The interplay of EU Regulation 2019/1111 with the 1980 Hague Convention in matters of child abduction*

La coordinación entre el reglamento (UE) 2019/1111 y el Convenio de la Haya de 1980 sobre la sustracción internacional de menores

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Abstract: Even if Regulation 2019/1111 have a quite limited impact on the EU system of jurisdictional competence and of recognition and enforcement of judgments in matters of parental responsibility, it introduced several novelties with regard to the section devoted to child abduction matters. The adoption of those new provisions suggests to investigate whether this also led to a change in the approach of the Regulation as towards the 1980 Hague Convention. The paper attempts to make it clear that the reference to complementarity can better explain the interplay between the two instruments and that, even more than in the past, the Regulation is not aimed at setting aside the operation of the Convention, but rather at providing special rules for its implementation within the European judicial area.

Keywords: Child abduction -Regulation (EU) 2019/1111-, 1980 Hague Convention – protection of fundamental rights – parental responsibility.

Resumen: Incluso si el Reglamento 2019/1111 ha tenido un impacto limitado en el sistema de la UE de competencia jurisdiccional y de reconocimiento y ejecución de sentencias en materia deresponsabilidad parental, introdujo varias novedades en materia de sustracción de menores. La adopción de esas nuevas disposiciones sugiere investigar si esto también condujo a un cambio en la actitud del Reglamento con respecto a la coordinación con el Convenio de la Haya de 1980. El artículo intenta explicar que la referencia a la complementariedad puede explicar mejor la interacción entre los dos instrumentos y que, incluso más que en el pasado, el Reglamento no pretende impedir el funcionamiento del Convenio, sino más bien establecer normas especiales para su aplicación en el espacio judicial europeo.

Keywords: sustracción internacional de menores - Reglamento (UE) 2019/1111 - Convenio de la Haya de 1980 - protección de los derechos fundamentales – responsabilidad parental.

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I. Introduction

1. As it had already emerged from the proposal of the Commission, the recast of Council Regulation (EC) No. 2201/2003 was not going to bring about ambitious innovations in the field of jurisdictional competence and of recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. Accordingly, Council Regulation (EU) 2019/1111[1] largely reflects the structure of the pre-existing instrument, with one very relevant exception: the EU legislator chose to place a far greater emphasis on child abduction, as clearly indicated by some general references in its text. On the one hand, international child abduction is now expressly mentioned in the title of the Regulation; on the other hand, it is also clarified in Article 1 that the scope of application of the Regulation covers cases of «wrongful removal or retention of a child» (provided that they concern more than one Member State).

2. Even though these mentions refer to features of the EU instrument which were already inherent in the previous Regulation, the drafting technique suggests that the necessity to adopt rules governing child abduction can be no longer explained by their merely ancillary nature to rules on jurisdictional competence and circulation of judgments, as they have acquired autonomous relevance from the perspective of the EU legislator.

3. This impression is reinforced if one looks at the provisions devoted to child abduction matters in the Regulation: not only do they ensure continuity with the past in the areas of jurisdictional competence and recognition and enforcement of judgments, but also they cover more extensively different aspects of international child abduction.

4. That choice is not surprising, if one keeps in mind that Article 11 of Council Regulation (EC) No 2201/2003[2] and the provisions connected thereto were the subject of several requests of preliminary ruling before the CJEU and gave rise to a wide practice by national courts. For this reason, since its initial recast proposal[3] the Commission identified the inefficiency of the proceedings in matters of child abduction as one of the shortcomings to be addressed[4] and underlined the necessity to revise that section of the Regulation.

5. In addition, the reform of EU rules on child abduction had not only to concentrate on the need to find suitable solutions from the internal perspective of the Union judicial area, but also to take into consideration the interplay of those rules with other relevant international instruments. This necessity clearly arose from the fact that the application of Regulation No. 2201/2003 by domestic courts was considered to entail difficulties relating to its coordination with the 1980 Hague Convention on the Civil Aspects of International Child Abduction[5] and its compatibility with standards concerning the protection of fundamental rights was sometimes called into question[6]. The possible inconsistency between different instruments even fuelled a dialogue between supra-national courts, as some cases were discussed,

[1] 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 (recast), *OJ* L 178 of 2 July 2019, p. 1 ff.

[2] 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, *OJ* L 338 of 23 December 2003, p. 1 ff.

[3] On the proposal, cf. C. Honorati, *The Commission's Proposal for a Recast of Brussels IIa Regulation*, in *International Family Law*, 2017, p. 97 ff.

[4] P. Beaumont, L. Walker, J. Holliday, *Parental responsibility and international child abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings*, in *International Family Law*, 2016, p. 307 ff.

[5] See esp. L. Walker, P. Beaumont, *Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, in *Journal of Private International Law*, 2013, p. 231 ff.

[6] ECtHR, Judgment of 12 July 2011, *Šneersone and Kampanella v. Italy*, application no. 14737/09, especially paras 84 and 93-96.

in subsequent times, both before the CJEU and the European Court of Human Rights, leading to only partially compatible outcomes[7].

6. In that context, an effort of EU institutions in ensuring the compatibility of the recast Regulation with the general legal framework in child abduction matters was required and some adjustments were made in order to remove possible concerns emerging from the mentioned practice of domestic and supra-national courts[8]. Thus, it can be useful to assess the approach of the new Regulation towards the 1980 Hague Convention and the rules concerning the protection of fundamental rights and to analyse to which extent the current provisions may provide viable solutions for the smooth coordination of those different groups of rules, despite their different objects and purposes.

