



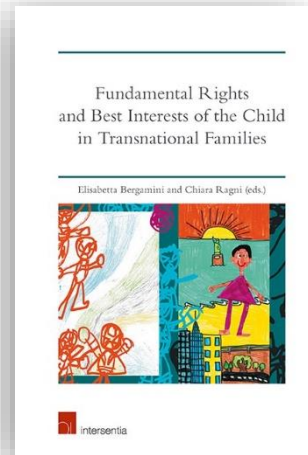
This contribution was originally published in:

**Fundamental Rights and Best Interests of the Child in Transnational Families**  
ISBN 978-1-78068-665-3

**Elisabetta Bergamini and Chiara Ragni (eds.)**

Published in September 2019 by Intersentia

[www.intersentia.co.uk](http://www.intersentia.co.uk)



**For more information on the book or to purchase**

<https://intersentia.com/en/fundamental-rights-and-best-interest-of-the-child-in-transnational-families.html>

This contribution is made available under the terms of the Creative Commons Attribution, NonCommercial, ShareAlike Creative Commons Licence (<https://creativecommons.org/licenses/by-nc-sa/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited and derived works are published under the same licence.

For any queries, or for commercial re-use, please contact Intersentia at [mail@intersentia.co.uk](mailto:mail@intersentia.co.uk) or on +44 (0) 1223 370170.

---

**Featured Recommendations**

**Plurality and Diversity of Family Relations in Europe**

K. Boele-Woelki and D. Martiny (eds.)

ISBN 978-1-78068-817-6

August 2019

**Safeguarding Children's Rights in Immigration Law**

M. Klaassen, S. Rap, P.

Rodrigues and T. Liefwaard (eds.)

ISBN 978-1-78068-949-4

Forthcoming

# PROVISIONAL MEASURES AND THE BEST INTERESTS OF THE CHILD IN THE FIELD OF PARENTAL RESPONSIBILITY

Lidia SANDRINI

1. Introduction .....	287
2. Jurisdiction on the Substance and Jurisdiction to Issue Interim Relief. . . .	289
3. The Presence of the Child or of the Child's Assets as a Ground of 'Interim' Jurisdiction .....	295
4. Coordination between Measures and Impact on the Notion of 'Provisional and Protective Measures' .....	302
5. Conclusions .....	307

## 1. INTRODUCTION

It is unanimously acknowledged that speedy action by courts is crucial when it comes to protecting the legal rights of minors in disputes concerning them,<sup>1</sup> particularly where young children are involved.<sup>2</sup> Thus, we may certainly say that speed is an essential element of the adjudication process for pursuing the best interests of children, as a procedural rule.<sup>3</sup> On the other hand, the need

---

<sup>1</sup> See Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1), CRC/C/GC/14 of 29.05.2013, para. 93: 'The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible'; European Convention on the Exercise of Children's Rights, Strasbourg, 25.01.1996, ETS No. 160, Article 7- Duty to act speedily: 'In proceedings affecting a child the judicial authority shall act speedily to avoid any unnecessary delay and procedures shall be available to ensure that its decisions are rapidly enforced. In urgent cases the judicial authority shall have the power, where appropriate, to take decisions which are immediately enforceable.'

<sup>2</sup> CJEU, case C-195/08 PPU, *Rinau*, ECLI:EU:C:2008:406, para. 81; case C-296/10, *Purrucker II*, ECLI:EU:C:2010:665, para. 83.

<sup>3</sup> As is well known, the General Comment No. 14, above n. 1, para. 6, underscores that, 'the child's best interests is a threefold concept which includes: (a) a substantive right,

to analyse all the elements necessary in the particular case to determine the best interests of the child in the substantive sense inevitably affects the duration of proceedings, which can often become quite complex.<sup>4</sup> Moreover, the conflict between speed and thoroughness is heightened in matters of parental responsibility, and is balanced within domestic legal systems by procedural rules that provide for interim measures of protection. The provisions on provisional and protective measures found in Regulation (EC) No. 2201/2003 are intended to bring about the same result in cross-border controversies.<sup>5</sup> This chapter will investigate the ways in which this Regulation implements the principle of the superior interests of the child, as well as how this principle, as incorporated in EU law, may be perceived through it. This analysis is particularly timely today, in light of the recent recast of the Regulation, not least of all in order to verify if, and to what degree, the modifications that had been proposed by the Commission,<sup>6</sup> and those eventually adopted,<sup>7</sup> effectively move toward strengthening the protection of children.

---

(b) a fundamental legal interpretative principle, and (c) a rule of procedure'. Concerning this last function in particular, see, *ibid.* para. 85 ff.

<sup>4</sup> See, e.g., European Convention on the Exercise of Children's Rights, above n. 1, Article 6 – Decision-making process.

<sup>5</sup> Council Regulation (EC) 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) 1347/2000 [2003] OJ L338/1 (hereinafter also: Brussels IIa).

<sup>6</sup> The reformulation (that followed the previous attempt of 2006, focused on matrimonial matters) started three years ago with the proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM/2016/0411 final (hereinafter also: the proposal), on which see C. HONORATI, 'La proposta di revisione del regolamento Bruxelles II-bis: Più tutela per i minori e più efficacia nell'esecuzione delle decisioni' (2017) *Riv. Dir. Int. Priv. Proc.*, 247–282. The proposal was preceded by the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) 2201/2003, COM/2014/0225 final. In light of this report, scenarios for the reform of the regulation of provisional measures were put forward by M. MELLONE, 'Provisional Measures and the Brussels IIbis Regulation: An Assessment of the Status Quo in View of Future Legislative Amendments' (2015) *Nederlands Internationaal Privaatrecht* 1, 20–26; T. KRUGER and L. SAMYN, 'Brussels II bis: Successes and Suggested Improvements' (2016) *Journal of Private International Law*, 132–168. More recently, see L. CARPANETO, 'La ricerca di una (nuova) sintesi tra interesse del minore "in astratto" e "in concreto" nella riforma del regolamento Bruxelles II-bis' (2018) *Riv. Dir. Int. Priv. Proc.*, 945–977, who takes into account also the general approach on the above-mentioned proposal reached by the JHA Council at its meeting held on 7 December 2018.

<sup>7</sup> After this chapter had been completed, 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 (hereafter also: the Recast) has been published in [2019] OJ L178/1. According to its Article 105, the new Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union, *i.e.* 22 July 2019. However, Article 100 establishes that it shall apply only to legal proceedings instituted, to authentic instruments formally drawn up

## 2. JURISDICTION ON THE SUBSTANCE AND JURISDICTION TO ISSUE INTERIM RELIEF

As well known, Article 20 of the Brussels IIa Regulation contains a rule that specifically addresses provisional and protective measures and allows them to be established even by the judicial authorities of Member States different from the one with jurisdiction over the substance of the matter.<sup>8</sup> Nevertheless, the Regulation first and foremost confers jurisdiction to adopt provisional measures on the latter courts. As is the case with other European Union Regulations that regulate jurisdiction, this is not stated explicitly in any particular rule,<sup>9</sup> and yet it has never been called into question.<sup>10</sup> This is also supported by the precedent established by the 1968 Brussels Convention:<sup>11</sup> the CJEU, albeit without any textual support, has not hesitated to declare that the same court identified as having the jurisdiction on the substance of the matter, ‘also has jurisdiction to order any provisional or protective measures which may prove necessary’.<sup>12</sup> Such

---

or registered and to agreements registered on or after 1 August 2022, while Regulation 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 that date and which fall within the scope of that Regulation. Given the timing, it is not possible to proceed here with an in-depth analysis of the final text of the Recast. However, a first-reading overview of the main differences among the current text, the Commission’s proposal and such final text, as far as provisional measures are concerned, will be provided.

<sup>8</sup> The text of Article 20 reads: ‘Provisional, including protective, measures. 1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter. 2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.’ Article 20 of Brussels IIa has been preceded by Article 12 of the Brussels II Regulation (Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, [2000] OJ L160/19) and Article 12 of the Brussels II Convention (see Council Act of 28 May 1998 drawing up, on basis of Article K.3 of the TEU, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters [1998] OJ C221/1).

