

Some comments related to the international child abduction as regulated by the Council Regulation (EU) no. 1111/2019 and the Romanian Case Law

Algunos comentarios relacionados con la sustracción internacional de menores según lo regulado por el Reglamento (UE) n.º 1111/2019 del Consejo y la jurisprudencia rumana

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**Abstract:** Considering that the international child abduction has increased nowadays, as it results from the Romanian case law, we have decided to study this part of the new Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter referred to as the “Regulation No. 1111/2019”).

For this purpose, we shall also outline the differences between the Regulation No. 1111/2019 and the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter referred to as the “Regulation No. 2201/2003”), which shall be repealed by the Regulation No. 1111/2019 from the 1st of August 2022.

The international child abduction is included in the title of a regulation for the first time. As well, a special chapter related to the international child abduction was inserted – Chapter III, articles 22-29. This amendment included by the Regulation No. 1111/2019 is not only useful, but also natural, given that the issue of the international child abduction is a complete separate issue from the parental responsibility and the exercise of this responsibility.

The new Regulation No. 1111/2019 provides clarifications in relation to the period when the seised court must give its decision, in article 24, entitled Expeditious court proceedings.

In accordance with the legal provisions of both the Regulation No. 1111/2019 and the 1980 Hague Convention, for ordering the return of a child the following conditions must be met: (i) there has been a breach of the rights of custody, (ii) the person, institution or other body having the care of the person of the child was actually exercising the custody rights at the time of removal or retention, (iii) the child

was habitually resident immediately before the wrongful removal or retention in the state where the return is requested, (iv) the person, institution or other body having the care of the person of the child had not consented to or subsequently acquiesced in the removal or retention, (v) no exception provided by articles 12 and 13 of the 1980 Hague Convention applies.

**Keywords:** International child abduction, Regulation No. 1111/2019, Regulation No. 2201/2003, parental responsibility, wrongful removal or retention of a child, return of the child.

**Resumen:** Teniendo en cuenta que la sustracción internacional de menores ha aumentado hoy en día, como resulta de la jurisprudencia rumana, hemos decidido estudiar esta parte del nuevo Reglamento (UE) 2019/1111 del Consejo de 25 de junio de 2019 sobre la competencia, el reconocimiento y la ejecución de resoluciones en materia matrimonial y en materia de responsabilidad parental, y sobre la sustracción internacional de menores (en lo sucesivo, el “Reglamento n.º 1111/2019”).

A tal fin, también esbozaremos las diferencias entre el Reglamento n.º 1111/2019 y el Reglamento (CE) N.º 2201/2003 del Consejo, de 27 de noviembre de 2003, relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia matrimonial y de responsabilidad parental, por el que se deroga el Reglamento (CE) n.º 1347/2000 (en lo sucesivo, el “Reglamento n.º 2201/2003”), que quedará derogado por el Reglamento n.º 1111/2019 a partir del 1 de agosto de 2022.

La sustracción internacional de menores se incluye por primera vez en el título de un reglamento. Asimismo, se insertó un capítulo especial relacionado con la sustracción internacional de menores: el capítulo III, artículos 22 a 29. Esta modificación incluida por el Reglamento n.º 1111/2019 no solo es útil, sino también natural, dado que la cuestión de la sustracción internacional de menores es una cuestión completamente separada de la responsabilidad parental y el ejercicio de esta responsabilidad.

El nuevo Reglamento n.º 1111/2019 proporciona aclaraciones en relación con el período en que el órgano jurisdiccional que conoce del asunto debe pronunciarse, en el artículo 24, titulado Procedimientos judiciales expeditivos.

De conformidad con las disposiciones legales tanto del Reglamento n.º 1111/2019 como del Convenio de La Haya de 1980, para ordenar la restitución de un menor deben cumplirse las siguientes condiciones: (i) se han producido violaciones de los derechos de custodia, (ii) la persona, institución u otro órgano que tenga el cuidado de la persona del menor estaba ejerciendo efectivamente los derechos de custodia en el momento del traslado o la retención, (iii) el niño tenía su residencia habitual inmediatamente antes del traslado o retención ilícitos en el Estado en que se solicita la restitución, (iv) la persona, institución u otro órgano que tuviera a su cargo la persona del niño no hubiera consentido o consentido posteriormente el traslado o la retención, (v) no se aplicará ninguna excepción prevista en los artículos 12 y 13 del Convenio de La Haya de 1980.

**Palabras clave:** Sustracción internacional de menores, Reglamento N.º 1111/2019, Reglamento N.º 2201/2003, responsabilidad parental, traslado o retención ilícitos de un niño, restitución del niño.

**Summary:** I. Introducción. II. Algunas causas de ineficiencia del Reglamento N.º 2201/2003. III. Diferencias entre el Reglamento n.º 1111/2019 y el Reglamento N.º 2201/2003 en relación con la sustracción internacional de menores. IV. Condiciones que deben cumplirse para ordenar la devolución de un niño. 1. Se ha producido una violación de los derechos de custodia. 2. La persona, institución u otro órgano que tenga a su cargo la persona del niño estaba ejerciendo efectivamente los derechos de custodia en el momento del traslado o la retención. 3. El niño tenía su residencia habitual inmediatamente antes del traslado o retención ilícitos en el estado en que se solicita la devolución. 4. La persona, institución u otro órgano que tenga a su cargo la persona del menor no había consentido o consentido posteriormente en la expulsión o retención. 5. No se aplica ninguna excepción prevista en los artículos 12 y 13 del Convenio de La Haya de 1980. V. Conclusiones.

