

LEGAL FRAMEWORK FOR INTERNATIONAL CHILD ABDUCTION IN THE EUROPEAN UNION – THE NEED FOR CHANGES IN THE LIGHT OF *POVSE V. AUSTRIA**

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I. Introduction

This article examines the appropriateness of application of the 1980 Child Abduction Convention within the framework of the Regulation Brussels IIa¹ in the light of the decision *Povse v. Austria*. This factually and legally complex case, submitted to the Court of Justice of the European Union (CJEU)² and the European Court of Human Rights (ECtHR),³ illustrates deficiencies of the current procedural framework on international child abduction in the European Union. Both judgments of the CJEU and of the ECtHR Court have been subject of a heated debate amongst family lawyers and private international law specialists alike.⁴

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1 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter: Regulation Brussels IIa or Regulation).

2 Case C-211/10 PPU *Povse v Alpaço* [2010] ECR I-6673

3 European Court of Human Rights Judgment of 18 June 2013, decision on admissibility, Application no. 3890/11 (*Sofia and Doris Povse v. Austria*).

4 See e.g., D. Van Iterson, ‘The ECJ and ECHR Judgments of *Povse* and Human Rights – a Legislative Perspective’ at <http://conflictoflaws.net/2013/the-ecj-and-echr-judgments-on-povse-and-human-rights-a-legislative-perspective/> (28 May 2015); H. Van Loon, ‘Kinderontvoering en mensenrechten’, in: K. Boele-Woelki (ed.) *Actuele ontwikkelingen in het familierecht*, - *Achtste UCERF symposium, UCERF REEKS 8*, (Ars Aequi Libri, Nijmegen, 2014) pp 9-29; H. Muir Wat, ‘Muir Wat on Abolition of Exequatur and Human Rights’, Online symposium, at <http://conflictoflaws.net/2013/muir-watt-on-povse/> (9 September 2013);

After the facts of the case and series of legal proceedings in Italy and Austria are briefly presented, the decisions of the CJEU and the ECtHR are analysed. Finally, some suggestions are offered on how to adjust the legislative framework so as to more appropriately accommodate the needs of actors in cross-border child abduction litigation. They may prove useful within the context of current discussion on the revision of the Brussels IIa Regulation.

II. *Povse v. Austria* – facts

After the relationship of unmarried couple Ms. Povse and Mr. Alpagó had deteriorated they separated in January 2008. Their daughter Sofia was born in December 2006 in Italy where the couple lived until the separation. Both parents had joint custody of the child in accordance with Article 317a of the Italian Civil Code. Ms. Povse travelled to Austria with her daughter on 8 February 2008 – on the same day that the Venice Youth Court awarded Mr. Alpagó sole custody of the child and issued a travel ban prohibiting Ms. Povse from leaving Italy without father's consent. This decision was revoked on 23 May 2008 whereby the Court authorised the residence of the child with the mother in Austria. In the same judgment, it granted preliminary joint custody to both parents. Until June 2009 meetings between the father and the child were held regularly. Thereafter Mr. Alpagó declared that he did not intend to continue with meetings and requested the return of the child to Italy. On 19 June 1990 the Leoben District Court dismissed the request for the return of the child under the 1980 Hague Child Abduction Convention. It referred to the decision of the Venice Youth Court of 23 May 2008 authorising the residence of the child in Austria. In addition to that, the Court issued an interim injunction against Mr. Alpagó prohibiting him to contact his daughter for 3 months, because of threatening messages sent to the mother.

4 M. Requejo, 'Requejo on Povse', Online symposium, at <http://conflictoflaws.net/2013/requejo-on-povse/> (9 September 2013); R.A. García, 'Povse v. Austria: Taking Direct Effect Seriously?', 2013, Online symposium, at <http://conflictoflaws.net/2013/povse-v-austria-taking-direct-effect-seriously/> (9 September 2013). On the analysis of earlier case law of the ECtHR, see P. Vlaardingerbroek, 'Internationale kinderontvoering en het EVRM', 32 *Nederlands Internationaal Privaatrecht* (2014) pp. 12-20.

In another proceeding in Austria the Judenburg District Court granted the request of Ms. Povse for preliminary sole custody. The Court based its jurisdiction with respect to matters of custody, access and alimony on Article 15(5) of the Regulation Brussels IIa.

In Italy, the Venice Youth Court issued the return order under Article 11(8) of the Regulation Brussels IIa on 10 July 2009. Holding that the Judenburg District Court had erroneously determined to have jurisdiction on the basis of Article 15(5) of the Brussels IIa Regulation, the Venice Youth Court decided that it retained its competence in the case at hand. On 21 July 2009, it issued a certificate of enforceability under Article 42 of the Regulation Brussels IIa.

The enforcement of the return order issued in Italy was requested on 22 September 2009 in Austria. The Leoben District Court dismissed the request on 12 November 2009. It held that the child's return without her mother would constitute a grave risk within the meaning of Article 13(b) of the 1980 Child Abduction Convention.⁵ After this decision had been reversed by Leoben Regional Court an appeal on points of law was filed with the Supreme Court (*Oberster Gerichtshof*). The latter submitted a request for a preliminary ruling to the CJEU on a number of questions relating to the interpretation of the Regulation Brussels IIa. In particular, the questions concerned the relevant provisions on jurisdiction (Arts. 10 and 11 para 8) and the provisions of Article 47(2) in connection with Article 42 of the Regulation relating to the enforcement of return orders. This decision has been analysed in greater detail *infra*, under 3.

