



**FRESHFIELDS BRUCKHAUS DERINGER**

**REVIEW OF THE IMPLEMENTATION  
OF BRUSSELS II REGULATION  
IN RELATION TO PARENTAL  
ABDUCTION OF CHILDREN**

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## EXECUTIVE SUMMARY

The following note highlights specific issues of concern in the field of child abduction and proposes areas for change and improvement in the implementation of the Brussels II-bis Regulation and relevant parts of the Hague Convention on Civil Aspects of Child Abduction. It is based on a sample of twelve cases that Freshfields Bruckhaus Deringer and ECAS have reviewed.

Several legal and practical problems in the implementation of the Brussels II-bis Regulation and relevant parts of the Hague Convention on Civil Aspects of Child Abduction are identified and analysed. The authors come to the conclusion that the parent who abducts the child to certain Member States appears to obtain an advantageous legal position, because – contrary to Art. 12 Hague Convention – there is no automatic and immediate decision by the relevant courts to return the child to the Member State from which it was abducted. This is due to a number of reasons, such as a lack of definition of what constitutes a “wrongful removal” and “habitual residence” of a child, as well as an uncertainty among courts concerning the proper application of the Brussels IIbis Regulation and the Hague Convention, often leading to a misapplication and conflicts of jurisdiction. Moreover, the authors have observed violations of the right of the child to have access to both parents, violations of the right of the left-behind parent to have a fair trial and the frustration or at least complication of the return due to considerable delays in court proceedings in some Member States. They have also noted that in some countries the Central Authorities and the Authorities for Youth Welfare play an important, but not always entirely neutral role in the proceedings. As a result, a combination of the difficulties mentioned above, together with further practical difficulties, which are also outlined in the paper, can amount to a denial of effective access to justice for the left-behind parent and the child.

In their conclusions, the authors give recommendations for future action by the Commission.

**WORKING PARTY ON EUROPEAN PARENTAL CHILD ABDUCTION**

**INFORMATION NOTE ON PARENTAL CHILD ABDUCTION  
CASES WITHIN THE EU**

**Prepared by Freshfields Bruckhaus Deringer  
and the European Citizen Action Service (ECAS)**

**Brussels, 31 October 2006**

## I. Introduction

This note highlights specific issues of concern in the field of child abduction and proposes areas for change and improvement in the implementation of the Brussels II-bis Regulation<sup>1</sup> (*the Regulation*) and relevant parts of the Hague Convention on Civil Aspects of Child Abduction<sup>2</sup> (*the Hague Convention*).

The note is based on a sample of twelve cases that Freshfields Bruckhaus Deringer (*Freshfields*) and ECAS have reviewed. These have not been selected in any scientific manner. They were cases referred to the parties concerned through various NGO networks and affected parents.<sup>3</sup> Nevertheless, there appear to be a number of similarities in the way in which many of the cases were treated. This suggests that further investigation of the scope of potential problems and possible solutions would be important.

We have sought to analyse whether and to what extent the problems identified might constitute a violation of European Law, in particular the Regulation.

The evidence obtained to date from the cases that we have looked at, together with supporting papers and more general information available from interested parties such as the European Parliament<sup>4</sup>, the US Department of State, which serves as CA in the USA,<sup>5</sup> and abduction charities<sup>6</sup>, demonstrates that the Hague Convention and the Regulation may not be being implemented by many Member States in accordance with their principal purpose (to return children quickly and efficiently to their country

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<sup>1</sup> Council Regulation (EC) No 2201/2003, repealing the so-called “Brussels II-Regulation”, Regulation (EC) No. 1347/2000.

<sup>2</sup> Hague Convention of 25 October 1980 on Civil Aspects of International Child Abduction, cf. [http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=24](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24). By Council Decision of 5 October 2006, the Council has decided that the European Union should accede to the Hague Conference of Private International Law (HCCH) and participate as a full member in the negotiations of conventions by the HCCH in areas of its competence, see Council decision No. 2006/719/EC, OJ C297/1.

<sup>3</sup> We have currently reviewed twelve cases of removal of children to another EU Member State. Seven cases involved the removal to Germany, two the removal to Austria, one to France, one to Poland and one to the Netherlands. Nine of these cases were considered by the courts as cases of wrongful removal of the child, as defined in Art. 3 Hague Convention (removal in breach of rights of custody under the law of the state in which the child was habitually resident immediately before the removal, and these rights were actually exercised at the time of the removal). In one case, the courts or the Central Authority (CA) claimed that the removal was not wrongful, cf. below at III.1.a. Only in three cases, where the child had been abducted to France, Poland and the Netherlands, the abducted children were eventually returned to the left-behind parent.

<sup>4</sup> See in particular *What frictions and strains prevail that prevent a convergence across the EU of practice in the recovery of abducted children?* Briefing Paper by Stefania Bariatti and Lidia Sandrini, University of Milan, (the *Briefing Paper*) requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, IP/C/LIBE/FWC/2005-27-SC2, PE365.979, attached as **Annex 1**.

<sup>5</sup> 2006 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction by the US Department of State for the period from 1 October 2004 to 30 September 2005, attached as **Annex 2**.

<sup>6</sup> Cf. the list of abduction charities and other contacts attached as **Annex 3**.

of habitual residence where wrongfully removed) and/or on a consistent basis. The result in some situations may not respect the rights, well-being and interests of the child, nor be compatible with EC Treaty principles. Nor do they achieve the Union's objectives of a genuinely European judicial area, protection of children's rights and equality before the law.