## I. Introduction

1. The first important act which regulated for the first time the international child abduction is the 1980 Hague Convention. According to its provisions, the 1980 Hague Convention aims to secure the prompt return of children wrongfully removed to or retained in any Contracting State and to ensure that

rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. Twenty-three years later, in 2003, the Regulation No. 2201/2003 was adopted, which also includes provisions regarding the international child abduction<sup>1</sup>.

2. The third most recent regulation, which also includes provisions regarding the international child abduction, is the Regulation No. 1111/2019. In fact, this last Regulation No. 1111/2019 is an improved version of the Regulation No. 2201/2003. The Regulation No. 1111/2019 shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after 1 August 2022<sup>2</sup>.

3. Regulation No. 2201/2003 shall continue to apply to decisions given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements which have become enforceable in the Member State where they were concluded before 1 August 2022 and which fall within the scope of that Regulation<sup>3</sup>. References to the repealed Regulation no. 2201/2003 shall be construed as references to the Regulation no. 1111/2019 and shall be read in accordance with the correlation table in Annex X<sup>4</sup>.

4. As far as the relation of the Regulation No. 1111/2019 with the 1980 Hague Convention, article 96 provides that “if a child has been wrongfully removed to, or is being wrongfully retained in, a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, the provisions of the 1980 Hague Convention shall continue to apply as complemented by the provisions of Chapters III and VI of this Regulation”.

## II. Some causes of inefficiency of the Regulation No. 2201/200

5. Referring to the international child abduction, during the period of application of the Regulation No. 2201/2003, the immediate return of a child could not have been insured in all cases.

6. Some causes of the inefficiency of the return procedure that we may consider are the following: (i) the six-week term for rendering a court return decision; (ii) the lack of a term when the central authority should settle a request; (iii) there is no limitation for the ways of challenging a return decision in the legislation of some Member States; (iv) the delays in settling the cases of international child abduction were caused by the fact that, in some Member States, the courts were not specialised in this procedure.

7. Although the Regulation No. 2201/2003 provides that “the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged”<sup>5</sup>, there have been debates about this six-week term.

8. Some judges and practitioners questioned themselves whether this term is available for each degree of jurisdiction or in this term are included the ways of challenging the resolution and even the enforcement of the return decision.

9. Besides the fact that there is a lack of a term when the central authority should settle a request, there has been no limitation for the ways of challenging a return decision in the legislation of some Member States.

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<sup>1</sup> C. M. CAAMIÑA DOMÍNGUEZ, *La sustracción de menores en la Unión Europea*, Madrid, Colex, 2010, pp. 174 and the following.

<sup>2</sup> Article 100 paragraph (1) of Regulation No. 1111/2019.

<sup>3</sup> Article 100 paragraph (2) of Regulation No. 1111/2019.

<sup>4</sup> Article 104 paragraph (2) of Regulation No. 1111/2019.

<sup>5</sup> Article 11 paragraph (3) of Regulation No. 2201/2003.

10. We also consider that the delays in settling the cases of international child abduction were caused by the fact that, in some Member States, the courts were not specialised in this procedure<sup>6</sup>.

### III. Differences between the Regulation No. 1111/2019 and the Regulation No. 2201/2003 regarding the international child abduction

11. The international child abduction is included in the title of a regulation for the first time. As well, a special chapter related to the international child abduction was inserted – Chapter III, articles 22-29. This amendment included by the Regulation No. 1111/2019 is not only useful, but also natural, given that the issue of the international child abduction is a complete separate issue from the parental responsibility and the exercise of this responsibility.

12. Another difference between these regulations consists in the detailed explanations regarding the relation between the Regulation No. 1111/2019 and the 1980 Hague Convention, as well as its relation with Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (hereinafter referred to as “the 1996 Hague Convention”).

13. Within the procedure of rendering a decision for ordering the return of a child, the competent court does not give its decision on entrusting the child for his raise and education to one of the parents or on the parental authority to be exercised jointly by both parents or, by way of exception, only by one of them, but it decides on the necessity of ordering the return of a child under 16 years 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.<sup>7</sup>

14. The new Regulation No. 1111/2019 provides clarifications in relation to the period when the seised court must give its decision, in article 24, entitled Expedient court proceedings. Thus, a court of first instance shall, except where exceptional circumstances make this impossible, give its decision no later than six weeks after it is seised. And referring to a second instance court, except where exceptional circumstances make this impossible, a court of higher instance shall give its decision no later than six weeks after all the required procedural steps have been taken and the court is in a position to examine the appeal, whether by hearing or otherwise.

