

Questionnaire on the Practical Operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction

Reply of the European Union to specific questions

Part I Recent developments

1.1. *Since the 2011/2012 Special Commission, have there been any significant developments regarding the legislation or procedural rules applicable in child abduction cases? Where possible please state the reason for the development in the legislation/rules and, where possible, the results achieved in practice (e.g. reducing the time required to decide a case).*

Cases of intra-EU cross-border parental child abduction are covered by Regulation (EC) No 2201/2003 (the Brussels IIa Regulation), which supplements the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

The 1980 Hague Convention, which is in force in all Member States, discourages unilateral removals of children across borders by establishing a mechanism for the prompt return of the child to the State where the child was habitually resident before the abduction. The aim is a mere factual return; the 1980 Hague Convention does not establish jurisdiction rules nor deal with the proceedings for the attribution of custody after separation or divorce of the parents. The Convention is based on the assumption, though, that the courts of the State where the child was habitually resident before the abduction are best placed to resolve the custody dispute.

The Regulation complements the return mechanism of the 1980 Hague Convention by some procedural safeguards and an additional procedure if the child is not returned to the State of habitual residence under the 1980 Hague Convention. To obtain the return of a child abducted from one Member State to another, the 1980 Hague Convention continues to apply in accordance with the terms of the Regulation. These return proceedings under the Convention take place in the State to which the child was abducted. If return is ordered and the child returns, the Convention's aim is achieved and the custody case, if the parents so wish, can be heard by the courts of the State of the child's habitual residence.

If return is refused by the Member State to which the child has been abducted, an additional procedure - the so-called "overriding mechanism" comes into play under the Regulation since 2005.

On 30 June 2016¹ the European Commission adopted a proposal for a recast of the Brussels IIa Regulation. In particular, the proposal includes measures such as deadlines to improve the efficiency of the child return procedure.

The proposal clarifies the timeframe established by Article 11 of the 1980 Hague Convention and Article 11(3) of the Regulation for issuing a return order in line with the view prevailing among those Member States which handle return cases under the 1980 Hague Convention most quickly. A separate six-week time limit would apply to the proceedings before the first instance court and the appellate court, respectively. In addition, the recast proposes to oblige Central Authorities to also work under a six-week time limit. Currently, no time limit exists for Central Authorities. This new 6+6+6 deadline would render the time limit for courts more realistic with a view to protecting the right of the respondent to a fair trial whilst limiting it to the shortest period realistically possible when respecting the rule of law.

Moreover, the measures proposed include an obligation for Member States to concentrate jurisdiction for child abduction cases on a limited number of courts while respecting the structure of the legal system concerned. This would allow judges to build up experience with this very specific type of procedure and thus rule on the return proceedings more quickly and expertly.

The proposal limits the number of ordinary appeals against a decision on the return application to one and explicitly invites a judge to consider whether a return order should be provisionally enforceable.

As to the "overriding mechanism" allowing the court of the Member State of the child's former habitual residence to exercise its jurisdiction in matters of parental responsibility one last time even if return under the 1980 Hague Convention was refused by the Member State of refuge, the proposal obliges the court of the Member State of origin to conduct a thorough examination of the best interests of the child before a final custody decision, possibly implying return of the child, is issued. In this context, when conducting this examination of the best interests of the child, any child who is capable of forming his or her own views has the right to be heard, using alternative means where relevant, if the child is not physically present.

¹ <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF>

Furthermore, the cooperation between the Central Authorities or a direct communication by a judge with the relevant court in the Member State of origin should be facilitated to assess measures ("ad-equate arrangements") to protect the child put in place in the Member State to which the child should be returned.

Where the child might be at a grave risk of harm or might otherwise be placed in an intolerable situation if returned to the country of the child's habitual residence without any safeguards, it should also be possible for the court of the Member State of refuge to order urgent protective measures required which, if necessary, can also "travel with the child" to the State of habitual residence where a final decision of the substance has to be taken. According to the proposal, these measures would remain in place until the Member State of the child's habitual residence has lifted, amended or replaced them.

The examination of the Commission's proposal by the EU Member States started on 19 July 2016 and it is still on-going. The final version of the recast Regulation may be therefore different from the original Commission's proposal described above.