The concept of "children's' rights" has been recognised by the EU in its Charter of Fundamental rights agreed at the Nice Council in 2000. The Charter is not currently legally binding but it is enshrined in the draft Constitutional Treaty (Part II, Article II-24). The Rights of the Child under this Charter include the fact that:

*"Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interest."*

This principle has also been repeatedly affirmed by the European Court of Human Rights.<sup>7</sup>

In the emotionally charged circumstances of child abduction cases, it is very important that children's rights are acknowledged and observed. However, from some of the cases that we have looked at, this has not happened. This is due to a number of legal and practical problems.

We have identified the following legal and practical issues<sup>8</sup> as being particularly problematic in the cases we have reviewed to date:

1. Legal Issues:

- Definition of wrongful removal / retention of a child
- Lack of definition of "habitual residence" of a child
- Cases of re-abduction
- Conflicts in court jurisdiction
- Violation of the right of the child to have access to both parents
- Violation of the right to a fair trial / fair hearing
- Frustration or complication of return due to delays in court proceedings and appeal practice
- Role of the Youth Authority / Guardian ad litem

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<sup>7</sup> Cf. eg judgment of 13 July 2000, case No 25735/94, *Elsholz v. Germany*; judgment of 26 February 2002, case No 46544, *Kutzner v. Germany*; judgment of 30 June 2005, case No. 30595, *Bove v. Italy*, all available at the internet website of the Court (<http://www.echr.coe.int>).

<sup>8</sup> The Briefing Paper speaks of legal or cultural and practical difficulties.

- Denial of access to the file at the CA
  - Denial of effective access to Justice
2. Practical Issues:
- Administrative delays / failings (CA/Police/Youth Authorities)
  - Timing of decision and its communication to parents
  - Shortcomings in implementation of access rights / role of the Youth Authority and other organisations
  - Communication between left-behind parent and child

## II. Legal Framework

Before analysing the legal and practical issues set forth above, we would like to briefly summarise the legal framework currently in force in cases of international parental child abduction.

The protection of children has been treated in a number of international conventions under the auspices of the United Nations, the European Union and the Hague Conference for International Law, which have as their primary purpose the well-being of the child.<sup>9</sup> In relation to the particular problem of child abduction, the Hague Convention forms an almost worldwide legal framework for the protection of children's rights. Over 80 states have already acceded to the Convention and some 40 more are currently in the process of being accepted for accession.<sup>10</sup>

In November 2003, the Council of the EU, in order to strengthen the cooperation and to resolve some problems relating to the practical functioning of the Hague Convention within the EU, adopted the Regulation, repealing the Brussels II regulation of 2000. It entered into force for 24 EU Member States (all except Denmark) on 1 March 2005. The Regulation is intended to provide answers to the legal difficulties experienced in the functioning of the Hague Convention, which continues to apply between EU Member States.<sup>11</sup> The Regulation provides for a framework which complements and sometimes clarifies the provisions of the Hague Convention, but also goes beyond it in scope:

- Parental Child Abduction: It reinforces and builds upon the Hague Convention's obligation to ensure the prompt return of the child; it also reiterates the right of access to the child and provides for an application for access in addition to the Hague Convention.

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<sup>9</sup> Cf. for example the Hague Conference on Private International Law, [http://www.hcch.net/index\\_en.php?act=home.splash](http://www.hcch.net/index_en.php?act=home.splash).

<sup>10</sup> Cf. statistics at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24).

<sup>11</sup> Briefing Paper, p.4.

- Jurisdiction: It establishes rules on jurisdiction based, as a general rule, subject to some exceptions, on the habitual residence of the child.
- Recognition of judgments: It provides for mutual recognition of all judgments on parental responsibility.

The purpose of the Regulation is, among others, to reinforce the right of the child to maintain contact with both parents after the parents separate or divorce, especially in situations when the parents live in different Member States. It also seeks to prevent child abduction within the EU by seeking to give the courts of the Member State of the child's residence before the abduction the final say in deciding where the child shall live. However, it would appear that the rules intended to achieve this goal are not sufficient to guarantee the rights and the wellbeing of the child. As outlined in detail below (at III.), there seem to be loopholes and problems, which result in different standards of implementation and protection of these rights in the EU.

### III. Problematic issues concerning international child abduction within the EU

From the twelve cases we have looked at, it seems apparent that the parent who abducts the child **to certain Member States** obtains an advantageous legal position because – contrary to Art. 12 Hague Convention – there is no automatic and immediate decision by the relevant courts to return the child to the left-behind parent in the Member State from which it was abducted.<sup>12</sup> The parent who abducted the child is thereby given the opportunity to retain the child for a period that is long enough to allow for the child to establish its habitual residence in the country to which it was abducted, thus benefiting from the illegal conduct without full regard to the rights of the child.

On the basis of case review, we have identified the following issues which we consider problematic:

#### 1. Legal Issues

##### a. Definition of wrongful removal or retention of a child

Pursuant to Art. 3 Hague Convention the removal or retention of a child is to be considered wrongful where

*“a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*

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<sup>12</sup> The Brussels II Regulation (Art. 11 para. 1) refers to the Hague Convention as the basis on which a decision regarding the return of a child has to be taken. It provides for procedural rules concerning the return proceeding, but it remains silent as regards the merits of the decision.