<sup>9</sup> According to M. PERTEGÁS SENDERS and C. MARIOTTINI, ‘Article 20: Provisional, Including Protective, Measures’ in U. MAGNUS and P. MANKOWSKI (eds.), *European Commentaries on Private International Law, vol. IV, Brussels IIbis Regulation*, Sellier European Law Publishers, Köln, 2017, pp. 269-281, p. 269, n. 1, ‘the formulation of Recital 16 ... reflects that other head of jurisdiction, besides Article 20, are also relevant for applications for interim relief’.

<sup>10</sup> See, e.g., CJEU, case C-256/09 *Purrucker I*, ECLI:EU:C:2010:437, para. 63 ff.; case C-92/12, *Health Service Executive*, ECLI:EU:C:2012:255.

<sup>11</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels, 27 September 1968 [1972] OJ L299/32.

<sup>12</sup> CJEU, case C-391/95, *Van Uden Maritime BV v. Firma Deco Line*, ECLI:EU:C:1998:543, para. 19.

an interpretation now finds confirmation in the Recast, precisely where it specifies the notion of ‘decision’ for the purposes of the recognition and enforcement regime, dealt by in Chapter IV, and, to that aim, includes therein ‘provisional, including protective, measures ordered by a court which by virtue of this Regulation has jurisdiction as to the substance of the matter’.<sup>13</sup>

Thus, under the current Article 8 (as well as under Article 7 of the Recast), the courts of a Member State in which a child is habitually resident will generally be authorised to adopt appropriate protective measures, both during proceedings and *ante causam*.<sup>14</sup> This choice by the EU legislator reveals a specific view of the ‘best interests of the child’, which manifests in the form of a procedural rule.<sup>15</sup> Indeed, habitual residence is favoured as an expression of the ‘criterion of proximity’,<sup>16</sup> since the judge nearest to ‘the place which, in practice, is the center of that child’s life’<sup>17</sup> appears to be best positioned to access all the elements important for reaching a decision that effectively reflects the child’s concrete needs and, therefore, to proceed more quickly to a ruling.<sup>18</sup> By contrast, different kinds of ties, like the child’s nationality, his or her cultural ties to the Member State of the parents’ origin, or the intention of one or both parents to take up residency in a given country, amount to mere indicators that identify the location of the habitual residence.<sup>19</sup>

Nonetheless, the Regulation provides for exceptions to the proximity criterion, through which it gives more weight to the interests of minors in the substantive sense, as preordained in a general and abstract way by the legislator.<sup>20</sup> These include the continuing jurisdiction of the authorities of the State of former habitual residence, provided by Article 9,<sup>21</sup> in keeping with the child’s right to maintain relationships with both parents under Article 24(3) of

<sup>13</sup> See Article 2 para. 1(b); see also article 59 and, in the preamble, recitals 30 and 31.

<sup>14</sup> On the notion of ‘habitual residence’ for purposes of this Regulation, see, among many, CJEU, case C-523/07, *A*, ECLI:EU:C:2009:225, paras. 35-42; case C-497/10 PPU, *Mercredi*, EU:C:2010:829, paras. 44 and 47-49; case C-111/17 PPU, *OL v PQ*, ECLI:EU:C:2017:436, paras. 42 and 43; and, finally, case C-393/18 PPU, *UD v. XB*, ECLI:EU:C:2018:835, para. 45 ff., with extensive references to previous case law.

<sup>15</sup> See General Comment No. 14, above n. 1, paras. 6 and 85 ff.

<sup>16</sup> See Brussels IIa, recital No. 12.

<sup>17</sup> CJEU, case C-512/17, *HR*, ECLI:EU:C:2018:513, para. 42.

<sup>18</sup> See CJEU, case C-403/09 PPU, *Detiček*, ECLI:EU:C:2009:810, para. 36; case C-256/09, above n. 10, para. 91, as well as case C-499/15, *W and V*, ECLI:EU:C:2017:118, paras. 51 and 52. On the appropriateness of the criterion of proximity for facilitating the collection of evidence, see CJEU, case C-111/17 PPU, above n. 14, para. 59. According to CJEU, case C-512/17, above n. 17, para. 54, the need to conduct an investigation that is specific to the circumstances of each case also has consequences for interpretation, as indications given in one case may only be applied to another case with due precaution.

<sup>19</sup> CJEU, case C-512/17, above n. 17, paras. 57-65. See also case C-111/17 PPU, above n. 14, paras. 47 and 51.

<sup>20</sup> General Comment No. 14, above n. 1, para. 6.

<sup>21</sup> See, in the Recast, Article 8.

the EU Charter, and the extension of the competence of those authorities even when a child's place of residence has changed following an abduction (Article 10)<sup>22</sup>. From this perspective the rule on residual jurisdiction (Article 14)<sup>23</sup> is particularly important. Allowing for the exercise of jurisdiction by EU Member States in cases of minors who habitually reside in third countries reveals how the choice to protect the interests of the minor at the procedural level of proximity to the court is closely connected to broad agreement on the contents of these interests at the level of substantive law.<sup>24</sup>

The best interests of the child principle as a procedural rule, as well as its weight at the substantive level as an abstract matter, may yield priority following an evaluation of the circumstances of the particular case, as Article 15<sup>25</sup> provides for the transfer of the case to a court better placed to hear it.<sup>26</sup> This reveals how the legislator gives primacy to individual needs over the pursuit of general goals. The prioritisation of the interests of the child in the particular case is also in evidence in the rules on prorogation of jurisdiction, this time *vis-à-vis* the interests of other subjects involved in the dispute (Article 12).<sup>27</sup>

The general rule and its exceptions make for a regulatory framework that is sufficiently flexible, and well-suited to ensure that, in the majority of cases, the court with jurisdiction over the substance of the matter will also be the one best positioned to adopt provisional and urgent measures.<sup>28</sup> However, the reasons that support this conclusion differ according to the position of the court with regard to the child. Indeed, the criterion of proximity, manifested in the grant of jurisdiction to the courts of the State of habitual residence, is sufficient in and of itself, in many cases, to ensure the immediate effectiveness of the measures

<sup>22</sup> Corresponding to Article 9 of the Recast.

<sup>23</sup> It remains Article 14 in the Recast.

<sup>24</sup> Article 12(4) establishes a similar rule for the extension of jurisdiction.

<sup>25</sup> The current provision is split into Articles 12 and 13 of the Recast.

<sup>26</sup> See CJEU, case C-428/15, *D.*, EU:C:2016:819, para. 58. See E. GALLANT, 'Le Forum Non Conveniens de l'Article 15 du Règlement Bruxelles II Bis' (2017) *Revue critique de droit international privé*, 464.

<sup>27</sup> CJEU, case C-215/15, *Gogova*, EU:C:2015:710, para. 41; case C-565/16, *Alessandro Saponaro and Kalliopi-Chloi Xylina*, ECLI:EU:C:2018:265, paras. 27 and 33. Nevertheless, it is interesting to note that, in this final decision, in light of circumstances that favoured linking the child to the chosen forum, the child's best interest requirement was considered to be satisfied, since 'the referring court has given no indication that might suggest that seizure of the court chosen by the parents would in any way prejudice the interests of the child' (ibid. para. 38), so that it appears that the existence of a connection between the child and the Member State to which the judicial authority that has been seised belongs effects a sort of presumption in favour of extending its competence to include the superior interests of the child. Article 12 of Regulation Brussels IIa finds equivalence in Article 10 of the Recast, despite the Correlation table (annex X to the Recast) not highlighting it, probably because of the substantial changes brought to the provision.