1.2 Please provide a brief summary of any significant decision concerning the interpretation or application of the 1980 Convention rendered since the 2011/2012 Special Commission by relevant authorities including the context of the 20 November 1989 United Nations Convention on the Rights of the Child and relevant regional instruments.

Opinion 1/13 of the Court of Justice of the European Union of 14 October 2014

Article 38(4) of the 1980 Convention stipulates that the Convention applies between the acceding country and other countries that are parties to the Convention once these countries make a declaration of acceptance concerning the accession. Therefore, it is only the declaration of acceptance that creates the legal relationship between the acceding country and the already Contracting Party, making the Convention enter into force between them.

The Court of Justice of the European Union, in its Opinion 1/13, handed down on 14 October 2014, has confirmed that this matter falls within the EU exclusive external competence, because of the existing parallel EU legislation, namely Regulation (EC) No 2201/2003 concerning jurisdiction and recognition and enforcement of judgments in matters of parental responsibility (the Brussels IIa Regulation).

As a consequence of the Court's Opinion, EU Member States are no longer in the position to accept individually the accession of third States to the 1980 Hague Convention and a common EU decision should be taken, case by case, authorizing all Member States to accept the new Contracting Parties to the 1980 Hague Convention or to authorize specific Member States to accept previous accessions when this was not done before the Court's Opinion.²

The decision to accept accessions is therefore a matter for the unanimous³ agreement of EU Member States, by means of Council Decisions adopted in the interest of the EU. When considering whether to accept an accession it is necessary to consider the third State's ability to implement the Convention effectively.

Further case law of the Court of Justice of the European Union relating to the 1980 Hague Convention

The CJEU's judgment of 22 December 2010 in Case C-497/10 PPU (*Mercredi v. Chaaffe*), following up on the CJEU's judgment of 2 April 2009 in Case C-523/07 (A), further clarified the criteria for establishing the habitual residence of a child. While the judgment in Case C-523/07 mentioned a list of possible criteria in general, Case C-497/10 PPU dealt with the case of an infant in particular.

The CJEU's judgment of 9 October 2014 in Case C-376/14 PPU (C) dealt with the question of wrongful removal or retention of a child who had been removed from one Member State to another following a first-instance custody order which was still under appeal. While the removal had been lawful at the time it occurred, the subsequent appellate decision in the State of (former) habitual residence of the child quashed the first-instance custody order in favour of the mother who had relocated with the child in the meantime.

² Ten Council Decisions have been already adopted, authorizing Member States to accept the accession to the 1980 Convention of **Andorra** (Council Decision 2015/1023 adopted on 15 June 2015); **Seychelles** (Council Decision 2015/2354 adopted on 10 December 2015); **Russia** (Council Decision 2015/2355 adopted on 10 December 2015); **Albania** (Council Decision 2015/2356 adopted on 10 December 2015); **Singapore** (Council Decision 2015/1024 adopted on 15 June 2015); **Morocco** (Council Decision 2015/2357 adopted on 10 December 2015); **Armenia** (Council Decision 2015/2358 adopted on 10 December 2015); **Republic of Korea** (Council Decision 2016/2313 adopted on 8 December 2016), **Kazakhstan** (Council Decision 2016/2311 adopted on 8 December 2016) and **Peru** (Council Decision 2016/2312 adopted on 8 December 2016).

³ However, in accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of these Decisions and is not bound by them or subject to their application.

The Court held that the court seised of a Hague return application in the Member State of refuge, in order to assess whether the non-return of the child now amounted to an unlawful retention, must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention. As part of that assessment, it is important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. The Court went on to state that Regulation No 2201/2003 must be interpreted as meaning that, in circumstances where the removal of a child has taken place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment fixing the child's residence at the home of the parent living in the Member State of origin, the failure to return the child to that Member State following the latter judgment is wrongful and Article 11 of the Regulation is applicable if it is held that the child was still habitually resident in that Member State immediately before the retention.

All judgments can be found at <http://curia.europa.eu/>

Part V: Non-Convention cases and non-Convention States

12. Non-Convention States and non-Convention cases

12.1 Are there any States that you would particularly like to see become a State Party to the 1980 Convention? If so, what steps would you suggest could be taken to promote the Convention and encourage ratification of, or accession to, the Convention in those States?