After the CJEU had rendered its decision in 2010, legal proceedings in two jurisdictions continued. Most importantly, in its judgment of 23 November 2011 the Venice Youth Court withdrew the decision of 23 May 2008 which had granted preliminary joint custody to both parents and had authorised the residence of the child with the mother in Austria. In addition to that, in the same decision the Court awarded a sole custody to Mr Alpago and ordered the return of the child to the father in Italy. It should be noted that Ms Povse submitted no appeal against this judgment. This decision replaced the judgment of 10 July 2009 in which the return order initially had been issued.⁶ Soon thereafter on 19 March 2012 Mr. Alpago notified the Leoben District Court of the 23 November 2011 judgment and submitted a certificate of enforceability

5 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: 1980 Hague Convention). The text and related materials are available on the website of the Hague Conference on Private International Law (www.hcch.net).

6 On the basis of the decision rendered in May 2008, the child lawfully stayed in Austria for more than a year.

under Article 42 of the Brussels IIa Regulation.

The Leoben Court dismissed the request. On appeal, the Regional Court ordered the enforcement, holding that the custody decision of the Judenburg District Court of 8 March 2010 was not to prevent the enforcement of the judgment of 23 November 2011. When deciding upon a request in cassation, the Austrian Supreme Court rejected the appeal holding that the allegation of violating Article 8 was not relevant in the proceedings before the Austrian courts, but that it had to be raised before competent Italian courts.

Enforcement proceedings were initiated on 4 October 2012 before the Wiener Neustadt District Court. On 20 May 2013 the Wiener Neustadt District Court ordered Ms Povse to hand over the child to her father by 7 July 2013, otherwise coercive measures would apply. It referred to the Supreme Court judgment and reiterated that it was for the Italian courts to examine any question relating to the child's well-being.

In Italy, criminal proceedings were instigated against Ms. Povse for removal of a minor and failure to comply with court orders. It is not entirely clear whether or not the legal aid would be available to Ms. Povse in the proceedings in Italy.

1. CJEU Judgment

In its judgment of 1 July 2010,⁷ the CJEU provides for the interpretation of a number of provisions of the Regulation Brussels IIa, in particular Articles 10, 11(8), 40, 42 and 47(2). The first two relate to issues of jurisdiction in matters of child abduction or rather the exceptions from the general jurisdictional rule on parental responsibility contained in Article 8. Namely, under the Regulation the habitual residence of a child as the basis for jurisdiction under Article 8 has been deviated from in certain circumstances. The exceptions from the main rule on jurisdiction are contained in Articles 9,⁸ 10 and 11. The inter-

7 CJEU *Povse*-judgment, *op. cit.* n. 2.

8 Article 9 provides under which conditions the courts of the child's former habitual residence retain jurisdiction in cases when the child lawfully moves to another Member State (*perpetuatio fori*). Accordingly, the courts in the country of the child's former habitual residence remain competent during a three-month period for the purpose of modifying a judgment on access right issued in that EU Member State, provided that the person entitled to exercise access right has habitual residence in that jurisdiction. The only exception is in the case of tacit prorogation, i.e., if the holder of the access rights participated in the proceedings before the courts in the Member State of child's new habitual residence without raising the objection of lack of jurisdiction. This provision is not further discussed as it was not the subject of ruling in the CJEU *Povse*-judgment.

pretation of the provisions on jurisdiction by the CJEU will be addressed *infra*, under 3.1 and 3.2. The relationship between the Regulation and the 1980 Hague Convention is explained in greater detail *infra*, under 3.2.

The provisions of Articles 40, 41,⁹ 42 and 47 relate to the enforcement of judgments concerning rights of access and of certain judgments that require the return of the child. In particular, any judgment on the access rights and return orders declared enforceable in an EU Member State in accordance with Articles 41(1) and 42(1) respectively shall be enforceable in another EU Member State under the same conditions as a judgment rendered in the state of enforcement. The interpretation of the relevant provisions on the enforcement in the CJEU *Povse*-judgment will be analysed *infra*, under 3.3.

1.1 Jurisdiction over child custody in cases of child abduction - Interpretation of Article 10 of the Regulation Brussels IIa

The relevant provisions of the Regulation aim at discouraging parental child abduction amongst Member States and ensuring the prompt return of the child to the Member State in which it had his or her habitual residence immediately before the abduction.¹⁰ Both wrongful removal and wrongful retention is to be understood under the term ‘child abduction’. The definition of the ‘wrongful removal or retention’ is provided in Article 2(11) of the Regulation. It is drafted along the lines of Article 3 of the 1980 Hague Convention, even though it is somewhat broader than the definition in Article 3. Thus, the removal or retention is wrongful when it is carried out in breach of the rights of custody provided that such rights were actually exercised at the moment of abduction, or would have been exercised if it had not been hindered by the removal or retention.¹¹ Yet in the Regulation, it is added that the custody is considered to be exercised jointly when one of the holders of parental responsibility is not

9 In the present case, Article 41 is of no relevance as it concerns judgments on access rights, which were not at stake in the case at hand. Yet, the reasoning of the CJEU on the return orders in the case at hand may analogously be applied to judgments which concern rights of access. This is so because in judgments rendered both in cases of access rights, as well as return orders fall under the same favourable regime for enforcement provided in Article 47 of the Regulation.

10 Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, up-dated version 1 June 2005, p. 28, at http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf (hereinafter: Practice Guide).

11 Article 2(11) of the Regulation.

allowed to decide on the residence of the child without the consent of the other holder of the parental responsibility.

