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Právna analýza rakúskej a nemeckej legislatívy v oblasti rodinného práva a sociálno – právnej ochrany detí a mládeže

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Cross-border Children Cases – Analysis from an Austrian Perspective

1. Social and economic backgrounds

Immigration on economic reason occurs inside the EU in an increasing number of cases. This should be welcomed, basically: The freedom of movement is one of the columns of European integration.

Nevertheless, the increasing number of immigration is leading to an increasing number of cases of international Family conflicts. Child Protection, Custody and Contact have to be exercised by Youth Welfare Authorities and Courts. As more than one Family Law regime may be applicable, jurisdiction, conflict of Laws, recognition and enforcement are sources of questions of major complexity. The transition from the principle of nationality to the principle of habitual residence needs a lot of explanation, training and communication to the public. In addition, the different adoption concepts and in particular the principle of domicile in the UK and in the Republic of Ireland can produce misunderstandings and confusion.

To solve those questions is a demanding task for judges, Lawyers and social workers. Recent experience shows the urgent need of cross-border communication and cooperation.

To refine and enhance the communication and cooperation between the Courts and Authorities in the EU would improve the protection of children, proper adjudication and administration of Family Law issues and in a long view the conditions of free movement inside the Union.

2. Jurisdiction and applicable Law in Custody and Contact Proceedings

a. Sources of Law (Regulation – Convention – national Law)

The issue is characterized by a variety of provisions. In any case where the child has his or her habitual residence in a Member State of the EU (other than Denmark), the Brussels II^{bis}Regulation (in the following: BIIa) prevails any other provision. According to its Art 8 the courts of a Member state shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member state at the time the court is seized. According to Art 60 BIIa the Regulation has precedence before the following other instruments:

Article 60

Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(a) the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors;

(b) the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages;

(c) the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;

(d) the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;

and

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Furthermore the relation between the BIIa and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children is governed by Art 61 BIIa, stating as follows:

Article 61

Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

(a) where the child concerned has his or her habitual residence on the territory of a Member State;

(b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

In summary, BIIagives jurisdiction to the state of the habitual residence. The concept of nationality as decisive element is no more relevant. That is helpful for immediate hearings and thus enhancing the personal impression of the judge. It is also in line with any administrative child protection regime: Only the Authorities where the child resides can contribute to child protection in a way that makes sense.

b. The concept of habitual Residence

Questions of jurisdiction in cross border Family cases are ruled by Art 8 - 12 of the Regulation Brussels II[bis] (in the following: BIIa). The main concept is to give jurisdiction in matters of parental responsibility to the State of habitual residence. However, the BIIa lacks a definition of "habitual residence" as other Regulations or Conventions. Thus, most important guidelines for interpretation will com from CJEU judgements. For the moment, *Mercredi/Chaffe*, Case C-497/10 PPU, can be addressed as leading case. In this judgement, the CJEU ruled

[…]

41 By its first question, the referring court seeks clarification, in essence, on how properly to interpret the concept of '**habitual residence'** for the purposes of Articles 8 and 10 of the Regulation, in order to determine which court has jurisdiction to make orders on matters relating to rights of custody, in particular where, as in the case in the main proceedings, the dispute concerns an infant who is lawfully removed by her mother to a Member State other than that of her habitual residence and has been staying there only a few days when the court in the State of departure is seised.

42 In that regard, it must be stated, as a preliminary observation, that, under Article 8(1) of the Regulation, the test for determining the jurisdiction of a court of a Member State in matters of parental responsibility over a child who lawfully moves to another State is where that child is habitually resident at the time when that court is seised.

43 Under Article 16 of the Regulation, a court is deemed to be seised only where a document instituting proceedings or an equivalent document is lodged with that court. As stated in paragraph 24 of this judgment, on 9 October 2009 Mr Chaffe brought his case before the court concerned in the person of Mr Justice Holman, Duty High Court Judge, only by telephone. Accordingly, it was only on 12 October 2009, subject, as made clear in paragraph 26 of this judgment, to the referring court's determination that Mr Chaffe did not subsequently fail to take the steps he was required to take to have service effected on Ms Mercredi, that the High Court of Justice of England and Wales is deemed to have been seised. On that date, Chloé, who arrived on the island of Réunion on 8 October 2009, had been in that French department for four days.

44 In that regard, it must first be observed that the Regulation contains no definition of the concept of 'habitual residence'. It merely follows from the use of the adjective 'habitual' that the residence must have a certain permanence or regularity.

45 According to settled case-law, it follows from the need for a uniform application of European Union law and the principle of equality that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-98/07 *NordaniaFinans and BG Factoring* [2008] ECR I-1281, paragraph 17; and Case C-523/07 *A* [2009] ECR I-2805, paragraph 34).

46 Since the articles of the Regulation which refer to 'habitual residence' make no express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept, its meaning and scope must be determined in the light of the context of the Regulation's provisions and the objective pursued by it, in particular the objective stated in recital 12 in the preamble to the Regulation, that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity.

47 To ensure that the best interests of the child are given the utmost consideration, the Court has previously ruled that the concept of 'habitual residence' under Article 8(1) of the Regulation corresponds to the place which reflects some degree of integration by the child in a social and family environment. That place must be established by the national court, taking account of all the circumstances of fact specific to each individual case (see *A*, paragraph 44).

48 Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the conditions and reasons for the child's stay on the territory of a Member State, and the child's nationality (see *A*, paragraph 44).

49 As the Court explained, moreover, in paragraph 38 of *A*, in order to determine where a child is habitually resident, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent.

50 In that context, the Court has stated that the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see *A*, paragraph 40).

51 In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.

52 In the main proceedings, the child's age, it may be added, is liable to be of particular importance.

53 The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.

54 As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

55 That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.

56 It follows from all of the foregoing that the answer to the first question is that the concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.

57 If the application of the abovementioned tests were, in the case in the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence, under Article 13 of the Regulation.

Rather surprisingly for an Austrian judge, the English Courts stated that the child was habitually resident in England. However, the High Court of Appeal suggested the transfer of jurisdiction according to Art 15 BIIa: It would make sense to see the French Courts as the better forum to decide about custody.

The Court also took the occasion to promote judicial communication and to address the parents' conscience to achieve amicable settlement.

c. Preservation of habitual Residence in general

It is important to bear in mind that Art 8 refers to habitual residence "at the time the court is seised". For that reason, jurisdiction does not change after the seizure of a court ("perpetuatiofori"). Thus, no party can profit from relocation when a custody case is already pending. Only Art 15 (with which we will deal later) could help to overcome the distance between the court seized and the child concerned, living now in another country after a lawful removal.

If relocation took place before the other parent could even seize the court, we have to distinguish between lawful and wrongful removal. Cases of lawful removal are ruled by Art 9, such of wrongful removal are ruled by Art 10.

Art 9 holds back some aspects of jurisdiction after removal, stating as follows:

> Article 9
>
> Continuing jurisdiction of the child's former habitual residence
>
> 1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.
>
> 2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

We have to keep in mind that this exception only works for the purpose of modifying a judgment on access rights previously issued in that Member State. No provision retains jurisdiction for custody cases after a lawful removal. Nor jurisdiction is retained for firstly applied access = contact cases.

This seems quite clear, at least in theory. In practice, all the problems of identifying habitual residence will be addressed by the applicant who tries to keep "his" court. For this purpose, he

will raise all possible doubts about the relevant factual and legal aspects leading to admittance or denial of habitual residence.

d. Preservation of habitual Residence in Abduction Cases

If a parent abducts the child, she or he shall not benefit from that unilateral and wrongful action by gaining the jurisdiction of "her/his" court. To hinder the establishment of a new habitual residence (and thus, the jurisdiction of the state of Flight), Art 10 BIIa provides as follows:

> Article 10
>
> Jurisdiction in cases of child abduction
>
> In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:
>
> (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;
>
> or
>
> (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having 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 at least one of the following conditions is met:
>
> (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
>
> (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
>
> (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 pursuant to Article 11(7);
>
> (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

This provision perfectly fits to Art 16 of the 1980 Convention (furthermore: HCA), which provides:

Article 16

> After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

On the other hand, neither Art 10 BIIa nor Art 16 HCA will hinder a custody decision in the State of Origin during the return proceedings (as it is stated, e. g., in the judgement of the Supreme Court of Austria 6 Ob 146/14k). An order, issued by the State of Origin giving sole custody to the taking parent will stop the return case. An order giving sole custody to the left behind parent during the return proceedings can be subject to enforcement in the State of Flight. If the State of Flight has not ordered a non-return-judgement previously, the enforcement of the custody decision of the state of Origin in the State of Flight needs an exequatur proceeding according to Art 28, stating as follows:

> Article 28
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> Enforceable judgments
>
> 1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.
>
> 2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

The situation is different when the custody order is issued after a non return judgement. Such decisions are ruled by Art 42 BIIa, stating as follows:

> Article 42
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> Return of the child
>
> 1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the

judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.

Thus, judgements given in the state of Origin after the denial of return in the state of Flight are enforceable without the need for a declaration of enforceability and without any possibility of opposing its recognition, if pursuant to Art 42, the judgement has been certified in the Member state of Origin in accordance with Art 42.

Two aspects have to be underlined: As the CJEU stated in the Povse case, not only final decisions about custody are subject to this free movement of judgements, but also preliminary orders. Find the reasons in the words of the CJEU here:

In Case C-211/10 PPU,

REFERENCE for a preliminary ruling under Article 267 TFEU from theObersterGerichtshof (Austria), made by decision of 20 April 2010, received atthe Court on 3 May 2010, in the proceedingsDoris Povse v Mauro Alpago,

51 By this question, the referring court seeks to ascertain whether Article 11(8) ofthe regulation must be interpreted as meaning that a judgment of the court withjurisdiction ordering the return of the child falls within the scope of thatprovision only when the basis of that order is a final judgment of the same courtrelating to rights of custody of the child.

52 It must be observed that such an interpretation, which makes the enforcementof a judgment of the court with jurisdiction ordering the return of the childdependent on whether a final judgment on rights of custody has been deliveredby that court, has no basis in the wording of Article 11 of the regulation and,specifically, of Article 11(8). On the contrary, Article 11(8) of the regulationextends to 'any subsequent judgment which requires the return of the child'.

53 It is true that Article 11(7) provides that the court or central authority of theMember State where the child was previously habitually resident must notifythe parties of information it receives concerning an order of non-return made inthe Member State of removal and invite them to make submissions 'so that thecourt can examine the question of custody of the child'. None the less, thatprovision merely indicates the final objective of the administrative and judicialprocedures, namely regularisation of the child's situation. It cannot be inferredfrom that provision that a decision on the custody of the child is a prerequisitefor the adoption of a decision ordering the return of the child. Indeed, thepurpose of that interim decision is also to contribute to achievement of the finalobjective, in particular, resolving the issue of custody of the child.

54 Likewise, Articles 40 and 42 to 47 of the regulation in no way tie theenforcement of a judgment made under Article 11(8) and accompanied by thecertificate referred to in Article 42(1) of the regulation to the prior adoption of ajudgment on custody.

55 That interpretation of Article 11(8) of the regulation is confirmed by theCourt's case-law.

56 The Court has held that, although intrinsically connected with other mattersgoverned by the regulation, in particular rights of custody, the enforceability ofa judgment requiring the return of a child following a judgment of non-returnhas procedural autonomy, so as not to delay the return of a child who has beenwrongfully removed. The Court has also confirmed the procedural autonomy ofthe provisions of Articles 11(8), 40 and 42 of the regulation and the prioritygiven to the jurisdiction of the court of origin, in the context of Section 4 ofChapter III of the regulation (see, to that effect, *Rinau*, paragraphs 63 and 64).

57 That interpretation is also consistent with the objective and purpose of thesystem set up by Articles 11(8), 40 and 42 of the regulation.

58 Within that system, when a court of the Member State to which the child hasbeen unlawfully removed has made a decision of non-return pursuant to Article13 of the 1980 Hague Convention, the regulation, Article 60 of which declaresits precedence over that convention in relations between Member States,reserves to the court which has jurisdiction under that regulation any decisionconcerning the possible return of the child. Thus, Article 11(8) provides that ajudgment of the court which has jurisdiction is enforceable in accordance withSection 4 of Chapter III of the regulation in order to secure the return of thechild.

59 It must be borne in mind that, before making that judgment, the court which hasjurisdiction must take into consideration the reasons for and evidenceunderlying the decision of non–return. The consideration of those matters is onereason why such a judgment, once it is made, is enforceable, in accordance withthe principle of mutual trust which underpins the regulation.

60 Moreover, under that system the issue of the return of the child is examinedtwice, thereby ensuring that the judgment is more soundly based and that theinterests of the child have increased protection.

61 Further, as the European Commission has correctly observed, the court whichis ultimately responsible for determining rights of custody must have the powerto determine all the interim arrangements and measures, including fixing thechild's place of residence, which might possibly require the return of the child.

62 The objective of the provisions of Articles 11(8), 40 and 42 of the regulation,namely, that proceedings be expeditious, and the priority given to thejurisdiction of the court of origin are scarcely compatible with an interpretationaccording to which a judgment ordering return must be preceded by a finaljudgment on rights of custody. Such an interpretation would constitute aconstraint which might compel the court with jurisdiction to take a decision onrights of custody when it had neither all the information and all the materialneeded for that purpose, nor the time required to make an objective anddispassionate assessment.

63 As regards the argument that such an interpretation might lead to the childbeing moved needlessly, if the court with jurisdiction were ultimately to awardcustody to the parent residing in the Member State of removal, it must be statedthat the importance of delivering a court judgment on the final custody of thechild that is fair and soundly based, the need to deter child abduction, and thechild's right to maintain on a regular basis a personal relationship and directcontact with both parents, take precedence over any disadvantages which suchmoving might entail.

64 One of the fundamental rights of the child is the right, set out in Article 24(3)of the Charter of Fundamental Rights of the European Union, proclaimed atNice on 7 December 2000 (OJ 2000 C 364, p. 1), to maintain on a regular basisa personal relationship and direct contact with both parents, respect for that rightundeniably merging into the best interests of any child (see Case C-403/09 PPU*Detiček* [2009]

ECR I-0000, paragraph 54). It is clear that an unlawful removalof the child, following the taking of a unilateral decision by one of the child'sparents, more often than not deprives the child of the possibility of maintainingon a regular basis a personal relationship and direct contact with the other parent(see *Detiček*, paragraph 56).

65 Consideration of the situation at issue in the main proceeding againdemonstrates the correctness of this approach.

66 The grounds for the judgment of 10 July 2009 whereby the court withjurisdiction ordered the return of the child were that the relationship between thechild and her father had been broken. Consequently, it is in the child's bestinterests to re-establish that relationship and also to ensure, if possible, that themother is in Italy, so that the relationship of the child with both parents, and theparental abilities and characters of the parents, can be examined thoroughly bythe competent Italian authorities, prior to delivery of a final judgment oncustody and parental responsibility.