*b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

*The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.*

The interpretation of what should be considered a “breach of rights of custody” is not very clearly or consistently applied: The reference in Art. 3 Hague Convention to “*the law of the State in which the child was habitually resident*” seems to leave room for different interpretations for two reasons, (i) the reference to national law (which is still substantially different from Member State to Member State)<sup>13</sup>, but also (ii) the lacking of a definition of habitual residence. For example, the removal of the child to another Member State without informing the left-behind parent has not been regarded a wrongful removal in a German-Austrian case, in which the parents had joint custody. Both, German and Austrian courts have regarded the removal of the child without informing the left-behind parent about its whereabouts as a legal act and not a wrongful removal, arguing that the removing parent (in this case, the mother) had the right to determine the residence of the child and, therefore, could move with the child without leaving an address for the father to visit his child. In the case at hand, the father did not know where his children were for about two months. He filed a police report and finally found the address with the help of the public prosecutor and Interpol. He had also filed an application for return of the children with the German and Austrian Central Authorities, but his application was dismissed on the grounds that there had not been a wrongful removal.<sup>14</sup>

This does not appear to be in line with the right of the child to have access to both parents. This right is not only explicitly mentioned in Art. 24 para3 of the EU Charter of Fundamental Rights, but has also been recognised in various judgments by the European Court of Human Rights (*ECHR*) in Strasbourg.<sup>15</sup> It seems to be logical that this right can only be enforced if both parents have access to the child, in particular, if both parents know where the child resides. Consequently, it seems to be a breach of a general principle which should be common to the right of custody and the rights of the child in any EU Member State to remove the child without informing the left-behind parent about its whereabouts or to retain it in a hidden place. The need to recognise such a situation as “*wrongful removal or retention*” in the sense of Art. 3 Hague Convention seems to be obvious.

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<sup>13</sup> Cf. Briefing Paper, p. 5: differences with regard to whether parents will be granted joint custody, but also concerning extension and effects of the right of access to the child.

<sup>14</sup> Case *Pomorski*, cf. **Annex 4**.

<sup>15</sup> See references in fn. 7.

## b. Lack of definition of “habitual residence” of a child

It is the fundamental principle of the Regulation and the Hague Convention that the most appropriate forum for deciding children and parental responsibility issues is the relevant court of the Member State / Contracting State of the habitual residence of the child. On the face of it, this would seem to mean the country where the child has been abducted. However, the lack of definition of the term “habitual residence” leaves the matter open to different interpretations. Indeed, the Practice Guide for the application of the new Brussels II Regulation<sup>16</sup>, says the meaning of the term has to be determined by the judge in each case on the basis of factual elements, in accordance with the objectives and purposes of the Regulation.

Thus, the reality emerging from some of the cases we have looked at, is that courts – whether in the Member State from which the child was abducted or in the Member State to which the child was abducted – tend to assume that they are competent on the basis of habitual residence of a child in their Member State. They seem either not to take the time to carefully review the facts on which the alleged habitual residence of the child is based or to interpret each fact which points to habitual residence in their Member State more favourably than those pointing to a different result. This inconsistency in applying the law can lead to a situation where courts in both Member States involved declare themselves to be competent and it takes weeks, if not months, as well as a lot of expense, paperwork and translations to determine the competent court. This situation can lead to practical consequences harmful for the child including attempts to re-abduct or hide the child.

For example, in a recent case between Germany and Portugal, the case *de Oliveira*,<sup>17</sup> the father had taken the four-year-old daughter back to Portugal with the consent of the mother. The child had lived in Germany for five months at that point. The mother lived and worked in Germany, whereas the father had an apartment there, but did not live there on a permanent basis. The girl had stayed with each parent for two weeks on an alternating basis in Germany before and was supposed to return to her mother in Germany after two weeks. The father signed her up for a local nursery school and filed an application for sole custody with a Portuguese court. He did not intend to let her mother take her back to Germany. The mother was notified of the proceeding, but instead of filing an application for return of the child to Germany with the Portuguese and German Central Authorities, she kidnapped the child and took it back to Germany. Subsequently, she filed an application for sole custody with a German court. Both parents pleaded that the child was habitually resident in the

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<sup>16</sup> Practice Guide of 1 June 2005 for the application of the new Brussels II Regulation (*Practice Guide*), drawn up by the Commission services in consultation with the European Judicial Network in civil and commercial matters (*EJN*), item II.1, p. 12.

<sup>17</sup> Case *de Oliveira*, cf. **Annex 5**.

country where they had filed their application, and both courts (initially) accepted these pleadings. It took some seven months until the Portuguese court denied its competence, the German court insisting its competence. The decision of the Portuguese court to declare itself incompetent is currently under appeal; nevertheless, the proceeding in Germany has not been suspended, the German judge claiming that he has never been informed about the appeal<sup>18</sup>.

While the problem of different interpretations of the term “habitual residence” is not a new one – this term has been used in Conventions on Private International Law before and judges and lawyers encountered the same difficulties concerning its interpretation before<sup>19</sup>, we believe that it should be possible to agree on some common principles as to its interpretation, such as factors for integration of the child in its new environment, among the EU Member States with the support of the EJC. In particular, since this concept is aimed to be an autonomous notion of Community law<sup>20</sup>. An agreement on such common principles could provide guidance to the courts involved, thereby facilitating and speeding up their work and helping to mitigate the conflict among the parents.