The first question submitted to the CJEU for a preliminary ruling is whether in the circumstances of the case at hand the Austrian courts, as courts of the child's new habitual residence, can establish jurisdiction on the basis of Article 10(b)(iv) of the Regulation Brussels IIa. The idea incorporated in Article 10 is that the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention, in principle retain jurisdiction to decide the custody of a child. That jurisdiction is transferred to the courts in the Member State to which the child was wrongly removed or retained only if the child has acquired a habitual residence in that Member State and provided that one of the alternative conditions under Article 10 is met. Thereby the Regulation ensures that the jurisdiction is retained by the courts of the 'Member State of origin' regardless of wrongful removal or retention of the child in another EU Member State (the requested 'Member State').¹²

Accordingly, the new habitual residence of the child in itself is not sufficient to deprive the courts of the Member State of child's habitual residence immediately before the wrongful removal or retention of their jurisdiction. Instead it must be accompanied by one of the conditions provided in Article 10 in order to vest jurisdiction upon the courts of the Member State where the child has been removed or retained. Firstly, the courts in a Member State prior to removal or retention, will have no competence if the child has acquired habitual residence in a Member State in which the child was removed or retained, and all those having the rights of custody have acquiesced in the removal or retention (Article 10(a)). Additionally, Article 10(b) provide the courts in a Member State where the child has acquired habitual resident will be vested with jurisdiction if the child has resided in that Member State for a period of at least one year after the person that holds the rights of custody has had or should have had knowledge of the whereabouts of the child; and the child is settled in his or her new environment; and provided that at least one of the following conditions is fulfilled:

- (i) No request for return has been filed before the competent authorities of the Member State where the child has been removed or is being retained within one year after the holder of the rights of custody has had or should have had knowledge of the whereabouts of the child.
- (ii) A request for return has been withdrawn and no new request has been filed within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child.

¹² Practice Guide, *op. cit.* n. 10, p. 28.

- (iii) A case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed, due to inactivity of the interested party to obtain the return of a child as provided in Article 11(7).
- (iv) The courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention has issued a judgment on custody that does not entail the return of the child.

Accordingly, under Article 10(b) a cumulative application of the following conditions is required: (1) A child has acquired habitual residence in the EU Member State where it has been removed or retained; (2) the residence has lasted at least one year after the person that holds the rights of custody has had or should have had knowledge of the whereabouts of the child; and (3) the child is settled in his or her new environment. When these conditions are complied with, one of the requirements under (i)-(iv) of Article 10(b) must be met in order to vest jurisdiction to the courts in a Member State where the child has been removed or retained.

In the case at hand, the Venice Youth Court is the court having jurisdiction over the place where the child was habitually resident before her wrongful removal to Austria. As already explained *supra*, under 2, the Venice Youth Court revoked its ruling prohibiting the mother from leaving Italy in its decision of 23 May 2008. Thereby it awarded provisional custody to both parents. With the view of rendering its final judgment on the rights of custody, the Court granted access rights to Mr. Alpagó and ordered an expert report on the relationship of the child with the parents. The Court also granted the right to decide on the practical aspects of the child's daily life to the mother. The father was ordered to share the costs of the child support. In addition to that, the conditions and times for the father's access right were determined. Finally, an expert report was to be submitted by a social worker concerning the nature of the relationship between the child and both parents.

The question submitted to the CJEU was whether the decision of the Venice Youth Court of 23 May 2008 presented 'a judgment on custody that does not entail the return of child' within the meaning of Article 10(b)(iv). If a positive answer was to be given, jurisdiction could have been transferred to the courts in Austria on the basis of Article 10(b)(iv) of the Regulation Brussels IIa.

It is not surprising that the CJEU held that the decision of 23 May 2008, as a provisional measure, did not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv). Consequently, it cannot be relied upon to transfer jurisdiction to the courts of the Member State to which the child has been unlawfully removed. Regarding

the transfer of jurisdiction under Article 10(b)(iv) the Court held, *inter alia*, that it:

‘must be interpreted as meaning that a provisional measure does not constitute a “judgment on custody that does not entail the return of the child” within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed.’

Thereby the Court has emphasised that the condition in Article 10(b)(iv) of the Regulation has to be interpreted strictly. Thus, a ‘judgment on custody that does not entail the return of child’ must be a final judgment, which no longer can be subjected to other administrative or court decisions. The final nature of the decision is not affected by the fact that the decision on the custody of the child may be subjected to a review or reconsideration at regular intervals.¹³ The Court rightly observes that if a decision of a provisional nature would be considered as a decision within the meaning of Article 10(b)(iv) of the Regulation, and accordingly entail a loss of jurisdiction over the custody of the child, the court of the Member State of the child’s previous habitual residence may be reluctant to render such provisional judgments even though they may be needed in the best interest of the child.¹⁴

In conclusion, the decision of the Venice Youth Court of 23 May 2008 concerns measures that are provisionally granted pending a final decision on the parental responsibility. As such it does not qualify as ‘a judgment on custody that does not entail the return of the child’ within the meaning of Article 10(b)(iv) of the Regulation. Consequently, in the case at hand this provision could not have been relied upon to transferred jurisdiction to the Austrian court.

1.2 Jurisdiction over return orders in child abduction cases - Article 11(8)

Whereas the provision of Article 10 relates to jurisdiction over the right to custody in cases of child abduction, Article 11 governs jurisdiction to order return of the child. Judgments rendered under Article 10 are recognised and enforced in other Member States in accordance with Sections 1 and 2 of the Regulation, Articles 23 and 28 respectively. A declaration of enforceability (*exequatur*) is required if a decision on the child custody given in one Member State is to be enforced in another Member State (Article 28).