<sup>28</sup> See B. ANCEL and H. MUIR WATT, 'L'intérêt Supérieur de l'Enfant dans le Concert des Juridictions: Le Règlement Bruxeels II Bis', (2005) *Revue critique de droit international privé*, 581.

adopted and, therefore, makes protection of the child more effective. The same cannot be said for the criteria for establishing jurisdiction that overlook the child's presence in the country, or which treat this as only one of many elements to take into consideration.<sup>29</sup> Concerning these, as well as under Article 8, in the event that the child is temporarily located in a country other than that of residence,<sup>30</sup> the competence of the court that has jurisdiction over the substance of the matter is justified not only as the natural outcome of the general character of the power of *ius dicere* attributed to it, but it is also appropriate in light of specific ways in which provisional protection is provided in family law disputes.<sup>31</sup> Despite the significant differences between the different national systems, the very nature of rights and protected interests involves agreement in moving toward measures anticipatory in nature, which are intended to set up provisional parameters for the family situation until a judgment is reached.<sup>32</sup> On the one hand, this feature of the measures makes it more difficult to assimilate them to enforcement procedures, a phenomenon which has regarded protective measures through the prioritisation of the enforcement phase over the adjudication phase.<sup>33</sup>

<sup>29</sup> Moreover, precisely because the presence of the child may have a bearing on the application of these rules, the possibility may not be ruled out that, in particular cases, they may create the need for protections that have immediate effect.

<sup>30</sup> On the importance of the physical presence of the child in a State for purposes of determining habitual residence, see, most recently, CJEU, case C-393/18 PPU, *UD v. XB*, ECLI:EU:C:2018:835, para. 52 ff., and the cases cited therein.

<sup>31</sup> On the importance of the features of interim measures in family matters with respect to establishing jurisdiction, see P. PICONE, 'Le Misure Provvisorie nel Diritto Internazionale Privato' in ID., *La Riforma Italiana del Diritto Internazionale Privato*, CEDAM, Padua 1998, p. 563 ff.

<sup>32</sup> This trend is particularly clear where measures concern the children themselves, and their placement with one of the parents or elsewhere, or else the specific rules related to exercising visitation rights. Moreover, even where property rights are at issue, despite the usefulness of purely precautionary measures such as the seizure of assets, provisional decisions more often deal with the administration of the assets themselves or set a payment schedule for maintenance obligations. Concerning this it is important to bear in mind that maintenance obligations are not included within the scope of application of the Brussels IIa Regulation, but fall under Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations [2009] OJ L7/1. Nevertheless, practical application demonstrates that, very often, child support issues arise in connection with matters concerning parental responsibility, and for these cases Article 3(d) of Regulation (EC) 4/2009 applies. For more on this, see CJEU, case C-604/17, *PM v. AH*, ECLI:EU:C:2018:10, para. 32; case C-499/15, above n. 18, para. 47 ff., and the commentary by N. JOUBERT, 'La Résidence de l'Enfant du Divorce Face à la Demande de Modification de la Décision Relative à la Garde et aux Aliments', (2018) *Revue critique de droit international privé*, 138.

<sup>33</sup> With regard to Article 24 of the 1968 Brussels Convention, traces of this orientation may be found in CJEU, case 125/79 *Denilauler v. snc Couchet Frères*, ECLI:EU:C:1980:130, para. 16: 'the contracting State, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered'.

On the other hand, it leads to favouring the attribution of the authority to adopt provisional measures to the court with jurisdiction over the substance of the matter, due to the greater likelihood of consistency between the assessments made in the two phases of proceedings. Thus, concentrating the jurisdiction into one supports, among other things, the goal of achieving continuity in regulating the rights linked to parental responsibility.

Nevertheless, it is clear that, to meet this goal in cases where the measure adopted by the court with jurisdiction over the substance of the matter calls for forced execution, it is crucial that the measure benefit from the streamlined recognition and enforcement described in Chapter III of the Regulation,<sup>34</sup> so that it may be enforced in the different Member State where the child is actually living. This possibility, which is a consequence of the broad notion of ‘judgment’ adopted by the Regulation, becomes important in disputes concerning parental responsibility in a situation somewhat symmetrical to the one we have already considered, in which the competent judge orders, as a provisional measure, that a child be moved to a different Member State to better assure his or her protection.<sup>35</sup> The CJEU has dealt with the relationship between the interests of the child and rules on the circulation of provisional measures in precisely this context: a provisional measure was adopted by an Irish court which had jurisdiction over the substance of the matter, with the intention of bringing about the result described. In *Health Service Executive*, the CJEU explained how the urgent need to ensure effective protection of the child (a need that was particularly clear in that case) requires a teleologically-oriented interpretation of the procedural rules for obtaining a declaration of enforceability, in order to ensure the speediness of the procedure, which is essential in order to achieve the very purpose of the Regulations on parental responsibility.<sup>36</sup>

On the other hand, the overriding importance of the interests of the minor did not allow for bypassing the letter of the law or overlooking the need for a declaration of enforceability in order for the Irish measure to be enforced in England, despite the referring court’s concerns about the risk of delay associated with obtaining the declaration.<sup>37</sup> Indeed, the CJEU held that only the legislator could make this possible, by modifying the regulatory scheme, underscoring that it falls to the legislator to establish effective procedural mechanisms to deal with the protection of minors.<sup>38</sup>

The CJEU’s remarks on this point did not go unobserved, and, indeed, one of the central elements of the proposed revision of Brussels IIa advanced by the

<sup>34</sup> Chapter IV of the Recast.

<sup>35</sup> See Article 2(4).

<sup>36</sup> Case C-92/12, above n. 10, paras. 127 and 133.

<sup>37</sup> *Ibid.*, paras. 114, 115.

<sup>38</sup> *Ibid.*, para. 121.



Commission was the elimination of the *exequatur* procedure.<sup>39</sup> In the proposal the Commission suggested to adopt a model already tested in other sectors,<sup>40</sup> and opened the possibility of giving weight to the grounds of refusal at the enforcement stage.<sup>41</sup> But this guarantee was deemed insufficient in the area of parental responsibility, and so a further proposal had been made to bolster the oversight of compliance with public policy, by verifying that the enforcement of decisions corresponded to the superior interests of the child where the child had objected to it, or where the circumstances had significantly changed since the time the decision was handed down.<sup>42</sup> It is likely that the latter situation would have arisen only rarely with regard to rulings adopting provisional measures,<sup>43</sup> and it is surely the assessment of the child's opinion that most frequently could have proved an obstacle to enforcement, because of the well-known differences in how Member States treat the rights of children to express their opinions in proceedings concerning them.<sup>44</sup> Moreover, with specific reference to proceedings to adopt protective measures, the urgent need to reach a decision and the resulting brevity of the proceedings often lead courts to omit such a step. These omissions are not currently considered grounds for another Member

<sup>39</sup> See Article 30 ff. of the proposal, above n. 6.

<sup>40</sup> See Article 39 ff. of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

<sup>41</sup> Article 40 of the proposal, above n. 6.

<sup>42</sup> *Ibid.*, para. 2. It is clear that this regulatory option aims to avoid any automatism that could be struck down by the European Court of Human Rights, as has already happened to the enforcement of decisions relating to returning minors who have been illegally abducted. For more on this, see L. CARPANETO, 'In-Depth Consideration of Family Life v. Immediate Return of the Child in Abduction Proceedings within the EU' (2014) *Riv. Dir. Int. Priv. Proc.*, 931–958.

<sup>43</sup> Nonetheless, in CJEU case C-403/09 PPU, above n. 19, this exact situation was brought before a Slovenian court, and served as the grounds for its refusal to enforce an Italian provisional measure granting a father exclusive custody of a child.