67 Consequently, the answer to the second question is that Article 11(8) of theregulation must be interpreted as meaning that a judgment of the court withjurisdiction ordering the return of the child falls within the scope of thatprovision, even if it is not preceded by a final judgment of that court relating torights of custody of the child.

On the other side, according to Austrian case law there is some room for review: Whether the basic conditions are met (non-return-order, proper completion of the form) has to be examined by the court of the enforcement state (see, e. g., Austrian Supreme Court 6 Ob 113/14g).

e. Lis pendens

The main objective of a lispendens rule is to hinder parallel jurisdiction and eventually irreconciliable judgements. A common room of justice cannot allow e. g. an Austrian judgement giving sole custody to the father and a Slovak judgement rewarding the mother with sole custody. The provision in Art 19 is traditional, as it states.

Article 19

Lis pendens and dependent actions

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its

proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

Most important aspect is the need of communication. It may be useful and desirable that the judges not only decide by their own discretion, but discuss the issue with the colleagues abroad.

f. the Court best fit to hear the case

More common to the UK as a State of common law tradition than to Austria or other civil law states, the BIIa induced the concept of "forum non conveniens" (actually better: forum plus conveniens") to the regime of jurisdiction. Art 15 BIIa provides as follows:

Article 15

Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or

(b) is the former habitual residence of the child; or

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility; or

(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.

A lot of question may be discussed in this context. I will only give some preliminary thoughts:

The concept of a court “better placed to hear” is extremely wide and open to a lot of deliberation. The discretion of the courts is open to discussion, legal remedies and, in consequence, danger of delay. It seems that some guidelines may be desirable, although a very flexible provision is favourable.

The transfer is not meant to be a transfer of the file, but only of the jurisdiction. Thus, a lot of paper –better said: a lot of information on paper – could be lost in the second stage of proceedings, ie in the court better placed. Better placed should be understood as "at least as good informed as the transferring court". The question may be, how to facilitate this.

The courts shall cooperate, as para 6 states. We may even make a stricter observation and say, there is no other way to meet the conditions than to cooperate. The questions raised within this new cross border judicial cooperation are big ones: How to communicate, how to document the communication, how to take the parties into the boat.

To bridge linguistic problems, Central Authorities or Liaison Judges are extremely useful.

The more experience with successful communication, the more mutual trust will be established. In consequence, the common room of freedom, security and Justice will be seen and felt inside and outside of the judicial community.

g. The Austrian Law of Custody – Relocationin the view of a foreign Judge (especially in Return Cases)

We have seen before how crucial it is to the jurisdiction in matters of parental responsibility to know whether a removal was wrongful. We find a definition in Art 2 Nr. 11 BIIa as follows:

> 11. the term "wrongful removal or retention" shall mean a child's removal or retention where:
>
> (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;
>
> and
>
> (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

The definition sees itself in accordance with the 1980 Hague Convention.

To establish whether a removal was wrongful, the court seized (in the State of Flight) has to apply the Family Law of another State (the state of the last uncontested habitual residence). As the breach of custody is relevant, it is important to know who enjoyed custody rights before the removal. Only existing rights can be breached. So it is relevant to know whom custody rights were given (i) by judgement or (ii) by operation of law.

At a first glance, it may be rather easily said whom custody war awarded by a court's judgement. The party, whom custody was given, certainly will be keen to present this judgement. What remains is a linguistic problem. It is not always easy to understand the real content of an order given by another State's Court. The pure linguistic problem should be solved by translation, although we all know the rather broad range of translations' quality. But it is not only the word, but the meaning of the word as a legal term. Even joint custody in German law does not mean the same as joint custody in Austria. It is a rather demanding task of comparative law to learn the meaning of "care", "custody", "parental responsibility" and a lot of other terms in a particular State's law. The only advice I can give in that field is to seek contact with the ejn network judges or the Hague liaison judge of the other state (or at least the Central Authority) to achieve a deeper understanding of the legal concept behind the terms used for custody provisions. The danger of grave misunderstandings and misinterpretation is really great. Reading foreign law instead of foreign judgements may even be more difficult. In the following I will try to introduce the Austrian concept of custody. As a foreign judge needs this provisions mostly to establish the breach of custody in Austrian law when he or she is confronted with an Application from a left behind parent in Austria for a return order, I will focus my overview on that standpoint.

To a child born from a married woman, this woman and her husband enjoy joint custody by operation of law. (Eventually the paternity of the husband may be contested). Sect 177 para 1 ABGB says that both parents are entrusted with custody if they are married (to be more precise: if they are married to each other at the time of the child's birth or get married after the child is born). If the mother is not married (to the father), she is entrusted solely with custody. However, both parents may declare to the marriage Registrar that they both are entrusted with custody (Sect 177 para 2 ABGB with details granting informed consensus and procedural certainty). The parents also may in any case submit an agreement regarding custody in court (even in modification of former agreement) which of them is solely or jointly entrusted with custody following Sect 177 para 3 ABGB. Even parents who do not share a common household may be entrusted with custody jointly. In this case, they have to consent (or the court has to order), at which parent's residence the child will have his or her main residence

according to Sect 177 para 4 ABGB. In exceptional cases parents may lose their custody rights: mainly if the parent endangers the welfare of the child (see Sect 181 para 1 ABGB), if he or she is not able to exercise the rights of custody (Sect 178 ABGB) or insofar as the interests of the parent and the child collides (Sect 271 ABGB). Neither custody agreements nor judgements are cut in stone. In the best interest of the child they can be amended (Sect 180 ABGB).

The details of the contents of custody can be found in Sect 160 ff ABGB. Usually three fields are named: (1) care and upbringing; (2) asset management and (3) legal representation of the child. More value is gained from a four-part matrix, distinguishing

Relation between child and parent (intern relation)	Care and upbringing	Assets management
Relation to third persons (extern relation)	Legal representation in the area of care and upbringing	Legal representation in the area of assets management

The most important section of this definition of custody for the return cases is the determination of the child's (not only habitual) residence in Sect 162 ABGB. The right of custody in the area of care and upbringing includes the right to determine the child's whereabouts, even to remove. The Austrian Family Law provides the right of custody (care and upbringing, assets management, legal representation), but also gives some basic rights to the non-custodial parent (sect 189: right to be informed about important matters in due time and to raise his or her opinion within a reasonable period of time. The opinion raised has to be considered in any event, if it is better in line with the child's best interest). The parent entrusted solely with custody therefore has to inform the other parent about important measures – and removal abroad certainly will be an important measure – and to give him or her the opportunity to be heard within appriate time before the measure is taken, Thus, unilateral removal of the child without providing information in due course and without hearing the other parents' opinion always will be a breach of Family Law.

If, however, the other parent is not intrusted with any custody (or has already gained a ne-exeat order from the Court, which is, according to *Abbott* vs *Abbot* US Supreme Court, the entrustment with custody rights in the sense of the 1980 Abduction Convention) this breach of family law obligations is, nevertheless, not a breach of custody in the sense of the 1980 Abduction Convention, Thus, an essential element is missing to constitute a child abduction case. A return application will not be successful at the end of the day if the left behind parent had no custody at all before the non-consensual removal or retention. Where both parents had

been entrusted with full custody before the removal or retention, a breach of custody cannot be denied. So, only one field of custodial situation is controversial: Sect 162 para 2 ABGB says:

> If the parents have agreed or the court has determined which parent entrusted with custody shall mainly be responsible for the child's care in his or her household, this parent is solely entitled to determine the child's residence.

This provision may be misleading. If you read it alone, it could be understood as if the other parent can do nothing against a removal. But, in my view, the provision does not stand alone but has to be read in connection with Sect 189, which gives the right to be informed and to be heard. The argument that Sect 189 does not apply for a custodial parent (but only for non-custodial parents) is not valid. Firstly, the application to custodial parents would be a very clear *argumentum a minoriadmaius* ("if even the non-custodial parent has such right, the more a custodial parent must have them). But this argumentum is not even necessary because Sect 189 para 5 provides explicitly:

> This provision applies accordingly to the parent who is entrusted with custody.

Other fields of custody are breached if a custodial parent in whose household the child is not mainly cared has no opportunity to be heard before the unilateral removal. A right of custody which could be paralyzed easily by the unilateral removal of the other parent would be too feeble to earn the name of a right. It would be merely useless.

Thus, we have to distinguish as follows

Removingparent			
Is not entrusted with custody	Is entrusted with custody but not the primary carer	Is entrusted with custody as the primary carer (holder of the household where the child mainly is cared)	Is entrusted solely with custody

<table>
<tr><td rowspan="4">Wrongfulremoval</td><td rowspan="4">Wrongfulremoval</td><td colspan="2">Has to notify the other parent in due course (Sect 189)</td><td colspan="3">Has to notify the other parent in due course (Sect 189)</td></tr>
<tr><td colspan="2">The other Parent</td><td colspan="3">The other Parent</td></tr>
<tr><td>Was not notified or applies for interim measures before the relocation

(Sect181)</td><td>Applies only later or never</td><td colspan="2">applies for interim measures before the relocation

(Sect181)</td><td>Was not notified or does not react at all</td></tr>
<tr><td rowspan="2">Return ordermaybegiven</td><td rowspan="2">Return ordermaybegiven</td><td rowspan="2">Return ordermaybegiven</td><td rowspan="2">Return order may be refused</td><td>A court order is issued before the removal</td><td>No court order is issued before the removal</td><td rowspan="2">Return order may be refused</td></tr>
<tr><td>Return ordermaybegiven</td><td>Return order may be refused</td></tr>
<tr><td colspan="7">No return order if the custody has not been exercised bevor the removal/retention</td></tr>
</table>

I have to admit that no judgement of the Austrian Supreme Court exists for now (in the second year this provisions entered into force) following exactly these distinctions. Also I learned that, e. g., not every German judge is convinced that an exclusive right of one parent cannot exclude the other parent. Nevertheless, I am convinced that the system I introduced is balanced and fair.

3. Beyond custody: administrative protection measures – the Austrian system

a. Shared competence in Legislation: Federal Law and Regional Law

Child protection may be a question of custody. As long as it deals only with custody, all jurisdiction lies with the civil Courts. In Austria, the District Court where the child habitually resides is the "Pflegschaftsgericht" who has to decide upon custody, access, information rights and so on. The District Court is first instance. Its judgement may be appealed (the legal remedy against an order from the Family Court is called "*Rekurs*"). As second instance, the Regional Court has to decide. In cases of major relevance concerning questions of Law, a second appeal ("*Revisionsrekurs*") to the Austrian Supreme Court (*ObersterGerichtshof*) may be admissible. Some matters of child protection, however, does not involve the courts but only the Child Welfare Authorities ("*Kinder- und Jugendhilfeträger*"), an administrative body of the Regions (*Länder*). Speaking about the competence for Legislation in the field of the Protection of children and Youth beyond the question of custody Austria has a system of shared competence forlegislation between federal law and regional law. According to the Austrian constitution (*Bundes-Verfassungsgesetz*) and Austria's character as a Federal state the competence for legislation concerning child protection measures is shared between the State (*Bund*) and the Regions (*Länder*).

Basic legislation in child protection measures lies within the competence of the State (*Bundesgrundsatzgesetzgebung*). The implementation, nevertheless, has to be legislated by each region (*Landesausführungsgesetze*). The basic legislation of the State only gives guidance to the regional implementing legislation, quite similar to the function of an EU Directive compared to the implementation acts of the member states.

Thus, legal child protection is based on (i) the basic Federal Act on Protection of Children and Youth (*Bundes-Kinder- und Jugendhilfegesetz*) and on (ii) nine regional implementation Acts (*Landes-Kinder- und Jugendhilfegesetze*). You may be able to find the sources as follows:

(i) **Federal Basic Act:** Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013) BGBl I 2013/69

http://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40149683/NOR40 149683.html

(ii) Regional Implementation Acts

(1) Burgenland

Gesetz vom 14. November 2013 über die Hilfen für Familien undErziehungshilfen für Kinder und Jugendliche (Burgenländisches Kinder- undJugendhilfegesetz - Bgld. KJHG)

LGBl. Nr. 62/2013 40. Stück

http://www.ris.bka.gv.at/Dokumente/Lgbl/LGBL_BU_20131127_62/LGBL_BU_20131127_62.html

(2) Carinthia

Gesetz vom 21. November 2013, über die Hilfen für Familien undErziehungshilfen für Kinder und Jugendliche (Kärntner Kinder- undJugendhilfegesetz – K-KJHG)

LGBl. Nr. 83/2013 38. Stück

http://www.ris.bka.gv.at/Dokumente/Lgbl/LGBL_KA_20131213_83/LGBL_KA_20131213_83.html

(3) Lower Austria

NÖ Kinder- und Jugendhilfegesetz

LGBl 9270-0

http://www.ris.bka.gv.at/Dokumente/LgblNO/LRNI_2013144/LRNI_2013144.html

(4) Upper Austria

Landesgesetz über die Hilfen für Familien und Erziehungshilfen für Kinder

und Jugendliche (Oö. Kinder- und Jugendhilfegesetz 2014 - Oö. KJHG 2014)

LGBl. Nr. 30/2014

http://www.ris.bka.gv.at/Dokumente/Lgbl/LGBL_OB_20140430_30/LGBL_OB_20140430_30.html

(5) Salzburg

Gesetz vom 18. März 2015 zur Erlassung eines Salzburger Kinder- undJugendhilfegesetzes sowie zur Änderung des Salzburger Jugendgesetzes,des Salzburger Pflegegesetzes sowie des Salzburger LandwirtschaftlichenSchulgesetzes

LGBl Nr. 32/2015

http://www.ris.bka.gv.at/Dokumente/LgblAuth/LGBLA_SA_20150403_32/LGBLA_SA_20150403_32.html

(6) Styria

Gesetz vom 15. Oktober 2013 über die Hilfen für Familien undErziehungshilfen für Kinder und Jugendliche (Steiermärkisches Kinder- undJugendhilfegesetz – StKJHG)

LGBl. Nr. 138/2013 Stück 34

http://www.ris.bka.gv.at/Dokumente/Lgbl/LGBL_ST_20131202_138/LGBL_ST_20131202_138.html

(7) Tyrol

Gesetz vom 6. November 2013 über die Kinder- und Jugendhilfe (TirolerKinder- und Jugendhilfegesetz – TKJHG)

LGBl. Nr. 150/2013 45.Stück

http://www.ris.bka.gv.at/Dokumente/Lgbl/LGBL_TI_20131219_150/LGBL_TI_20131219_150.html

(8) Vorarlberg

Gesetz über die Kinder- und Jugendhilfe (Kinder- und Jugendhilfegesetz –KJH-G)

LGBl. Nr. 29/2013 16. Stück

https://www.ris.bka.gv.at/Dokumente/Lgbl/LGBL_VO_20130716_29/LGBL_VO_20130716_29.html

(9) Vienna

Wiener Kinder- und Jugendhilfegesetz 2013– WKJHG 2013 [CELEX-Nrn.:32003L0086, 32005L0036, 32009L0050, 32011L0036, 32011L0098 und32013L0033]

LGBl. Nr. 41/2014

http://www.wien.gv.at/recht/landesrechtwien/landesgesetzblatt/jahrgang/2013/html/lg2013051.html

b. Measures stated in the Federal Basic Act

As basic rules the federal basic act stated specific measures of child protection. Please be aware that thoseare not immediate self-executing provisions. Those provisions are only binding the regional legislation. The implementing Acts contains the concrete and self-executing provisions for the regional Child Welfare Authorities. Nevertheless, it is useful to know the basic concept and it would be too much to introduce all nine systems in depth. So be aware of the following overview.