II. The general position of the Regulation in matters of child abduction

7. As anticipated, Regulation 2019/1111 did not introduce significant changes with regard to rules on jurisdictional competence regarding parental responsibility. As far as child abduction matters are concerned, Article 9 of the Regulation, dealing with the possible effects of the wrongful removal or retention of a child on the jurisdiction of national courts in matters of parental responsibility, reproduces, virtually unchanged, the text of Article 10 of Regulation No 2201/2003, even though the new provision will now have to be coordinated with Article 29, expressly referring to proceedings on the rights of custody possibly entailing the return of the child.

8. On a different note, the rules on the circulation of judgments in matters of parental responsibility underwent an important transformation, as the requirement of *exequatur* proceedings was abolished. However, following the same approach already enshrined in Regulation No 2201/2003 and by way of derogation from the general regime, decisions ordering the return of the child, which are adopted notwithstanding a previous refusal by the court of the Member State to which the child has been removed or in which he or she has been retained, are considered as «privileged» and benefit from preferential rules for circulation[9].

9. In this framework, the key development in child abduction matters is displayed by the fact that Regulation 2019/1111 replaced the single provision contained in Article 11 of Council Regulation (EC) No 2201/2003 with a special Chapter (accompanied by no less than 12 recitals of the exceedingly long preamble), which focuses on proceedings for the return of the child, laying down uniform *substantive* and *procedural* rules. Within the new Chapter, the role of Central Authorities in processing applications, means for alternative dispute resolution, procedures for the return of a child, conditions for the refusal to return the child and procedures following such a refusal are dealt with in detail in Articles 22-29.

10. At the outset, the existence of a wider set of provisions concerning child abduction, combined with the express choice to stress the relevance of the topic, may suggest to consider with special accuracy the extent of the competence of the European Union in those matters.

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[7] Cf. R. Lamont, *Protecting Children's Rights after Child Abduction: The Interaction of the CJEU and ECHR in Interpreting Brussels II bis*, in E. Bergamini, C. Ragni (eds), *Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge, Cambridge University Press, 2019, p. 225 ff. See also C. Honorati, A. Limantè, *Article 11*, in C. Honorati (ed), *Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction*, Torino-Frankfurt am Main, Giappichelli-Peter Lang, 2017, p. 112 ff., esp. p. 133 ff.

[8] See T. Kruger, L. Samyn, *Brussels II* bis*: successes and suggested improvements*, in *Journal of Private International Law*, 2016, p. 159 ff.

[9] See S. Corneloup, T. Kruger, *Le règlement 2019/1111, Bruxelles II: la protection des enfants gagne du ter(rain)*, in *Rev. crit. dr. int. pr.*, 2020, p. 215 ff.; V. Lazic´, I. Pretelli, *Revised Recognition and Enforcement Procedures in Regulation Brussels II* ter, in *Yearbook of Private International Law*, 2021, p. 155 ff.

11. The legal basis of Regulation 2019/1111, as a measure «concerning family law with cross-border implications», was found in Article 81.3 TFEU. In this context, the EU legislator deemed it necessary to expressly clarify that the notion of «civil matters» includes child abduction, by stating in the preamble that proceedings concerning the return of the child, «according to the case-law of the Court of Justice and in line with Article 19 of the 1980 Hague Convention, are not proceedings on the substance of parental responsibility but closely related to it»[10].

12. While this statement clarifies that the provisions of Regulation 2019/1111 concerning international child abduction fall within the material scope of Article 81 TFEU, it is also worth noting that those provisions go far beyond traditional mechanisms of private international law, as they do not deal only with issues concerning jurisdictional competence or the circulation of judgments. In particular, they set out time-limits for the duration of proceedings concerning the return of the child before Central Authorities (Article 23) and before domestic courts (Article 24) or the duration of enforcement proceedings (Article 28); the employment of alternative dispute resolution means (Article 25); the right of the child to express his or her views (Article 26); the procedure for the return of a child before the courts of the Member State where the child was abducted to (Article 27); the consequences of the refusal to return a child and the powers that can be exercised by the courts of the Member State which are competent for parental responsibility matters (Article 29).

13. However, it is well-known that Article 81.1 TFEU points to a broad notion of «judicial cooperation in civil matters », given the wide range of possible measures mentioned in Article 81.2 TFEU. Accordingly, even relying on a merely textual interpretation, it is possible to reach the conclusion that all the provisions concerning child abduction matters in Regulation 2019/1111 correspond to one of the objectives set forth in Article 81.2 TFEU, including «the elimination of obstacles to the proper functioning of civil proceedings» and «the development of alternative methods of dispute settlement».

14. In addition, as it was remarked also by the Court of Justice in its Opinion 1/13, international child abduction has clear cross-border implications[11] and rules on proceedings for the return of the child, as between Member States, have a strong impact on other principles enshrined in the Treaties, such as free movement of persons. The Court of Justice had the occasion to stress this point later in *ZW*, where it held that German rules concerning criminal responsibility for child abduction could not lead to discriminate against EU citizens who have exercised their right to move and reside in a Member State which is not their State of origin[12].

15. The conclusion can be easily drawn that also the rules contained in Regulation 2019/1111 can serve the same purpose of avoiding restrictions on the freedom of movement of EU citizens as they overcome the fragmentation of domestic rules governing the civil aspects of child abduction and implementing the 1980 Hague Convention in different Member States.