<sup>44</sup> A comparative look at Germany and Italy can be found in T. PFEIFFER, M. ESCHER and J. WITTMANN, 'The Fragmentation of Recognition and Enforcement Regimes' in I. VIARENGO and F. VILLATA (eds.), *Planning the Future of Cross-Border Families: A Path through Coordination. Final Study*, (EUFam's, Project JUST/2014/JCOO/AG/CIVI/7729) <[www.eufams.unimi.it](http://www.eufams.unimi.it)> accessed 20.10.2018, pp. 221 ff. In light of the need this study shows to identify standards shared by the Member States, the suggestion found in the European Parliament's Resolution on the Commission's proposal (P8\_TA(2018)0017, 18.01. 2018), to recall at Rec. No. 23 – naturally along with Article 24(1) of the EU Charter and Article 12 of the United Nations Convention on the Rights of the Child – the Council of Europe Recommendation on the participation of children and young people under the age of 18 (CM/Rec(2012)2 of 28 March 2012) could surely be appreciated, as the indications contained therein could contribute to the adoption of a more uniform approach among Member States. Unfortunately, eventually the EU legislator did not consider such reference necessary and omitted it. In general, on Regulations providing for listening to the child and proposed modifications, see B. UBERTAZZI, 'The Hearing of the child in the Brussels IIa Regulation and its Recast Proposal' (2017) *Journal of Private International Law*, 568–601.

State's refusal to enforce the measures, since Article 23(1)(b) of the Regulation allows for an exception to the duty to hear the child in urgent cases. By contrast, there was no room for exceptions in the proposal, and this could have potentially created an important obstacle to the circulation of provisional and protective measures.<sup>45</sup> The question arose whether such an inflexible approach was really necessary, and whether it was in line with the child's interests. Thoughtfully, the Recast answers these doubts in the negative: the final text retains the current exception for reasons of urgency to the rule that impose hearing the child, and reformulates in a restrictive way the ground for the refusal of the enforcement related to a change of circumstances after the decision has been given.<sup>46</sup> One cannot but welcome such an outcome, which, together with the abolition of the *exequatur*, results in a much more effective solution than the one envisaged by the Commission to the need of ensuring a timely and continuous protection of minors.

### 3. THE PRESENCE OF THE CHILD OR OF THE CHILD'S ASSETS AS A GROUND OF 'INTERIM' JURISDICTION

The decision of the EU legislator to reject the Commission's proposal to allow the Member State of enforcement a more extensive oversight over any provisional measures granted by the court with jurisdiction on the substance of the matter did not go without consequences for the recasting process. Because of that, a more far reaching reform of the rules governing protective measures taken by a court lacking such jurisdiction, particularly with regard to the circulation of these measures in the other Member States, has been avoided, yet, without forsaking the commitment to strengthen the effectiveness of provisional protection, even taking significant action concerning the existing limits on it.

Before looking at the revision process and at where it has eventually headed, it is worth recalling that the current text of Article 20 of the Regulation already contains notable differences with regard to the provisions with the same scope in other EU Regulations,<sup>47</sup> particularly because it does not exactly follow the

<sup>45</sup> Urgency, as a factor which can justify not hearing the child's view, is not mentioned in the proposal, above n. 6, or in Article 20, the general rule governing the right of the child to express his or her opinion, and neither does it appear in Article 38, among the reasons not to enforce a measure. The choice is surprising, even in light of the case law of the CJEU, which has underscored the non-absolute nature of the right of the child to be heard. See, in particular, CJEU, case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, ECLI:EU:C:2010:828, para. 63.

<sup>46</sup> See its Article 39 para. 2 and Article 56 para. 4.

<sup>47</sup> See Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels I) [2001] OJ L12/1, Article 31; Council Regulation (EC) 4/2009, above n. 32,

brief formula taken from the 1968 Brussels Convention.<sup>48</sup> Drawing on the 1961 and 1996 Hague Conventions on the protection of minors, the provision is completed by specifying the requirements for exercising this power, the first of which is the urgency of adopting measures.<sup>49</sup>

The urgency requirement relates both to the current circumstances of the child and to the practical impossibility of bringing the question of parental responsibility before the court with jurisdiction over the substance of the matter.<sup>50</sup> In other words, Article 20 assumes an instrumental and subsidiary role with regard to jurisdiction established on the basis of the criteria relating to the substance of the matter. This may even come out *ante causam* in cases in which the intervention by the judicial authority with jurisdiction over the substance would lack the necessary directness to be able to protect a child from the risk of serious harm. The urgency required by the rule may lie, therefore, in the need to ensure the immediate effectiveness of protective measures adopted by the court with jurisdiction to rule on the substance, hastening their ability to be enforced in the State where the child resides. Therefore, it appears that the English court in the *Health Service Executive* case mentioned above was correct to refer to Article 20.<sup>51</sup> While awaiting the declaration of enforceability of the Irish provisional ruling on the involuntary placement of the child in a residential institution in England, where she had been transferred in the meantime, the English court held that it was ‘urgent that an interim order be made to allow for staff at the English [special care] Unit to detain and treat her.’<sup>52</sup>

On the other hand, the CJEU has refused to connect the urgency requirement with changes in the circumstances occurring after the court with jurisdiction

---

Article 14; Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/1, Article 19; Regulation (EU) 1215/2012, above n. 40, Article 35; Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regulation [2016] OJ L 183/1, Article 19; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L 183/1, Article 19.

<sup>48</sup> See Article 24 of the 1968 Brussels Convention, above n. 11.

<sup>49</sup> See Article 9 of the Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, The Hague, 5.10.1961 (hereinafter: 1961 Hague Convention), and Article 11 of the Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, The Hague, 19.10.1996 (hereinafter: 1996 Hague Convention).

<sup>50</sup> See P. LAGARDE, Explanatory Report (1998) Proceedings of the Eighteenth Session (1996), tome II, ‘Protection of children’, <hch.net> accessed 20.10.2018, 533–605, p. 567. See also CJEU, case C-523/07, above n. 14, para. 48; case C-403/09 PPU, above n. 18, para. 42.

<sup>51</sup> Case C-92/12 PPU, above n. 10, paras. 51 and 130–132.

<sup>52</sup> [2012] EWHC 1640 (Fam), para. 22.

over the substance of the matter has made a custody decision concerning the child, even on a provisional basis, whenever the alleged change derives from the fact that the child has become well-integrated into the environment where he or she lives following an illegal abduction. Indeed, intervention by the courts of the State where the child is living would amount to a substantive alteration of the determinations made by the competent court. More generally, '[i]f a change of circumstances resulting from a gradual process such as the child's integration into a new environment were enough ... any delay in the enforcement procedure in the requested Member State would contribute to creating the conditions that would allow the former court to block the enforcement of the judgment that had been declared enforceable. Such an interpretation would undermine the very principles on which that Regulation is based.'<sup>53</sup> This is an important clarification, because it underscores how Article 20 should be interpreted in light of the principles that underlie the Regulation. That is, it should generally be interpreted restrictively, since it is an exception to the system of competences provided for therein.<sup>54</sup>

This also applies to the second condition provided by the rule, which establishes the requirements for immediate enforcement of a provisional measure: namely, that it concerns persons or assets located within the Member State. This provision is fully consistent with the criterion of proximity: the court of the State where the minor is temporarily located,<sup>55</sup> since it is, at that time, the closest to the subject in need of protection, may intervene on a temporary basis, then leaving the court with jurisdiction over the substance of the matter to make all final decisions, using the primacy mechanism under Article 20(2).<sup>56</sup>

The choice to explicitly lay out the elements of connection with the territory of the Member State that would allow its courts to exercise interim jurisdiction can only be seen as a positive thing, since it makes it easier for national courts to apply the rule.<sup>57</sup> Its value is particularly evident in contrast with the unsatisfactory situation brought about by the 1968 Brussels Convention, in which the CJEU attempted to fill the gap left by the absence of any such provision. The outcome was the requirement, vague and difficult to apply, that there be a 'real connecting link' between the subject matter of the measures sought and the territorial jurisdiction of the Contracting State of the seised court.<sup>58</sup>

<sup>53</sup> CJEU, case C-403/09 PPU, above n. 18, para. 47.

<sup>54</sup> *Ibid.*, para. 38.

<sup>55</sup> CJEU, case C-523/07, above n. 14, para. 48: 'Those measures are applicable to children who have their habitual residence in one Member State but stay temporarily or intermittently in another Member State.'

<sup>56</sup> On such a mechanism, see below, para. 4.