In contrast to that, orders on the return of child rendered in one Member State under Article 11(8) are directly enforceable in other Member States under

13 CJEU *Povse*-judgment, *op. cit.* n. 2, para. 46.

14 *Ibid.*, para. 47.

the special, more favourable enforcement regime provided for in Section 4. Thereby no declaration of enforceability is required, as will be explained in greater detail *infra*, under 3.3.

In regulating certain aspects of return of the child, Article 11 of the Regulation modifies provisions of the 1980 Hague Convention. The latter remains applicable, but is supplemented by the provisions of the Regulation. Thereby, the Regulation prevails over the provisions of the Convention in matters governed by it.¹⁵ When a competent authority in an EU Member State has to proceed on the basis of the 1980 Hague Convention, it will do so by applying provisions of Article 11(2)-11(8) of the Regulation.¹⁶ Consequently, the application of the 1980 Hague Convention in EU Member States to a certain extent differs from the manner in which the Convention applies in non-EU contracting states.¹⁷ The Regulation adjusts the applicability of the 1980 Hague Convention in the European Union Member States in order to enhance its effectiveness. For example, paragraph 2 of Article 11 supplements Article 12 and 13 of the 1980 Hague Convention so as to require that the child is given the opportunity to be heard ‘unless this appears inappropriate having regard to his or her age or degree of maturity’.¹⁸

In addition to that, the courts at the Member State of wrongful removal or retention are under the obligation to act expeditiously and to decide upon an application for a return of the child within six weeks. There is no such a requirement under the 1980 Hague Convention. Also the Regulation poses a restriction regarding the reason for which a return of the child may be refused provided in Article 13b) of the 1980 Hague Convention. Thus, a grave risk that the return would expose the child to physical or psychological harm or would place the child in an intolerable position under Article 13b) of the Convention, cannot be relied upon if adequate arrangements have been made to ensure that the child is sufficiently protected in the country of origin after the

15 Article 60(e) of the Regulation Brussels IIa.

16 Article 11(1) of the Regulation Brussels IIa.

17 There are 93 contracting states to the 1980 Hague Convention (status per 10 April 2014, http://www.hcch.net/index_en.php?act=conventions.status&cid=24). Recently, the Council of the European Union adopted decisions on 15 June 2015 authorising certain Member States to accept, in the interest of the European Union, the accession of Andorra and Singapore to the Convention. When interpreting certain provisions of the Brussels IIa Regulation, the CJEU in its Opinion 1/13 of 14 October 2014 asserted that the declarations of acceptance under the 1980 Hague Convention were within the exclusive external competence of the EU. Since a number of the EU Member States had accepted the ratifications of Singapore and Andorra before the Opinion 1/13, the relevant decisions of the Council are addressed only to the EU Member States that have not already accepted the ratifications of the two states.

18 Article 11(2) of the Regulation Brussels IIa.

return.¹⁹ The provisions of the Regulation in Article 11(2)-(5) prevail over the relevant rules of the 1980 Hague Convention contained in Articles 11-13.²⁰

Finally, in Article 11(6)-(8), the Regulation goes further than the 1980 Hague Convention and determines how to proceed if the courts of the EU Member State where the child has been removed or retained decide that the child shall not return. Thus, it determines how the courts in a requested Member State will proceed if an order on non-return is issued.²¹ It also defines the rules of procedure to be followed by the courts in the EU Member State where the child had habitual residence immediately before the wrongful removal or retention.²²

The most substantial departure from the 1980 Hague Convention, is the rule provided for in Article 11(8) of the Regulation. Under the Convention, the jurisdiction to render a decision on the return of the child is vested with the courts of the country where the child has been removed or retained. Considering the strict conditions outlined in Article 13 of the Convention it is likely that those courts would order a return of the child in the vast majority of cases. The 1980 Hague Convention does not regulate how to proceed when the court of the country where the child has been wrongly removed or retained, renders a decision on non-return of the child. In contrast, Article 11(8) the Regulation provides that '[n]otwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child'. Thus, the Regulation shifts the jurisdiction to finally decide on a request for return from the courts of the 'requested Member State'²³ to the 'Member State of origin'.

Enforceability of such orders, so as not to delay the return of a child, is ensured by provisions in Section 4, Articles 42, 41, and 47. Thereby the exequatur is abolished regarding decisions on return of the child and rights of access. The underlying purpose of those provisions and Article 11(8) is to deter child abduction and to protect the child's right to maintain a personal relationship and direct contact on a regular basis with both parents. The need to protect this

19 Article 11(4) of the Regulation Brussels IIa.

20 For a detailed overview of the modifications and alterations in the application of the relevant provisions, see the sheet in Practice Guide, *op. cit.* n. 11, p. 35.

21 Article 11(6) of the Regulation Brussels IIa.

22 Article 11(7) of the Regulation Brussels IIa.

23 According to the 1980 Hague Convention they are competent to decide upon requests for a return of the child.

right as one of the fundamental rights set out in Article 24(3) of the Charter of Fundamental Rights of the EU²⁴ and to deter child abduction has repeatedly been emphasised in the ECJ jurisprudence.²⁵

In a similar vein, the ‘procedural autonomy’ of the provisions of Article 11(8), 40 and 42, and the priority given to the jurisdiction of the court of origin is confirmed in the ECJ case law.²⁶ Thus, there is no need for a return order issued under Article 11(8) to be preceded or accompanied by a final judgment on the custody rights, as it was confirmed in the *Povse*-judgment.²⁷