III. The approach of Regulation 2019/1111 towards the 1980 Hague Convention: an express commitment to complementarity

16. The existence of a close relation between the Regulation and the principle of free movement of persons – which the establishment of an Area of Freedom, Security and Justice is aimed at guaranteeing – is, of course, the general underlying rationale for the inclusion of specific provisions on child abduction into an instrument dealing with parental responsibility.

[10] Cf. Recital 5 of Regulation 2019/1111.

[11] CJEU, Opinion 1/13 of 14 October 2014, ECLI:EU:C:2014:2303, para. 68. On the Opinion, see the contributions in P. Franzina (ed), *The External Dimension of EU Private International Law After Opinion 1/13*, Antwerp, Intersentia, 2016.

[12] CJEU, Judgment of 19 November 2020, Case C-454/19, *ZW*, ECLI:EU:C:2020:947.

17. In that context, the Court of Justice of the European Union underlined that the provisions on child abduction as contained in Regulation No. 2201/2003 were intimately linked to the framework of the 1980 Hague Convention and that the two instruments shared the same objectives, which could be summarised as follows: to deter child abductions and, in cases of abduction, to obtain the child's return without delay[13]. Therefore, the Regulation was expected to contribute to the fulfilment of those goals, as all the Member States are Contracting Parties of the 1980 Hague Convention and the European Union itself, although unable to become a party, does participate in the conventional system through the intermediary of its Member States[14].

18. As compared to the Convention, the Regulation has a broader material scope of application, as it contains rules defining jurisdictional competence on parental responsibility, which can and do often come into play also in child abduction cases. In fact, questions concerning the return of an abducted child may be intertwined with questions concerning the custody of that same child. Nonetheless, such considerations are, in principle, not relevant for the operation of the Hague Convention system, which is only focused on the consequences of the abduction and leaves domestic rules free to govern custody issues.

19. Accordingly, the objective pursued by Regulation No. 2201/2003 in this area was not to supersede the application of the Convention as between Member States. The relevant provisions were rather intended to build a regional system inspired by the principle of mutual trust between EU Member States and thus capable of achieving more effectively the return of abducted children through the application of the Convention as complemented by the Regulation itself. It was then argued that the two instruments constituted, within the European judicial area, a unitary body of rules in child abduction matters[15].

20. However, the general approach taken by Regulation No. 2201/2003 with regard to its relationship with possibly overlapping international conventions appeared to point into a different direction. In fact, Article 60 of the Regulation provided that the instrument was to «take precedence», *inter alia*, over the 1980 Hague Convention insofar as it concerned matters governed by the Regulation. The priority to be accorded to the Regulation could be seen as an obstacle for the correct application of the Convention and for the harmonious interplay of the two instruments.

21. Probably out of this concern and in the wake of a wider commitment to promote the application of Hague instruments before the courts of Member States[16], Regulation 2019/1111 clarified, even from a textual point of view, its attitude towards the 1980 Hague Convention. The latter is no longer mentioned in Article 95 of the new Regulation, which ensures priority to this instrument over certain multilateral conventions, and the stronger emphasis on the relevance of rules on international child abduction is now displayed by the presence of a provision (Article 96) separately dealing with the relationship between Regulation 2019/1111 and the 1980 Hague Convention.

22. Article 96 is mainly concerned with the definition of the respective scope of application *ratione personarum* of the 1980 Hague Convention and of the Regulation. On the one hand, recognition and enforcement of judgments ordering the return of the child as between different Member States are ensured by the Regulation, as this matter is not governed by the Convention and is otherwise left to the

[13] CJEU, Judgment of 11 July 2008, Case C-195/08 PPU, *Rinau*, ECLI:EU:C:2008:406, para. 58; Judgment of 8 June 2017, Case C-111/17 PPU, *OL v PQ*, ECLI:EU:C:2017:436, para. 63.

[14] On international agreements concluded by Member States and binding on the European Union, see A. Rosas, *The Status in EU Law of International Agreements Concluded by EU Member States*, in *Fordham International Law Journal*, 2011, p. 1304 ff.

[15] See CJEU, Opinion 1/13, cit., para. 78.

[16] On the relationship between the Regulation and the 1996 Hague Convention, see B. Campuzano Diaz, *El nuevo Reglamento (UE) 2019/1111: análisis de las mejoras en las relaciones con el Convenio de la Haya de 19 de octubre de 1996 sobre responsabilidad parental*, in *Cuadernos de derecho transnacional*, 2020, p. 97 ff.

application of domestic private international law rules. On the other hand, the application of the special substantive and procedural rules contained in the Regulation is confined to the cases in which the child, who is wrongfully removed to or retained in a Member State, had his or her habitual residence in another Member State, while only the Convention will apply, in particular, when the child was habitually resident in a non-EU Member Contracting State[17], even if he or she is subsequently removed from one Member State to another.

23. The new provision does not mark the primacy of the Regulation, but stresses the complementarity between the two instruments: when their respective scope of application coincides, the provisions of the Convention «continue to apply», but domestic courts must at the same time take into account the special rules to be found in the Regulation. Thus, the wording of Article 96, neatly circumscribing the role of the Regulation, entails a formal deference towards the 1980 Hague Convention.