### c. Cases of re-abduction

Neither the Hague Convention nor the Regulation provide for rules in cases, where a child was abducted to or wrongfully retained in another Member State and the left-behind parent, instead of filing an application for the return of the child, kidnaps the child and brings it back to the Member State where it lived before. Apart from the practical problems of locating the child and ensuring its access to both parents, this creates difficult legal issues for the Courts in any decision as regards the return of the child.

In such cases, like, for example, the case *de Oliveira* referred to under item b), the courts are faced with the difficult question as to whether to order the return of the child to the country from which it was abducted, but in which it might not have been habitually resident (not any more or not yet), or not to order the return of the child despite the clear provision of Art. 12 para. 1 Hague Convention with regard to cases where the removal / retention took place less than one year before the commencement of judicial proceedings.

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<sup>18</sup> In fact, it is possible that the mother of the child did not inform the German court about the appeal, and the father of the child – who had not been properly notified of this proceeding – prefers not to appear in this proceeding in order to avoid any of his statements being interpreted as (tacit) acceptance of jurisdiction. However, it is interesting to note that the German judge had been in contact with the Portuguese judge of first instance, but – apparently – was neither informed by that judge about the appeal, nor investigated himself why the father was not responding.

<sup>19</sup> Cf. for example *Sonnenberger*, in: Münchener Kommentar zum EGBGB, 4<sup>th</sup> ed. 2006, Introduction (*Einleitung*), para. 730-735.

<sup>20</sup> Practice Guide, item II.1, p.12.

Art. 12 para. 1 Hague Convention provides:

*“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.”*

In such cases, the judge is only not bound to order the return of the child if the exceptions mentioned in Art. 13 Hague Convention apply, ie if:

*“a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or*

*b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”*

The burden for proving that one of these conditions is fulfilled is considerably high. If the child clearly was habitually resident in the state from which it was abducted and to which it was re-abducted, this might play a role for the assessment whether it might suffer psychological harm if it were returned. However, it should be kept in mind that this provision only constitutes an exception to the general rule that a child should be returned and it should, therefore, be interpreted narrowly. Any other interpretation would only have the effect to encourage left-behind parents to re-abduct their children. Instead of encouraging such behaviour, the Member States, with the support of the Commission and the EJN, should rather try to improve the international cooperation on the level of the judiciary and the administration in order to incentivise the left-behind parent to file an application with the Central Authorities and to pursue legal ways towards the return of their children.

#### **d. Conflicts in court jurisdiction**

While there are cases in which courts in both the Member State to which the child was abducted, as well as the Member State from which it was abducted, assume they have jurisdiction (cf. above), there are also cases in which courts in both such Member States deny having jurisdiction. These cases are actually even more difficult in the sense that they constitute a denial of access to justice. Such decisions are often the result of insufficient knowledge of the relevant rules of conflict of law / jurisdiction, ie the Regulation and the Hague Convention, and a lack of communication between the courts.<sup>21</sup>

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<sup>21</sup> Cf. also Briefing Paper, p. 6 (“The need of a high degree of cooperation among judges”).

In the *Pomorski* case, mentioned above (at item a)<sup>22</sup>, the German court after termination of the divorce proceeding continued with the custody and access proceeding (under a new reference number), despite the fact that the children had been living in Austria for some six months at that point and it was quite clear that they would continue to live there. A few months later, the father, who had tried to obtain access / visiting arrangements in the course of the German proceeding, filed an application for access to his children with the (Austrian) court at the place of residence of his children. This application was rejected – the Austrian court regarded itself as not being competent to hear the case since there was an on-going proceeding concerning custody and access in Germany. Moreover, it did not accept the father’s application for a preliminary injunction concerning access. Another few months later; the German court also denied jurisdiction, basing its decision on the argument that Austria had in the meantime become the children’s place of habitual residence.<sup>23</sup>

The denial of jurisdiction by courts in both countries involved, which even denied to issue preliminary injunctions, led to considerable delays and could have been avoided, had the courts interpreted the provisions of the Regulation correctly and / or – at least – communicated with each other.

#### e. Violations of the right of the child to have access to both parents

The fundamental right of the child to have regular access to both parents does not seem to be properly respected in some EU Member States. Apart from practical difficulties in organising the access (which we will examine in more detail below at item 2.c), courts sometimes deny that there is such a right, which becomes particularly significant when proceedings are delayed without taking into account the consequences for the relationship between the child and the left-behind parent.

In the *Pomorski* case, when the father finally filed an application for access under Art. 21 Hague Convention in November 2005 with the competent court in Vienna, the court rejected his application one month later based on the argument that it was not competent under the Hague Convention to decide about the existence and the extent of the father’s right of access to the children. The custody proceeding was at that point still pending before a German court. Consequently, the court determined that there was no judgment regarding the right of custody and/or access yet, which could have been enforced in Austria pursuant to Art. 41 Regulation.

Art. 21 Hague Convention provides:

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<sup>22</sup> Case *Pomorski*, cf. **Annex 4**.