According to the basic act the child welfare authorities may act as follows:

When there is a concrete suspicion under specific circumstances which allows the conclusion

that the welfare of a child or young person[1] is in danger (for example: the report of the Child Welfare Authority, a report of somebody with professionalduties to report [e. g. pediatrists, teacher, Kindergarten] or credible allegations by third persons) the evaluation of danger (*Gefährdungsabklärung*) has to start immediately to evaluate the risk of danger. The evaluation of risk of danger consists of the investigation of the circumstances and of the preliminary establishment that a danger for the best interest of the child takes place. The basic act provides that any evaluationhas to be done in a structured procedure regarding professional standards and taking into consideration the specific character of the danger expected. In a non-exhaustive way the possible sources for establishing theevaluation of danger are summarized in sect 22 para 3 BKJHG as follows:

Talks with the concerned minors, with parents or other persons with the right for care and upbringing (furthermore: carers), the visit of the location where the child resides, reports and expertise from professionals and more.

The evaluation of danger shall lead to an assistance plan (*Hilfeplanung*). Its outcome has to be evaluated from time to time to establish if the chosen means of assistance to the upbringing (Erziehungshilfe) the assistance plan shall grantthe emotional,social, psychicand physic development and the education of the concerned minor. The assistance means, most promising in the individual case have to be taken, considering that it should be the least intruding means ("ultima ration" – last resort). The minors, the parents or other carers should participate in the evaluation of danger, they shall be heard before the taking and amending of measures of upbringing and they have to be informed about the possible consequences for the development of the children and the youth. All those participant shall be heard with their wishes and their wishes shall be fulfilled as far as this would not lead to negative effects on the development of the concerned minors or would lead to inappropriate costs. The participation of minors has to take into consideration their standard of development. Any participation has to be withdrawn if it would endanger the best interest of the minor.

Sect 25 ff. B-KJHG names the means of assistance. Firstly there is the **assistance of upbringing** (*Erziehungshilfe*). This protection measure takes place without taking the minor out of the actual environment. Ambulant assistance, current visits at home, visits to Doctors and reduction of contacts with endangering persons are included.

Sect 26 gives guidance to "**plenary upbringing**" (*volleErziehung*). If the best interest of the minor is in danger and this can only be mended with his or her upbringing in another environment than with the family or with the actual environment. Plenary upbringing takes place under the condition that the Child Welfare Authority has custody about the minor in the field of care and upbringing. The plenary upbringing may take place with removing the minor to near relatives, to foster parents or into institutional care.

If the parents or the othercarersagree with the upbringing assistance, only a **written agreement** between the carerand the Child Welfare Authority is necessary. If the parents or the other carers do not consent a necessary upbringing assistance, the Child Welfare Authority has to apply for the necessary orders at the court, for example to take away the custody or specific areas of the custody from the parents (or carers) by the court.

This custody orders are based on section 181 of the Austrian General Civil Code (*AllgemeinesBürgerlichesGesetzbuch – ABGB*). As an emergency measure the Child Welfare

[1] The Acts use both terms, whereas no legal definition of a „child" is valid (formerly – more than ten years ago, the Austrian General Civil Code gave a definition of a „child" as a person under the age of seven). To avoid irritation, I will use the term "minor" instead, meaning a person under the age of 18.

Authority has to grant upbringing assistance immediately and to apply to the court according to sect 211 ABGB.

c. Overview about the measures stated in the Regional Implementation Acts

The following overview is only parry superficial for examinations please try to find the provisions in the sited regional implementation acts. Although most of the implementation Acts past and copy the provisions in the Federal Basic Act, some details differ.

(1) Burgenland:

In the implementation act of Burgenland the following provisions can be found:

- Relations to foster parents in the case of plenary upbringing:section 23
- Evaluation of danger section 28
- assistance plan section 29
- plenary upbringing section 32

(2) Carinthia:

In the implementation act of Carinthiathe following provisions can be found:

- Relations to foster parents in the case of plenary upbringing:section 24
- Evaluation of danger section 39
- assistance plan section 42 ff
- plenary upbringing section 42 ff

(3) Lower Austria:

In the implementation act of Lower Austriathe following provisions can be found:

- Relations to foster parents in the case of plenary upbringing section 58 ff
- Evaluation of danger section 30 - 33
- assistance plan section 34 - 66
- plenary upbringing section 34 - 66

(4) Upper Austria:

In the implementation act of Upper Austriathe following provisions can be found:

- Relations to foster parents in the case of plenary upbringing:section 26 f
- Evaluation of danger section 40 – 42
- assistance plan section 41
- plenary upbringing section 44

(5) Salzburg:

In the implementation act of Salzburgthe following provisions can be found:

- Relations to foster parents in the case of plenary upbringing:section 26
- Evaluation of danger section 13 f
- assistance plan section 17
- plenary upbringing section 18

(6) Styria:

In the implementation act of Styriathe following provisions can be found:

- Relations to foster parents in the case of plenary upbringing: section 33
- Evaluation of danger section 25
- assistance plan section 27
- plenary upbringing section 28

(7) Tyrol:

In the implementation act of Tyrolthe following provisions can be found:

- Relations to foster parents in the case of plenary upbringing:section 23
- Evaluation of danger section 37
- assistance plan section 38
- plenary upbringing section 40 – 44

(8) Vorarlberg

In the implementation act of Vorarlbergthe following provisions can be found:

- Relations to foster parents in the case of plenary upbringing: section 26
- Evaluation of danger section 17
- assistance plan section 18 – 23
- plenary upbringing section 18 – 23

(9) Vienna:

In the implementation act of Viennathe following provisions can be found:

- Relations to foster parents in the case of plenary upbringing section 38 ff
- Evaluation of danger section 24
- assistance plan section 29
- plenary upbringing section 30– 37

d. Judicial Review of Child Protection Measures

As said before, the Child Welfare Authority has to **assist the parents** in exercising their parental responsibility. In some cases, in particular where no person closely related to the minor is able to exercise parental responsibility **custody** may be granted to the **Child Welfare Authority** itself (section 209 ABGB). The Child Welfare Authority has, according to section 211 para 1 ABGB, to take all necessary steps to provide court orders in the best interest of the child. If the case is urgent, the Child Welfare Authority can undertake the necessary **measures** in the field of care and upbringing in advance. Those measures will have legal binding until a court order is issued. The protection measures have to be reported to the court as soon as possible, at least within a time limit of 8 days after they have been taken. As far as protection measures had been taken the Child Welfare Authority is bearer of parental responsibility on a preliminary basis (i. e. until the court order). The Austrian act of non-contentious procedure (*Außerstreitgesetz*) provides for the necessary procedural provisions in section 107a. By application of the child or a person whose custody is afflicted by the protection measure, has immediately, as far as possible in the time limit of 4 weeks, to decide whether the measure of the Child Welfare Authority is preliminarily admissible or inadmissible. The application has to be lodged within the time limit of 4 weeks after the start of the protection measure. The court can declare the measure as inadmissible. Such an order is preliminary valid and enforceable as long as the court does not state otherwise (i. e. suspending the validity until the judgements has become final).

The legal remedy against declaration of inadmissibility of the measure is the appeal (*Rekurs*) by the child Welfare Authority which has to be lodged within the time limit of 3 days. Even if the protection measure was finalized (given up) by the child welfare authority without any court order, the child or the person whose custody was afflicted by the measure can apply for a statement that the measure was inadmissible. Such an application has to be lodged within the time limit of 3 months after the end of the measure.

These provisions are clearly led by the intention to care for a thoughtful and reluctant application of measures taking a child out of the actual family and his or her surroundings. It is the right of the parents (carers) deprived from custody to apply for a preliminary measure according to section 107a of the non-contentious procedure Act and to get back the custody rights as soon as this can be done in respect to the best interest of the child.

e. Some Case Law to Reunition of Children and Parents

As said before, a preliminary child protection measure of the Child Welfare Authority is only justified if the best interest of the child is injeopardy.

In a leading case the Austrian Supreme Court stated as follows (2 Ob 177/10h SZ 2010/152):

In cases where the Child Welfare Authority acts on the basis of its interim competence (section 211 para 1 ABGB) because it means that the child‘s welfare is in danger, the court has to examine the facts as swift as possible to be able to determinate whether these measures shall be maintained until the final judgment, if they are admissible. If not, the court has to amend the protection measures by court order or to revoke them entirely. Otherwise the protection measure will stay into force until the final judgment of the court. In the meantime the Child Welfare Authority is bearer of the custody rights in the field of the taken measures. There is no need for a judicial confirmation or a judicial mirror order.

Not only the court, but also the Child Welfare Authority itself can amend or revoke the protection measures. Whenever it is possible to **send the minor back** to his or her family (respective the parent with custody) a return is inevitable.

In its judgment 8 Ob 48/14p the Austrian supreme court stated, according to former case law, that the decision is only guided by the best interest of the child and that amending of the relations of custody is ultima ratio (only the last resort) under restrictive conditions. This is, of course, in line with Art 8 ECHR.

Protection measures need some **prognostic decision**, too. In one recently decided case, the Supreme Court stated that recent problems with lackof cooperation between the mother and the Child Welfare Authority are not sufficient. As long as it is not established that the mother neglectedthe child by purpose and where it could be said without reasonable doubts that the mother in her way wants the best for the child, the Supreme Court stated that more investigation about the skillsof the mother in particular if she is able to conduct herself in future according to the necessary amount of compliance, are necessary before the final decision to maintain her deprivation of custody (4 Ob 165/13p).

In summary everything has to be done to maintain the relation between parents and children and not to deprive the parents from the right of custody if it is not necessary in the sense of a last resort (ultima ratio). Whenever the situation changes, new attend to reunite the parents and the child has to be born in mind.

It may be difficult for parents from another culture to deal with Child Welfare Authority and the court on equal footing. The grant of legal aid may assist. We should not forget either that the confrontation with the administrative authority and the court can appear difficult for Austrian parents, too. It is a problem of education as much as a problem of cultural differences.

The Austrian procedural law with its protection of parties' guidance for parties which has no legal representative and his very low formal standard for requests applications and giving evidence may be of help for those parents quite far away from being accustomed to court proceedings.

4. From Foster Care to Adoption

a. Basic Differences

Foster Care means the exercise of the right of custody (in the field of care and upbringing) given to other persons than the bearer of custody. Sometimes parents themselves may give their children into foster care. Mostly foster care is, however, a protection measure, initiated by the Child Welfare authority. In that cases custody lies (and stays) within the child Welfare Authority, which only lives the "**exercise** of custody" to third people. Generally, **foster care** seems more favourable to the best interest of a child than **institutional care**. On the other side, it may enlarge the gap between the (natural) parents and the child even more. Although very committed, well trained and subject to review of the Child Welfare Authority, foster parents are in some aspects foreign people to the child, making (not to say faking) a social family. As the basic concept is to try to re-establish the relationship of child and natural parents as soon as possible, foster care is meant to be a transitorial measure. However, it may develop sustainability and may even end in adoption – thus legalizing the parent-children-

relation between foster parents and children. If a State (and relatives in the State) of Originwants "his" children back, it is important to act as swift as possible to avoid the establishment of a parent-child-relation between foster parents and child that cannot be extinguished without danger to the best interest of a (especially a very young) child.

b. Adoption in General

For the Austrian Law of Adoption please find an overview in the following:

The meaning of adoption: Persons capable of contracting may adopt a child. The adoption establishes the relationship between adopter and adoptee (Sect 191 para 1 ABGB). The adoption of a child by more than one person simultaneously or – as long as the adoptive relationship exists – successively is – for the moment – only admissible when the adopters are married to each other. As a rule spouses may only adopt jointly. Exceptions are admissible if the natural child of the other spouse shall be adopted, if one spouse must not adopt because he lacks legal requirements concerning his contractual capacity or age, if his residence has been unknown for at least one year, if the spouses have been separated for at least three years or if similar and particularly important reasons justify the adoption by only one spouse. This provision of Sect 191 para 2 ABGB was annulled by the Constitutional Court (with effect from the 1.1.2016 on) and will presumably be replaced by a regime more liberal regarding registered partners or non-registered partners.
Persons who have been entrusted with the care of the intended adoptee's property by an official order must not adopt him as long as they are not relieved of this duty. In advance they have to render account and prove the preservation of the entrusted property (Sect 191 para 3 ABGB).

Form; beginning of effectiveness: Adoption is established by a written contract between the adopter and the adoptee and by a judicial authorisation on application of one of the contracting parties. In case of authorisation the adoption becomes effective at the time of contractual agreement. The death of the adopter after this moment does not impede the authorisation (Sect 192 para 1 ABGB). An adoptee incapable of contracting concludes the contract by his legal representative who does not need a judicial permission to do so. When the legal representative refuses to give his consent, the court shall substitute it on application of the adopter or adoptee, if justified reasons for the refusal are inexistent (Sect 192 para 2 ABGB).

Age: The adoptive parents must be 25 years of age (Sect 193 para 1 ABGB). The adoptive parents must be at least sixteen years older than the adoptee (Sect 181 para 2 ABGB). An insignificant non-compliance with this age difference has been unremarkable according to former law, if a relationship between the adopter and the adoptee equivalent to a parent-child relationship already exists. The Constitutional Court also stated that the lack of the possibility to adopt a child not 16 years younger than the prospective adopter may contradict the best interest of a child and annulled therefore the words "at least sixteen years" coming into effect on 1.1.2016, too. If no amendment is done until this date, it would be sufficient that the adoptive parent is older than the child. Nevertheless, the potential of a parent-child

relationship would require a significant age difference, based on the underlined concept. It ist likely, that amendment will take place until 1.1.2016.