24. A closer examination shows that this approach based on complementarity is, in fact, inherent in different features and provisions of the Regulation, that may lead to the combined operation of the "1980 Hague system" and of the "Brussels-II system". First, the Regulation refers to some general notions according to the same definitions that can be found in the 1980 Hague Convention; secondly, it requires that certain general principles of EU law in procedural matters be applicable also when national courts have to decide on child abduction cases; thirdly, the Regulation tries to provide coordination between proceedings concerning the return of the child and proceedings concerning custody rights; fourthly, the Regulation interferes with the functioning of some provisions of the Convention – especially Article 13.1.b – in order to provide guidance for national courts when they are called upon to implement those provisions, but also in order to enhance the possibilities of a return of the child to the State of his or her habitual residence. Those different aspects of the interplay between the two instruments deserve careful consideration.

III.1. Complementarity in practice: a) use of common notions

25. Like its predecessor, Regulation 2019/1111 moves from the assumption that, in order to ensure a sound coordination with the 1980 Hague Convention, some general notions, which are necessary for the functioning of the rules on child abduction, have to be interpreted in accordance with the definitions provided by the Convention. In this connection, the use of common definitions was facilitated by the fact that Regulation No. 2201/2003 was drafted with a view to guaranteeing its parallel application with the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

26. For this reason, some harmonised notions can be now found in all the three mentioned instruments: in particular, the definitions of «rights of custody», «rights of access», «wrongful removal» and «wrongful retention», as contained in Article 1.2 of the Regulation, are clearly modeled after the corresponding concepts referred to in the 1980 and 1996 Hague Conventions[18]. Being those concepts crucial for the implementation of instruments dealing with child abduction matters, a uniform interpretation can certainly be helpful in achieving a closer coordination.

27. However, the parallelism between the Regulation and the 1980 Hague Convention with reference to the use of common notions is not absolute, as the EU system has the potential for the development of an autonomous interpretation through the mechanism of preliminary ruling by the Court

[17] On the scope *ratione personae* of the Convention, see E. Pérez-Vera, *Explanatory Report to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, available at *hcch.net*, para. 75 ff.

[18] The fact that the definitions of "wrongful removal" and "wrongful retention" are framed in very similar terms in the Convention and in the Regulation is, for example, remarked by CJEU, Order of 10 April 2018, *CV v DU*, ECLI:EU:C:2018:220, para. 39.

of Justice. This implies that a binding interpretation of the provisions of the Regulation (and possibly of the 1980 Hague Convention[19]) can be provided to the courts of all the Member States, while this cannot occur as between the Contracting Parties of the Convention. That interpretation is inevitably affected by the impact of other sources of EU law, among which the Charter of Fundamental Rights plays a prominent role, and relies on methods and elements that are peculiar to the legal system of the European Union.

28. The case-law of the Court of Justice already provides some examples. For instance, in *McB.* the Court interpreted the notion of «holder of custody rights» and found that Regulation No. 2201/2003 did not prevent a Member State from ensuring that a father, who is not married to the child's mother, may acquire custody rights only as a result of a domestic judgment[20]. That conclusion, entirely based on the textual interpretation of Article 2 of the Regulation, was also evaluated in the light of Articles 7 and 24 of the Charter and considered as compatible with the right to private and family life and with children's rights[21]; in that context, the possible contribution of the 1980 Hague Convention to the interpretation of the notion was never discussed.

29. Likewise, in *Valcheva* the notion of «rights of access» was interpreted as including the right of persons with whom the child has family ties, like grandparents, to have contact with the child itself[22]: again, the Court did not refer to the parallel notion employed in the 1980 Hague Convention, but took into consideration the general objectives of Regulation No. 2201/2003 and its *travaux préparatoires*.

30. According to the same pattern, the definition of «wrongful removal» and «wrongful retention» was also analysed in some judgments of the Court of Justice, which was able to develop an autonomous interpretation, making only faint references to the 1980 Hague Convention and essentially relying on the objectives and the structure of the Regulation and on arguments based on the coordination of judicial cooperation in civil matters with other EU instruments. It was then held that the retention of an infant by the mother in a Member State against the will of the father cannot be deemed as wrongful, when the child was born in that State in conformity with a common choice of the parents and even if the parents exercise joint parental responsibility[23]. In a more recent case[24], a removal of the child from his or her Member State of habitual residence to another Member State, occurred without the father's consent, was not considered as wrongful, in the light of the fact that the mother had to comply with a decision to transfer taken by the first Member State in application of the "Dublin-III" Regulation[25].

31. Thus, some of the notions that are enshrined in the Regulation were derived from the 1980 Hague Convention and ensure the continuity between the two instruments; however, one must be aware that through the interpretation of the Court of Justice they may undergo an evolution that will remain confined to the European judicial area (unless the preliminary rulings of the Court are able to exercise some influence on the broader system of the Convention, if the courts of other Contracting Parties are willing to take them into account).

[19] On the power of the Court of Justice to deal with questions concerning the interpretation of the 1980 Hague Convention, see CJEU, Judgment of 9 October 2014, Case C-376/14 PPU, *C v M*, ECLI:EU:C:2014:2268, para. 58.

[20] CJEU, Judgment of 5 October 2010, Case C-400/10 PPU, ECLI:EU:C:2010:582.

[21] See N. Lazzerini, *Il controllo della compatibilità del diritto nazionale con la Carta dei diritti fondamentali nella sentenza McB*, in *Rivista di diritto internazionale*, 2011, p. 136 ff.