<sup>57</sup> See e.g., *Krajský soud v Českých Budějovicích*, 14 January 2009, 5 Co 32/2009, EUFam's: CZS20090114; Corte di Appello di Catania, 17 March 2014, EUFam's: ITS20140317, both available on the EUFam's data-base <www.eufams.unimi.it> accessed 20.10.2018.

<sup>58</sup> CJEU, case C-391/95, above n. 12, para. 40.

However, the more generic re-formulation of the requirements laid out in the Hague Conventions (which refer to the physical presence of the child or of his or her assets in the State), in order to adapt them to the broader scope of *ratione materiae* application of the Regulation, has caused some interpretive uncertainties.<sup>59</sup> The CJEU's observation in *Detiček*, that provisional measures impacting custody concern the minor as well as both parents,<sup>60</sup> engendered doubt as to whether the requirement that the 'persons' in relation to whom the measure is adopted must be physically present in the Member State and must always apply to all the subjects involved.<sup>61</sup> The answer appears to be yes when it comes to measures that are specifically intended to modify the arrangement for exercising parental responsibility that was previously established by the court with jurisdiction over the substance of the matter (as in the case referred to the CJEU for a preliminary ruling). However, it does not appear that the CJEU was intending to establish an analogous limitation for other types of measures, i.e. that, generally speaking, actions under Article 20 are blocked where even just one of the child's parents is not present in the Member State where judicial action is sought. Indeed, in the CJEU's reasoning, the need to ensure respect for the child's right 'to maintain on a regular basis a personal relationship and direct contact with both his or her parents', enshrined in Article 24(3) of the EU Charter,<sup>62</sup> is crucial, since 'respect for that right undeniably merges into the best interests of any child'.<sup>63</sup> Thus, it is clear that the requirement in question cannot be interpreted without taking into account the specific effects that the provisional measure will have on the particular scenario. On the contrary, it must necessarily be interpreted in light of these effects and may, therefore, vary on the basis of what the specific object of the requested measure is and the intended result of implementing it. However, in order to prevent uncertainties about interpretation from undermining the protection of children, the decision of the EU legislator to endorse the Commission's proposal to modify the rule, aligning its text with that of the Hague Conventions, is certainly appropriate,<sup>64</sup> despite the fact that, precisely because of such an alignment, the new provision will not apply to divorce, separation, or annulment of marriage disputes. This outcome is not particularly worrisome, given that coordinating with the other

---

<sup>59</sup> Indeed, Article 20 applies to all disputes falling under the second chapter of the Regulation, including those in the areas of divorce, separation, and annulment of marriage.

<sup>60</sup> CJEU, case C-403/09 PPU, above n. 18, paras. 50–52.

<sup>61</sup> According to T. KRUGER and L. SAMYN, above n. 6, p. 149, 'This judgment seems to imply that provisional measures can only be granted if all persons involved are present on the territory of the court'.

<sup>62</sup> [2016] OJ C202/389.

<sup>63</sup> CJEU, case C-403/09 PPU, above n. 18, para. 54.

<sup>64</sup> Article 12 of the proposal, above n. 6. The wording suggested by the Commission has been retained, with some drafting changes, in the Recast: see Art. 15.

EU Regulations specifically intended to regulate financial claims that may arise in the context of such cases leaves very little space for applying Article 20.<sup>65</sup>

Looking at the issue from a different angle, it bears noting that the CJEU's case law seems intended to deny that Article 20 entails a ground of jurisdiction.<sup>66</sup> This interpretation has consequences on two distinct levels. The first, obviously, concerns the exercise of jurisdiction: the adoption of provisional measures by a court other than the one with jurisdiction over the substance of the matter can only occur where the court's power is granted by an internal jurisdictional rule and, at the same time, where the requirements in Article 20 have been satisfied. Thus, the court is obliged to carry out a two-fold verification, which, however, we rarely see in practical application (probably not least of all due to the extreme brevity of the reasoning section of rulings adopting provisional measures), and which, perhaps, amounts to a superfluous burden on the courts. Indeed, it is difficult to see the usefulness of applying domestic jurisdictional rules in the context of a Regulation which, on the one hand, it is not interested in the criteria that such rules lay down and, on the other, focus the attention exclusively on the limits that rein in their application.

The denial of Article 20's ability to directly grant jurisdiction also has effects at another level: that of the territorial effectiveness of measures adopted by courts not having jurisdiction over the substance of the matter, which are excluded from the system of recognition and enforcement.<sup>67</sup> The CJEU reaches this conclusion on the basis of a systematic analysis, basing its reasoning on the Regulation's draft and explanatory documents,<sup>68</sup> and, *a contrario*, on the framework established by the 1996 Hague Convention.<sup>69</sup> It is plausible that the Court's chief purpose was that of avoiding the 'remedy shopping'<sup>70</sup> phenomenon, which emerged in the wake of the 1968 Brussels Convention, after judicial affirmation that provisional measures adopted by courts without jurisdiction over the substance of the matter do qualify for recognition and enforcement.<sup>71</sup>

<sup>65</sup> See M. PERTEGÁS SENDERS and C. MARIOTTINI, above n. 9, p. 274 ff.

<sup>66</sup> On precisely this matter, see Advocate General Sharpston, opinion delivered on 20.05.2010, CJEU, case C-256/09, *Purrucker I*, ECLI:EU:C:2010:296, para. 169: 'a court acting by virtue of Article 20 alone does not enjoy any jurisdiction conferred by the Regulation. It is merely "not prevented" from taking such urgent measures as are necessary and as are available under national law, in respect of persons or assets within its territorial jurisdiction'. This issue remains controversial, however; see Advocate General Kokott, opinion delivered on 29.01.2009, CJEU, case C-523/07, A, ECLI:EU:C:2009:39, para. 57.

<sup>67</sup> CJEU, case C-256/09, above n. 10, para. 87.

<sup>68</sup> *Ibid.*, paras. 84–86.

<sup>69</sup> *Ibid.*, paras. 88–90.

<sup>70</sup> *Ibid.*, para. 91, which explicitly describes the need to avoid any risk of 'of circumvention of the rules of jurisdiction laid down by that Regulation and of forum shopping, which would be contrary to the objectives pursued by that regulation'.

<sup>71</sup> See CJEU, case 143/78, *De Cavel v. De Cavel*, ECLI:EU:C:1979:83, para. 9; case 125/79, above n. 33. On the possibility of interpreting these judgments differently, see L. COLLINS,

Thus, the CJEU's interpretation further distinguished the regulation of interim protection under the Brussels IIa Regulation both from the aforementioned Hague Convention and from those other Regulations currently in force that borrowed from the model of the Brussels Convention, in order to ensure that legislative choices about how to further the best interests of the child in the context of assigning jurisdiction should not be undermined.<sup>72</sup> It remains in doubt, however, whether this goal has been fully reached. In fact, by simultaneously allowing the possibility of recognising measures adopted under Article 20 of the Regulation on the basis of other international instruments (chiefly the 1996 Hague Convention, once again), or on the basis of the applicable national rules of the requested member State, the CJEU has left the door open to potential opportunistic manoeuvring by the parties to a dispute.<sup>73</sup>

Leaving this murky area aside, the CJEU's case law on Article 20 of the Regulation has surely contributed significantly to outlining a system capable of guaranteeing adequate protection for children in the majority of disputes over parental responsibility. One notable exception, however, includes cases of international child abduction, an area where experience reveals that different solutions are needed. In particular, it has become clear that, where a child is at risk of physical or psychological harm, or of living in an otherwise intolerable situation following his or her return to the State of habitual residence, Article 11(4)'s obligation to order the child's return in any case, as long as there is evidence that adequate steps have been taken to ensure the child's protection, has been ignored in many cases. It is worth recalling that, within the European area of freedom, security and justice, even because of the freedom of movement that it allows, such an obligation is crucial in order to ensure the highest possible level of protection of children in cases of wrongful removal or retention, that is, in pursuing their best interests. Yet, it is likely that establishing a climate of mutual trust, which forms the basis of the reinforced duty to return with regard to the one provided for under the 1980 Hague Convention, is complicated by the practical difficulties that still hinder cooperation between the judiciaries of the

---

'Provisional and Protective Measures in International Litigation' (1992) *Recueil des Cours*, Vol. 234, 126 ff.