Judicial Authorisation: The adoption of a child incapable of contracting shall be authorised, if the adoption is in the child's best interest and if a relationship equivalent to a parent-child relationship exists or shall be established. If the adoptee is capable of contracting, the adoption shall only be authorised, if the applicants provide evidence that a close relationship equivalent to a parent-child relationship already exists, in particular if the adoptee and the adopter have – during a period of five years – lived together or provided assistance to each other in a comparably close relationship (Sect 194 para 1 ABGB).Except for the lack of those requirements the authorisation shall be denied if a preponderant interest of an adopter's natural child is opposing, especially if his maintenance or education could be endangered; for the rest economic concerns shall not be taken into consideration, unless the adopter acts with exclusive or preponderant intention to damage a natural child (Sect 194 para 2 ABGB).
Persons who have to consent: The authorisation may only be given with consent of the following persons: (1) the parents of the minor adoptee; (2) the spouse or registered partner of the adopter; (3) the spouse or registered partner of the adoptee; (4) the adoptee from the age of 14 years (Sect 195 para 1 ABGB). The right of consent of a person mentioned in Sect 195 para 1 is omitted if he concluded the adoption contract as legal representative of the adoptee; furthermore if he is not only temporarily incapable of a reasonable statement or if the residence of a person mentioned in para. (1) Nr. 1 to 3 has been unknown for at least six months (Sect 195 para 2 ABGB).The court shall substitute the refused consent of a person mentioned in para. (1) Nr. 1 to 3 on application of one of the contracting parties if there are no justified reasons for the refusal (Sect 195 para 3 ABGB).

Persons who have to be heard: A right to be heard have (1) the adoptee incapable of contracting from the age of five years, unless he has already lived together with the adopter since this time; (2) the parents of the adoptee with full contractual capacity; (3) the foster parents or the director of the institution where the adoptee is placed; (4) the youth welfare authority (Sect 196 para 1 ABGB).The right to be heard of an entitled person mentioned in para 1 is omitted if he concluded the adoption contract as legal representative of the adoptee; furthermore if he could not be heard or could only be heard with disproportional difficulties (Sect 196 para 2 ABGB).

Effects: Between the adopter and his descendants on the one hand and the adoptee and his descendants being minor at the time the adoption becomes effective on the other hand the same rights are established as from legitimate parentage (Sect 198 para 1 ABGB). Sect 198 para 2 ABGB deals with the with other effects, in particular it opens the gate to a same sex partnership adoption. Please see details in the ABGB and be aware that it is very likely that the provision has to be amended before 1.1.2016.

The obligations of the natural parents and their relatives under family law to provide maintenance and endowement to the adoptee and his descendants being minor at the time the adoption becomes effective remain valid (Sect 198 para 1 ABGB).The same holds true for the adoptee's obligation to provide maintenance to his natural parents unless they grossly failed in providing maintenance before the adoption to the child still being under the age of fourteen(Sect 198 para 2 ABGB).But the obligations remaining valid under para 1 and 2 are inferior to the same obligations that established by the adoption(Sect 198 para 3 ABGB).Rights under the law of succession remain valid between the natural parents and their relatives on the one hand and the adoptee and his descendants being minor at the time the

adoption becomes effective on the other hand (Sect 199 para 1 ABGB). All in all this gives not sufficient grounds to talk about adoption according to Austrian Law as incomplete.

Revocation and annulment: The judicial authorisation shall be revoked retroactively by the court:1. ex officio or on application of a contracting party if the adopter has been incapable of contracting at the time the adoption was concluded unless he has indicated that he is willing to continue the adoption after reaching full contractual capacity;2. ex officio or on application of a contracting party if an adoptee incapable of contracting concluded the adoption contract himself unless the legal representative or the adoptee after reaching full contractual capacity have subsequently given their consent or unless the court has substituted the later refused consent of the legal representative pursuant to Sect 192 para 2;3. ex officio or on application of a contracting party if the adoptee has been adopted by more than one person unless the adopters have been married to each other at the time the adoption has been authorised;ex officio or on application of a contracting party if the adoption contract has been concluded exclusively or predominantly with the intent to enable the adoptee to obtain the family name of the adoptive father or the adoptive mother or to create the appearance of an adoption in order to conceal an unlawful sexual relationship;5. on application of a contracting party if the adoption contract wasn't concluded in writing and if no more than five years have passed since the authorisation order entered into effectRights under the law of succession remain valid between the natural parents and their relatives on the one hand and the adoptee and his descendants being minor at the time the adoption becomes effective on the other hand (Sect 200 para 1 ABGB).If a contracting party did not know the reason for the revocation (para 1 n 1 to 3 and 5) at the time the adoption has been concluded, on his application the revocation has the effect of an annulment (Sect 201) in relation to the other contracting partyRights under the law of succession remain valid between the natural parents and their relatives on the one hand and the adoptee and his descendants being minor at the time the adoption becomes effective on the other hand (Sect 200 para 2 ABGB).In relation to a third party having obtained rights before the revocation by trusting in a valid adoption no objection may be raised that the authorisation has been revoked. A third party may not rely on the effects of the revocation to the disadvantage of a contracting party who did not know the reasons for the revocation at the time the adoption has been concludedRights under the law of succession remain valid between the natural parents and their relatives on the one hand and the adoptee and his descendants being minor at the time the adoption becomes effective on the other hand (Sect 200 para 3 ABGB).

The adoption shall be annulled by the court 1. if the statement of a contracting party or of a person entitled to consent to the adoption has been caused by fraud or unlawful and well-founded fear and the person concerned applies for the annulment within one year from the discovery of the fraud or the termination of the predicament; 2. ex officio if the perpetuation of the adoption would seriously endanger the well-being of the adoptee incapable of contracting;3. on application of the adoptee if the annulment serves the well-being of the adoptee after the dissolution or the annulment of the marriage of the adoptive parents or after the death of the adoptive father (the adoptive mother) unless a justified interest of the adoptive father (adoptive mother) who is concerned by the annulment and even though he (she) is deceased, doesn't contradict;4. if the adoptive father (the adoptive mother) and the adoptee capable of contracting apply for the annulmentRights under the law of succession remain valid between the natural parents and their relatives on the one hand and the adoptee and his descendants being minor at the time the adoption becomes effective on the other hand (Sect 201 para 1 ABGB).If the adoption was concluded by an adoptive father and an adoptive mother, the annulment pursuant to para 1 may only be declared to both of them;

the annulment may only be declared to just one of them if the marriage has been dissolved or annulled Rights under the law of succession remain valid between the natural parents and their relatives on the one hand and the adoptee and his descendants being minor at the time the adoption becomes effective on the other hand (Sect 201 para 2 ABGB).

After the annulment-order became final the legal relations established by the adoption between the adoptive father (the adoptive mother) and his (her) descendants on the one hand and the adoptee and his descendants on the other hand are terminated Rights under the law of succession remain valid between the natural parents and their relatives on the one hand and the adoptee and his descendants being minor at the time the adoption becomes effective on the other hand (Sect 202 para 1 ABGB).At that time the relations under family law between the natural parents and their relatives on the one hand and the adoptee and his descendants on the other hand are revived as far as they had been terminated according to Sect 197.At the time mentioned in para 1 the effects of the adoption pursuant to the naming law are considered as never produced with regard to the adoptee and his minor descendants(Sect 202 para 3 ABGB).
A revocation or annulment for other reasons than those being mentioned in Sect200 and 201 is inadmissible; as well as a contractual agreement or a law suit contesting the validity of the adoption contractRights under the law of succession remain valid between the natural parents and their relatives on the one hand and the adoptee and his descendants being minor at the time the adoption becomes effective on the other hand (Sect 203 ABGB).

c. Adoption without the consent of the biological parents

As said under b), adoption cannot be granted without the consent of the natural parents. In General, a parent exercising his or her parental rights in a way that jeopardizes the best interest of the child, may be deprived of his or her parental rights by a Court's order in the best interest of the child. This general approach has its mirror in Sect 195 para 3 ABGB, where the Court may replace the consent where one of the partners of the adoption contract is applying for that replacement and no reasonable grounds for the refusal are given.

Such a **replacement** is of course near to a "children expropriation", if done too liberal. Thus, it only may be done in exceptional cases, where the refusal of consent is only given *mala fide* and without any reasonable ground. If the refusing parent has neglected his parental duties gravely (not only in a less serious way) until now, his refusal is not deemed justified. An honest and not *mala fide* given refusal is not unjustified even if the best interest of the child would be better suited with the adoption (see, e. g., 2 Ob 239/09z), the mere wish not to cut of the link of parentage is, if not only given *mala fide*and contradictionary to the past behaviour, a justified reason (see, e.g. 4 Ob 149/10f). in this judgement, the Supreme Court stated:

> Whether adoption is in the best interest oft hechild and whether the refused consent hast o be replaced by court in lack of justified reasons hasto bee judged by the Court by ist thoughtful descretion based on the outcome ofthe proceeding. "Justified reasons" in case

law can be summarized as follows: The provision will secure that no adoption takes place in contrary to the well reasoned opinion of a person afflicted in their legal position by the adoption. Circumstances in favour of the best interest of the child are not sufficient for the replacement. In doubt a refusal is reasonable. The parent's wish to maintain the child-parent-relationship is not absolutely justifying reason but in that situation the adoption has to be real necessary for the child and his interest has to prevail clearly.

So, case Law and academic textbooks see the **replacement** of consent as **exception**. The rule is: No adoption without consent of the natural parents.

d. The Concept of Repatriation

The idea of **repatriation** is close to the idea of "children of the state". As long as the **nationality** is the decisive criterion of applicable law, it seems also appropriate to give jurisdiction to the state of origin. In the modern field of child protection and parental responsibility, however, nationality is not the decisive factor. **Habitual residence** is contradictory to the concept of repatriation. The court where the child habitually resides abroad is *exdefinitione*not the court of the minor's origin. Repatriation cannot be ordered by the court of the State of origin because this Court lacks jurisdiction. Thus, repatriation is not as easy done as it is wanted. The consular authorities can only act on behalf of a natural person who wants to be awarded with the parental responsibility. If there are relatives in the state of origin who wants to be awarded with parental responsibility, they have to apply for before the courts of the State of habitual residence. If the Child Welfare Authorities of the state of origin wish to get custody rights themselves, they also have to apply. The is only one bypass: If the Child Welfare Authority of the State of habitual residence shares the opinion of the Child Welfare Authority of the State of origin that it would be in the best interest of the child to be brought up in the State of origin, they may consent that custody shall be transferred from the Child Welfare Authority of the State of habitual residence to the Child Welfare Authority of the State of origin.

The Child Welfare Authority of the State of origin may relocate the child to this State. Nevertheless,**jurisdiction** remains with the **State of habitual residence** unless a transfer of jurisdiction is done via Arte 15 BIIa.

Practical experience teaches us that even consular bodies are not awareof this legal basis, not to speak from public media or private person. A lot of information should be given to the public and to private persons, either by the Ministries of Justice and the Ministry of Family or by the Central Authorities of all States concerned.

5. The Role of the Consular Bodies

International law gives **protection to the citizens of a State**if they are involved in proceedings abroad. The Consul of the State of origin is able to get information about proceedings and to act, if necessary, on behalf of the citizens of his or her State. Basically the

provisions are ruled by the Vienna Consular Convention, but there are some bilateral Conventions giving the Consul even more rights in custody cases. To give an overview about Austrian bilateral conventions, I only wants to address the Austrian-Turkish Convention and the Austrian-Yugoslavian Convention. Two of the biggest groups of immigrants in Austria, the Turks and the Serbs, thus have particular legal basis for consular assistance. This legal basis prevail the BIIa regulation, but they hardly fit together. The main reason for this observation is that consular assistance is governed by the **principle of citizenship**, where jurisdiction is governed by the **principle of habitual residence**. To bridge the conflicts between those two principles needs a lot of delicacy and a constructive and flexible approach from both sides.

Relatives abroad often can't believe that the parents are not apt and able to bring up the children. They often doubt that there is no element of prejudice or xenophobia in the decision of the Child Welfare Authority. Slogans like"robbery of children" are often found in public media. It is a very delicate but very important task of all authorities concerned, in particular the Ministries, the Central Authorities, the Child Welfare Authorities and the Courts, to avoid misunderstandings and bad feelings. The more of **communication** between the authorities concerned takes place, the less irritation will occur. Building mutual trust is at stake.

The most promising avenues for building mutual trust are cross border conferences and the installment of liaison judges or administrative representatives. This may also reduce the linguistic problems. If the concerned authorities are not able to trust each other and to share a constructive approach in the best interest of the child, they will fail as much as, unfortunately, the parents might have failed in a particular case.

6. Cross-border Placements

The placement of a child is ruled by art56 BIIa as follows:

> **Article 56**
>
> **Placement of a child in another Member State**
>
> 1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.
>
> 2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.
>
> 3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.

> 4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.

Although the provision looks rather short and easy, the **procedure** is **cumbersome**, if not clumsy. I do not want to go into details. I will only deliver some short observations:

The consecutive duties of information and cooperation are time consuming and not easy to follow. Easier, maybe **more streamlined procedures** shall be discussed. The scope should be drafted a lot clearer than now.

On the other side, the **addressees** of the provision are not only judges and Lawyers, in particular such ones with cross border experience, but **social workers**. A lot of education lacks for proper application of the provision. As Austrian Central Authority, we learned that many placements have been done in the past under total ignorance of Art 56 BIIa.

Having said this, we feel that in the exercise of the current provision there is much room for improvement. And so it is for the revision of Brussels II^{bis} in the future.

7. The tasks of the CA in Art 15, 55 and 56 matters

a. Some Cases to deliberate

Let us take a look on some cases:

A)

A 12 year old girl with social defects living in Vienna could be placed in an Irish educational camp. Parents and Child Welfare Authority share the opinion that this would be in the best interest of the child. The camp starts three days later.

Even with the most efficient assistance of both Central Authorities concerned, it is extremely difficult to act as swift but as cautious as possible to undertake the investigation to establish that the measure is appropriate and the best way to act in the best interest of the child.

B)

An Austrian 17 years old girl with severe mental problems needs treatment available only in a Munich clinic. Parents and the Austrian Child Welfare Authority are in consensus that she should stay in that clinic, even against her will (lack of compliance).

Jurisdiction in cases to keep a minor safe in a psychiatric institution by consensus of custodial parents and the doctors may or may not be in the scope of BIIa. In our case it can't be denied that the jurisdiction lies by the Austrian Courts. Nevertheless, the Austrian Court would not interfere in custodial procedure, as long as the medically informed decision of the parents is beyond any doubt far from jeopardising the best interest of the child. In Austria the judicial review of the decision to "take the child in" lies in the jurisdiction of the court where the hospital or clinic is sited. In our case, that would be Munich. We learned from the Munich judge that according to German Law, the jurisdiction lies in the Family Court, which, in the particular cases, lacks jurisdiction as the habitual residence of the child is in Austria (Linz, two hours from Munich, to be precise).

As CA, we suggested some possible avenues: a) The Linz Court could issue an order that there is no reason to amend the provision of custody in the light of the decision to take the child in the Munich clinic. b) The Linz Court could ask for the transmission of jurisdiction according to Art 15 BIIa. The Munich Court would be more suitable for the judicial review of the way of treatment in Munich.