[22] CJEU, Judgment of 31 May 2018, Case C-335/17, ECLI:EU:C:2018:359.

[23] CJEU, Judgment of 8 June 2017, *OL v PQ*, cit.

[24] CJEU, Judgment of 2 August 2021, Case C-262/21 PPU, *A v B*, ECLI:EU:C:2021:640.

[25] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), in *OJ* L 180 of 29 June 2013, p. 31 ff.

III.2. Complementarity in practice: b) introducing procedural principles relevant under EU law in return proceedings

32. While the use of common notions is a pre-condition for the combined operation of the 1980 Hague Convention and of the Regulation, it must be considered that proceedings for the return of the child under the 1980 Hague Convention are not supposed to be conducted according to uniform rules in different Contracting States. However, the high degree of integration between EU Member States suggested to take steps in that direction, laying down more detailed procedural rules.

33. A good example is provided by the so-called "six-weeks rule", already established by Article 11 of the 1980 Hague Convention: while domestic courts still have to strike a balance between their duty to act expeditiously and the necessity of a thorough examination of child abduction proceedings[26], Article 24 of Regulation 2019/1111 attempted to provide some clarifications as to the functioning of the rule in court proceedings.

34. The same necessity to act within a very tight time-frame is extended by the Regulation to enforcement of return orders, that is subject, too, to the six-weeks rule according to Article 28. This matter is not covered by the 1980 Hague Convention, but a clear guidance in this respect is provided by the case-law of the European Court of Human Rights, which requires «**s**pecific streamlined proceedings…for the enforcement of return orders»[27]: this shared approach is a clear sign of the convergence of the objectives of the Regulation with the need to protect fundamental rights. Unsurprisingly, then, in *Rinau v Lithuania*[28] the European Court, even though ruling long after the relevant circumstances, had the occasion to conclude that there had been a violation of the right to private and family life in a case in which a Member State had failed to give swift enforcement to a return order due to the intervention of domestic political figures and notwithstanding a preliminary ruling of the Court of Justice clearly pointing to the necessity to apply the enforcement procedure based on the certificate issued by the Member State of origin[29].

35. But the effort to supplement the general framework of the Convention regime is especially visible, insofar as some general principles of Union law concerning civil procedure have now developed and are binding on Member States even when they apply the 1980 Hague Convention.

36. In particular, one of the general novelties in Regulation 2019/1111 is the emphasis placed on the right of the child to be heard[30]: the provision now contained in Article 21 of the Regulation and applicable in proceedings concerning parental responsibility is clearly based on Article 24 of the European Charter of Fundamental Rights and on Article 12 on the 1989 UN Convention on the Rights of the Child. If the child is capable of forming his or her views, he or she must be provided with an opportunity to express those views and domestic courts are expected to give them due weight in accordance with his or her age and maturity. The conditions and manner of implementation of the right of the child to be heard is left to domestic law[31], but the importance of the principle is confirmed by the fact that the Regulation considers the failure to comply with the principle as a ground for refusal of recognition of judgments under its Article 39 (or as a ground of non-issuance of a certificate for the so-called privileged decisions under its Article 47).

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[26] For an evaluation of those duties, see C. Honorati, A. Limantè, *Article 11*, cit., p. 116 ff. and p. 133 ff., with special reference to the case-law of the European Court of Human Rights.

[27] European Court of Human Rights, Judgment of 15 January 2015, *M.A. v Austria*, application no. 4097/13, para. 136. See also Judgment of 1 February 2018, *M.K. v Greece*, application no. 51312/16.

[28] European Court of Human Rights, Judgment of 14 January 2020, application no. 10926/09.

[29] CJEU, Judgment of 11 July 2008, Case C-195/08 PPU, *Rinau*, ECLI:EU:C:2008:406.

[30] On the approach of domestic courts to the hearing of the child, see T. van Hof, S. Lembrechts, F. Maoli, G. Sciaccaluga, T. Kruger, W. Vandenhole, L. Carpaneto *To hear or not to hear: reasoning of judges regarding the hearing of the child in international child abduction proceedings*, in *Family Law Quarterly*, 2020, p. 327 ff.

[31] T. Kruger, L. Carpaneto, F. Maoli, S. Lembrechts, T. van Hof, G. Sciaccaluga, *Current-day international child abduction does Brussels IIb live up to the challenges?*, in *Journal of Private International Law*, 2022, p. 159 ff., esp. p. 166 ff.

37. Given the significance the right of the child to be heard, Article 26 explicitly extends its applicability to child abduction proceedings through a reference to Article 21. This feature of the Regulation is, however, not new, as an obligation to give the child, if of sufficient age and maturity, the opportunity to be heard already existed under Article 11.5 of Regulation No. 2201/2003. Such a provision builds upon a very general mention of the necessity to take into account children's views in Article 13 of the 1980 Hague Convention, which, however, does not impose on domestic courts an obligation to hear the child[32], but only to take into account his or her objection to being returned. Thus, the Regulation advances the relevance of the hearing of the child in abduction proceedings, even though the extent of such an obligation is still largely dependent on the contents of domestic law.

38. In addition, Article 27.1 of the Regulation, employing the same wording of previous Article 11.5 of Regulation No. 2201/2003, also requires domestic court to hear the person seeking the return of the child in return proceedings, in accordance with his or her right to an effective remedy, which encompasses the right of access to a court[33]. Such a procedural guarantee for the left-behind parent appears to be necessary in order to ensure that the operation of the Hague regime takes place in accordance with fair trial standards. Likewise, it can be inferred from Articles 39 and 47 of the Regulation that the same guarantee applies to the abducting parent, in order to ensure that proceedings fully comply with the adversarial principle.