15. The “wrongful removal or retention”<sup>8</sup> means the removal or retention of a child where: (i) such removal or retention is in breach of rights of custody acquired by decision, by operation of law or

<sup>6</sup> M. GONZÁLEZ MARIMÓN, “La regulación de la sustracción internacional de menores en el Reglamento Bruselas II ter y sus principales novedades: Hacia una mejor protección del interés superior del menor”, *Cuadernos de Derecho Transnacional* (Marzo 2022), Vol. 14, Nº 1, pp. 294-297.

<sup>7</sup> For a detailed analysis of the provisions regarding the jurisdiction, M. GONZÁLEZ MARIMÓN, “Menor y responsabilidad parental en la Unión Europea”, Valencia, Tirant Lo Blanch, 2021, pp. 97 and the following.

<sup>8</sup> According to article 3 of the 1980 Hague Convention “The removal or the retention of a child is to be considered wrongful where: a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State”.

The Regulation No. 2201/2003 defines the term “wrongful removal or retention” as 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.

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 (ii) 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<sup>9</sup>.

16. While article 4 of the 1980 Hague Convention defines the child as the individual who is less than 16 years<sup>10</sup>, the Regulation No. 1111/2019 defines the child as any individual below the age of 18 years.

17. In relation to ordering the return of the child, although the Regulation No. 1111/2019 defines the child as “any person below the age of 18 years”<sup>11</sup>, in accordance with point 17 of its Preamble, the 1980 Hague Convention, and consequently also Chapter III of this Regulation, which complements the application of the 1980 Hague Convention in relations between Member States, should continue to apply to children up to the age of 16 years. Therefore, for these purposes, strictly referring to the international child abduction, the child means any person below the age of 16 years, not 18 years.

18. As provides article 22 of the Regulation No. 1111/2019, “where a person, institution or other body alleging a breach of rights of custody applies, either directly or with the assistance of a Central Authority, to the court in a Member State for a decision on the basis of the 1980 Hague Convention ordering the return of a child under 16 years 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, Articles 23 to 29, and Chapter VI, of this Regulation shall apply and complement the 1980 Hague Convention”.

Therefore, the new provisions complete those of the 1980 Hague Convention in relation with the Member States, especially the procedures to be followed by the central authority and the court in the six-week term, regulating the procedures for the return of a child and the enforcement of the return decisions.

19. As well, a detailed procedure following a refusal to return the child under point (b) of Article 13 paragraph (1) and Article 13 paragraph (2) of the 1980 Hague Convention is provided<sup>12</sup>.

20. The part which describes the procedures related to the recognition of a decision given in a Member State in other Member State is supplemented with provisions regarding the documents to be produced for recognition.

21. We may conclude that the main strong point of the Regulation 1111/2019 was to extend and to ensure the mutual trust between the authorities of the Member States in order to accelerate and to describe the procedures in relation with the international child abduction.

#### IV. Conditions to be met for ordering the return of a child<sup>13</sup>

22. In accordance with the legal provisions of both the Regulation No. 1111/2019 and the 1980 Hague Convention, for ordering the return of a child the following conditions must be met: (i) there has been a breach of the rights of custody; (ii) the person, institution or other body having the care of the person of the child was actually exercising the custody rights at the time of removal or retention; (iii) the child was habitually resident immediately before the wrongful removal or retention in the state where the return is requested; (iv) the person, institution or other body having the care of the person of the

<sup>9</sup> Article 2 paragraph 2 point (11) of Regulation No. 1111/2019.

<sup>10</sup> The Convention shall cease to apply when the child turns the age of 16 years.

<sup>11</sup> Article 2 paragraph 2 point (6) of Regulation No. 1111/2019.

<sup>12</sup> Article 29 of Regulation No. 1111/2019.

<sup>13</sup> C. M. CAAMIÑA DOMÍNGUEZ, “Child Abduction in the European Union: Applications for the Return of a Child before the Spanish Courts”, *Journal of Family Law and Practice*, vol. 3, núm. 2, 2012, pp. 32-36.

child had not consented to or subsequently acquiesced in the removal or retention; and (v) no exception provided by articles 12 and 13 of the 1980 Hague Convention applies.

## 1. There has been a breach of the rights of custody

**23.** The rights of custody “includes rights and duties relating to the care of the person of a child and in particular the right to determine the place of residence of a child<sup>14</sup>”.

**24.** In relation to the rights of custody, we consider relevant a short presentation of the child’s dwelling and the parental authority from the perspective of the Romanian law<sup>15</sup>.

**25.** According to the provisions of article 400 of the Civil Code, the establishment of the child’s dwelling must be made at one of the parents, according to his best interests, the law does not foresee whether it is necessary to establish the exact address at which the child will live with the parent. Therefore, it has been considered<sup>16</sup> that, in the silence of law, it is not mandatory to mention the address of the parent with whom the child shall live, given the possibility of changing it even repeatedly<sup>17</sup>. Nevertheless, changing the child’s dwelling must be made with the consent of the other parent, should it affect the parental authority exercise or other parental rights, in case of misunderstandings the custody court having the competence to decide. In this case, however, it has been considered that the court must specify where the new home of the child shall be established, at least in terms of the elements affecting the parental rights exercise, such as the country or locality.