<sup>72</sup> I.e. Regulations Brussels I, 650/2012, 2016/1103 and 2016/1104, above n. 47, and 4/2009, above n. 32.

<sup>73</sup> CJEU, case C-256/09, above n. 10, para. 92, where it states that appeal may be made to these rules 'in a way that is compatible with the regulation'. For more on this, see P. BEAUMONT, L. WALKER and J. HOLLIDAY, 'Conflicts of EU Courts on Child Abduction: The Reality of Article 11(6)–(8) Brussels IIa Proceedings across the EU' (2016) *Journal of Private International Law*, 211–260, 219–221; U. P. GRUBER, 'Die Anerkennung einstweiliger Maßnahmen in der EuEheVO' (2017) *IPRax* 5, 467–470. This opportunity was taken by Oberlandesgericht München, 22.01.2015, 12 UF 1821/14, EUFam's: DES20150122, available on the EUFam's data-base <[www.eufams.unimi.it](http://www.eufams.unimi.it)> accessed 20.10.2018.

different Member States, each of which, in turn, shows reluctance to delegate the protection of a child to another court.<sup>74</sup>

This problem is so serious that the Commission had proposed allowing the courts of the host State to intervene of their own accord, if only on a provisional basis, to institute the protective measures that, once recognised and enforced in the other Member State, can make the child's return safe. The intention was to bring about a system in which, as the Commission stressed, protective measures can 'travel with the child', preventing dangerous gaps in child protection.<sup>75</sup> It is worth noting that, in the Commission's proposal, the scope of the suggested modifications would not have been limited to cases of international abduction of children, but would have extended more generally to all protective measures adopted by courts not having jurisdiction over the substance of the dispute. That was because Article 12, which reproduces the text of the current Article 20, with some modifications, became a proper rule establishing jurisdiction.<sup>76</sup> This was intended to create the preconditions for decisions adopted on its basis to be recognised and enforced in other Member States. Indeed, the proposal expressly provides for this possibility at Article 48, limiting it to measures adopted in adversarial proceedings.

Thus conceived, the modifications to the Regulation would have exceeded the need for reform as it emerged from the evaluation of its operation and application. Furthermore, they were bucking the current trend in favour of a restrictive approach to the circulation of provisional and protective measures ordered by a court other than the one with jurisdiction over the substance of the matter, which has emerged with the recast Brussels I Regulation.<sup>77</sup> As the next section describes, this different option could have been justified in light of the fact that Brussels IIa contains a valid mechanism for circumventing the inconveniences that have dogged this possibility in the area of civil and commercial disputes. However, it was chiefly due to the need to balance the above-mentioned difficulties in enforcing abroad the measures granted by the judge dealing with the merits. These, in turn, were a direct result of the adoption, in the Commission's proposal, of the above-described strictes approach to the assessment of the child's opinion at the enforcement stage. Indeed, in such a scenario, the court of the Member State where the child is present would have

<sup>74</sup> Convention on the Civil Aspects of International Child Abduction, The Hague, 25.10.1980 (hereinafter: 1980 Hague Convention). On the added value of the Brussels IIa regime on child abduction compared to the 1980 Hague Convention see L. CARPANETO, above n. 42, 934 ff. On the interdependent relationship between mutual trust among the judicial authorities of the Member States and the protection of the best interests of children, see K. LENAERTS, 'The Best Interests of the Child Always Come First: The Brussels II Bis Regulation and the European Court of Justice' (2013) *Jurisprudence* 4, 1302–1328, 1326.

<sup>75</sup> See the proposal, above n. 6, pp. 10 and 14.

<sup>76</sup> The provision was inserted into Chapter II, section 2, on parental responsibility.

<sup>77</sup> See Article 2(a) of Regulation 1215/2012, above n. 40.



had a better chance to hear him or her, without impairing the speediness of the procedure and, thus, to adopt measures proving effective, even in the case of a child moving from a Member State to another.

Once it was decided to retain the grounds for the refusal of enforcement as they currently are, it comes without surprise that the legislator has substantially taken over the suggested modifications to Article 20 (relieving courts from the burden of the currently required two-fold verification in order to exercise jurisdiction), yet opting for a more prudent approach as to the circulation of provisional and protective measures granted by a court that is not competent on the merits. Consequently, under the Recast, the possibility to have such measures enforced in another Member State is limited to those ordered in accordance with its Article 27(5) in conjunction with its Article 15, i.e. to interim measures ancillary to return orders and intended to secure the protection of the child after his or her return in the circumstances referred to in point (b) of Article 13(1) of the 1980 Hague Convention.<sup>78</sup>

Albeit minimalist, this choice will probably prove sufficient in achieving the purpose of reinforcing the duty to return the child in abduction cases, and thus in pursuing the best interests of minors. Indeed, in this connection, it is submitted that, given the context in which a declaration of enforceability is no longer strictly necessary in order to proceed with the enforcement,<sup>79</sup> the solution outlined by the Recast may be more efficient, both in terms of economy of procedure and of the resulting protection of the child, than the so-called ‘mirror orders’, which cropped up in applications of the 1980 Hague Convention, particularly where the enforcement may only be opposed in exceptional cases, and cannot be used as a stalling tactic.<sup>80</sup>

#### 4. COORDINATION BETWEEN MEASURES AND IMPACT ON THE NOTION OF ‘PROVISIONAL AND PROTECTIVE MEASURES’

The two-fold track for instituting interim protection under Brussels IIa creates the need to coordinate among the different authorities which may, for different reasons, oversee the same case, so that no contradictions may even temporarily arise between their decisions until the proceedings on the substance of the case

<sup>78</sup> See art. 2 par. 1 of the Recast.

<sup>79</sup> Ibid., Article 34.

<sup>80</sup> Namely the adoption in the State of habitual residence of measures that replicate the ones adopted or requested in the State where the child is present. On this practice, see HCC, Guide to Good Practice Child Abduction Convention: Part III – Preventive Measures, 2005, p. 20, where as an example it is mentioned the case *Gumbrell v. Jones* [2001] NZFLR 593, available on INCADAT < <https://www.incadat.com/en/> accessed 20.10.2018, at: [HC/E/NZ 446].

have been concluded. This is a common problem for other EU Regulations on jurisdiction as well and, before, for the Brussels Convention, wherein only the intervention of the CJEU has given the court with jurisdiction over the substance of the matter a central role even in the phase concerning protective measures.<sup>81</sup> This has led to the somewhat unsatisfactory outcome<sup>82</sup> that has necessitated, in the recasting of Regulation Brussels I, the interventions discussed above, which seek to limit the potential circulation of protective measures.<sup>83</sup>

At the regulatory level, this issue was addressed only in the Brussels IIa Regulation, which expressly provides at Article 20(2) that the provisional measures adopted under the first section of that Chapter will cease to apply when the court with jurisdiction over the substance of the matter has adopted the measures it deems appropriate.<sup>84</sup> It is important to stress that as the Brussels I Regulation was being recast, the idea of introducing a modification to bring about a similar result ran into opposition from the Member States.<sup>85</sup> This suggests that it was the specific characteristics of parental responsibility disputes – in which the protection of the child is pivotal, and in which it is broadly accepted that the protection of the child’s interests takes priority over the need to resolve the opposing interests of the parties – which allowed for the creation of a unique way of regulating the relationships between the judicial authorities involved and between the various measures adopted.

Although the solution in Regulation No. 2201/2003 is unique in EU legislation, national judges have not run into particular difficulties in applying it. This suggests that the division of the roles between the court with jurisdiction

<sup>81</sup> See the case law which aims to prevent protective measures from being used as a tool to circumvent the criteria to establish jurisdiction on the substance of the matter, in particular: CJEU, case C-391/95, above n. 12, para. 46; case C-99/96 *Mietz v Intership Yachting Sneek BV*, ECLI:EU:C:1999:202, paras. 47 and 55.