Mostly the practical way is the best: Munich Court finally issued an order based on the urgency of the case. I consider this procedure as swift, as human, as practicable as possible. I would care less, whether it is in line with perfect dogmatic legal deliberation, too. At least, we saw a case where Art 15 BIIa might have been very useful.

C)

Requests of (not only) Slovak Central Authority are currently coming in to our Central Authority. They are based on Art 55 BIIa.

Article 55

Cooperation on cases specific to parental responsibility

The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

(a) collect and exchange information:

(i) on the situation of the child;

(ii) on any procedures under way; or

(iii) on decisions taken concerning the child;

(b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;

(c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;

(d) provide such information and assistance as is needed by courts to apply Article 56; and

(e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

Thus, every request is based on Art 55 as a request to collect and exchange information (i) on the situation of the child; (ii) on any procedures under way; or (iii) on decisions taken concerning the child.

Undoubtable, a request for information falls under the scope of this provision, when the social situation, the household and the health of the **child** and its education is asked. Sometimes, the request is made about the situation of a **parent** (who applies for custody and wants to remove the child to his habitual residence, e. g. from Bratislava to Vienna). In this situation it may be arguable that Art 55 gives no proper legal basis for examination. However, the taking of evidence Regulation would do, so it may be reduced to a question of labelling. Nevertheless, better drafting could cover this situation without any reasonable doubt (e. g. “on the situation of the child or his or her actual or prospective surrounding”).

The Central Authority has to **facilitate the examination**, not to do it in persona. In Austria we proceed as follows: We request the**report** of the competent Child Welfare Authority. Sometimes the address, where the situation shall be examined, is not very precise. Often "Mr. Google" can help, but everything will go faster with the right ZIP-Code. The answer is given as soon as possible. I have to admit that I am often surprised how fast some of the Child Welfare Authorities are able to act. If one needs more time, request for an update from the requesting Central Authority comes rather soon and without a lot of added value, because our means to make the procedure faster are more than limited.

8. Summary

The view of the EU to child protection measures over children residing inside the EU is pretty clear: The Authorities and Family Courts of the State of the habitual residence of the child have jurisdiction (see Art 8 BIIa). The same concept applies to the State parties of the 1996 Child Protection Convention, even to the state parties of its predecessor, the 1961 Convention. The relation between the Convention and the Regulation in matters of cooperation, recognition and enforcement is crystal clear: BIIa applies inter Member States (except of Denmark), the Conventions inter State parties. Some added spice can be put in the cauldron by regarding consular rights between the States: The consul of the state of residence may have some rights to be informed of and to apply in Family cases with citizens of his State. In Austria, we have even a bilateral Convention with Yugoslavia (i. e. now in particular Serbia and Bosnia-Herzegovina) stating that the consul might decide about the custody of a Yugoslavian (read now Serbian etc.) national.

This shows a kind of "clash of cultures" between the modern concept of habitual residence and the older concept of Nationality. With State parties of the 1961 Convention (e. g. Turkey) a blend is made through the concept of protection measures in the jurisdiction of (and governed by the Law of) the State of residence combined with the right of the State of origin to revoke those measures and replace them by his own measures. However, the coordination of the measures in both states needs a lot of communication between Central Authorities, the Courts, the child Welfare Authorities and in some cases with the consular representatives. Central Authorities and Courts seem to cover the role of the avant-garde in enhancing mutual trust and cooperation.

Children in International Relationships, Cross-border Child Protection - a German Perspective

1. Introduction

This paper describes and analyses the German system of child and youth services and focuses on cross-border situations[2].

2. Demographic development in Germany

Germany has a population of 81,1 million inhabitans (September 30,2014)[3]. This number was already reached in 1995 (81,817), increased up to 82.537 in 2003 and declines since that year[4]. This is a development in the former territory of the Federal Republic as well as in the new Länder (Federal States). Since 1997, there have been more olderinhabitans (persons over 60 of age) than young ones (persons below 20 years of age). In 2010 5.0 percent of the inhabitans were children under 6, 8.4 percent children between 6 and 15, 2.9 percent young people between15 and 18[5]. This means that 16.3 percent of the German population was less than 18 years old. Majority begins in Germany at the age of eighteen, section 2 German Civil Code („BürgerlichesGesetzbuch“/“BGB“)[6]. In 2010 the total amount of minors was 13,2193 million.

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[2] The author thanks Professor Dr. Brigitta Goldberg and Professor Dr. Dirk Nüsken from the EvangelischeFachhochschuleRheinland-Westfalen-Lippeand Dr. FraukeBachler and Ulrike Kluthfom the German Central Authority for their valuable support.

[3] Available at <https://www.destatis.de/EN/FactsFigures/FactsFigures.html>.

[4] Statistical Yearbook Germany 2012, p. 6, available at <https://www.destatis.de/EN/Publications/Specialized/Population/StatYearbook_Chapter2_5011001129004.pdf?__blob=publicationFile>.

[5] Ibid., p. 11.

[6] Available at <http://www.gesetze-im-internet.de/englisch_bgb/index.html>.

Already for a longer period the birth rate is declining, in the Eastern Länder even more drastic than in the former territory of the Federal Republic[7]. The number of births outside marriage is growing. In 2010 677.947 live births took place in Germany of which 225.472 were births outside marriage[8]. This is a total of 1/3 of births.

In 2012 women in Germany gave birth to their first child at an average of almost 29 years[9]. The average number of children born in Germany by a German woman is 1.5 children, for a foreign woman it is 1.6[10].

In 2010 95.1 percent of the live born children (644.463) had German citizenship out of which 4.6 percent had both parents with foreign citizenship and 14.66 percent had one parent with foreign citizenship. 4.9 percent of live born children in 2010 had foreign citizenship (33.484)[11].

There is a considerable rate of people, including young people, migrating to Germany. In 2010 15,746 million inhabitans (19.3 percent) had a migrant background, that includes migration after 1949 and all foreigners born in Germany as well as people born as Germans in Germany with at least one parent who has immigrated or one parent born as a foreigner in Germany[12]. In 2011 nearly 80 percent of the foreign population in Germany were from European countries out of which 37,5 percent were from other EU-countries. The biggest foreign populations were from Turkey (21,1 percent), Italy (7,5 percent) and Poland (6,8 percent). 30,241 people (0,4 percent) were from Slovakia[13].In 2010 798,282 people immigrated to Germany. 670,605 people departured[14].Poland was the top country of origin of people who immigrated to Germany followed by Romania and Bulgaria[15]. In 2010 91,209 minors (under 18 years) migrated to Germany and 60,589 departured[16].

In Germany as in most industrialised countries, the changing age structure caused by decreasing births and an increasing life expectancy is one of the greatest challenges in socio-political terms. According to population projections, in-migration from abroad might slow down the process of ageing and diminishing in the population living in Germany, but it will not be able to stop it. Migration and integration will be central socio-political issues for the foreseeable future[17].

[7] Supra note 4, p. 13.
[8] Supra note 4, p. 13.
[9] Supra note 4, p. 16.
[10] Supra note 4, p. 15.
[11] Supra note 4, p. 17.
[12] Supra note 4, p. 20.
[13] Supra note 4, p. 22.
[14] Supra note 4, p. 28.
[15] Supra note 4, p. 29.
[16] Ibid.
[17] Available at <https://www.destatis.de/EN/FactsFigures/SocietyState/SocietyState.html>.

Young migrants in Germany live concentrated in certain regions and neighbourhoods. There is a considerable heterogeneity of national origins in this population of children and youth. The immigration experiences are differing in various groups of young migrants. There are wide differences in the levels of education of persons with a migrant background versus non-migrants. A third of all second-generation and third-generation migrants does not have a vocational education certificate. The youth unemployment among migrants is significantly higher than for young people without a migrant background[18].

A large proportion of expenditure of public budgets is made for social security. However, questions of funding have been one of the reasons why a lively debate has been going on for some years about reforming the social systems[19].

3. Basic structures of the German system of child and youth services[20]

3.1. The federal structure of Germany

The Federal Republic of Germany is a federal state consisting of 16 so-called Länder, each of which is a state in itself. Except as otherwise provided or permitted, the exercise of state powers and the discharge of state functions is a matter of the Länder, Art. 30 Basic Law for the Federal Republic of Germany[21]. Federal law takes precedence over Land law, Art. 31 Basic Law. Regulations by the European Union are increasingly significant.

There are local self-governments in towns and counties performed by a council representing the citizens' interests. The local authorities discharge different types of roles. One are the statutory responsibilities of self-government including youth/social services, benefits and others.

[18] Available at <http://www.kinder-jugendhilfe.info/en_kjhg/cgi-bin/showcontent.asp?ThemaID=5002>.
[19] Available at <https://www.destatis.de/EN/FactsFigures/SocietyState/SocietyState.html>.
[20] The following is mainly based on: Child and Youth Services in Germany, 2009, available at < http://www.kinder-jugendhilfe.info/en_kjhg/cgi-bin/showcontent.asp?ThemaID=5002> and RealingRighrs, case studies on state responses to violence against women and children in Europe, 2011, available at < https://www.dijuf.de/tl_files/downloads/2011/Projekte/RRS-Report_(Forschungsbericht_EN)_2011.pdf>.
[21] Available at < http://www.gesetze-im-internet.de/englisch_gg/index.html>.

The Federation'spublic revenue is mainly derived from Federal taxes and the Federation's share of shared taxes.The Länder(Federal States) obtain their revenue mainly from Land taxes and the Länders' share of shared taxes as well as the Financial Equalization Scheme aiming to mitigate financial disparities between the Länder, and from Federal, complemental grants.The local authoritiesderive their funds mainly from community taxes, the local authorities' share of the income tax as well as trade tax, and from allocations made by the respective Land.

3.2. German Youth Welfare Offices

All towns and counties, which are administrative districts in their own rights, establish youth offices: In the context of local self-government, they are responsible for local child and youth services including their planning and funding. Currently there are youth welfare offices in 591 cities and districts.

The Länder run 16 Youth ministries of the Länder, Youth offices of the Länder and give financial support to the organisations and bodies responsible for child and youth services in the aim of further developing and evenly balancing the expansion of provision. They assist the local youth service bodies by providing counselling and advanced training.

The Federation runs the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth.In 2006, the federal government founded a National Centre for Early Prevention („NationalesZentrumFrüheHilfen","NZFH")[22] and, together with the Länder, initiated programmes for its development and promotion. The National Centre promotes a wide range of projects nationwide intended to improve cooperation between health care and child and youth welfare services.

Neither the federal level nor the Länder may set binding guidelines or issue instructions. As a result, the governments and parliaments bring their child protection policy into effect via legislation as their only binding instrument.

Beside administrative functions the youth office deals with all matters of child and youth service and, in particular, with counselling of young people and families with problems, developing proposals for the further development of child and youth services, youth service planning, funding and support for voluntary youth service agencies. The tasks of the youth office include family support, socio-educational services, support in juvenile and family court proceedings, guardianship by the Youth Office.

[22]More information available at <http://www.fruehehilfen.de>.

There are statutory and voluntary youth services co-operating as partners. Beside youth welfare offices as public authorities NGO's, independent youth welfare agencies are entrusted with risk assessment in cooperation with a qualified expert and encouragement of the child and/or custodial parent(s) to accept the necessary support. The duty to notify the statutory youth welfare office of child endangerment only applies if the NGO does not have sufficient means to assess or respond to the danger and if efforts to encourage the voluntary use of support services have been unsuccessful. The details in so far differ in the districts. The local youth office is the statutory sector which has the overall responsibility and shall refrain from activities of its own when activities can be provided by voluntary youth service providers. Those gain financial support by the statutory youth services.

There is a consensus on the inseparability of protection and help and a rejection of the older concept of child and youth welfare as a regulatory task aimed only at averting danger. Art. 1 Social Code VIII, Child and Youth Services Act („SGB VIII-Kinder- und Jugendhilfe-Gesetz"/ „KJHG")[23] states the principles: parents and young people are citizens and entitled to benefits. They have participation rights. Professional staff in child and youth services are obliged to involve them. Citizens have the right to choose among the facilities and services of various providers and organisations, Art. 5 KJHG. Children have the right to be involved in line with a child's specific stage of development, Art. 8 KJHG. The youth office has a protective mandate in cases of child endangerment, Art. 8a KJHG. The person having custodial rights and the minor have the right to the joint development of an assistance plan determining the needs, the nature and the extent of support services, Art. 36 KJHG.

There are nation-wide standards on the topic of dealing with child endangerment which are supplemented on a federal state or regional level through child protection acts, administrative provisions, policy recommendations, guidelines, scientific concepts and the like. The leading community associations have developed common guidelines for the implementation of section 8a SGB VIII[24], which play an important role („Bundesvereinigung der kommunalenSpitzenverbände", 2009). However, the sub-legislative provisions on the performance of the protection duties are distributed unsystematically through further education programmes and through their integration into the professional training curricula.

3.3. Child protection procedure

Art. 6 (2) Basic Law for the Federal Republic of Germanystates that the care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty. This means that the state has the function as guardian. The youth office, NGO youth welfare institutions, the family court and

[23] Only available in German <http://www.gesetze-im-internet.de/sgb_8/>.
[24] Supra note 22.

others such as schools, health care system, social worker in other working fields act as guardians.

Every person and institution can and should give information about an endangerment of the child to the youth office which has a protective duty. In 2012 the police, court and public prosecutor's office informed the youth office (17.2 percent), friends and neighbours (14.2 percent), schools and kindergarten (12.9 percent), anonymous information (11.1 percent) followed by information given by youth office and NGO, youth welfare services, health institutions, parents, relatives, children themselves, others[25].

Youth offices and the NGO-youth welfare organisations have to protect children, Art. 8a KJHG. They have to check the situation of the individual child and have to assess the risk whether the child's best interests are in danger.Doing so they normally involve parents, child and others being in contact with the child (for example school, kindergarten). The youth office gives a diagnosis and prognosis. If required, they must be offered the necessary support services. That means, if necessary, the youth authority grants assistance, for example by engaging social educational services in case of willingness of the legal guardian of the child. Before implementation of sustained support services the youth welfare office has to draw up a service plan, following a help conference in which all relevant parties participate. This includes children and their parents, foster parents or other carers as well as NGO professionals and psychiatrists or psychotherapists, if such treatment is to be offered. The youth welfare offices must then review any service plan in further help conferences at regular intervals, section 36 (2) SGB VIII[26].

If a danger is identified or if a more thorough assessment of the danger is deemed necessary and the parents are neither willing nor able to cooperate, the youth welfare office must appeal to the family court, section 8a (2) (1) SGB VIII. In emergency cases, the youth welfare office has to take children into care, if neccessary, assisted by the police, section 8 (2)(2), section 42 SGB VIII. If the parents oppose this, the child must be returned or an application must be made to the family court without delay.

In 2012 106.623 child protection procedures in youth offices took place. The results was: no endangerment and no need for further assistance in 32 percent, no endangerment but need for further assistance in 32 percent,urgent child endangerment in 16 percent and latent child endangerment in 20 percent[27].