**26.** At the same time, it has been shown that the child’s dwelling can be also be established abroad, together with one of the parents, if this shall meet the best interests of the child. Whenever possible, it can be decided for a psychosocial inquiry report to be done, in order to know the conditions offered by the parent to whom the child will live.

**27.** The change of the circumstances envisaged in the judgment may entail the change of the measure establishing the child’s dwelling, which can be settled at the other parent or at other individuals or care institutions if the case may be.

**28.** Changing the decision on the child’s dwelling can only take place if his interest so requires, that is, only when the parent where the home was established can no longer provide him the necessary conditions for a proper development<sup>18</sup>.

**29.** As far as the change of the child’s dwelling is concerned, we have to distinguish between the children entrusted to one of the parents according to the Family Code<sup>19</sup> and the children for whom

<sup>14</sup> Article 2 paragraph 2 point (9) of Regulation No. 1111/2019.

<sup>15</sup> See D. LUPAȘCU/ C. MAREȘ, “Theoretical and practical issues regarding the child’s care”, in the volume of *the International Conference Challenges of the knowledge society*, May 11-12, 2018, pp. 256-261.

<sup>16</sup> See the Conference of the Romanian National Institute of Magistracy of February 20, 2012, entitled “Provisions of the New Civil Code in the Field of Family Law - Unification of Practice”, p. 15 ([http://www.inm-lex.ro/fisiere/pag\\_115/det\\_1506/8453.pdf](http://www.inm-lex.ro/fisiere/pag_115/det_1506/8453.pdf)).

<sup>17</sup> See also C. MAREȘ, “Family Law”, 2nd edition, Publishing House C.H. Beck, Bucharest, 2015, page 219; B.D. MOLOMAN/ L.-C. URECHE, “The new Civil Code. 2nd Book. About family. Articles 258-534. Commentaries, explanations and jurisprudence”, Universul Juridic Publishing House, Bucharest, 2016, p. 465.

<sup>18</sup> See Supreme Court of Justice, Civil Section, decision no. 2448/1993, in “Buletinul Jurisprudenței. Culegere de decizii pe anul 1993”, Continent XXI & Universul Publishing House, Bucharest, 1994, p. 109112; Court of Appeal of Alba Iulia, Section for children and family, decision no. 64/R/2008 and no. 35/R/2008, <http://www.jurisprudenta.org/>; Court of Appeal of Cluj, Civil Section, of labour and social securities, for children and family, decision nro 237/R of January 25, 2008 and no. 1855/R of October 3, 2008, <http://www.jurisprudenta.org/>.

<sup>19</sup> Law no. 4/1953 entered into force on the 1st of February 1954, published in the Official Gazette of Romania No. 1 of January 4, 1954, as further amended and supplemented.

the parental authority has been ordered to be jointly exercised and to have their place of residence with one of their parents, according to the provisions of the Civil Code (Law no. 287/2009, republished)<sup>20</sup>.

30. Thus, with respect to the child entrusted to one of the parents according to the Family Code, since the Civil Code provisions regulate the parental authority institution, without the institution of entrusting a child to one of the parents, it can be at any times requested changing the measure of his custody and, therefore, changing his dwelling from the parent to whom he was entrusted, even if the circumstances taken into consideration by the court at his entrustment have not changed.

31. As regards a child for whom the custody court has ruled, under the provisions of the Civil Code, that the parental authority shall be exercised jointly by both parents<sup>21</sup> or, by way of exception, only by one of them<sup>22</sup>, being thus established the dwelling at one of the parents, changing said dwelling can only be requested in case the circumstances envisaged by the custody court have changed at the time when the change of the child's dwelling is requested.

32. Therefore, according to the new regulations, disregard the parent with whom the child's dwelling shall be established, the latter shall benefit from the care of both parents who, in the form of joint parental authority exercise, shall collaborate in taking all important decisions with respect to the child, being actively involved in raising and educating him.

33. The Family Code provided the possibility of entrusting the child for his raise and education to one of the parents, which implies that the parent ensures the raising and education of the child, the other parent having the possibility to look after the manner in which these obligations are fulfilled. Therefore, the child lived with the parent to whom he was entrusted for his raise and education, without the court expressly ruling it.

34. As per the provisions of article 496 paragraph (4) of the Civil Code, the "child's dwelling, established in accordance with this article, cannot be change without the approval of the parents, except in cases expressly provided by the law".

35. Moreover, article 497 paragraph (2) of the Civil Code stipulates that changing the child's dwelling, together with the parent with whom he lives, cannot occur without the prior consent of the other parent, in case it affects the exercise of the parental authority or other parental rights.

36. In case of misunderstandings between the parents, the custody court shall decide, according to the best interests of the child, taking into account the conclusions of the psychosocial inquiry report and listening to the parents and to the child<sup>23</sup>.

## **2. The person, institution or other body having the care of the person of the child was actually exercising the custody rights at the time of removal or retention**

37. The return of a child who was wrongfully removed or retained may be decided by a court, following a quick special procedure. In order to decide the return of a child, the court must verify whether the legal conditions provided by the 1980 Hague Convention and/or those provided by the Regulation No. 2201/2003 and from August 22, 2022, those provided by the Regulation No. 1111/2019 are met.