<sup>82</sup> See, in particular, CJEU, case C-80/00 *Italian Leather spa v. WECO Polstermöbel GmbH & Co.*, ECLI:EU:C:2002:342, which recognises a judgment by the requested State denying the adoption of similar protective measures, under Article 24 of the 1968 Brussels Convention, as grounds for refusing to recognise a preventive measure adopted by the judge with jurisdiction over the substance of the matter.

<sup>83</sup> See Article 2(a) of Regulation (EU) 1215/2012, above n. 40.

<sup>84</sup> In the broader context of the instruments adopted as a part of judicial cooperation in civil matters, we may observe an attempt to coordinate those geared toward ‘promoting the compatibility of the rules on civil procedure applicable in the Member States’ provided for by Article 81(2)(f) TFEU. See, in particular, Article 16 of the Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59, where, however, the means of coordinating are radically different, since they are specifically intended to avoid excessive protection of creditors to the detriment of debtors.

<sup>85</sup> See A. DICKINSON, ‘Provisional Measures in the “Brussels I” Review: Disturbing the Status Quo?’, (2010) *Journal of Private International Law*, 519–564, 550 ff.; L. SANDRINI, ‘Coordination of Substantive and Interim Proceedings’ in F. POCAR, I. VIARENGO and F. VILLATA (eds.), *Recasting Brussels I*, Cedam, Padua, 2012, pp. 273–284, p. 275 ff., as well as the bibliographical references therein.

over the substance of the matter and the court with jurisdiction under Article 20, as clarified by the case law of the CJEU, does indeed respond to the peculiar needs of this area of law.<sup>86</sup> Of particular relevance here are a set of Italian decisions in which, on the one hand, courts seised with the substance of the matter intervened to replace measures adopted in other Member States under Article 20 and, on the other hand, courts seised under Article 20 instead rejected requested protective measures. In these latter cases the Italian courts held that, in light of the specific circumstances, adopting the measures would have amounted to undue interference with the exercise of jurisdiction by the judiciary of the State of the child's habitual residence.<sup>87</sup> One thing that has surely enabled the correct application of EU legislation in this area is that it was previously tested out in the broader context of international cooperation. Indeed, the very same regulatory solution appeared in the 1961 Hague Convention,<sup>88</sup> and was later replicated, with some modifications, in the 1996 Convention.<sup>89</sup> From a different point of view, it is clear that the subordinate relationship that this regulatory scheme establishes between the different judicial authorities cannot always be realised, due to the necessarily final and irreversible effect of some urgent provisional measures, which may take the form of judicial approval to proceed with medical treatments concerning the child, for example.<sup>90</sup>

Aside from specific scenarios like this one, however, Article 20(2) has the result of guaranteeing that protective measures adopted by courts without jurisdiction over the substance of the matter will, indeed, be provisional. Thus, it resolves the issue of how to categorise measures that fall under the rule, allowing for its avoidance. That is what until now this issue has not come up in the context of the Brussels IIa Regulation with the same urgency that it has had in other sectors. However, the new framework outlined by the proposal could have potentially given rise to interpretative uncertainties about it. Indeed, the practice applying the 1968 Brussels Convention demonstrates that such uncertainties are more likely to arise when a different Member State is called upon to enforce a measure. In this scenario, the limits on the exercise of provisional jurisdiction by a court not having jurisdiction over the substance of the matter – without prejudice to the prohibition of review of jurisdiction of the court of origin<sup>91</sup> and the prohibition

<sup>86</sup> See, in particular, CJEU, case C-523/07, above n. 14.

<sup>87</sup> See Corte di Appello di Catania, 3.06.2015, EUFam's: ITS20150603; Tribunale di Arezzo, 15.03.2011, EUFam's: ITF20110315; Tribunale di Cagliari, 12.12.2015, EUFam's: ITF20151212; Tribunale di Roma, 18.05.2017, EUFam's: ITF201702518, available on the EUFam's data-base <www.eufams.unimi.it> accessed 20.10.2018.

<sup>88</sup> See Article 9 of the 1961 Hague Convention, above n. 49.

<sup>89</sup> See Article 12(3) of the 1996 Hague Convention, above n. 49.

<sup>90</sup> In this respect, see M. W. DE STEIGER, *Rapport Explicatif (1961) Actes et documents de la Neuvième session (1960)*, tome IV, 'Protection des mineurs', p. 7.

<sup>91</sup> Article 24 of Regulation Brussels IIa and Article 50 of the proposal, above n. 6. See CJEU, case C-455/15 PPU, *P v. Q*, ECLI:EU:C:2015:763, paras. 42–46, and the remarks by S. CORNELOUP, 'Actualité du règlement Bruxelles II bis', (2016) *Revue critique de droit international privé*, 479.

of review of the merits,<sup>92</sup> which prevent reviews concerning the existence of the urgency requirement – may well leave room for oversight concerning the nature of the measure.<sup>93</sup> Indeed, this is not excluded even where there is a reference to the national legal systems, which can be found both in Article 20(1) of the Brussels IIa Regulation and Article 24 of the Brussels Convention (and in the corresponding rules of the provisions which replaced it). In fact, even in this scenario, national regulations may only be applied in compliance with EU law.<sup>94</sup> Thus, it is perhaps for the very purpose of mitigating the interpretive problems that could derive from the aforementioned reference to national law, in a system that allows for the circulation of protective measures adopted by courts without jurisdiction over the substance of the matter, that the Commission proposed eliminating it from the text of the Regulation. This kind of intervention, in light of the case law of the CJEU concerning the interpretation of EU law, would have pointed toward the definition of an autonomous meaning.<sup>95</sup> However, since this is not even loosely sketched out by the Regulation, it would have required intervention by the CJEU in order to truly be defined. The shortcomings of this method, specifically when it comes to the regulation of provisional protective measures, have already come to light.<sup>96</sup> On the other hand, the Commission's

<sup>92</sup> Article 26 of Regulation Brussels IIa and Article 52 of the proposal, above n. 6.

<sup>93</sup> In the system envisioned by the Commission, this check could take place within proceedings to refuse enforcement under Article 40 ff. of the proposal.

<sup>94</sup> This is one of the boundaries that the Court draws even in areas reserved for the competences of the Member States. An emblematic topic in this category, the object of which is an institution expressly recognised as belonging to domestic jurisdiction, is case law concerning citizenship: see, among many, CJEU, case C-360/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, ECLI:EU:C:1992:295, para. 10, which states that, 'Under international law, it is for each Member State, *having due regard to Community law*, to lay down the conditions for the acquisition and loss of nationality' (emphasis added). In accordance with the same orientation, as to the 1968 Brussels Convention, CJEU, case C-261/90, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v. Dresdner Bank AG.*, ECLI:EU:C:1992:149, para. 34, explained that, 'The expression "provisional, including protective, measures" within the meaning of Article 24 must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter', thus obliging the judge to carry out a two-fold qualification, in light of domestic law and the characteristics laid out by the CJEU.

<sup>95</sup> Concerning this, the formula that has been consistently reiterated in the cases of the CJEU state: 'the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Community, having regard to the context of the provision and the objective pursued by the legislation in question' (case C-523/07, above n. 14, para. 34; see also case C-393/18 PPU, above n. 14, para. 46 and the case law cited therein).

<sup>96</sup> Concerning the 1968 Brussels Convention, the CJEU, in addition to the general indication provided in case C-261/90, above n. 94, in which it held that the *actio pauliana* of French

refusal to engage in the development of an autonomous meaning is fully understandable in light of the profound differences between the legal systems of the Member States when it comes to protective measures, and, at the same time, the variety of situations that call for the adoption of such measures, and which result in an equally varied panoply of provisions.<sup>97</sup> Under the circumstances, it is likely that any attempt to define an autonomous meaning that could be, at once, sufficiently precise and all-inclusive, as well as capable of gaining the Council's approval, would likely be unrealistic.