1.3 Enforcement of return orders issued under Article 11(8) of the Regulation

The Regulation provides for an enforcement regime of the return orders issued in Section 4 of Chapter III (Articles 42 and 41 – Article 47). Thereby the exequatur regarding decisions on return of the child and rights of access is abolished. The judgment of the court of the Member State of habitual residence of the child immediately before wrongful removal or retention shall be enforceable in accordance with Sect. 4 of Chapter III. A return of a child given in a judgment according to Article 11(8) and certified in the Member State where it is rendered, is to be recognised and enforced in another EU Member State without the need to obtain a declaration of enforceability and with no possibility to oppose the recognition and enforcement.²⁸

Besides, there is no possibility of opposing the enforcement. The only condition is that the judgment is certified in the Member State of origin by using form Annex III. Article 42 paragraph 2 lies down a number of conditions for issuing the certificate: the child and the parties were given the opportunity to be heard and the court has taken into consideration the reasons under Article 13 of the 1980 Hague Convention. Judgments

24 Charter of Fundamental Rights of the European Union, 7 December 2000, Nice, OJ 2000 C 364, p. 1.

25 See e.g., *Povse*-judgment, para 64 and ECJ judgment of 23 December 2009, Case C-403/09 PPU *Detiček* [2009] ECR I-12193, para 54.

26 See e.g., CJEU judgment of 11 July 2008, Case C-195/08 PPU (*Rinau*) [2008] ECR I-5271., paras. 63 and 64.

27 Regarding to the second question the CJEU in the *Povse*-judgment held that ‘judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child.’

28 Article 42(1) of the Regulation Brussels IIa.

certified in the country of origin are not examined in the country of the enforcement. The certificate will be completed in the language of the judgment, and will include details of any measure for the protection of the child if such a measure has been ordered. Return orders so certified in the country of origin, are enforced as a judgment rendered in the Member State of the enforcement.

The only reason to refuse the enforcement is if the judgment is irreconcilable with a subsequent enforceable decision.²⁹ The ruling in the *Povse*-judgment is clear that ‘a subsequent decision’ may only be a judgment rendered in the country of origin. Since the *Bezirksgericht* Judenburg issued an interim order on 25 August 2009, which became final and enforceable in under Austrian law, the question arose as to whether such a decision prevented the enforcement of the return order made in the State of origin (Italy) issued on the basis of Article 11(8) on 10 July 2009. The Austrian *Oberster Gerichtshof* submitted the question to the CJEU of whether the interim order of 25 August 2009 presents such a ‘subsequent enforceable judgment’ preventing the enforcement of the return order issued by an Italian court on 10 July 2009.

The Court concludes that the second subparagraph of Article 47(2) BIIa must be ‘interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional rights of custody and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child’.³⁰ In answering the question, the CJEU emphasised the importance of the allocation of jurisdiction established in Article 11(8) solely to the courts in the Member State of origin. Thereby the question of irreconcilability within the meaning of Article 47(2) can be raised only in relation to any judgment subsequently rendered by the courts in the Member State of origin. Consequently, jurisdiction over return orders under Article 11(8) is vested with the court of a Member State where the child had habitual residence immediately before the abduction. The CJEU holds that any other interpretation would circumvent the system set up by Section 4 of

29 Article 47(2)

30 *Ibid.*, ruling 3.

Chapter III and would deprive Article 11(8) of practical effect.³¹

Accordingly, a final ruling on the return of a child lies within the jurisdiction of the court in the EU Member State where the child has his or her habitual residence immediately before the wrongful removal or retention. In contrast to that, under the 1980 Hague Convention the jurisdiction for the return of a child lies with the courts in a Member State where the child has been removed or retained.

Moreover, no objections may be raised in a Member State of enforcement against return orders certified in a 'country of origin' as provided under Article 42 paragraph 2. As just discussed, 'a subsequent enforceable judgment' under Article 47 paragraph 2 is the only possibility to oppose the enforcement, but again it is a judgment to be rendered in the country of origin and not in the Member State of enforcement. The same holds true for any objection such as a violation of fundamental rights or best interest of the child. The ruling in the CJEU *Povse*-judgment is explicit in that respect:

'Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.'

Hence, the court in the Member State of enforcement is left with no discretion. It may not examine or control whether the court in the Member State of origin has complied with the conditions to issue the certificate provided in Article 42 paragraph 2. In other words, it must recognise and enforce the return order even if the court in a Member State of origin failed to apply or incorrectly applied the requirements in Article 42.³² The reasoning in the *Povse*-judgment merely confirms an earlier ruling of the CJEU.³³ Considering that a party is

31 CJEU *Povse*-judgment, *op. cit.* n. 2, para 78.

32 See also, P. R. Beaumont, 'The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction' 335 *Recueil des cours* (2008) pp 9-103, at. p. 93.

33 CJEU judgment of 22 December 2010, C-491/10 PPU (*Joseba Andoni Aguirre Zarraga v. Simone Pelz*), holding, *inter alia*, that the allegation of violation of fundamental rights were not to prevent the free circulation of judgments under the Brussels IIa Regulation.

left with virtually no remedy at the state of the recognition and enforcement of return orders, and that such orders are unconditionally enforced, it is not surprising that the enforcement regime under the Brussels IIa Regulation is referred to as ‘nuclear missile’.³⁴ The Regulation and its provision on the enforcement reflect the principle of mutual trust amongst EU Member States.³⁵

III. Proceedings before the European Court of Human Rights

Vast majority of cases submitted before the European Court of Human Rights (ECtHR) in the area of private international law concern family matters. Especially in cases involving cross-border child abduction violations of procedural standards under Article 6, as well as of substantive law issues under Article 8 of the European Convention on Human Rights³⁶ are likely to be invoked. Return orders and the decisions banning the removal of a child from particular jurisdiction have bearing on the right to respect family life incorporated in Article 8 of the Convention. In the case at hand, the legal battle in two jurisdictions continued after the CJEU had rendered its decision. Finally, the claim was brought before the European Court of Human Rights (ECHR).