<sup>23</sup> In this case, it took the German court six months after the initial decision that it was competent to hear the case in the *access proceeding* to finally decide that an Austrian court was better placed to hear that case and to transfer the case. It took another three months (ie nine months in total) until the German court (upon appeal) accepted that it also did not have jurisdiction with regard to the *custody proceeding*.

*“An application to make arrangements for organising or securing the effective exercise of right of access may be presented to the Central Authorities of the Contracting State in the same way as an application for the return of a child.”*

In addition, as there was no judgment concerning custody and / or access yet, under German family law both parents still had joint custody and, consequently, the father had a right of access to his children as part of his right of custody. Furthermore, the children have a fundamental right of regular access to both parents, which goes hand in hand with the right of the parents to have access to their children. Thus, the Austrian court had sufficient legal authority pursuant to Art. 21 Hague Convention, German law and the jurisdiction of the ECHR concerning the access of children to both parents (and *vice versa*) to grant the father access to his children.

In several other cases we reviewed, the right of the child to have access to both parents on a regular basis was recognised in principle. However, the ways to grant access and the timeframe within which access was granted differed considerably between the Member States.<sup>24</sup> For example, the courts in the Netherlands and Poland seem to be efficient and quick to order the return of the child or grant access to the child,<sup>25</sup> as compared to courts in other Member States we received cases from, notably Germany and Austria, where courts showed a reluctance to grant access notwithstanding considerable delays in the court proceedings.

A further specific example is the *Vander Elst* case<sup>26</sup>, which started under the Hague Convention in 2003 and still continues today subject to the Regulation. The mother appealed in September 2005 against the decision by a German court which granted the right to determine the child's residence and to take care of its education to the father (without the mother's knowledge or presence) and, at the same time, applied for access to her daughter, whom she had only seen briefly twice in two years since her wrongful retention by the father of the child.<sup>27</sup> She was able to see her daughter for a meeting of approx. two hours at the end of May 2006, ie eight months after her access application and almost three years after the wrongful retention of the child. She has not been able to see her since. A decision concerning access to the child on a regular basis is expected for 7 November 2006. The custody proceeding is still pending; a decision in this proceeding is expected for March / April 2007.

#### **f. Violations of the right to a fair trial / fair hearing**

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<sup>24</sup> Cf. also Briefing Paper, p. 5.

<sup>25</sup> Cf. cases *Tyers* (Annex 6) and *Pokrzeptowicz-Meyer* (Annex 7).

<sup>26</sup> Case *Vander Elst*, Annex 8.

<sup>27</sup> It seems that the German CA treated Mrs Vander Elst's application in February 2004 only as an application for return of the child and not – automatically - as an application for access to the child. This could not be clarified yet since the CA denies access to the file, cf. below at item i).

The right to a fair trial is a fundamental human right, recognised in some form by all EU Member States and enshrined in Art. 47 of the Charter of Fundamental Rights of the European Union (*Charter*). This right includes the right to a fair hearing within reasonable time by an independent and impartial tribunal previously established by law (cf. Art. 47 para. 2 of the Charter).

However, this fundamental right is not always respected in certain EU Member States. For example, in two of the cases we reviewed, where the child was abducted to Germany, the abducting parent managed to obtain a court decision granting him/her the right to determine the residence of the child and to take care of its education without the left-behind parent having been heard by the court. In *Vander Elst*, the abducting parent provided the correct address of the left-behind parent, but the letter informing her of the proceeding came back (for unknown reasons) and the judge did not investigate further.<sup>28</sup> In the same case, the left-behind mother re-located to Switzerland and provided her new address, including country code, to the (same) court. Despite the French address (in a village close to Geneva), the letter informing her of the continuation of the proceeding was sent to Sweden instead of Switzerland.

In *de Oliveira*, the (abducting) mother provided a local address of the father, knowing that he did not live there any more and did not check his mail.<sup>29</sup> As a result, the father did not know about the custody proceeding and the judge granted the right to determine the residence of the child to the mother his absence. When the father was informed about this decision one month later by the German CA, he informed the judge about his address in Portugal. Nevertheless, the judge continued his attempts to serve important court documents upon the father at his (old) address in Germany.

In both cases, the judges did not conduct further investigations or re-schedule the hearing in order to properly allow the left-behind parent the opportunity to plead his/her case.

Although the decisions in both cases were preliminary, they enabled the abducting parent to gain time (for further integration of the child in the Member State to which it was abducted) and this situation provided them with a basis for court orders prohibiting the other parent to see the child.<sup>30</sup>

#### **g. Frustration or complication of return due to delays in the court proceedings and appeal practice**

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<sup>28</sup> Case *Vander Elst*, cf. Annex 8.

<sup>29</sup> Case *de Oliveira*, cf. Annex 5.

<sup>30</sup> This possibility was, for example, used by the abducting father in the *Vander Elst* case to prevent the left-behind mother from getting in touch with her daughter or her daughter's teachers after the mother had tried to see her daughter outside Primary School in December 2003 for the first time after the wrongful retention by the father in September 2003.