39. Another reference to procedural steps to be taken in child abduction proceedings that can be seen as related to more general tendencies under EU law concerns recourse to alternative dispute resolution means in Article 25 of the Regulation. Even if EU legislation regarding mediation or other similar mechanisms in family matters is still at an early stage[34], the Regulation seems to suggest that domestic courts should usually invite parties to engage into alternative dispute resolution. National courts, though, still enjoy a broad discretion to evaluate the appropriateness of those mechanism to each case.

40. The much more detailed rules on the recognition and enforcement of the agreements reached by the parties with the necessary involvement of the child, as enshrined in Articles 64-68 of the Regulation[35], may further encourage the parents to submit to alternative dispute resolution. The possible usefulness of a wider employment of those means is unquestionable, especially because they can allow the joint settlement of custody issues and of child abduction issues; still, several factors (risk of an abuse of mediation proceedings in order to delay the return of the child, difficulties connected to heated confrontation between the parents, lack of specialist mediators in some Member States) should deter from a too "enthusiastic" approach to this topic[36].

III.3. Complementarity in practice: c) coordination between return proceedings and parental responsibility proceedings

41. In the third place, a relationship between Regulation 2019/1111 and the 1980 Hague Convention based on complementarity can be seen in those rules which aim at coordinating return proceedings and parental responsibility proceedings. The Convention being focused only on child abduction, its rules are unable to provide such a coordination and limit themselves to granting priority to return

[32] See also European Court of Human Rights, Judgment of 23 November 2021, *S.N. and M.B.N. v. Switzerland*, application no. 12937/20, para. 112; Judgment of 9 September 2014, *Gajtani v. Switzerland*, application no. 43730/07, para. 108.

[33] For a case in which the right to access to a court in return proceedings was expressly mentioned, see ECtHR, Judgment of 25 June 2013, *Anghel v. Italy*, application no. 5968/09, esp. para. 56 ff.

[34] Cf. 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, *OJ* L 136 of 24 May 2008, p. 3 ff.: the Directive covers family matters alongside with other civil and commercial matters, but sets out only very general principles.

[35] See C. Honorati, S. Bernasconi, *L'efficacia* cross-border *degli accordi stragiudiziali in materia familiare tra i regolamenti Bruxelles II*-bis *e Bruxelles II*-ter, in *Freedom Security Justice European Legal Studies,* 2020, p. 22 ss.

[36] For the idea that eagerness to use this instrument is not sufficient for the establishment of an effective mediation system in child abduction cases, see S. Vigers, *Mediating International Child Abduction Cases*, Oxford, Hart Publishing, 2013, p. 115 ff.

proceedings by preventing, in principle, the courts of the State of removal or retention from determining custody issues and by preserving the respective autonomy of the two sets of proceedings. In the same vein, Article 9 of the Convention clarifies that a decision concerning the return of the child cannot be understood as a determination on the merits of custody rights.

42. The approach enshrined in the Regulation is partially different, as a consequence of the fact that parental responsibility falls within its scope of application. For this reason, even though the two sets of proceedings remain separate and subject to different rules, Regulation 2019/1111 appears to welcome, at least in its preamble[37], the possibility of an all-encompassing solution, provided that it is agreed upon by the parties: if the parents settle simultaneously return issues and custody issues, it will be possible to concentrate jurisdiction in the Member State of the removal or retention according to Article 10 of the Regulation.

43. While this may happen if the parties are willing to accept this, the Regulation, reiterating a position already taken in Regulation No. 2201/2003, clearly prioritises the role of the courts which may exercise the competence in matters of parental responsibility, assuming that they are better placed in order to make a decision as to the welfare of the child and probably fearing that the courts in the State of the wrongful removal or retention can be biased in favour of the abducting parent. For this reason, departing from the suggestions of several scholars[38], Regulation 2019/1111 did not abolish the so-called overriding mechanism, but rather re-focused it by clarifying that the courts of the State of the habitual residence of the child are not expected to merely second-guess the decision made in the State of removal or retention about the return of the child, but to examine that issue in the more general framework of a case about parental responsibility.

44. On the one hand, the rule retained its prominent role in the system established by the Regulation in child abduction matters, as it is shown by the fact that Article 42 of Regulation 2019/1111 lists decisions for the return of the child made under Article 29.6 among the «privileged decisions». Even if the general abolition of *exequatur* proceedings within the scope of application of the Regulation may lead to overlook the special position of those decisions, they still are not subject to the procedure and grounds for refusal of recognition or enforcement usually applicable in matters of parental responsibility and a different set of remedies against their enforcement is provided[39].

45. On the other hand, the new provision appears to be more consistent with the general functioning of the Regulation[40], as it allows the courts of the State of the child's habitual residence to make use of their jurisdictional competence, which is not affected, under the mentioned Article 9 of the Regulation, by the wrongful removal or retention[41], unless the holder of custody rights has acquiesced in the removal or retention. Thus, the powers of the State of the abduction, emanating from the 1980 Hague Convention and confined to the return of the child, and those of the State of the habitual residence, dealing in a broader context with custody and access rights, may clearly co-exist.

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[37] Cf. Recital 22 of the Regulation: «Member States which have concentrated jurisdiction should consider enabling the court seised with the return application under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of the return proceedings».