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<sup>20</sup> Published in the Official Gazette of Romania No. 505 of July 15, 2011 as further amended.

<sup>21</sup> Article 397 and article 503 paragraph (1) of Civil Code.

<sup>22</sup> Article 398 and article 507 of Civil Code.

<sup>23</sup> Article 497 paragraph (2) Civil Code.

**38.** The Regulation No. 1111/2019 defines “parental responsibility” as all rights and duties relating to the person or the property of a child which are given to an individual or legal entity by a decision, by operation of law or by an agreement having legal effect, including rights of custody and rights of access<sup>24</sup>. “Holder of parental responsibility” means any person, institution or other body having parental responsibility for a child<sup>25</sup>.

**39.** For this condition, besides the fact that the parent claimant must be holder of parental responsibility, he/she should have effectively exercised the parental responsibility before the wrongful removal or retention of the child<sup>26</sup>.

**40.** According to the Romanian case law,<sup>27</sup> the court must outline within its reasoned resolution the way in which the parent claimant who is holder of parental responsibility has effectively exercised the parental responsibility. This prove is not so difficult, the parent claimant must provide evidence regarding his/her effective implication in raising, educating and taking care the child before the child’s wrongful removal or retention.

**41.** In order to combat this condition, in some cases, the parent respondent tries, either before submitting a request for return or later, to obtain a decision of custody rights, even temporary, with the intention to block, in any manner, the return of the child. Notwithstanding, even such decision is obtained, it cannot be taken into account by the court in this procedure, because, on the one hand, the court is not called upon to settle the merits of the relations between the parents and, on the other hand, such decision must be rendered by a court competent in relation to the habitual residence of the child.

### **3. The child was habitually resident immediately before the wrongful removal or retention in the state where the return is requested**

**42.** Neither the 1980 Hague Convention nor the Regulations No. 2201/2003 and No. 1111/2019 define the child’s habitual residence. Although, the child’s habitual residence is a key element in the international child abduction, it is not defined by any of the international or European regulation. Such definitions are provided by the case law.

**43.** A first definition of the child’s habitual residence is provided by Court of Justice of the European Union in the case C-523/07<sup>28</sup>. According to this judgement, the concept of “habitual residence” under Article 8 paragraph (1) of Regulation No. 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

**44.** Three years later, the same Court of Justice of the European Union, in the case C-497/10, ruled another definition of the child’s habitual residence<sup>29</sup>. According to this judgement, the concept of “habitual residence”, for the purposes of Articles 8 and 10 of Regulation No. 2201/2003 must be inter-

<sup>24</sup> Article 2 paragraph 2 point (7) of Regulation No. 1111/2019.

<sup>25</sup> Article 2 paragraph 2 point (8) of Regulation No. 1111/2019.

<sup>26</sup> Court of Appeal of Bucharest, IIIrd Civil Section, Civil Decision No. 218/2019, published on <http://idrept.ro>.

<sup>27</sup> Court of Appeal of Bucharest, IIIrd Civil Section, Civil Decision No. 349/2018, published on <http://idrept.ro>, Civil Decision No. 407/2018, published on <http://idrept.ro>.

<sup>28</sup> <https://curia.europa.eu/juris>.

<sup>29</sup> <https://curia.europa.eu/juris>.



preted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case. If the application of the abovementioned tests were, in the case in the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence, under Article 13 of the Regulation.

45. The same Court of Justice of the European Union, in the case C-512/17, ruled another definition of the child's habitual residence<sup>30</sup>. According to this judgement, the concept of "habitual residence", for the purposes of Article 8 paragraph (1) of Regulation No 2201/2003 must be interpreted as meaning that a child's place of habitual residence for the purpose of that regulation is the place which, in practice, is the centre of that child's life. It is for the national court to determine, on the basis of a consistent body of evidence, where that centre was located at the time the application concerning parental responsibility over the child was submitted. In that regard, in a case such as that in the main proceedings, having regard to the facts established by that court, the following, taken together, are decisive factors: (a) the fact that, from its birth until its parents' separation, the child generally lived with those parents in a specific place; (b) the fact that the parent who, in practice, has had custody of the child since the couple's separation continues to stay in that place with the child on a daily basis and is employed there under an employment contract of indefinite duration; and (c) the fact that the child has regular contact there with his/her other parent, who is still resident in that place.

46. By contrast, in a case such as that in the main proceedings, the following cannot be regarded as decisive: (a) the stays which the parent who, in practice, has custody of the child has spent in the past with that child in the territory of that parent's Member State of origin in the context of leave periods or holidays; (b) the origins of the parent in question, the cultural ties which the child has with that Member State as a result, and the parent's relationships with family residing in that Member State; and (c) any intention the parent has of settling in that Member State with the child in the future.

47. It is apparent from that case law that the child's place of habitual residence for the purpose of Regulation No. 2201/2003 is the place which, in practice, is the centre of that child's life. Pursuant to Article 8 paragraph (1) of that regulation, it is for the court seised to determine where that centre was located at the time the application concerning parental responsibility over the child was submitted<sup>31</sup>.