Only family courts may intervene withparental rights. The family court is a section of the local court. It only deals with family affairs. The decisionmaker is one professional judge.Exceptions are made for cases of serious emergency, in which police and/or youth

[25] Available at <https://www.destatis.de/DE/Publikationen/Qualitaetsberichte/Soziales/Gefaehrdungseinschaetzung.html>.
[26] Supra Note 22.
[27] Supra Note 25.

welfare office may temporarily ensure protection and must inform the family court promptly. If the family court becomes aware of grounds to assume child endangerment it must institute proceedings ex officio.

Where the physical, mental or psychological best interests of the child or its property are endangered and the parents do not wish or are not able to avert the danger, the family court must take the measures necessary to avert the danger,§ 1666 German Civil Code[28].There is no further definition of „best interests of the child". It is the task of the judge to define with the help of general criteria and standards the best interests in the individual case. There is no need to distinguish in detail whether the physical, mental or psychological best interests are touched as differentiation is often difficult. They often go together. This arrangement proves it's worth in practice. The judge can individually decide and there is no need to distinguish different forms. The concept of „best interests of the child" is the relevant factor. But this does of course not release the judge from arguing with regard to proven facts.

There is unanimous consent that the state doesnot have the right and the duty to care for the best advancement of the child. The child cannot claim/demand that the state looks for ideal parents[29]. Parents with their social-economic situation, their values and behaviour are generally the child's fate[30]. Only in case of an endangerment the state has to intervene.

The Federal Constitutional Court and the Federal High Court of Justice gave important guidelines: endangerment means that a present and existing threat that can be foreseen with a high degree of certainty, such that future developments will result in considerable harm to the child[31]. This means that the expected injuries must be serious, imminent and anticipated as certain[32]. Endangerments often occur in connection with parents with shortcomings such as psychological deseases, drug addiction, alcoholism, neglects, child-rearing errors, assault, schooling, access, medical treatments.

Evaluating the situation the court hears the parents (section 160 Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction („Gesetzüber das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligenGerichtsbarkeit"/"FamFG")[33]and the youth office, section 162 FamFG. The judge personally hears the child (section 159 FamFG), based on a decision of the Constitutional Court[34]starting at the age of three. In proceedings concerning parental responsibility we have to assume generally that the bindings, relationships and tendencies of a child related to his/ her attachment figures as well as his/ her wishes and will are important criteria for the decision. The right of dignity and personalty gives the child the right to be heardby the judge personally.

If necessary the court appoints a guardian ad litem for the child who has the task to determine

[28] Supra note 6.
[29] German Constitutional Court NJW 1973,133.
[30] German Constitutional Court NJW 2010, 233.
[31] German Constitutional Court FamRZ 2012, 1127; BGH FamRZ 2005, 344.
[32]BGH –already in 1956- FamRZ 1956,350.
[33]Available at <http://www.gesetze-im-internet.de/englisch_famfg/englisch_famfg.html#p0833>.
[34]BVerfG, No. 1 BV R 349/80.

and to assess the child's interests in the proceedings, section 158 FamFG. In cases concerning children in danger the appointment is required as a rule. Guardian ad litems are independant participants in the proceedings, mostly with a psycho-social background or lawyers, who receive compensation by the court (350,-€ or 550,-€ per case and per child).

In proceedings concerning the question of an endangerment to the welfare of the child the court should discuss how the endangerment can be handled, particularly through public agencies and the possible consequences of not accepting necessary assistance, section 157 (1) FamFG. The court shall promptly assess the issuance of an interlocutory order, § 157 (3) FamFG.

After hearing all participants of the proceedings and, if necessary hearing the opinion of an independant expert (mostly a psychologist) the court decides on the measures required in the individual case to remove the danger to the interests of the child.The judge has a discretion.The measures that have to be necessary can include:

>instructions to seek public assistance, such as benefits of child and youth welfare and healthcare;

>instructions to ensure that the obligation to attend school is complied with;

>prohibitions to use the family home or another dwelling temporarily or for an indefinite period, to be within a certain radius of the home or to visit certain other places where the child regularly spends time;

>prohibition to establish contact with the child or to bring about a meeting with the child;

>substitution of declarations of the person with parental custody;

>partial or complete removal of parental custody. Suspending only a part of the parent's right to decide on the child is possible and often used. If parental custody is withdrawn wholly or in part, the court appoints a guardian – when parental rights are withdrawn in all respects- or curator – when parental rights have been restricted- who decides on the appropriate support for the child. That might be a private person such as a relative, a professional person or the youth authority.

Measures which entail a separation of the child from its parental family are admissible only if the danger cannot be countered in another way, not even through public support measures, section 1666 a (1) BGB. The complete care for the person of the child may be revoked only if other measures have been unsuccessful or if it is to be assumed that they do not suffice to avert the danger, section 1666a (2) BGB.

Every participant of the proceedings can go on appeal with a time limit of one month, sections 58 – 69 FamFG. Then three professional family judges decide in the Higher Regional Court. Against that judmentin general an appeal on points of law within one month is possible, sections 70 – 75 FamFG. The Federal High Court of Justice decides.

These decisions are not final and may be amended at any time. A measure to avert a danger to the child's best interests must be reviewed by the court on suggestion and on a regular basis – often once a year- ex officio. It must be terminated by the court if the child's best interest is no longer in danger or the measure is no longer necessary, section1696 BGB; section 166 FamFG.

Criminal proceedings are the other judicial branch to react on endangerment of a child. In the criminal justice system the separation between child protection and prosecution is central to the German approach to child maltreatment. On the one hand, the legal system reacts to the infringement of a child's legal rights with a differentiated code of criminal offences, which guarantees that such acts are punishable. On the other hand, child protection is based on the view that for effective protection and support, it is vital to win the trust and cooperation of the families whenever possible; criminal prosecution may impair this relationship, especially if the abuse occurred within the family. Therefore, the law draws a line between child protection and criminal justice and will resort to criminal justice only when in the best interests of the child.

3.4. Analysis of the cooperation of the different stakeholders

The youth welfare office is an independant participant in the proceedings. The court can propose measures necessary, the youth office then decides whether these measures will be granted and paid by the youth office. The court has no right to direct the youth office. This strengthens the proceedings but can also weaken them. In practice this causes rarely a problem. In case that youth office and court are of different opinions about the measures needed those are further discussed, the court then often asks in addition for the opinion of an independant expert. As a result of that discussion youth office and court regularly finally agree in the measures necessary.

The youth welfare offices are often understaffed so that the officers take care for urgent child protection cases but not as detailed, and sometimes not as quick, as it would be desirable. Because of a few bad cases, that were reported extensively in the mass media, the youth authorities have shortened their procedure in case of evaluation of an endangerment. There is often a lack of time for the other cases concerning children without an endangerment. There is a similar situation in the family courts. The judges often have to deal with a heavy workload so that they can not deal with the individual case in such details as desired. The pre-drawing of urgent cases causes more delay for the other cases.

The financing of projects by the youth office depends on the decision of those having the local responsibility. The financing is often not secure. Because of increasing costs and depts of the local governments there is a danger that they try to reduce offers to save money. If legal rights to support are not actively claimed by children, parents, professionals such as courts there is a danger that the lack of strictly binding duties is increasingly used to reduce the offers. Another point we also have to be aware of is that another department within the youth authority decides on the payment. The youth welfare officer responsible for the child care often asks the court for a clear statement in the decision that a certain measure is necessary.

Such a statement by the court helps the youth welfare officer to convince his/her colleagues in the same youth welfare authority responsible for the finances to grant them.

There is an urgent need for the different systems to collaborate. The Federal Child Protection Act from 2012 („GesetzzurKooperation und Information imKinderschutz („Bundeskinderschutzgesetz“/“BKiSchG“)[35]is of big help in so far. It focuses on prevention, active protection, early support. The different professionals in the field of child protection should work together and build up networks organised by the local youth offices, section 3 BKiSchG. This results in general information about the possibilities and limits of the other systems, personal knowledge of those involved, discussios about cooperation and better teamwork in the individual case. This is an ongoing challenge to face the individual case and new problems.

4. Cross-border family cases concerning children

4.1. Endangerment of a child with a cross-border background

Parallel to the situation that the number of children living in Germany and having a cross-border background in whatever way is growing the number of cases of endangerment of a child with a cross-border backgound is increasing. This leads to new problems and new responsibilities of the authorities involved. As already mentioned most of the people migrating to Germany are from other European countries including South-East Europe. The freedom of movement within the EU is an important factor in so far. We locate qualified immigrants and migration out of poverty[36]. The second group mentioned are mostly people who left their country because of poverty already in their country of origin. In general they move to German regions that are economically underdeveloped[37]. They often join a group of fellow countrymen already living here. A group of poor people comes into existence with a different cultural background, low educational background and no or only limited access to social benefits. The situation of children growing up under such circumstances means a special challenge for the youth authorities and the courts. It is not enough only having a look at the children. The families need extensive help in questions of habitation, access to social benefits, job-seeking, regulation of personal bankruptcies, acess to healthcare, language competences, school and kindergarten, social links[38].

Children with a cross-border background have the same right to receive the help of the state that they need, Art. 2 and Art. 3 UN Convention on the Rights of the Child. Helping in such a situation is a difficult and labor-intensive task for the youth authorities who already suffer from capacity overload. The question arises whether the regular standards for child protection fit these situations of endangerment because of poverty while the family structures are often

[35]Only available in German <http://www.gesetze-im-internet.de/kkg/>.
[36] Bauer andLingg, Zuwanderung aus Südosteuropa – Neue Herausforderungen für die Jugendhilfe, NDV 2014, 476 -478.
[37] Ibid., p. 476.
[38] Ibid., p. 477.

in a pretty good order. Cultural differences have to be accepted. The definitions of „best interest of the child“ and „protection of the child“ have to be adopted[39]. The limit of acceptance and the beginning of an endangerment has to be identifiedin each individual case. Even if there is a right under the law of the state of habitual residence to castigate a child this is a mistreatment that endangers the child[40]. Forced marriages[41] and female genital mutilations[42] endanger the child's best interests.

In cross-border cases a consideration of the danger of an escape into another state that is not in the child's interest is necessary. It might be necessary to apply for an order of the court closing the borders.

Aliens law often must be taken in account requiring cooperation with the Aliens Authority[43].

There is a need for individual settings of help and creative ideas. Social workers and clubs with cultural background are of big help[44]. The German branch of the International Social Service[45] helps in so far.

The situation in the court is comparable. The same law is applicable without regard to the passport and other cross-border circumstances. Parties to whom legal aid is granted can choose the lawyers representing them on their own. Only a very few specialised lawyers do not accept legal aid cases so that the quality of legal representation is similar with and without legal aid. The court conducts the proceedings having regard to the needs of the individual case and not to the money spent. Translation is guaranteed. The court decides whether an expert has to be involved and it does not make any differences in the person of the expert having regard to the question whether it is a legal aid case or not. The expert gains the same amount of money. The proceedings are synchronous.

But the problems are often manifold. Accepting cultural differences the difficult question is at what time an endangerment takes place that can not be accepted and that needs a change. The means to help are often difficult to be found. We need information about different cultural backgrounds and have to overcome cultural problems. To give an example: regularly a seminar about the question how to deal in court with people with different cultural backgrounds, especially islamic background is offered. I can not give more information on it. The interest of the judges in participating seems to be very high. Till now I never succeded in taking part.

[39] Ibid., p. 478.
[40] BayOLGFamRZ 1993, 229; OLG Düsseldorf NJW 1985, 1291.
[41] KG NJW 1985,68.
[42] BGH NJW 2005,672.
[43] Formoreinformation: Tamm, Ausländerrecht und Jugendhilfe – Gibt es einen gemeinsamen Schutzauftrag?, NDV 2010, 137 – 139.
[44] Ibid., p. 477.
[45] For more information <http://www.iss-ger.de>.

4.2. Transfer to a court better placed to hear the case

Art. 15 Brussels II bis offers as an exception the possibility that a court having jurisdiction transfers this jurisdiction to a court of another Member State. Art. 8,9 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children („1996 Hague Convention“)offer a similar possibility.

In Germany this possibility is hardly used. There are only very few casespublished in the specialised literature.

One case went through all three instances. Mother and child lived in Berlin. The father was living in Paris. The mother stated problems with the contact that took place in Paris and applied in Berlin for abandonment of the father's contact with the child. The first instance court decided on the transfer of jurisdiction to the court in Paris arguing that the problematic situation took place in Paris so that the French court seemed in a better position to enlighten the situation and to decide. The mother went on appeal arguing withthe child's social background in Berlin. The Court of Appeal[46] stated that appeal (under the law that was applicable in these days) was allowed. They did not see the conditions for a transfer fulfilled. They underlined that only exceptional cases fall underthe scope of Art. 15 Brussels II bis, cases in which it is predictable from the beginning that facts are limited and nearly only took place in the area of jurisdiction of the foreign court. The Federal High Court of Justice[47] as third instance stated that an appeal to the Federal High Court of Justice was not permitted.

In another case a first instance court had refused to start the procedure under Art. 15 Brussels II bis. The appeal court[48] stated that the first instance court decision on jurisdiction is incontestable. Because of the lack of a provision in Brussels II bis the court stated that national law is applicable, § 13a (5) Act to Implement Certain Legal Instruments in the Field of International Family Law

(“Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts“ ,“IntFamRVG“)[49].

I remember one of my own cases in which a father living in the UK wanted contact with his children living in Germany. They lived in Germany becausethe new husband of their mother was an English soldier positioned in Germany. During the proceedings -I had just asked for an expert opinion- the soldier was transferredback to England so that the whole family moved to England. Now all participants of the proceedings were living in England. Because of the ruling of perpetuatiofori I still had jurisdiction for that case sincethe children had had their habitual residence in Germany when the proceedings started. But it made no sense to continue

[46] Kammergericht, decision from July 10, 2006, file no 16 UF 90/06, available at juris.
[47] BGH, decision from April 02, 2008, file no. XII ZB 134/06, available at juris.
[48] OLG Stuttgart, decision from May 06, 2014, file no 17 UF 60/14, available at juris.
[49] Available at <http://www.gesetze-im-internet.de/englisch_intfamrvg/index.html>.

to control the situation from Germany. With the consent of the parties and the help of the network judges in the European Judicial Network (EJN) the British court quickly assumed jurisdiction and jurisdiction was transferred.

The German literature also underlines the character of an exception. Examples mentioned are: decision on custody of a child while a custodial case concerning sibling, living in the other Member State takes place. Custodial case of a child after death of both parents because of a car crash while the wider family is living in another Member State[50].