1. Complaint submitted to the European Court of Human Rights

The applicants – the mother and the child – submitted complaint to the European Court of Human Rights that the Austrian courts had violated their right to respect for private and family life under Article 8 of the ECHR by ordering the enforcement of the Italian courts’ return order. Article 8 of the Convention reads as follows:

- ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of

34 Muir Watt, *op. cit.* n. 4, p. 6.

35 CJEU *Povse*-judgment, *op. cit.* n. 2. para 40.

36 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (hereafter: Convention). See the overview of the case law of the ECtHR concerning Article 8 of the Convention in A. R. Mowbray, *et. Al.*, *Cases, Material and Commentary on the European Convention on Human Rights*, 3rd edition. (Oxford University Press, Oxford, 2012) pp. 488-597.

disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

They maintained that the Austrian courts limited themselves to ordering the enforcement of Italian return order and thus failed to examine their argument that the return would constitute a serious danger for child’s well-being. In particular, the child could not communicate with the father, had not seen him for 4 years and she would not be able to accompany the child due to criminal proceedings against her in Italy. The applicants acknowledged that the decisions were in line with the position of the CJEU, yet violated Article 8 for not examining the arguments against the enforcement. Thus, the application to the ECHR invokes the questions of whether a EU Member State granting the enforcement under the Regulation Brussels IIa, can be held accountable for any violation of fundamental rights granted under the European Convention of Human Rights, and, if so, whether the Austrian court’s decision on the enforcement of the return order violates the applicant’s right to respect for their family life.

2. The judgment of the European Court of Human Rights

When deciding upon the application on the alleged violation of the Convention by Austria, the ECtHR posed the following questions:

- Was there an interference with the right to respect for family life?
- Was the interference in accordance with the law?
- Did the interference have a legitimate aim?
- Was the interference necessary?³⁷

The Court decided that there was an interference with the right to respect for family life, i.e. the decisions of Austrian courts ordering the enforcement interfered with the applicant’s right to respect for their family life. Such interference violates Article 8 of the Convention, unless it is ‘in accordance with the law, pursues legitimate aims and is ‘necessary in a democratic society’ to achieve that aim.’³⁸ The interference was in accordance with the law. The enforcement of the return orders was based on Article 42 of the Regulation Brussels IIa which is directly applicable in Austria³⁹ The interference did have a legitimate aim which is reuniting the child with the father. Compliance with

37 ECtHR *Povse*-judgment, *op. cit.* n. 2, p. 20 and 21.

38 ECtHR *Povse*-judgment, *op. cit.* n. 2, paras. 70-71.

39 *Ibid.*, para 72.

EU law by a Contracting Party constitutes a legitimate general-interest objective.⁴⁰

In addressing the last question whether the interference is necessary, the Court applied the *Bosphorus*-test.⁴¹ It held that ‘...the presumption of Convention compliance will apply provided that the Austrian courts did no more than implement the legal obligations flowing from’ membership of the EU. In other words, the presumption of compliance would apply if Austrian courts merely complied with their obligation to apply the relevant provision of the Regulation Brussels IIa as interpreted by the CJEU in the preliminary ruling.⁴² In such a case the ‘protection of fundamental rights afforded by the EU is in principle equivalent to that of the Convention system’⁴³ The Court examined further whether international organisation in question must protect fundamental rights to a degree equivalent to the Convention. If so, a Member State is presumed to have acted in accordance with the Convention. In the case at hand, the court of the Member State had no discretion than to order the enforcement of the return order. Otherwise the presumption does not apply. Additionally, there are no circumstances justifying that the presumption is rebutted, which would be if it is proven that the protection of Convention right was ‘manifestly deficient’.

Whilst applying the *Bosphorus*-test in applied the case at hand the reasoning of the ECtHR can be summarised as follows:

- 1) European Union protects fundamental rights to an equivalent degree and accordingly the presumption of compliance applies.⁴⁴
- 2) The EU legislative act in question - Regulation Brussels IIa - protects fundamental rights, considering the standards to be complied with by the court ordering the return of child and the fact that Austrian Supreme Court made use of most important control mechanism provided for in the European Union by requesting a preliminary ruling of the CJEU.⁴⁵

40 *Ibid.*, para 73.

41 ECtHR 30 June 2005, appl. no. 45036/98, *Bosphorus Airways v. Ireland*

42 Already in ECtHR 6 March 2013, appl. No. 12323/11 *Michaud v. France*, where a state had transferred a part of their sovereignty to an international organisation, that state would be in compliance with obligations under the Convention where the relevant organisation protects fundamental rights in manner ‘that it to say not identical but ‘comparable’ to that for which is protected by the Convention. *Michaud*-judgment, para 102.

43 *Ibid.*, para 77.

44 *Ibid.*, as determined in ECtHR *Michaud v. France-judgement*, *op. cit.* n. 42.

45 *Ibid.*, paras 80-81.

3) The Austrian courts had no discretion in ordering the enforcement, as the Regulation Brussels IIa introduces strict division of authority between the court of origin and the court of enforcement. Referring to its judgment in *Sneersone and Kampanella v. Italy*,⁴⁶ the Court concludes that any objection to the judgment should have been raised before the Italian courts as the court of the country of origin. It is open to the applicants to rely on their Convention rights before the Italian courts.

The applications failed to appeal against the return order. The question of any changed circumstances for a review of that order can still be raised before the Italian courts. Therefore, by enforcing the return order without any scrutiny of its merits the Austrian courts did not deprive the applicants of the protection of their rights under the Convention.