[38] See, e.g., P. Beaumont, L. Walker, J. Holliday, *Conflicts of EU courts on child abduction: the reality of article 11(6)-(8) Brussels IIa proceedings across the EU*, in *Journal of Private International Law*, 2016, pp. 211 ff.; T. Kruger, L. Samyn, *Brussels II* bis*: successes and suggested improvements*, cit., p. 165 ff.

[39] Cf. Article 48 of the Regulation, concerning rectification and withdrawal of the certificate, and Article 50, concerning the situation of irreconcilable decisions.

[40] For the idea that the new provision is an improvement to the existing system, cf. T. Kruger, L. Carpaneto, F. Maoli, S. Lembrechts, T. van Hof, G. Sciaccaluga, *Current-day international child abduction: does Brussels IIb live up to the challenges?*, cit., p. 176 ff.

[41] Accordingly, the impossibility to order the return of the child in the State of his or her habitual residence following a refusal to return the child under Article 13, para. 1, lett. a), of the 1980 Hague Convention seems to be merely a consequence of the fact that the courts of that State no longer possess jurisdictional competence in matters of parental responsibility, in line with Article 9, lett. a), of the Regulation.

46. This general idea had in fact already been expressed in the ruling of the Court of Justice in *Hampshire County Council*, where it was held that the 1980 Hague Convention does not intend to be exclusively applied in order to obtain the prompt return of the child and that, consequently, this may be ordered in the context of proceedings concerning parental responsibility at the same time that custody issues are settled by the court having jurisdictional competence according to EU rules[42]. That principle allowed the parties to have alternatively recourse either to the return proceedings under the 1980 Hague Convention or to the parental responsibility proceedings under the Regulation No. 2201/2003.

47. Article 29.6 clearly goes beyond this approach, as it is aimed to establish the consequences that are to follow when the rules of the Convention are applied: for this reason, Article 29.4 of the Regulation establishes an obligation to entertain direct communication between the courts of the State of abduction and the courts where proceedings concerning parental responsibility take place, so that the latter may take into consideration the non-return decision and possibly apply Article 29.6 of the Regulation.

48. However, the so-called "overriding mechanism" will now be available only in some cases, expressly identified by Article 29.1 of the Regulation: the power to order the return of the child can be exercised only if the courts of the State of wrongful removal or retention rely on the existence of a grave risk of physical or psychological harm for the child or if they uphold the child's objection to being returned[43]. In this connection, the Regulation also envisages a supplementary duty for the courts of the State of removal or retention: when they refuse to return the child in the proceedings under the 1980 Hague Convention, they are required to expressly state the grounds for such a refusal[44].

III.4. Complementarity in practice: d) special EU rules for the application of Article 13 of the 1980 Hague Convention

49. From a fourth point of view, Regulation 2019/1111 complements the regime established by the 1980 Hague Convention with regard to the implementation of Article 13, para. 1, lett. b), of the Convention itself: such a choice is explained by the fact that the application of that provision by domestic courts can be at odds with the general objective of the Regulation to ensure the prompt return of the child and, at the same time, involves a wide margin of discretion.

50. However, the existence of that margin is required by the need to comply with the principles envisaged in the case-law of the European Court of Human Rights, which highlighted that in matters of child abduction the right to private and family life under Article 8 of the European Convention on Human Rights can be protected by complying with the principles laid down in the 1980 Hague Convention and in the 1989 UN Convention on the Rights of the Child[45]. Accordingly, the European Court held that a

[42] CJEU, Judgment of 19 September 2018, Joined Cases C-325/18 PPU and C-375/18 PPU, ECLI:EU:C:2018:739, paras. 45-62.

[43] The powers of the courts of the State of the habitual residence will be subject to limitations, insofar as the refusal to return the child is based on a possible the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms under Article 20 of the Convention: even if they still may exercise their jurisdictional competence with regard to custody rights, they cannot make an order as to the return of the child under Article 29.6 of the Regulation. However, as such a judgment would benefit from the special regime of circulation established by the Regulation, it is unclear whether the State of the enforcement could, in fact, oppose the return of the child relying on the previous decision of its courts under Article 20 of the Convention.

[44] Cf. Recital 48 of the Regulation: the necessity to identify the grounds taken into consideration by the court refusing the return of the child arises from the contents of the Annex I, that has to be filled in and attached to the judgment, when it is communicated to the courts of the State of the habitual residence of the child.

[45] European Court of Human Rights, Judgment of 6 July 2010, *Neulinger and Shuruk v Switzerland*, application no. 41615/07, para. 132.

child's return cannot be ordered automatically or mechanically[46] and stressed the need to take genuinely into account all the relevant factors that may suggest the existence of a grave risk for the child in case of return[47].

51. Thus, domestic courts are called upon to carry out an in-depth assessment of the circumstances of the case, in order to ascertain whether one of the exceptions enshrined in articles 12 and 13 of the 1980 Hague Convention may apply and to strike a fair balance between the different interests at stake. As Member States are expected to comply with those obligations even when they have to apply EU rules, Regulation 2019/1111 tried to supplement the Convention on this subject and took different steps in order to regulate the power of domestic courts to refer to Article 13, para. 1, lett. b), as a ground for non-return, moving further than the pre-existing rules in Regulation No. 2201/2003.