Given this challenge, one may well wonder whether an autonomous meaning is really necessary or whether it could be useful anyway when it comes to regulation of parental responsibility, and whether its absence will have an impact, as it has had in the areas of civil and commercial law. It would appear that the answer is no, considering the chiefly anticipatory nature of provisional measures intended to protect children, which is decisive in this context. What distinguishes provisional rulings from rulings on the substance can be reduced to the urgent need for a ruling (a requirement provided for in the Regulation and applicable in any case, even where the characterisation must be made *ex lege fori*), to the provisional nature of the effects of the former, and to the usually summary assessment of the case. The potential weaknesses of this third characteristic do not undermine the system outlined by the Regulation. By the same token, the same may be said of the provisional character of protective measures, which, even if it was not *ab origine* a feature of the adopted measure, would in any case come about *ex post* through the mechanism of the primacy of the measures adopted by the court with jurisdiction over the substance of the matter, as already mentioned. It is equally clear that the duty of communication that, '[i]n so far as the protection of the best interests of the child so requires', falls on the court without jurisdiction over the substance, with regard to the measures it adopts, which the Recast includes in the text of the provision on interim

---

law does not derive from Article 24 of the Convention, has spoken numerous times on the notion of protective measures, with regard to specific measures provided for under the national legal systems (see CJEU, case C-99/96, above n. 81, para. 53 ff.; case C-80/00, above n. 82, paras. 39 and 46; case C-104/03, *St Paul Dairy Industries NV v. Unibel Exser BVBA*, ECLI:EU:C:2005:255, para. 25). These pronouncements case by case, tied to the queries submitted by the referring courts, have nevertheless not led to the complete definition of this concept.

<sup>97</sup> It is not possible to give a complete overview of the different measures that fit into the controversies on parental responsibility, which, as mentioned previously (see above, para. 2 n. 32 and corresponding text), differ significantly from State to State. In addition to those already mentioned here, however, it is worth recalling those intended to prevent the child from crossing the border with only one parent, since these are often adopted *ante causam* with respect to custody proceedings, in order to counteract the phenomenon of international abduction. See, e.g. Ústavní soud, 3.03.2011, 2471/10, EUFam's: CZC20110303; Tribunale per i minorenni di Venezia, 30.11.2011, EUFam's: ITF20111130, available on the EUFam database <[www.eufams.unimi.it](http://www.eufams.unimi.it)> accessed 20.10.2018.

measures, not only will facilitate speedy enforcement of the measures, but also their rapid replacement with whatever measures the court with jurisdiction over the substance of the matter considers most appropriate.<sup>98</sup>

Thus the regulatory framework, which already provides tools intended to react against potential abuses of the special provision on provisional and protective measures, whatever characteristics these may have (even in the absence of an autonomous meaning), will see their effectiveness strengthened when the Recast will come into application. It should therefore be welcome the choice to reconsider the elimination of the reference to the national legal systems in the re-formulation of Article 20.<sup>99</sup> Indeed, its elimination would not only have failed to add value, but, on the contrary, by denying the court of origin a sure and known regulatory reference point without providing a new one, it could have engendered uncertainty in the course of the procedure for issuing provisional measures and, thus, have deleterious effects for the underlying goal of the provision: speedy intervention to provide interim protection.

## 5. CONCLUSIONS

The fact that the Member States of the EU share the goal of ensuring the best interests of the child in international disputes and, more specifically, that of guaranteeing speedy and effective protection of children's rights has permitted a well-articulated and functional regulatory scheme for provisional and protective measures to develop within the Brussels IIa Regulation. This, in itself, is an important outcome, considering that in all other sectors, including those that appear equally connected to the field of family law (i.e. spousal maintenance and property issues deriving from marriage or a registered partnership), the provision of interim measures has so far resisted every attempt to further judicial cooperation in civil matters in the EU.

The CJEU's intervention has been intended to capitalise on the features of the regulatory scheme established by the legislator, rather than to fill any gaps in it. This does not, however, undermine the importance of its contributions. Indeed, the CJEU has consistently underscored the central role of the principle of the superior interests of the child in interpreting EU laws on parental responsibility.

<sup>98</sup> See Article 15, para. 2 and para. 3, for communications from the court competent on the merits to that having issued protective measures. See also Article 12, para. 1 line 2 of the proposal, above n. 6. The provision imposing a duty of communication codifies the position taken by the CJEU in case C-523/07, above n. 14, paras. 57-64. For more on this, see A. DUTTA and A. SCHULZ, 'First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive', (2014) *Journal of Private International Law*, 1-40, 37 ff.

<sup>99</sup> See Article 15, para. 1 of the Recast.

At the same time, it has clearly identified the limits that govern appeals to the superior interests of the minor as an interpretative rule in the EU system. Teleological interpretation, according to the CJEU, may indeed lead to a broad interpretation of the rules, but may not contradict the letter of the provisions. It has, therefore, ruled out the possibility that the superior interests of the child may be invoked in a particular case in order to sidestep a general evaluation made by the legislator in the abstract concerning the interests of *children*. This is an important indication, and one that is all the more significant since it comes from a court that has not hesitated in other contexts, where necessary, to exercise creative jurisprudence. Therefore, it follows that it is the duty of the legislator to find regulatory solutions that are flexible enough to allow courts to give the proper weight to the specific features of each individual, particular case.

As mentioned above, the EU legislator has taken on this duty, and has proposed to modify the aspects of the regulatory scheme that the CJEU and the practice of national courts have identified as lacking, including with regard to the area just mentioned. The proposed modifications and those eventually adopted in the area of provisional protective measures discussed here lend themselves to a few observations. These derive, first, from the composite nature of the concept of the superior interests of the child. The protection of the child consists in guaranteeing a set of rights that must all necessarily be respected. In particular, the emphasis that the EU places on the child's right to be heard cannot obscure the fact that the same degree of importance must attach to the right to speedy and effective protection from whatever harm, physical or psychological, he or she may be exposed to. The Commission's proposal did not appear to have sufficiently balanced these two rights. Instead, it seems that, in its attempt to generally bolster the guarantees that protect the child's right to be heard, it neglected to consider that the specific goal of protective measures and their provisional nature may call for solutions different from those outlined for recognising and enforcing rulings on the substance of a matter. The recently adopted Recast, on the contrary, by retaining substantially unchanged the current grounds for refusal of enforcement of decisions in matters of parental responsibility and the related exceptions, is certainly more effective in reconciling the different exigencies.

Second, it seems that a careful consideration of the interests of the child in the re-formulation of the Regulation's rule on protective measures has led to a fruitful re-thinking of the role attributed to the definition of autonomous meanings in the area of judicial cooperation in civil matters. More precisely, it could lead to the emergence (or re-emergence) of the instrumental function they carry out in light of the objectives that the act or the specific rule pursue, and to abandonment of the tendency to consider uniformity of legal meanings and concepts as a value in itself. Then, the reference to the law of the Member States could be judged positively, and not as a failure to progress toward a space of freedom, safety, and justice, whenever it may facilitate the task of national

courts, without jeopardising the overall coherence of the system, as seems to be the case with interim reliefs in the field of parental responsibility.

More generally, the self-restraint shown by the EU legislator in carrying on the recasting deserves appreciation. Among the modifications put forward by the Commission, only those likely to result in an actual enhancement in terms of protection of minors have been eventually picked up, while more far-reaching interventions have been rejected. That is, relating to provisional and protective measures, the current rules have been modified to the extent strictly necessary in light of the shortcomings that emerged in almost fourteen years of application. This minimalist approach in pursuing the aims of the recasting will hopefully contribute to mitigating the inevitable interpretative uncertainties and the consequent difficulties of application that any normative reform always brings about. Lastly, but no less important, quite the contrary in fact, in the always changing scenario of the EU judicial cooperation, which seems characterised by a sort of regulatory hyperactivity, it will contribute to acknowledging the importance of the stability of the normative framework as one of the crucial factors to ensuring the best interests of the child, both at the procedural and substantive levels.