In that context, it is necessary, in general, to take into consideration factors such as the duration, regularity, conditions and reasons for the child's stay in the territory of the different Member States concerned, the place and conditions of the child's attendance at school, and the family and social relationships of the child in those Member States<sup>32</sup>.

Furthermore, where the child is not of school age, *a fortiori* where the child is an infant, the circumstances of the reference person(s) with whom that child lives, by whom the child is in fact looked after and taken care of on a daily basis — as a general rule, its parents, — are particularly important for determining the place which is the centre of that child's life. The Court has observed that the environment of such a child is essentially a family environment, determined by that person or those persons, and that that child necessarily shares the social and family environment of the circle of people on whom

<sup>30</sup> <https://curia.europa.eu/juris>.

<sup>31</sup> Paragraph 42 of Judgment of the Court of Justice of the European Union, in the case C-512/17, <https://curia.europa.eu/juris>.

<sup>32</sup> Paragraph 43 of Judgment of the Court of Justice of the European Union, in the case C-512/17, <https://curia.europa.eu/juris>.

he or she is dependent (see, to that effect, judgment of 22 December 2010, *Mercredi*, C497/10 PPU, paragraphs 53 to 55)<sup>33</sup>.

Accordingly, in a situation where such an infant lives with its parents on a daily basis, it is necessary, in particular, to determine the place where the parents are permanently present and are integrated into a social and family environment. In that regard, it is necessary to take into consideration factors such as the duration, regularity, conditions and reasons for their stay in the territory of the different Member States concerned, and the family and social relationships maintained by them and by the child in those Member States (see, to that effect, judgment of 22 December 2010, *Mercredi*, C497/10 PPU, paragraphs 55 and 56)<sup>34</sup>.

Lastly, the intention of the parents to settle with the child in a given Member State, where that intention is manifested by tangible steps, may also be taken into account in order to determine the child's place of habitual residence<sup>35</sup>.

**48.** In this respect we have to mention that in accordance with the Romanian legislation<sup>36</sup> and the national case law, as already presented above, the courts usually do not expressly provide the specific address where the child lives with his resident parent<sup>37</sup>. Therefore, from the perspective of the child's habitual residence and the child's wrongful removal or retention, the express provision of city where the child will live with the resident parent would be very useful<sup>38</sup>. In this context, the change of the child's habitual residence would be established easier and whether this change is legal or not<sup>39</sup>.

**49.** Moreover, after the child's removal, establishing the parent's domicile in another state is completely irrelevant in determining the child's place of habitual residence whose return is requested.

**50.** This condition which consists in the child's place of habitual residence in one Member State, before his/her wrongful removal or retention, is still one of the criteria who raise debates within this procedure.

#### **4. The person, institution or other body having the care of the person of the child had not consented to or subsequently acquiesced in the removal or retention**

**51.** This condition is essential for the procedure. We have to distinguish between the removal and the retention.

The removal means that the child was taken from one state to another, without the non-resident parent's consent, while the retention or the refuse to return the child consists in the fact that, at the beginning, a consent of the non-resident parent has been expressed, so that the resident parent may leave with

<sup>33</sup> Paragraph 44 of Judgment of the Court of Justice of the European Union, in the case C-512/17, <https://curia.europa.eu/juris>.

<sup>34</sup> Paragraph 45 of Judgment of the Court of Justice of the European Union, in the case C-512/17, <https://curia.europa.eu/juris>.

<sup>35</sup> Paragraph 46 of Judgment of the Court of Justice of the European Union, in the case C-512/17, <https://curia.europa.eu/juris>.

<sup>36</sup> Article 400 of the Romanian Civil Code – "(1) In the absence of an agreement between the parents or if this is contrary to the best interests of the child, the guardianship court establishes, together with the divorce, the dwelling of the child with the parent with whom he/she steadfastly lives.

(2) If until the divorce the child lived with both parents, the court establishes his home at one of them, taking into account his superior interest.

(3) Exceptionally, and only if it is in the best interests of the child, the court may establish his/her home with grandparents or other relatives or persons, with their consent, or at a protection institution. They exercise the supervision of the child and perform all the usual acts regarding his health, education and teaching."

<sup>37</sup> *Conference of the Romanian National Institute of Magistracy* of February 20, 2021, entitled "Provisions of the New Civil Code in the Field of Family Law - Unification of Practice", p. 15 ([http://www.inm-lex.ro/fisiere/pag\\_115/det\\_1506/8453.pdf](http://www.inm-lex.ro/fisiere/pag_115/det_1506/8453.pdf)).

<sup>38</sup> C. MAREȘ, "Family Law", 3rd edition, Publishing House C.H. Beck, Bucharest, 2022, pp. 236-237.

<sup>39</sup> T. KOKIC/ A. IACUBA, "Lawful or unlawful change of the child's habitual residence" at *European Seminar – Cooperation between EU Member States to solve civil cases related to the wrongful removal or retention of a child*, Publishing House Sitech, Craiova, 2018, p. 45.

the child, but he/she did not agree with the stay of the child in the state where is not the child's habitual residence. Practically, the limits of the initial consent of the non-resident parent are violated.

