



Cross-border parental responsibility. Rules on jurisdiction, transfer of jurisdiction and provisional measures in the light of Regulation 2201/2003.



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Introduction

The EU has a limited role in family law matters. Each individual member state has its own rules about separation, divorce, maintenance of spouses and children, custody and guardianship and other family law matters. The role of the EU is mainly concerned with ensuring that decisions made in one country can be implemented in another. It also has a role in trying to establish which country has jurisdiction to hear a particular case.

Expression referring to the previous speakers I would like to discuss issues related to parental responsibilities with particular emphasis on jurisdiction, transfer of jurisdiction and provisional measures.

I will discuss council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction, recognition and enforcement of matrimonial and parental judgments.

Jurisdiction in matters of parental responsibility

The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility (paragraph 12 preamble).

Which children are covered by the Regulation?

The Regulation does not define a maximum age for the children who are covered by the Regulation, but leaves this question to national law. Although decisions on parental responsibility concern in most cases minors below the age of 18, persons below 18 years may be subject to emancipation under national law, in particular if they wish to marry.

Article 2. Definitions.

The term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access (paragraph 7 art.2).

Parental responsibility

It applies to:

1. rights of custody and rights of access;
2. guardianship, curatorship and similar legal arrangements;
3. the designation and functions of any person or body in charge of the child or the child's property, or which represents or assists the child;
4. placing the child in a foster family or in institutional care;
5. measures to protect the child, covering the administration, conservation or use of his or her property.

The provisions of Articles 8 to 10 and 12 and 13 set out a system of jurisdiction rules to determine the grounds on which the courts of a Member State are competent in matters of parental responsibility.

Parental responsibility.
General jurisdiction. The courts of habitual
residence of the child.

Article 8

The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

The concept of “habitual residence” .

The concept of “habitual residence” has in recent years been used increasingly as a connecting factor in international instruments particularly those concerning family law. Habitual residence is not defined by the Regulation. The meaning of the term should be interpreted in accordance with the objectives and purposes of the Regulation.

It must be emphasised that the interpretation of habitual residence is not determined by reference to any concept of habitual residence under any particular national law, but should be accorded an “autonomous” meaning under and for the purposes of the law of the European Union.

Whether or not in any particular case a child has her or his habitual residence in any particular Member State has to be determined by the court in each case on the basis of the facts applying to the situation of that particular child.

Case law of the CJEU on interpretation of the meaning of habitual residence.

It can sometimes be difficult to determine where a child has her or his habitual residence especially where there is frequent movement from one Member State to another or the move across an international border is relatively recent. The Court of Justice of the European Union has given some guidance as to the factors which should be taken into account in determining the habitual residence of a child for the purposes of the Regulation.

Continuing jurisdiction of the child's former habitual residence.

Article 9 is subject to the following conditions:

1. The access rights to be modified must have been conferred in a judgment,
2. It applies only to “lawful” moves of a child from one Member State to another,
3. It applies only during the three-month period following the child’s move ,
4. The child must have acquired habitual residence in the ‘new’ Member State during the three-month period,
5. The holder of access rights must still be habitually resident in the Member State of origin and not have accepted the change of jurisdiction.

Transfer of jurisdiction.

In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court (paragraph 13 preamble).

Exceptions to the general rule.

Articles 9, 10, 12 and 13 set out the exceptions to the general rule, indicating where jurisdiction may lie with the courts of a Member State other than that in which the child is habitually resident.

Jurisdiction in cases of child abduction – Article 10 we will continue later – tomorrow morning.

Prorogation of jurisdiction

Article 12 covers two different situations:

1. Jurisdiction of a divorce court in matters of parental responsibility

and

2. Jurisdiction of a court of a Member State with which the child has a substantial connection.

Jurisdiction of a divorce court in matters of parental responsibility

The divorce court (the same applies where such a court has been seised of an application for separation or annulment of marriage) has jurisdiction provided the following conditions are met:

1. At least one of the spouses has parental responsibility in relation to the child, and
2. The spouses and all holders of parental responsibility accept the jurisdiction of the divorce court, whether by express acceptance or unequivocal conduct; this should be determined by the court at the time the court is seised, and
3. The jurisdiction of that court is in the superior interests of the child.

Jurisdiction of a court of a Member State with which the child has a substantial connection

Such court has jurisdiction provided the following conditions are met:

1. the child has a substantial connection with the Member State in question, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident there or that the child is a national of that State. These circumstances are not exclusive, and it is possible to base the connection on others, and
2. all parties to the proceedings accept the jurisdiction of those courts expressly or otherwise unequivocally at the time the court is seised (in other words equivalent to the requirement in situation 1)
3. the jurisdiction is in the best (superior) interests of the child

Presence of the child

If it proves impossible to determine the habitual residence of the child and Article 12 does not apply, Article 13 allows a judge of a Member State to decide on matters of parental responsibility with regard to children who are present in that Member State.

Residual jurisdiction

If no court has jurisdiction pursuant to Articles 8 to 13, the court may found its jurisdiction on the basis of its own national rules on private international law. Such decisions are to be recognised and declared enforceable in other Member States pursuant to the rules of the Regulation.

Statement of jurisdiction

Applying Art 17 the court seised must declare of its own motion that it has or does not have jurisdiction.

Provisional measures.

This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State.

Provisional and Protective measures – Article 20

Article 20 makes it clear that the provisions of the Regulation do not prevent a court from taking provisional, including protective, measures in accordance with its national law in respect of a child situated on its territory even if a court of another Member State has jurisdiction under the Regulation as to the substance of the matter.

It is suggested, consequently, that as a matter of good practice and in order to make clearly evident the grounds of jurisdiction on the basis of which a court takes a measure under Article 20 that whenever a court does so it should state in limine of the judgment whereby the measures are taken whether it has jurisdictional competence under the Regulation on the substance of the process or whether it has not.

The reasoning behind this is that as the provisional measures are not enforceable in the other Member State there is no possibility of the judgments conflicting.