My work as a network judge shows that there is sometimes uncertainty about the meaning of transfer of jurisdiction. It has to be distinguished from the reference of a case because of lack of local jurisdiction to another court in the same Member State. In such a case we refer the case to the other court and sendthe whole file. Transfer of jurisdiction is something else. The court having international jurisdiction transfers only theinternational jurisdiction, not the file. The other court then starts proceedings on its own. If interested the second court can ask the first court for copies of the file. As network judge I know that this happens sometimes. The second court has to care for translations if needed.

This spring, when attending the Anglophone-Germanophone conference we got aware of different approaches to Art. 15 Brussels II biswithin the EU.The British colleagues informed us about the marked increase in the number of cross-border care cases, that means cases in which the state intervenes because of child protection in the life of a family which has a strong link with another country. We state the same increase of such cases in Germany. In these cases a careful consideration of the implications of the family's links to another country has to take place.From the point of view of the British colleagues that is often a reason to think about the use of Art.15 Brussels II bis. This astonished us and showed the needfor further discussion. Conversations on following international and national conferences already broadened my knowlege. I think that we have to dinstinguish different cases.

There seems to be a considerable number of pregnant women living in the United Kingdom and already in the focus of the youth welfare authorities who decide to move to Ireland to give birth to their child there. The reason behind it seems to be the fear of loosing the child because of the British law under which an adoption quite easily and quickly takes place in case of deprivation of the child.A sort of „child care tourism" takes place. I am sure that we have similar relocations beween other Member States.If the mother only moved to Ireland or another State to give birth and plans to go back the question of habitual residence, Art. 8 Brussels II bis, is already difficult. In case the result is that the habitual residence is in the new Member State it seems understandable to check Art. 15 Brussels II bis.

In other cases it seems difficult from the German point of view to understand the application of Art. 15 Brussels II bis. Discussing these cases with 15 specialised German judges on ournational conferencein May 2015 they all agreed with our worries and refused applying Art. 15 in these cases.

[50] Staudinger-Pirrung, Vorbem. C 1 zu Art. 19 EGBGB (Internationales Kindschaftsrecht 2), Vorbem zu Art. 19 EGBGB, no. C 89.

A typical case in which our approaches are different goes as follows: The authorities of England (or another Member State) start proceedings because of endangerment of a child. The State getsaware of a child living in England under bad circumstances. The mother's origin is in another Member State. The father is unknown. Mother and child moved to England only some time ago, let us assume one year ago. She wants to stay with the child in England. Although they moved around within the country and the child is not attending school or kindergarten the habitual residence of the child, Art. 8 Brussels II bis, is in the UK so that this Member State has international jurisdiction for proceedings because of endangerment of the child.Which are the points of referenceconnected to Art. 15 Brussels II bis?Child's and mother's origin are in the other Member State, there is a grandmother living in the other Member State. From the point of view of our honourablecolleagues from England this a case for Art. 15 Brussels II bis. From their point of view the other Member State seems in a better situation to hear the case.

From the German point of view there are a lot of arguments to disagree with that. One reason might be that the underlying principle, the principle of forum non conveniens has its origin in common law. It is a new idea for civil law countries that might lead to more reluctance to use it. But there are a lot of arguments connected to the substance that speak against it. The child's habitual residence is in State A, otherwise we would not discuss Art. 15 Brussels II bis. Art. 15 Brussels II bisis restricted to exceptions, as indicated at the very beginning of Art. 15 (1) Brussels II bis.To apply Art. 15 Brussels II bis as a rule should be avoided in order not to endanger the predictability of legal decisions and to avoid unnecessary delays[51].The main factors that have to be checked thoroughly are the questions of endangerment. What is the current situation of the individual child? Has the caregiversufficient capacity to take care of the child? Can help be offered so that the caregivercan be strengthened in a sufficient way? Only if this is not possible that State has a right and a duty to intervene. These questions can best be checked and answered by authorities in the State of habitual residence. The question of the capacities of relatives living abroad is subordinate as it is only relevant if the circumstances in the State of habitual residence show the need of an intervention. With the help of Art. 55 Brussels II bis and by ordering a social report with the help of the International Social Service all information relevant can be gathered by the court having international jurisdiction.If we use Art. 15 Brussels II bis in a wide way we question the general decision of Brussels II bis that the habitual residence is the relevant factor[52].

I heard from another case that shows another danger in case of using Art. 15 Brussels II bis in such a situation of endangerment. A child was in danger in England. The origin of the family is in Latvia. A sibling of the child is living in Latvia and is adopted by a Latvian couple. This couple showed interest in taking also care of the sibling found in a bad situation in England. With the agreement of the Latvian court the British court transferred jurisdiction to the Latvian court. In the meantimethe couple in Latvia received more information about the child found in England. Realising the big needs of this child they withdraw their interest in raising up the child. For a longer period nothing is happening now. The Latvian court is already

[51] Rauscher, Europäisches Zivilprozess- und Kollisionsrecht, Art. 15 Brüssel IIa-VO, no. 4.
[52] Staudinger-Pirrung, supra note 50, no. C 89.

inactive for a longer period of time. We can assume that it does not feel responsible and not in a situation to develop the situation of the child still living in England. The British court does not actbecausethe jurisdiction has beentransferred. As a result nothing happens. This is probably not in the best interests of the child. On a seminar this spring aLatvian lawyer asked me for help. My advice was to contact the Latvian court in order to convince the court in Latvia to do something. It might consider a retransfer of the jurisdictionback to England. The question is whether this is possible. The comprehension of the network judges within the European Judicial network in both Member States might be useful.

From my point of view this case shows very clearly that the main facts that have to be collected and evaluated in case of endangerment are to be located in the State of habitual residence. The rest are only additional facts that should also be gathered by this State. The centralperson is the child and this child is in the State of habitual residence. How can it be heard by the other State? Of course there are possibilities via videoconference or the child might even be brought to the second State by judgment of the court having jurisdiction. But I can not imagine a situation that this can lead to an assessment that the other court is better placed to hear the case.

The impact of a tranfer of jurisdiction is big. Each court applies the national substantive law in case of endangerment and there are probably differences in so far.

We can argue that these questions are always solved in the individual case as Art. 15 Brussels II bis requires a consent of the court of another Member State. This is a means to regulate the situation and to evaluate it from both sides. But beside that we noticethat the standardsof the application of Art. 15 Brussels II bis seem to be very different within the EU. There is a need for a more discussion trying to find a more uniform approach.

Additional topics that arise and need discussion are: the authorites of which Member State are responsible for granting and paying help? What are the cross-border rules for the responsibility and the transfer of responsibility of the youth authorities? And which Member State pays? Will the Member State being responsible for child care or the Member State giving the judgment have to pay for the needs of that child arising out of that judgment? These are important questions waiting for clear answers.

4.3. Placement of a child in another Member State

4.3.1. General information

Art. 56 Brussels II bis arranges special procedures for consultation in case that a placement of a child in another Member State is planned. Although there are some differences in comparison to a placement in another contracting State ruled by Art. 33 1996 Hague Convention (as an example the ruling on Kafala) many topics and problems are parallel.

The conditions for the consultation procedures are:

a) A court contemplates. As Brussels II bis has to be interpreted autonomously "court" is not only a court in the narrow sense, but an authority as defined in Art. 2 (1) Brussels II bis. The national law of the requesting State decides which authority is competent. If the person having the care and the custody of the child decides without intervention of a public authority this does not fall into the scope of Art. 56 Brussels II bis.

I once had to deal with a case in which, preparing a planned placement in Germany,custodial rights were already given tothe foster parents by the authorities in the requesting State. I decided that this is nevertheless a case that falls under the scope of Art. 56 Brussels II bis as the aim of protection is touched[53]. This is not a private placement.

Same with a placement decided in Germany. From the German point of view it is not the court and not the youth authority that decides on the placement, but always the person with the custodial rights. A purely private decision does not fall into the scope, even if the decision was taken after asking the youth authority for advice. But if the decision is one under section 27 following SGB VIII (Socio-educational provision for children with problems)[54] or one decided by the parents to avoid further actions of the court because of endangerment of the child the placement falls into the scope[55].

b) A cross-border placement in institutional care or with a foster family is planned. This includes an institution that detains liberty (European Court of Justice, C-92/12 PPU).

c) The competent authority of the requested State has consented, Art. 56 (2) Brussels II bis.It can be difficult to decidewhether the foreign authority deciding is the competent oneas we often do not have detailed information about the structures in the requesting State. The German Central Authority is very active in collecting information and helping about the requirements in other Member States[56].

d) The Central Authority and other authority having jurisdiction in the State where the placement is planned shall first be consulted, Art. 56 (1) Brussels II bis.The Central Authoritiesarethemainactors.

In case of a placement with a foster family the procedures differ depending whether in the other Member State a public intervention is required for domestic cases of child placement, Art. 56 (4) Brussels II bis.This regulation stands in contrast to Art. 33 1996 Hague Convention which always requires consultation procedures.Because of that differentiation and sincethe national law of the requested State governs the details of the procedures, Art. 56 (3) Brussels II bis, incoming and outgoing cases have to be distinguished.

[53] Amtsgericht Hamm.
[54] Supra note 22.
[55] EschelbachandRölke, Ibid., p. 498.
[56] Available at < https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Unterbringung/Unterbringung_node.html>.

We can state in general that the rulings of Art. 56 Brussels II bis are often applicable. The following situations can fall into the scope of Art. 56 Brussels II bis: A child should be placed with the grandmother living in another Member State; an institutional care in another Member States seems fitting; the foster family plans to move abroad because of professional reasons. But the provisionsare often not known to people working in the youth authorities, are only rarely applied and often lead to confusion[57].

4.3.2. Incoming cases (placement of children in Germany)

The number of children placed in Germany is unknown. We had only a few consultation procedures. Most of them with Austria, placing children in Bavaria (same language), with Belgium, placing children from the German speaking part of Belgium in North Rhine-Westphalia and with Luxembourg, placing children because of lack of suitable institutions in Germany. These were normally placements in institutional care. Some of these procedures, especially at the beginning of the application of Art. 56 Brussels II bis, were started too late as the children were already placed in Germany. Nowadays the placements by these Member States in institutions, which are often the same, is a pretty normal process and the institutions involved know the ways so that nowadays these cases regularly run without big differences. The assumption is that more children are placed in Germany without the procedures of consultation. The problem is how to get aware of these cases and how to deal with them. There is a danger that for children placed without the procedures of consultation a problematic financial situation occuringafter a while might lead to problems including the return of the child to his/ her Member State of origin[58].

If a placement of a child in a foster family in Germany is planned, Art. 56 Brussels II bis, the procedure of consultation has to take place by consulting the BundesamtfürJustiz as German Central Authority or the Central Authority of the other Member State concerned or the competent German supra-local youth welfare agency ("Landesjugendamt") directly[59]. Art. 56 (4) (procedure of information) ismostly not applicable sincea public authority intervention is mostly required in Germany for domestic cases, Section 44 SGB VIII[60]. But in case of a placement with a foster family which includes relatives to the third degree without the granting of „full-time foster care" – which is an administative decision – no authority intervention is needed, section 44 (1) (2) No. 3 SGB VIII so that only the information is required.

The procedures for consultation are ruled by Art. 56 (3) Brussels II bis and sections 45 – 47 IntFamRVG[61]. The supra-local agency responsible for the public youth welfare service in the area where, as proposed by the requesting agency, the child is to be placed, has the

[57] Schlubach, Länderübergreifende Unterbringung von Kindern, NDV 2015, p. 135 – 139, p. 135.
[58] Ibid.
[59] available at <www.bagljae.de>, adress list can be found under „Landesjugendämter", then „Kontakt LJÄ".
[60] Supra note 22.
[61] Supra note 49.

competence to consent to the placement of a child, section 45 IntFamRVG. Section 46 (1) IntFamRVGdetermines detailed conditions:

Consent to the request should as a rule be granted where

1. carrying out the intended placement in Germany is in the best interests of the child, in particular because he or she has a particular connection with the State,

2. the foreign agency has submitted a report and, to the extent necessary, medical certificates or reports setting out the reasons for the intended placement,

3. the child has been heard in the proceedings abroad, unless this appeared inappropriate on the ground of the child's age or degree of maturity,

4. the consent of the appropriate institution or foster family has been given and there are no reasons telling against such placement,

5. any approval required by the law governing aliens has been given or promised,

6. the issue of assumption of costs has been dealt with.

Where there is a request for placement of a foreign child, the opinion of the aliens authority shall be obtained in addition, section 46 (4) IntFamRVG.

There are even more conditions set out in section 46 (2) IntFamRVG in the case of a placement linked with deprivation of liberty: the request shall be refused notwithstanding the general conditions where

1. in the requesting State, no court decides on the placement, or

2. on the basis of the notified facts of the case, a placement linked with deprivation of liberty would not be admissible under national law. This means that the conditions of section 1631 b BGB[62] have to be fulfilled: Accommodation for the child that is associated with deprivation of liberty is permissible if it is necessary in the child's best interests, in particular in order to avert a danger to the child himself/herself or to a third-party and the danger cannot be remedied by other means, including other public assistance.

[62] Supra note 6.

Over and above the consent of the supra-local agency responsible for the public youth welfare service shall be admissible only with the approval of the Family Court, section 47 (1) IntFamRVG. Local jurisdiction lies with the Family Court at the seat of the Higher Regional Court in whose area of jurisdiction the child is to be placed for the district of that Higher Regional Court, section 47 (2) IntFamRVG (specialised court).

The court should as a rule give its approval where

1. the conditions referred to in section 46 subsection (1), number 1 to 3, are met, and

2. there is no apparent impediment to recognition of the intended placement, Art. 23 (g) Brussels II bis.

The decisions of the court and the supra-local agency are incontestable, sections 47(3), 46 (5) (2) IntFamRVG. In most cases known the consent was granted.

Summing upmany institutions are involved and a lot of conditions have to be fulfilled. This is always a challenge as there is mostly an urgent need to place the child and the space for that child in an institution can not be reserved for a longer period.An earlier application is mostly not possible as a request has to nominate the institution in a concrete way. A delay in the procedures hasnegative input on the child. They integrate into their actual situation and the preparation of a move without a concrete date when it will take place is difficult[63].On the other hand it has to be respected that many Member States require the procedure of Art. 56 Brussels II bisto becompleted before the placement of the child abroad.

In some cases the children were not heard, Art. 46 (1) (3) IntFamRVG. The reason seems to be that the conditions and standards for hearing a child differ a lot between the Member States. In many Member States there does not seem to be a need to hear the child in such a case but if the placement is plannedin Germany the child has to be heard in the proceedings abroad in order to receive the consent for the placement by the Germany authorities. Basic condition is that the foreign authorities know about the German conditions. The German Central Authority offers detailed information on the web page[64].

4.3.3. **Outgoing cases** (placement of children in other Member States)

The number of children with habitual residence in Germany placed in institutional care or with a foster family is significant. Reasons for that are the increasedpopulation(including in

[63] Ibid., p. 137.
[64] available at <https://www.bundesjustizamt.de/EN/SharedDocs/Public/HKUE/Germany.pdf?__blob=publicationFile&v=4>.