52. For this condition, the courts will examine the parents' intentions expressed either directly, verbally or in writing, or indirectly, through their actions before or after the removal or retention<sup>40</sup>.

## 5. No exception provided by articles 12 and 13 of the 1980 Hague Convention applies

53. Although the other conditions above mentioned are met in order to consider that a removal or retention could be wrongful, the court settling the claim may reject it if an exception provided by articles 12 and 13 of the 1980 Hague Convention applies.

Article 12 of the 1980 Hague Convention provides that "(1) Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. (2) The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

Based on these provisions, we may say that when the request for return has been submitted after more than one year has passed since the wrongful removal or non-removal, the court settling the request for return shall, as a rule, order the return, unless it is proved that this child has integrated into his/her new environment in the new state<sup>41</sup>. Therefore, the submission of a request for return after more than one year has passed and the child's integration in his new environment will lead to the rejection of the request.

When the referral under the 1980 Hague Convention was made before the one-year deadline to be fulfilled, any discussion or request for evidence from the parent respondent regarding the integration of the child into the new environment is irrelevant.

The calculation of the 12-month term stipulated by the 1980 Hague Convention will be made from the date of submission of the request for return, not from the date when the court is seised with a request for return.

54. Perhaps the most often invoked exceptions in the matter of international child abduction are those provided by article 13 of the 1980 Hague Convention: "(1) Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that: (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

(2) The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

(3) In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

The exception provided by article 13 paragraph (1) letter a) implies, in fact, the non-fulfilment of the substantive conditions for the admission of the request, respectively, the applicant does not effectively exercise the custody rights or has given his consent before or later to the removal or retention.

<sup>40</sup> Court of Appeal of Bucharest, IIIrd Civil Section, Civil Decision No. 466/2018, published on <http://idrept.ro>.

<sup>41</sup> Court of Appeal of Bucharest, IIIrd Civil Section, Civil Decision No. 86/2017, published on <http://idrept.ro>.

With regard to the acquiescence, the case law<sup>42</sup> has outlined that it must meet several conditions in order to be valid, such as: to be unequivocal and to be subsequent to the moment when the child is removed or when the child is retained on the territory of the new state.

Article 13 paragraph 1 letter (b) allows the court seized with the request for return to reject it, even if the substantive conditions, mentioned above, are met, if it finds that there is a serious risk that the return of the child will expose him to a physical or mental danger or that in any other way, he will place him in an intolerable situation.

This is the exception most common invoked before the national courts by the parent respondent, because the legal provisions allow him to make reference to various events or happenings from which the existence of a serious danger could result.

**55.** In relation with this article 13 paragraph 1 letter (b) of the 1980 Hague Convention, we consider relevant the Judgement of the European Court of Human Rights of May 21, 2019, in the case of O.C.I. and Others v. Romania<sup>43</sup>, where the European Court<sup>44</sup> decided that there has been a violation of Article 8 of the Convention.

**56.** In this respect, the Court has noted that the applicants complained about the manner in which the domestic authorities had interpreted the notion of “grave risk” enshrined in Article 13 paragraph (1) letter (b) of the 1980 Hague Convention as grounds for an exception to the principle of returning children to the place of their habitual residence<sup>45</sup>.

The Court has reiterated that in the context of an application for return, which is distinct from custody proceedings, it is primarily for the national authorities of the requested State, which have, *inter alia*, the benefit of direct contact with the interested parties, to establish the best interests of the child and evaluate the case in the light of the exceptions provided for by the 1980 Hague Convention. Nevertheless, the Court must satisfy itself that the decision-making process leading to the adoption of the impugned measures by the domestic courts was fair and allowed those concerned to present their case fully, and that the best interests of the child were defended. This means, in the circumstances of this case, that the Court must assess whether the allegations of “grave risk” raised by the first applicant before the domestic courts were genuinely taken into account by those courts<sup>46</sup>.

In this context, the Court has noted that the first applicant substantiated the allegations of violence against the children by submitting recordings of past episodes of abuse. The father also admitted in court that he had used physical force to discipline his children. The domestic courts established that the second and third applicants had been subject to use of physical force at the hands of their father. The Court have looked at how the domestic courts assessed that information and how they weighed it in the children’s best interests<sup>47</sup>.

The domestic courts, while condemning in general terms abuse against children and reaffirming their right to respect for their dignity, were nevertheless satisfied that what the second and third applicants had suffered at the hands of their father had only been occasional acts of violence and would not reoccur “often enough to pose a grave risk”. Moreover, the Court of Appeal seems to have considered that the children’s right not to be subject to domestic abuse was “to a larger or lesser extent debatable”. The Court failed to see how those statements fit in with the relevant provisions of domestic law prohibiting in absolute terms domestic corporal punishment. In fact, such assessments of the children’s rights run counter to the very prohibition of domestic abuse against children and cast doubt on the decision-making process<sup>48</sup>.