52. To this regard, Article 27.3 of Regulation 2019/1111 reiterates that the risk of a physical or psychological harm to the child does not lead automatically to a decision of non-return, insofar as "adequate arrangements have been made to secure the protection of the child after his or her return". While the scope of that protection can vary on a case-by-case basis[48], the provision is intended to suggest that domestic courts take into account the efforts of the parent seeking the return of the child to prevent possible risks for the child itself and to plan in advance measures counterweighting them. However, the new Regulation placed a stronger emphasis also on the duty for domestic courts to conduct an in-depth analysis of the arrangements made in the State of the habitual residence on the basis of the evidence provided by the claimant or of expert reports or other means ordered *ex officio*.

53. Similarly, the new provision contained in Article 27.5 of the Regulation adds a different instrument, that can be activated by domestic courts when they decide to order the return of the child notwithstanding the existence of the grave risk of a physical or psychological harm, namely the establishment of provisional measures[49] aimed at avoiding such risk. Since the purpose of the provision is to ensure that Article 13, para. 1, lett. b), of the Convention does not constitute an obstacle to the return of the child whenever domestic courts may proceed with the adoption of adequate measures, this has a clear impact on the functioning of the conventional regime. As the reference to Article 15 of the Regulation clarifies, the rationale for this special way of implementation can be found in the suitability of provisional measures for circulation to other Member States[50]: that possibility does not exist under the 1980 Hague Convention and can only be envisaged as a result of the mutual trust between the Member States of the European Union.

54. While those provisions seem to restrain the ability of domestic courts to rely on Article 13, para. 1, lett. b), of the 1980 Hague Convention, a very significant progress was made by Regulation 2019/1111 to the opposite direction, as Article 56.4 of the Regulation now allows domestic courts to take consideration of a risk of physical or psychological harm for the child even during enforcement pro-

[46] European Court of Human Rights, judgment of 12 July 2011, *Šneersone and Kampanella v Italy,* application no. 14737/09, para. 85.

[47] European Court of Human Rights, Judgment of 26 November 2013, *X v Latvia*, application no. 27853/09. In the sense that EU rules subscribe to the «same philosophy», European Court of Human Rights, Judgment of 28 October 2021, *Kupás v Hungary*, application no 24720/17, para. 49.

[48] For the necessity that protective measures include also the protection of the mother, at least when she is the victim of domestic violence by the father seeking the return of the child, see C. Honorati, G. Ricciardi, *Violenza domestica e protezione* cross-border, in *Riv. dir. int. priv. proc.*, 2022, p. 225 ff., esp. p. 241 ff.; I. Pretelli, *Una reinterpretación del Convenio de La Haya sobre la sustracción de menores para proteger a los niños de la exposición al sexismo, la misoginia y la violencia contra las mujeres*, in *Cuadernos de Derecho Transnacional*, 2022, p. 1310 ff.

[49] The provisional nature of those measures can be explained by the fact that, after the return of the child, any decision as to the custody and access rights will be in the hands of the domestic courts of the State of the habitual residence of the child, which, on account of their jurisdictional competence on the merits, may also take different protective measures.

[50] See T. Kruger, L. Carpaneto, F. Maoli, S. Lembrechts, T. van Hof, G. Sciaccaluga, *Current-day international child abduction: does Brussels IIb live up to the challenges?*, cit., p. 178.

ceedings. The Regulation took a very cautious approach about the scope of application of this provision, underlining that it can be invoked only «in exceptional cases», but the fact remains that the courts of the State of enforcement are supposed to engage into a scrupulous assessment of the circumstances of the case before they can give way to the implementation of the decision.

55. The particular significance of the provision, which is bound to apply also to the enforcement of «privileged decisions» under the Regulation, lies in its capacity to respond to concerns arising from the possible infringement of fundamental rights for a mechanical application of EU rules in matters of circulation of judgments[51]. In fact, the suspension of the enforcement proceedings that can be ordered under Article 56.4 of the Regulation is expressly directed at protecting the rights of the child whenever a change of the circumstances so requires. Even if the provision covers a procedural stage which is outside the scope of application of the 1980 Hague Convention, one can still discern its complementarity, insofar as it contributes to preventing the same risks and dangers that are taken into account by Article 13 of the Convention itself and could lead, if disregarded, to a possible violation of Article 8 of the European Convention on Human Rights.

IV. Concluding remarks

56. As we have seen, Regulation 2019/1111 reinforces the impression that it may act as a unitary body with the 1980 Hague Convention and that its rules are intended to supplement the system of the Convention itself by providing a special regime applicable as between EU Member States. In the new Regulation, this approach has been clarified, as the priority clause was replaced with a provision that identifies the respective scope of application of the two instruments and expressly underlines that the Regulation is expected to apply in combination with the Convention.

57. In order to enhance the fulfilment of the objective of a prompt return of the child in the European judicial area, the new Regulation, building on the experience of Regulation No. 2201/2003, further develops the opportunities of a complementary application of its rules in return proceedings and in proceedings following the refusal to return the child. In doing so, the Regulation ensures a better coordination between the two sets of proceedings, preserving the crucial role of the courts of the State of the habitual residence of the child insofar as they are competent in matters of parental responsibility, and emphasises the importance to comply with general procedural principles of EU law, but also includes several new provisions clearly aiming to enhance the ability of EU rules in child abduction matters to comply with the principles relating to the protection of fundamental rights.

[51] See G. Biagioni, Avotinš v. Latvia. *The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in *European Papers*, 2016, p 579 ff.