Please explain:

In its contacts with third States, the EU already promotes the 1980 Convention and encourages its ratification/accession.⁴

The EU promotes a world-wide ratification of / accession to the Convention, in particular of those countries which have special links to the EU, as in the context of the European Neighbourhood Policy (ENP)⁵, the EU policy addressed to its southern and eastern

⁴ However, as explained in the answer to question 1.2, the actual acceptance of a third country's accession to the 1980 Convention is subject to a specific EU procedure.

⁵ https://eeas.europa.eu/headquarters/headquarters-homepage/330/european-neighbourhood-policy-enp_en; https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/overview_en. The ENP

neighbours in order to achieve the closest possible political association and the greatest possible degree of economic integration.

Several ENP countries are already Party to the 1980 Convention, but others are not. The EU is particularly interested in the accession of **Tunisia** and **Egypt**, as, because of geographical proximity and immigration issues, a relevant number of cases of child abduction are pending with these countries and the conventional framework would undoubtedly facilitate their resolution. Both Tunisia and Egypt are currently considering the possibility to become party to the 1980 Convention.

Beside the political dialogue, the EU has also used the instrument of the consular demarche in order to convey the message that accession to the Convention would be beneficial for the best interests of children involved in cross-border family disputes. A joint demarche by the EU Delegation, several EU Member States and the US Embassy was delivered on 21 March 2014 on the issue of child abduction to the Ministry of Foreign Affairs of Egypt.

Another country of EU interest is **China**⁶. An EU demarche on child abduction was delivered on 30 April 2015 to the Ministry of Foreign Affairs, Department of Treaty and Law, responsible for handling issues related to the 1980 Hague Child Abduction Convention. The issue will come up again in the Legal Affairs Dialogue which has been established in 2016 between EU and China as horizontal platform for EU-China cooperation.

As indicated below, in order to promote the Convention, the EU has also used some financial instruments to the benefit of the third countries which are entitled to participate in the relevant programmes, basically Euromed Justice ⁷ and TAIEX⁸.

[countries are: Algeria, Egypt, Israel, Jordan, Lebanon, Lybia, Morocco, Palestine, Syria, Tunisia \(ENP South\); Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine \(ENP East\).](#)

⁶ Currently, the Convention applies to the *Special Administrative Regions of Hong Kong and Macao* only.

⁷ <http://euromed-justice.eu/>

⁸ https://ec.europa.eu/neighbourhood-enlargement/tenders/taix_en

12.2 In relation to the "Malta Process":

The EU has actively supported the Malta Process since its beginning, encouraging, in its international contacts, third States to accede to the Hague Conventions on family law and participating to the four Malta Conferences organized so far.

With the Euromed Justice Programme and the TAIEX Instrument, the EU has co-financed seminars and study visits, as, for instance, the *"Judicial Seminar on Cross-border protection of children and families"* organized in December 2010 in Rabat, Morocco. All these activities were aimed at improving co-operation between Hague and non-Hague countries in the Mediterranean area and promoting adherence to the 1980 and 1996 Conventions.

As already pointed out during the 2011/2012 Special Commission, the European Union particularly appreciated the rapid progress made by the Working Party on Mediation in the context of the Malta Process which led to the **Principles for the Establishment of Mediation Structures** and the accompanying **Explanatory Memorandum**.

The Union underlines the practical benefits of this project. It is important, in the absence of a Convention framework, to establish an alternative practical framework for the resolution of sensitive disputes involving children (in particular with regard to the mentioned countries of North Africa).

Regarding the future of the Malta Process, the Union believes that the work on mediation should be continued now by focussing on the practical implementation of the guide to good practice on mediation and the acceptance and implementation of the Principles for the Establishment of Mediation Structures. Among other things, best practise might include the establishment of central contact points facilitating the provision of information on available mediation services, on access to mediation, etc.

In order to further promote mediation, the EU has also translated the Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation into all EU official languages and into Arabic⁹.

⁹ <https://www.hcch.net/en/publications-and-studies/details4/?pid=5568&dtid=3>