Under Art. 11 para. 3 of the Regulation, a court to which an application for return of a child is made, shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law and issuing its judgment no later than six weeks after the application is lodged. The court practice in the EU Member States differs considerably in this respect. Positive examples where proceedings were conducted expeditiously can be found in the Netherlands<sup>31</sup>, Poland<sup>32</sup> and France<sup>33</sup>. Examples for delays in the return proceedings – even after the entry into force of the regulation – can notably be found in Germany.<sup>34</sup>

Apart from delays in the return proceedings, a further problem of child abduction cases in Germany is that the decision of the judge in the return proceeding can be appealed and the child will not be sent back to the country from which it was abducted during the appeal process. Thus, even if a decision on return were rendered within the time frame of 6 weeks, the abducting parent could file an appeal against this decision and thereby gain time – time which can be essential for the assessment as to whether the child has been integrated into its new environment. It is unclear whether judges in Germany have the legal authority to order the immediate return of the child despite an appeal. The implementing law (*Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts - IntFamRVG*)<sup>35</sup> contains a provision in § 15 (preliminary injunctions), which seems to provide a basis for such an order.

§ 15 IntFamRVG reads as follows:

*“The court can ex officio or upon application issue preliminary injunctions in order to prevent the child from harm or to avoid damages to the interests of the parties concerned. In particular, it can order such injunctions to secure the location of the child during the proceeding or to prevent the frustration or complication of its return. § 621g of the Code of Civil Procedure is applied analogically.”*

However, it seems that the courts are unwilling to use this potential power, as we have not heard of any case in which such an injunction was issued to secure the immediate return of the child despite an appeal proceeding.

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<sup>31</sup> Case *Tyers*.

<sup>32</sup> Case *Pokrzepowicz-Meyer*.

<sup>33</sup> Case *Georis* cf. **Annex 9**.

<sup>34</sup> Cf. eg cases *Vander Elst* (return proceeding in 2003/2004 – final decision was issued by court of appeals after approx 5 months) and *de Oliveira* (return proceeding in 2006, no appeal, approx 3 months).

<sup>35</sup> In force since 1 March 2005, BGBl I 2005, 162.

#### **h. Role of the Youth Authority / *Guardian ad litem***

In some countries, a special authority is in charge of dealing with the welfare of children and young people. These authorities, for example the *Jugendamt* in Germany or the *Raad voor de Kinderbescherming* in the Netherlands, usually get involved in parental child abduction court proceedings and are often asked to issue an opinion. Moreover, in some countries, such as Germany, a special *guardian ad litem* – mostly lawyers – is appointed by the courts to represent the child in the access / custody proceeding. In Germany, these *guardians ad litem* work closely with the Youth Authority and are also often asked to provide an opinion in court.

In most of the cases reviewed involving abduction to Germany, the left-behind parent found the involvement and behaviour of representatives of the *Jugendamt* or the *guardians ad litem* unhelpful. In particular, the *Jugendamt* and/or the court-appointed *guardian ad litem* regularly issued opinions in favour of the abducting parent (residing in Germany), without having even met the left-behind parent.<sup>36</sup>

In the *Vander Elst* case, for example, an application for damages based on a breach of an official duty of the German state, represented by the *Jugendamt*, by issuing an opinion which led to a court decision against the left-behind parent without hearing the respective parent, is pending at the District Court (*Landgericht*) of Darmstadt.<sup>37</sup> The court already informally acknowledged that this constitutes a breach of an official duty (right to be heard in administrative proceedings), but stated that there does not seem to be a connection with the ultimate decision to grant the right to determine the residence of the child to the abducting parent and invited the applicant to supplement her arguments. Therein lies the problem.<sup>38</sup>

#### **i. Denial of access to the file of the CA**

Another particular problem with regard to the CA seems to exist in Germany. In the *Vander Elst* case, for example, there were significant delays in the administrative proceeding, which led to a very late application for return with the competent court (7 months after the application with the CA) and ultimately to a decision by the German courts that the child should not be returned (cf. in detail below at item 2.a.). The left-behind mother requested access to the administrative file at the CA, in order to find out why there had been such huge delays in this case, why she was being denied access to her daughter for a long time and to prepare for an action for damages against the German government. However, access to the file was denied on the ground that the CA acted as a proxy to

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<sup>36</sup> Case *Vander Elst, de Oliveira, Gallez* (Annex 10), *Pomorski, Grindlay* (Annex 11) and *Booth* (Annex 12).

<sup>37</sup> Case *Vander Elst*, Annex 8.

<sup>38</sup> The proceeding is expected to continue on 7 November 2006.

the applicant, which seems absurd because the applicant should be able to gain access to his/her own file and – as a further consequence – should be able to assert that the CA is failing in its duties to help her seek expeditious return of her child.

The lawyer of the left-behind mother in this case approached the Federal Ministry of Justice in March 2006 and applied for access to the file on the basis of the Act in Access to Information of Federal Authorities. His request was again denied. This time, the Federal Ministry of Justice argued that the Attorney General (who acts as CA in Germany) in family proceedings does not exercise the function of an authority in terms of Sect. 1 Para. 1 of the Act mentioned above, despite the fact that he is acting as (Central) “Authority” in terms of the Hague Convention. Access to the file continues to be denied.

