the rights and obligations on taking care of a child, including the right to decide on the place of residence”. See also (Costache, 2014, pp. 793-799).

<sup>2</sup> Romania accessed the Convention on the civil aspects of the international children kidnapping contracted at Hague on October, 25th 1980 by Law no. 100/1992, published in the “Romanian Official Monitor”, part I, no. 243 from September, 30th. See (Dobozi, 2011, p. 318).

<sup>3</sup> See (Gavrilescu, 2012, pp. 41-52).

- a *decision to return the child*, which is directly recognized and enforceable in other Member States, under the condition of being accompanied by a certificate (article 42, paragraph 1), the same as in the cases related to judgments concerning the right of visitation.

### **3. On the Certificate for Return of the Child and its Effects**

*Ex officio*, the court of origin shall issue the certificate on the return of the child referred to in article 42 of the Regulation (using the standard form set out in Annex IV), which means that during the process of demonstrating the compliance with the procedural guarantees required by article 42, paragraph 2 of the Regulation, i.e. all parties had the opportunity to be heard, including the child, unless a hearing is considered inappropriate in relation to his age or degree of maturity; for the solution there were taken into account the reasons for the judgment of the non-return issued according to article 13 of the 1980 Hague Convention and the evidence administered in the process.

Regarding the timing of issuing the certificate for the return of the child, this is when the judgment becomes “enforceable” (article 42, line 1, paragraph 2 of the Regulation entitles the court to declare the judgment enforceable “without bringing prejudice to any appeal”).

We should note that against issuing this certificate it cannot be appealed, but only promoting a correcting action, in the case of committing errors when filling in the certificate by the judge in the State of origin.

Issuing the certificate on rights the return of the child produces two legal effects: it no longer requires the request for exequatur and it is no longer possible to challenge the recognition of the judgment.

### **4. On the Judgment of the Return of the Child**

The party that wishes to apply the judgment enforceability of the return of the child will submit, according to article 45 of the Regulation, a copy of the judgment passed by the court of origin (which is considered as if it was passed by a national court in the executing State) and the certificate of return of the child. The procedure for the enforcement of a judgment for the return of the child is subject to the national law and the national authorities apply the rules which ensure the

efficient and rapid execution of passed judgments under the Regulation, so as not to undermine its objectives.

From the EU Court of Justice practice we mention two cases:

- In one case<sup>1</sup>, it was noted that related to the circumstances of the case (the return to the father, in Spain, of a daughter, who currently lives in Germany with her mother, the defendant) that the competent court of the executing Member State (Germany) cannot oppose the enforcement of a certified judgment ordering the return of a child wrongfully retained, on the grounds that the court of the Member State of origin (Spain), where that judgment was passed, had breached article 42 of Regulation (EC) no. 2201/2003, interpreted in accordance with article 24 of the Charter of Fundamental Rights of the European Union, the appreciation of such a breach having exclusive jurisdiction of the courts of the Member State of origin.

- the request for passing a preliminary judgment<sup>2</sup> was made within the proceedings between Ms Povse, on the one hand, and Mr Alpago, on the other hand, on the return to Italy of their daughter, who was in Austria with her mother having custody of the child. The EU Court of Justice held that article 47, paragraph (2) of the Regulation no. 2201/2003 must be interpreted as in the meaning that a subsequent judgment passed by a court in the executing Member State, which has provisionally decided upon custody and which is considered enforceable under the law of that State may not hinder the execution of a certified judgment delivered previously by the court of the Member State of origin ordering the child's return. Also, the enforcement of a certified judgment cannot be refused in the executing Member State on the grounds that, following a change of circumstances after being passed, it might be seriously detrimental to the interests of the child. Such a change must be pleaded before the competent court of the Member State of origin, which should be seized also with a possible request for the annulment of the judgment's execution.

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<sup>1</sup> In Case C-491/10 PPU (Zarraga vs. Pelz) Court judgment of December 22, 2010 is available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83464&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=375430>.

<sup>2</sup> In Case C211- 10 (Povsic vs. Alpago) judgment of the Court of 1 July 2010 is available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83999&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=376461>.

## 5. Conclusion

In conclusion, in order to return the child, the Regulation settles the conflict that can occur between a non-return decision issued by the court of the Member State where the child is abducted or wrongfully removed and a subsequent judgment for return, passed by the court of the Member State where the child has his habitual residence, in favor of the latter. The decision to return is not subject to the exequatur procedure, as it is immediately recognized and enforceable in the State where the child is.

## 6. References

- Avram, M. (2013). *Drept civil. Familia/Civil Law. The Family*. Bucharest: Hamangiu.
- Buglea, C.-P. (2013). *Drept internațional privat din perspectiva reglementărilor europene aplicabile în domeniu și a noului Cod civil român/Private international law from the perspective of European regulations applicable in the field and the new Romanian Civil Code*. Bucharest: Universul Juridic.
- Burduf, Ioana; Frauenberger, Ulrike; Kaller, Maria; Markovits, Katalin; Onaca, Viviana; Păncescu, Flavius George; Rechberger, Walter & Tobă, Camelia (2013). *Cooperarea judiciară în materie civilă și comercială, Manual/ Judicial cooperation in civil and commercial matters, Manual*, pp. 140-158, [http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201\\_Manual%20Civil.pdf](http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201_Manual%20Civil.pdf).
- Păncescu, F. (2013). *Procesul civil internațional/International civil trial*, in *Noul Cod de procedură civilă. Comentariu pe articole/The New Code of Civil Procedure. Comment on articles* (coord. G. Boroi), Vol. II. Bucharest: Hamangiu.
- Costache, Mirela (2014). Social, Psychological and Legal Arguments Supporting the Objective Side of the Civil Tort of Parents for their Children's Underage Illegal Act or Those Placed Under Judicial Interdiction. *International Multidisciplinary Scientific Conferences On Social Sciences & Arts SGEM 2014*, Albena, Bulgaria, 1-9 September, pp. 793-799.
- Dobozi, V. (2011). Applying the Stipulations of the Hague Convention regarding the Civil Aspects of International Children Kidnapping. *Judicial Courier*, no. 6, p. 318.
- Gavrilăscu, A. G. (2012). Regarding the Admissibility Conditions of the Claim of Returning the Child Whose Displacement or Non-Return Is Illegal. *Annals Constantin Brancusi - Juridical Sciences Series*, Vol. 1, No. 1, pp. 41-52.
- Lupșan, G. (2015). Reflections on the Abolition of Exequatur in Family Law Cases regarding the Exercise of the Right of Visitation. *Acta Universitatis Danubius. Juridica*, vol. 11, no 1, pp. 31-37.
- Negruț, Vasilica (2013). General Considerations Regarding the Restrictions, Exemptions and Limitations on the Right of Free Movement of Persons. *Acta Universitatis Danubius. Juridica*, Vol. 10, no. 2, pp. 5-12.
- Nicolae, I. (2014). *Dreptul familiei în context național și în raporturile de drept internațional privat/Family law in national and international private law relations*. Bucharest: Hamangiu.