3. Criticism to the ECtHR judgment

The *Povse*-saga is the result of the existing complicated system of legal regulation on international child abduction in the European Union. It is not surprising that the judgments in the case at hand have attracted much attention and have been heavily criticised.

In particular, the appropriateness of applying the *Bosphorus*-presumption by the ECtHR may be questioned. It is true that both European legal orders – the EU Charter of Fundamental Rights and the ECHR – do incorporate and reflect comparable standards as far as the rights of the child are concerned. Yet, as rightly objected in the literature ‘they may not share a methodology in the assessment of the existence of a violation, nor give exactly the same weight to the various factors which weigh into the process’.⁴⁷ The accession of the European Union to the ECHR would diminish the relevance of the *Bosphorus*-presumption. However, in the light of the Opinion 2/3 delivered on 18 December 2014,⁴⁸ the CJEU ‘blocked the path of the EU to the European Convention on Human Rights’.⁴⁹

46 ECtHR of 12 July 2011, Appl. No., 14737/09 (*Sneersone and Kampanella v. Italy*).

47 Muir Watt, *op. cit.* n. 4, p. 5. For a more extensive criticism on the application of *Bosphorus*-test, see Requejo, *op. cit.* n. 4, p. 6-8.

48 Opinion 2/3 delivered on 18 December 2014, ECHR, EU: C:2014:2454.

49 ‘Editorial Comments: The EU’s Accession to the ECHR – A ‘NO’ from the ECJ’ 52 *Common Market Law Review* 1(2015),pp. 1-16. For the comments on the Opinion, see also, S. Peers, ‘The EU’s Accession to the ECHR: The Dream Becomes a Nightmare’ 16 *German Law Journal* (2015) pp. 213-222, <http://www.germanlawjournal.com/index.php?pageID=11&artID=1673>. (28 August 2015).

On the first appearance the ruling in *Povse* might seem as if the Court applied standards that somewhat deviate from principles in child abduction cases established in its earlier judgments outside the context of the Regulation Brussels IIa. These principles are summarised in *Sneersone and Kampanella v. Italy*⁵⁰ as follows:

- 1) In this area the decisive issue is whether there is a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order.⁵¹ Thereby the child's best interests must be the primary consideration.⁵²
- 2) 'The child's interests' are primarily considered to be in having his or her ties with his or her family maintained.⁵³ When assessing what is the best interests of the child a variety of individual circumstances will be considered, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences.
- 3) Return of the child cannot be ordered automatically or mechanically when the Hague Convention is applicable.

Especially the part of the decision in the *Povse*-judgment ruling that no control on the merit of the return order by Austrian courts did not violate the applicants' fundamental rights under the Convention, might appear as deviating from the above-mentioned standards. That is particularly true for the holding that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. Those unfamiliar with the complex system of international child abduction in the European Union, may perceive it as inconsistency in the rulings of the ECtHR when this part of the decision in the *Povse*-case is compared to the rulings in earlier relevant case law⁵⁴ and upheld in post-*Povse* rulings.⁵⁵ Especially by those whose rights are meant to be protected, this may be viewed as an inconsistency in applying the relevant

50 ECtHR *Sneersone and Kampanella v. Italy*-judgement, *op. cit.* n. 46.

51 See ECtHR of 6 December 2007, Appl. No. 39388/05 (*Maumousseau and Washington v. France*), para 62.

52 ECtHR of 19 September 2000, Application no. 40031/98 (*Case of Gnahoré v France*)

53 ECtHR no. 25735/94, §50, ECHR 2000-VIII (*Elsholz v. Germany [GC]*); ECtHR of 4 April 2006, no. 8153/04, para (*Maršálek v. the Czech Republic*).

54 ECtHR *Sneersone and Kampanella v. Italy*-judgement, *op. cit.* n. 46.

55 See e.g., ECtHR judgment of 26 November 2013, Application no. 27853/09 (*X v Latvia*), where the ECtHR in circumstances comparable to the *Povse*-case reasoned that the return orders were not to be issued when the best interest of the child is at stake.

standards. Yet, it should be emphasised that there is no departure from the earlier established criteria. The ECtHR did not alter the position that the return orders should not be issued automatically. It merely confirmed that the examination of the relevant criteria must be done before the court in the country of origin and not before the enforcement court. A different ruling is hardly conceivable in the context of the legal framework under the Regulation Brussels IIa.

It may be concluded that in the case at hand the major criticism in both the ECJ and ECtHR judgments does not lie with the legal reasoning or application and interpretation of relevant legal sources. Instead the existing legal framework under the Brussels IIa Regulation provided under Articles 11(8) and 42 is a real source of problem. It unnecessarily complicates the application of the 1980 Hague Convention and substantially deviates from the procedure provided therein. Most importantly, it is indeed doubtful that the system of automatic and unconditional enforcement of return orders under Article 42 adequately protects the best interest of the child.

IV. Abolition of exequatur in EU Private International Law

The judgments in *Povse*-case not only illustrates how inappropriate and counterproductive the setting under Articles 11(8) and 42 within the legal framework of the Brussels IIa Regulation, but also raise questions relevant for the discussion on the regime of the enforcement of judgments within the European Union.⁵⁶

⁵⁶ See e.g., the debate on abolishing the exequatur when the Regulation Brussels I was discussed: A. Dickinson, 'The Revision of the Brussels I Regulation. Surveying the Proposed Brussels I BIs Regulation – solid foundations but renovation needed', *Yearbook of Private International Law* 2010, pp. 247-309; G. Cuniberti, and G. Rueda, 'Abolition of Exequatur: Addressing the Commission's Concerns' *RebelsZ* (2011) pp. 286-316; P. A. Nielsen, 'The New Brussels I Regulation' *Common Market Law Review* (2013) pp. 503-528.