<sup>42</sup> Court of Appeal of Bucharest, IIIrd Civil Section, Civil Decision No. 349/2018, published on <http://idrept.ro>

<sup>43</sup> Published in the Official Gazette of Romania no. 558 of July 8, 2019.

<sup>44</sup> See, C. M. CAAMIÑA DOMÍNGUEZ, “La sustracción internacional de menores ante el Tribunal Europeo de Derechos Humanos” en *Liber amicorum Angelo Davì. La vita giuridica internazionale nell’età della globalizzazione*, vol. I, Editoriale Scientifica s.r.l., 2019, pp. 431-452.

<sup>45</sup> Paragraph 39.

<sup>46</sup> Paragraph 40.

<sup>47</sup> Paragraph 41.

<sup>48</sup> Paragraph 42.

The European Court reiterated that the best interests of the children, which unquestionably include respect for their rights and dignity, are the cornerstone of the protection afforded to children from corporal punishment. Corporal punishment against children cannot be tolerated and States should strive to expressly and comprehensively prohibit it in law and practice. In this context, the risk of domestic violence against children cannot pass as a mere inconvenience necessarily linked to the experience of return, but concerns a situation which goes beyond what a child might reasonably bear<sup>49</sup>.

Furthermore, there is nothing in the domestic courts' decisions that leads the Court to believe that they considered that the children were no longer at risk of being violently disciplined by their father if returned to his care. In fact, it can be inferred from the reasoning of the Bucharest Court of Appeal that that court accepted that if such a risk reoccurred, the Italian authorities would be able to react and to protect the children from any abuse of their rights, but only "if the risk was brought to their attention and supported by evidence"<sup>50</sup>.

On this point, the European Court has noted that as member States of the European Union ("the EU"), both States are parties to the Brussels II bis Regulation, which is thus applicable in the case. That Regulation, which builds on the 1980 Hague Convention, is based on the principle of mutual trust between EU member States. However, in the Court's view, the existence of mutual trust between child-protection authorities does not mean that the State to which children have been wrongfully removed is obliged to send them back to an environment where they will incur a grave risk of domestic violence solely because the authorities in the State in which the child had its habitual residence are capable of dealing with cases of domestic child abuse. Nothing in the 1980 Hague Convention or in the Brussels II bis Regulation allows the Court to reach a different conclusion<sup>51</sup>.

In this respect, and considering that a child's return cannot be ordered automatically or mechanically when the 1980 Hague Convention is applicable, the Court considers that the domestic courts should have given more consideration to the potential risk of ill-treatment for the children if they were returned to Italy. They should have at least ensured that specific arrangements were made in order to safeguard the children<sup>52</sup>.

Considering the above arguments, and notwithstanding the principle of subsidiarity, the Court concluded that the domestic courts had failed to examine the allegations of "grave risk" in a manner consistent with the children's best interests within the scope of the procedural framework of the 1980 Hague Convention<sup>53</sup>.

## V. Conclusions

**57.** This procedure is not meant to solve the background of the problems between the parents, nor to establish who is the most suitable to deal with the raising and education of the child or who best responds to his security needs. That is why the court invested with a request for return makes a simple summary analysis, verifies whether the conditions stipulated by the 1980 Hague Convention or the Regulation No. 1111/2019 are met and a possible application of an exception provided by article 12 or 13 of the 1980 Hague Convention.

**58.** For the first time, the international child abduction has been included in the title of the Regulation No. 1111/2019. As well, a special chapter related to the international child abduction was inserted – Chapter III, articles 22-29. This amendment included by the Regulation No. 1111/2019 is not only useful, but also natural, given that the issue of the international child abduction is a complete separate issue from the parental responsibility and the exercise of this responsibility.

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<sup>49</sup> Paragraph 43.

<sup>50</sup> Paragraph 44.

<sup>51</sup> Paragraph 45.

<sup>52</sup> Paragraph 46.

<sup>53</sup> Paragraph 47.

**59.** The new Regulation No. 1111/2019 provides clarifications in relation to the period when the seised court must give its decision, in article 24, entitled *Expeditious court proceedings*.

**60.** Referring to the international child abduction, during the period of application of the Regulation No. 2201/2003, the immediate return of a child could not have been insured in all cases.

**61.** Some causes of the inefficiency of the return procedure that we may consider are the following: (i) the six-week term for rendering a court return decision; (ii) the lack of a term when the central authority should settle a request; (iii) there is no limitation for the ways of challenging a return decision in the legislation of some Member States; (iv) the delays in settling the cases of international child abduction were caused by the fact that, in some Member States, the courts were not specialised in this procedure.

**62.** In accordance with the legal provisions of both the Regulation No. 1111/2019 and the 1980 Hague Convention, for ordering the return of a child the following conditions must be met: (i) there has been a breach of the rights of custody, (ii) the person, institution or other body having the care of the person of the child was actually exercising the custody rights at the time of removal or retention, (iii) the child was habitually resident immediately before the wrongful removal or retention in the state where the return is requested, (iv) the person, institution or other body having the care of the person of the child had not consented to or subsequently acquiesced in the removal or retention, (v) no exception provided by articles 12 and 13 of the 1980 Hague Convention applies.