#### **j. Denial of effective access to justice**

All the cases we have reviewed have shown that the left-behind parent needs to be represented by a lawyer, despite the fact that under Art. 7 (f) Hague Convention the CAs of the Contracting States

*“shall take the appropriate measures to initiate or facilitate judicial proceedings”*

on behalf of left-behind parent. In our experience, although limited to certain countries, the CAs in some countries, notably Germany and Austria, are not efficient enough to provide effective and rapid assistance to a foreign left-behind parent.<sup>39</sup>

Moreover, since these cases tend to be very complex, lawyers and judges involved need to have thorough knowledge of Private International Law, the various regulations and conventions and the court system in different countries. In general, we think that it would be difficult to find many competent family lawyers fluent in foreign languages (in order to communicate with the left-behind parent) and with a good knowledge of the relevant provisions of the law. Several cases we reviewed have shown that lawyers working under a legal aid scheme tend not to be experienced and not sufficiently motivated to pursue such cases.<sup>40</sup> In some of these cases, the lawyer in charge did not even know the Hague Convention or gave wrong advice due to his/her lack of knowledge of its implementation.<sup>41</sup>

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<sup>39</sup> Cf. Briefing Paper, p. 9 – “the role of the CA’s in performing their task can vary deeply”.

<sup>40</sup> Cf. for example cases *Vander Elst* (first German lawyer), *de Oliveira, Wilson (Annex 13)*, *Booth, Tijssen (Annex 14)*.

<sup>41</sup> Case *Tijssen*.

The combination of complex factual situations, unclear legal terms such as “habitual residence” and “wrongful removal”, the difficulties in finding a good and motivated lawyer and the language barrier all tend to result in a situation leading to a denial of effective access to justice for the left-behind parent.

Consequently, we believe that it is very important for judges and lawyers who have to deal with such cases to have a good knowledge of Private International Law and the relevant provisions related to cases of parental child abduction, in order to ensure a fair process for both parents.

## 2. Practical Issues

In addition to the legal issues mentioned above, there are also considerable practical difficulties, which hinder a consistent interpretation and implementation of the Regulation and the Hague Convention.

### a. Administrative delays / failings (CA / Police / Youth Authority)

As outlined above (at item 1), timing is crucial in any proceeding for the return of an abducted child. The Regulation states as a general standard a period of six weeks or less for the return proceedings (cf. Art. 11 para. 3 Regulation). However, delays at the administrative level, namely at the Central Authorities, can lead to an overall period of time for the complete proceeding which is much longer than that.

Such delays can be due to the fact that the location of the child is unknown and the CA is unable to locate the child for the left-behind parent, a problem which is not addressed by the Regulation.<sup>42</sup> It seems that the various authorities within the same Member State, including the police, are not always working together effectively and the situation is worse as regards cross-border co-operation. In two cases we reviewed, where the child was abducted to Germany, the CA was unable to help the left-behind parent to locate the child: In *de Oliveira*, the left-behind father – upon his own initiative, through a public prosecutor in his home country – found the location of the child in Germany with the help of Interpol.<sup>43</sup> In *Gallez*, even the police were unable to locate the mother and the missing child, despite the fact that she received social assistance and the child attended a public school.<sup>44</sup>

Delays can also be due to the administrative procedure of the CA itself: In *Vander Elst*, the left-behind mother filed an application for return of the child, together with an application for legal aid. The legal aid application was considered incomplete, but the German CA did not inform the mother

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<sup>42</sup> Cf. Briefing Paper, p. 7.

<sup>43</sup> Case *de Oliveira*, cf. **Annex 5**.

<sup>44</sup> Case *Gallez*, cf. **Annex 10**. Other examples are children who disappeared in France (case *Georis*, **Annex 9**) and Cyprus (case *Voelschow*, **Annex 15**).

accordingly or support her to complete the application. Only upon intervention of the CA of Switzerland, where the mother was residing, and four months after the initial application, did the German CA admit that it had not yet started a return proceeding and specified its document request. It took another three months until the application was regarded as being complete and the CA filed an application for return of the abducted child with the competent court (almost one year after the wrongful retention of the child).

#### **b. Timing of decision and its communication to parents**

Co-operation and co-ordination between the courts and other law enforcement authorities, in particular the police, should be improved not only before or during the return proceedings, but also after completion of the proceeding, as long as the child has not returned to the parent from which it was abducted or retained.

In the case *Georis*, in which the French judge recognised the Belgian custody judgment and ordered the return of the child, which had been abducted to France, it ended with the disappearance of the child. The child could not be located until today, some six months after its disappearance. In this case the French Judge recognised the Belgian custody decision, which provided for sole custody of the father, in March 2006. The decision became legally binding upon receipt by the parties, but the judge had informed the parties' lawyers in advance. The Belgian father went to Paris immediately, but the mother and son had already disappeared. No security measures had been taken to ensure the safe return of the child to Belgium.

#### **c. Shortcomings in implementation of access rights / role of the Youth Authorities and other organisations**

In addition to the extensive efforts the left-behind parent needs to pursue along his/her journey to see the child, further difficulties can arise in organising meetings with the child. Initially the courts usually only allow accompanied visits, since there is a danger that the child might be confused / psychologically harmed or that the left-behind parent might try to re-abduct the child. These meetings usually take place in the presence of a social worker or a representative of the Youth Authority. Consequently, the left-behind parent depends on their flexibility and timetable for the meetings. For example, in *de Oliveira*, the Portuguese father who lives in Portugal is allowed to see his five-year-old daughter every other week for approx. 1.5 hrs on a Wednesday between 6pm and 7.30 pm – the father has been unable to persuade the Youth Authority to be more flexible or to get the judge to order more extensive meetings over the weekend. In this context, it is interesting to note that, while the court jurisdiction for cases of child abduction has been concentrated in Germany to lie with specialised Family Courts, there is no such concentration of competence at the level of the Youth Authorities.