No uniform approach in regulating free circulation of decisions is maintained in EU PIL instruments. Thus, there are those which require the exequatur⁵⁷ and those where no declaration of enforceability in the country of the enforcement is needed. Whereas the enforcement regime under the Regulations where the exequatur has been retained is rather comparable, there is no uniform system of enforcement under the regulations where the exequatur has been abolished. Thus, under the recently revised Regulation Brussels Ibis,⁵⁸ no exequatur is required, but a party against whom the enforcement is sought still has the right to oppose the enforcement on certain grounds. Under the Insolvency Regulation,⁵⁹ no special procedure is required, but public policy exception may be invoked in the Member State of the enforcement. In a number of Regulations, no exequatur is required, but the enforcement may be refused if there is an earlier irreconcilable judgment.⁶⁰ Finally, virtually unconditional enforcement of the return orders under the Regulation Brussels Iia has already been addressed.

57 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12 (all Member States, including Denmark), Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 2003 338 of 23.12.2003 (divorce and parental responsibility, except decisions concerning return of child orders and decisions in the right of access/contacts) and Regulation (EU) No 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, OJ 2012 L 201 of 27.7.2012 (Denmark and the United Kingdom are not bound by it).

58 Regulation (EU) No 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 (recast), OJ L 351 of 20.12.2012, p. 1–32, as amended by Regulation No 542/2014 applicable as of 10 January 2015.

59 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160 of 30.6.2000, pp. 1–18.

60 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims O J L 143 of 30.04.2004, pp. 15 – 39; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, O J L 399 of 30.12.2006, p. 1–32; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations for judgments rendered in those Member States that have ratified the 2007 Hague Protocol.

In general, such diversity of approaches in regulating circulation of judgment within the EU can result in differences in the level of protection of ‘procedural position’ granted to certain ‘weak parties.’⁶¹ The line of reasoning in maintaining various approaches in that respect on the EU level is not always easily discernible. In any case, a more consistent and coherent approach in carrying out underlying policies and aims in the EU PIL legal instruments should be achieved when drafting new and revising the existing legislation. A certain degree of control is retained in all private international legal instruments on the EU level, the framework set out in the provisions of Articles 11(8) and 42 of the Regulation Brussels IIa being the only exception. The Report from the Commission of 15 April 2014⁶² illustrates that the possibility to revise the Regulation Brussels IIa has been considered. Within that context, the questions submitted for public consultation include issues such as should all judgments concerning parental responsibility circulate freely without exequatur including judgments on placement of a child in institutional care or a foster family and should there some means of control in the enforcement state be maintained.⁶³ If a proposal for revising the Regulation Brussels IIa would be offered, it is to be hoped that the EU legislator will use that opportunity to remedy the unsatisfactory existing framework on unconditional enforcement of return orders. In addition to that any decision on abolishing exequatur for some or all decisions concerning parental responsibility should be preceded by careful examination of its possible effects. And if an approach to abolish exequatur would be followed, a certain degree of control at the enforcement stage should be provided.

61 On the diversity of regimes of enforcement, as well as unclear line of reasoning in protecting interests of ‘weak’ parties and inconsistency among various PIL EU instruments, see V. Lazić, ‘Procedural Justice for Weaker Parties in Cross-border Litigation under the EU Regulatory Scheme’ 10 *Utrecht Law Review* 4 (2014) pp. 100-117, at p. 115-116.

62 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) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (Brussels, 15.4.2014 COM(2014) 225 final).

63 See also, the questionnaire thereto attached for the purposes of public consultations in questions no. 20 (relating to abolishing exequatur in the enforcement of judgments on placement of a child in institutional care or a foster family) and 21 (concerning maintaining certain main safeguards such as public policy, proper service of documents, right of parties (the child) to be heard, irreconcilable judgments).

V. Conclusions

Circumstances surrounding the *Povse*-judgments illustrate how the system of justice sometimes can work against those whose rights are intended to be protected. The EU legislators attach great importance to the access to justice, credibility and trustworthiness of the system of justice. It is often emphasised that one of the core values in the European Union and the rule of law, is a system where justice is not only done, but also is seen to be done. Factual and legal circumstances surrounding *Povse*-judgments certainly do not meet the standard. This especially holds true for the legislative framework concerning orders for return of the child under the Regulation Brussels IIa.

The framework on the direct enforcement of return orders within the Regulation is obviously well intended. The underlying purpose is enhancing the effectiveness of the 1980 Hague Child Abduction Convention and the issuance of the return orders so as to adequately protect the right of the child to have the ties with the family maintained. Yet it has failed to meet that aim. Moreover, it does not necessarily ensure an adequate protection of the best interest of child, as the *Povse*-case clearly illustrates. In addition to that, it implies two-fold or parallel applications of the 1980 Hague Convention, one amongst the EU Member States and the other for non-EU members. Such a system of legal regulation may create an appearance of inconsistency in administration of justice. Therefore, it is hoped that at the occasion of possible future revision of the Regulation the European legislator will no longer maintain the regulatory scheme under Article 11(8) and 42.

Within the discussion on further abolition of exequatur in the legal EU PIL instruments, the approach of 'direct enforcement' with no control in a Member State of the enforcement should generally be avoided. Regarding possible abolition of exequatur for decision on the custody of the child certain minimum standards of compliance with basic notions of morality and justice pertaining to public policy should be able to be examined at the enforcement stage.