#### **d. Communication between left-behind parent and child at accompanied meetings**

In two other cases, *Vander Elst* and *Pomorski*, the left-behind parent managed to arrange a schedule for an access meeting with her child with the accompanying authority or organisation. However, further complications arose with regard to the language to be spoken at such meetings. In this case, as the child was abducted to Germany, the accompanying authority or organisation insisted that communication between the left-behind parent and the child take place in a language that the representatives could understand, preferably German. This can lead to communication difficulties in the meetings if the left-behind parent and / or the child speak limited or no German. In practice, this leads to a denial of an effective visiting right, because, in extremely difficult and emotional circumstances, the left-behind parent cannot easily communicate with the child.

#### **IV. Recommendations for Future Action**

Our preliminary review of cases involving child abduction is not intended to be a comprehensive study. We have looked at twelve cases that have been referred to us. Therefore we cannot claim to have undertaken a comprehensive review on a country-by-country basis. There is no doubt that there have been some positive changes over the years in the way Member States deal with child abduction, but there is apparently still plenty of room for improvement. For the children and parents who still suffer, one case is a case too many. Even with this handful of cases, we are able to ascertain that, notwithstanding the new Brussels II Regulation, there remain defects in the current system.

For a more scientific evaluation, we recommend that the Commission consider producing a report on the effectiveness of the Regulation. The US Department of State (in its role as CA) does a similar exercise in relation to the Hague Convention, consulting with the National Authorities, the country officers and the consular sections of permanent representations (which are often the first point of contact for the parents concerned). The Regulation on the other hand establishes a review *not later than 1 January 2012 – ten years* after the Regulation entered into force. In the circumstances, merely fulfilling the legal requirement does not seem sufficient.

There are a number of further substantive and practical points that we would recommend the Commission to consider in order to improve the current situation. These include:

- **Child abduction as a priority for further EU action**

Child abduction should be one of the Commission's priorities for future EU action within the context of the action plan proposed by the Communication on children's rights. The Commission should continue to work on improving the implementation of the Regulation and the Hague

Convention, using its competences within the EU as well as its new status as a full member of the HCCH.<sup>45</sup>

- **Clearer interpretation/implementation of Brussels II Regulation and its practice guidelines**

1. *A clear presumption* that the abducting parent cannot benefit from his/her wrongdoing/lawbreaking so that any exceptions within the Regulation must be interpreted narrowly.
2. *A clearer definition of habitual residence* so that there is a presumption that an “illegal move” to another country will not lead to residence.
3. *A definition of child abduction*, to include situations such as moving a child to another jurisdiction without a forwarding address.

- **Encouraging the CA’s and other law enforcement agencies to improve coordination and effectiveness**

This could include exchanging information and running training programmes (also see bullet below). Such coordination could be organised by extending SOLVIT to cover this area, or by creating a specific on-line network to enhance the exchange of information and thereby effective implementation of Brussels II and the Hague Convention.

- **Establishing within the Commission, a Task Force on Child Abduction to centralise information, learning and expertise in this area**

Currently there are a number of excellent NGOs, universities and individual lawyers that have developed expertise in child abduction cases, but the nature of the issue is such that there is no single EU-wide co-ordinated approach.

1. *Special training programmes for judges and lawyers*: This Task Force could help the CA’s establish special training programmes for judges and lawyers, supported by special training teams of legal experts that can be deployed for training sessions in the Member States.
2. *Information Packs*: Furthermore, it could coordinate an information pack to be made available in each Member State, for use by parents and people who they are likely to turn to eg Consulates, Ministries of Foreign Affairs and Departments of Justice.

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<sup>45</sup> The EU will become a full member of the HCCH (Hague Conference of Private International Law) once two-thirds of the current members of the HCCH have voted in favour of its accession, cf. Council decision No. 2006/719/EC of 5 October 2006, OJL297/1.

3. **Best Practices Guide:** It could also help to develop a best practices guide for mediation proceedings<sup>46</sup> and the organisation of access meetings in such cases

▪ **Setting up a Missing Children’s Network**

Since one of the biggest practical problems in child abduction cases is that the children and the abducting parent simply vanish, we believe that it would be helpful for the Commission to set up and encourage Member States to participate in a special network comprising police, CA’s, courts, other authorities (eg youth authorities like the *Jugendamt*, but also social security authorities, who might receive applications for child support) and the media to more effectively locate missing children.<sup>47</sup>

▪ **Encouraging Harmonisation of Family Law Rules**

The rules on (joint) custody and access, as well as their implementation in practice, still differ considerably between the Member States.<sup>48</sup> The Commission should encourage and support the Member States to harmonise these rules and the relevant practice of courts and law enforcement agencies.

▪ **Launching Infringement Proceedings**

If Member States misapply the Regulation the Commission could consider bringing infringement proceedings against the countries in question. In addition it may be appropriate to consider infringement proceedings in certain cases for violation of Art. 12 and/or 18 EC and/or supporting legal proceedings involving human rights issues in the ECJ.

Brussels, 31 October 2006  
Freshfields Bruckhaus Deringer/ECAS

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<sup>46</sup> Cf. Briefing Paper, p. 8 (“The importance of mediation”).

<sup>47</sup> Cf. Briefing Paper, p. 5.