2008 13.7 million minors and 8.8 million young adults under 27 years[65]) and social problems resulting in the need to place a child outside the family.

In 2008 in 12 percent of the cases in which help was offered a young person was placed outside the family. This is a total number of 51,630[66].The main reason is endangerment of the child. In 2008 for 9 out of 10000 young persons under 21 years a placement in a foster family, section 33 SGB VIII, started[67]. In the same time 32,200 young people (19 out of 10000) were placed in institutional care, § 34 SGB VIII[68].

The cross-border placement of a child with a foster family or in institutional care is only permitted if this is required in the individual case, section 27 (2) (3) SGB VIII. It isoften difficult for the youth authorities to check the suitability of the proposed foster family. These persons are living abroad and are often relatives of the child. It is not enough to have a first look at them. The conditions under which the child is planned to live must be evaluated. The exerciseof officialauthority in another state is sometimes forbidden, often not accepted. There is a need for effective cooperation and administrative assistance. Central Authorities and the International Social Service can be asked for support[69].

The help most rarely offered is the „intensive sozialpädagogischeEinzelbetreuung“ (intensive social pedagogic case work), section 35 SGB VIII. In 2008 it started for 2 out of 10,000 young people under 21. It offers the possibility to grant flexible help to young people in extremly difficult and dangerous situations in their lives. In general these young people are older than the children in other forms of help[70]. One alternative is the so called „Auslandsmaßnahme“ (measure abroad). These are pedagogical placements abroad individually tailoredfor each child. In general this is used for extremly difficult children who mostly stay abroad for one up to two years. They have often problems with aggression, drugs, criminal offenses. Experts estimate that per year there might be from 500 up to 1200 young people in such measures, which sums up to only 1.4 percent of the help granted in Germany in total[71]. German and foreign responsibles for such measures promote the possibilities they offer abroad. Acadamic researches indicate chances and limits[72]. The media is often interested in such measures criticising the aimof the project, the quality of the measures, the success, the amount of money spent and the danger of “pushing off” these children.

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[65] Available only in German at <https://www.destatis.de/DE/Publikationen/WirtschaftStatistik/Sozialleistungen/ErzieherischeHilfe042010.pdf?__blob=publicationFile>, p. 396.

[66] Ibid., p. 397.

[67] Ibid, p. 400.

[68] Supra note 22.

[69] EschelbachandRölke, Vollzeitpflege im Ausland – Aufgaben deutscher Jugendämter, JAmt 2014, p. 494 – 503.

[70] Supra note 64, p. 402.

[71] < http://www.projekt-husky.de/ph/media/downloads/artikel/08-08-12_Diplomarbeit_Individualpaedagogische_Hilfemassnahmen_im_Ausland_Anne_Veronika_Lembert.pdf>, 49.

[72] As an example < http://www.projekt-husky.de/ph/media/downloads/artikel/08-08-12_Diplomarbeit_Individualpaedagogische_Hilfemassnahmen_im_Ausland_Anne_Veronika_Lembert.pdf>.

These placements fall underthe scope of Art. 56 Brussels II bis. It seems that they cause irritations abroad. The children are often extremly difficult. The German „Auslandsmaßnahme“ (“measure abroad”) is nearly unknown and not much used in other Member States. Meaning and aim are hardly understandable[73].Some Member States lack a national law that complements Art. 56 Brussels II bis. The standards of defining the best interests of the child differ and Brussels II bis lacks an explanation in so far[74].

In order to help with the procedures for consultation abroad the German Central Authority offers valuable information concerning all Member States[75]. There should be a big interest in each Member State to run a good system of procedures of consulation regulated by national law and to care for a good information about it for the national authorites and those in the other Member States. This is a task given by Brussels II bis and the most effective way to be aware and to control placements.But till now only a few Member States have national regulations[76].

4.3.4. Making up the procedure of consultations

Practice shows that children are still placed in other Member States without the prior procedure of consultation. The number of children from Germany placed abroad and the number of children placed from abroad in Germany without the procedure of consulation is unknown. We can be sure that this is a problem in both directions. Authorities place children abroad regulating everything with the institutional caregiverbut without consulting the Central Authority or the competent authority in the country of placement. Cases like that regularly come to light. All efforts should be taken to avoid such situations. But the question is what has to be done if the child hasalready been placed, whether the child has to be returned to the home State or another State. Such a situation might lead to awkward situations with consequences on the temporary residence permit and the financial situation[77].

The question is whether there is a possibility for the making up of the procedure of consultation by giving the consent “ex post”/posteriori. The European Court of Justice has given important information in so far in the judgment C-92/12 PPU. A making up of the procedure of consultations seems possible in case it is in the best interests of the child. An example: the child is already in the State that was not requested for a longer period and has settled with a foster family. The procedure of consultations should then start without delay and after receiving the consent of the requested State a new decision of placement of the child seems necessary by the relevant authorities. Having regards tothe best interests of the child such a way of dealing with the situations should be used as much as possible. There is a need for a good cooperation ofthe authorities involved.

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[73]Schlubach, p. 128.
[74]Schlubach, p. 137.
[75]available at <https://www.bundesjustizamt.de/EN/SharedDocs/Public/HKUE/Abroad.pdf?__blob=publicationFile&v=6>.
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[76]Eschelbach and Rölke, Ibid.,p. 499.
[77] Ibid., p. 499.

However, the interpretion of this EJC ruling differs from one Member State to another and also its application depends on the facts of each individual case. Recent experiences of the German Central Authority have shown that children who have been placed abroad without the prior consent of the competent authority were forced to return to their home Member State before a new consultation procedure was initiated. A consent "ex-post" is therefore often not possible. As a return and thus an interruption of the placement abroad is certainly not in the best interest of the child, the proper implementation of the consultation procedure should be observed.

4.3.5. Working group on placement of children abroad

For some time a working group in Germany tries to realise and to overcome obstacles when placing a child abroad or in Germany. The members of the working group are especially representatives from the supra-local agencies responsible for the public youth welfare service and from the German Central Authority. I just joined them at their last meeting at the beginning of June 2015 to give an input as a judge dealing with incoming cases. The aim of the working group is to improve the situation and to create standards. The Central Authority plays an important role in collecting, updating and disseminating information, Art. 55 (d) Brussells II bis.

4.3.6. Responsibility for ongoing help and payment of costs

The question which Member State is responsible for ongoing help for the child is important and difficult to be answered. There is no international regulation in so far. The practice is pretty different. One proposal is to answer this question with the help of Art. 8 Brussels II, that means differing with the help of the question of habitual residence[78]. If the State of origin is still offering help this State seems to be responsible for additional help. New actions necessary as for example a seizure of the child because of endangerment is a new, and not only additional decision in the responsibility of the other youth authority. Information and cooperation are essential.[79] In addition one should be aware that responsibility for help is not automatically connected with the duty to pay the costs. Cross-border standards would be helpful. Nowadays concrete cross-border agreements are essential.

4.3.7. Habitual residence in case of a placement abroad

Another problem is the question of habitual residence of a child in such a measure abroad which is regularly limited in time.

The question of habitual residence might be difficult to solve. A judge contacted me as

[78] Ibid., p. 500.
[79] Ibid.

network judge asking formy opinion concerning the question of international jurisdiction: Two years ago the judge deprived custodial rights of a boy from the parents because of endangerment. In these days the family was living in the court's district. The guardian then decided on institutional care of the child in the district of another German court. Because of his problematic behaviour the boy moved to another institutional care in Germany in the district of another court. A few months later another relocation of the boy into institutional care abroad in Poland took place. The father now starts proceedings in Germany in the district of the judge who decided on the deprivation of the parent's rights two years ago. The father, now living in Kosovo, applies for custodial rights. The boy has beenin Poland for 1 ½ years now. This measure is limited in time. The mother is living in another part of Germany now. The difficult questions the judge has to decide on are: Where is the habitual residence of the boy now? Is it Poland sincehe has been living there for 1 ½ years now? Or is it still Germany becausethe time in Poland is limited and the measure is part of a German pedagogical decision? The boy might be in a German institutional care only speaking German. The tendency of the judge is to argue that the boy's habitual residence is still in Germany. Then the next problem occurs: which German court has local jurisdiction? Which is the court of habitual residence of the child, section 152 (2) FamFG?[80] Probably not the one of the actual habitual residence of the mother as the child has never lived there. The last place of habitual residence in Germany before the relocation to Poland? This was an institutional care that failed quickly. Same with the institutional care taking place before. Does that mean that is the place were the child lived two years ago with the parents? These are very difficult questions that need to be decided.Standards are not known to me.

4.4. Cooperation between Central Authorities, especially on cases specific to parental responsibility

Central Authorities under Brussels II bis play a vital role. They should be identical with the Central Authority under Conventions on cross-border child protection. This is the case in Germany. Section 3 (1) IntFamRVG81 regulates: "The Central Authority under

1. Article 53 of Regulation (EC) No. 2201/2003,
2. Article 29 of the Hague Child Protection Convention,
3. Article 6 of the Hague Child Abduction Convention,
4. Article 2 of the European Custody Convention

shall be the Federal Office of Justice."

In parallel to Art.31, 321996 Hague Convention Art. 55 Brussels II bisregulates the

[80] Supra note 33.
[81] Ibid.

cooperation in the individual case specific to parental responsibility and lists the specific duties of the Central Authorities. The application from another Central Authority or the holder of parental responsibility is condition for the commencement of measuresaccording to this Article, Art. 55 (1) Brussels II bis. If a court applies under Article 55 Brussels II bis the outcome may depend on its role in the proceedings. The court may have to resort to an application under Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Sections 6 and 7 IntFamRVG[82] specify the tasks of the German Central Authority by ruling on the performance of tasks by the Central Authority and when ascertaining the child's whereabouts:

"Section 6

Performance of tasks by the Central Authority

(1) For the purpose of fulfilment of the tasks incumbent on it the Central Authority shall take all necessary measures with the assistance of the competent agencies. It shall correspond directly with all competent agencies in Germany and abroad. Communications shall be forwarded without delay to the competent agencies.

(2) For the purpose of implementing the Hague Child Abduction Convention and the European Custody Convention the Central Authority shall commence court proceedings if necessary. Within the framework of these Conventions the Central Authority shall, for the purpose of returning a child, be deemed to be authorised, on behalf of the applicant, to take action in or out of court, either on its own or by power of attorney delegated to persons representing it. Its authority to take relevant action, on its own behalf, in order to secure compliance with the Conventions shall remain unaffected.

Section 7

Ascertainment of whereabouts

(1) The Central Authority shall take all necessary measures including bringing in the police enforcement authorities to ascertain the child's whereabouts in cases where the child's place of abode is unknown and there are indications to the effect that the child is in Germany.

(2) So far as is necessary for ascertainment of the child's whereabouts, the Central Authority shall be authorised to collect vehicle keeper data required, pursuant to section 33 subsection (1), first sentence number 2, of the Road Traffic Act, at the Federal Motor Transport Authority, and to request the providers of benefits, within the meaning of sections 18 to 29 of

[82] Ibid.

the First Book of the Social Code, for notification of a person's current whereabouts.

(3) Under the conditions stated in subsection (1) the Central Authority can cause issuance, by the Federal Criminal Police Office, of a notice for ascertainment of a person's whereabouts. It can also initiate the storage of a search notice in the Central Register.

(4) So far as other agencies are brought in, the Central Authority shall transmit such personal data to these agencies as are necessary for carrying out the measures; such data may only be used for the purpose for which they were transmitted."

4.5. Cases under the 1980 Hague Convention

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter the 1980 Hague Convention)entered into force in Germany on December 01,1990**.** This Convention is in force between Germany and Slovakia since February 01, 2001.

4.5.1. The Central Authority

The"BundesamtfürJustiz" ("Federal Office of Justice")is the German Central Authority. It is situated in Bonn and is one of the largestCentral Authorities wordwide. In 2014 it was dealing with 444 1980 Hague Convention cases. 367 were return cases (188 incoming and 179 outgoing cases). 77 cases were on access (34 incoing and 43 outgoing cases). In 2014 three incoming return cases and one outgoing return case were with Slovakia. Most cases are with EU-Member States. In 2014 the states mostly involved were Poland for incoming and Turkey for outgoing cases[83].

The case managers in charge are responsible for certain States. This helps to create special knowledge concerning that state and the possibility to build up personal relationships with the case managers of the other Central Authority. At presentMister Keuchleris responsible for cases connected with Slovakia.

4.5.2. The courts

By way of a change to the German Federal Implementing Act, which entered into force on 1 July 1999 jurisdiction for return cases and some other cross-border family cases was concentrated, sections 11, 12IntFamRVG[84]. The district court in whose district the court of appeal is located has jurisdiction for the district of the appellate court. Today only 22 out of more than 660 family courts in Germany deal with these cases[85]. The total number of cases

[83] Further information can be found at <https://www.bundesjustizamt.de/EN/Topics/citizen_services/HKUE/HKUE_node.html>.

[84] Ibid.

[85]more information about the background: Brieger, Erb-Klünemann, Dr. Schulz, Concentration of jurisdiction under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and

dealt with by the courts differs from the number of cases handled by the Central Authority. Reasons for that are that not all cases come to court and that the intervention of the Central Authority is not compulsary. Estimated 1/5 of the cases in court are without intervention by the Central Authority.

Even more concentration of jurisdiction takes place inmost specialised courts. The rules of court of each individual court regulate the division of cases between the judges in general, that means prior to the incoming of a case. Most specialised courts have regulated that only one or (preferably) two judges in the first instance courts and only one panel in the courts of appeal deal with these cases internally. Leaving aside substitutes in cases of absence, this makes a total of 64 judges at first instance and 92 judges at the appellate level in Germany[86].

Since 1 March 2001, the Act implementing the 1980 Child Abduction Convention also ensures that parallel proceedings are avoided and strengthens Article 16. If Hague return proceedings are brought before the specialised court and proceedings for return, access or the surrender / delivery of a child are already pending before the local family court in whose district the child is present, section 13 IntFamRVG obliges the local court to transfer the proceedings to the specialised court before which return proceedings are pending. If proceedings with regard to the three objects mentioned above are instituted later, the specialised court before which return proceedings are pending has exclusive jurisdiction for these matters. The specialised courts are more likely to be aware of Article 16 1980 Hague Convention which prevents them from deciding on the merits of custody, under the conditions set out, even if they have (international) jurisdiction. Moreover, they also know that pursuant to Article 10 Brussels II bis and Article 7 1996 Hague Convention, in the case of abductions falling under the scope of these instruments they would not even have jurisdiction for custody issues. And in the exceptional case of refusals under Article 13 1980 Convention, they are aware of their obligations under Article 11 (6) – (8)Brussels IIbis[87].

4.5.3. The length of proceedings

Over the years it was possible to shorten return proceedings in Germany significantly. In 2012 proceedings in court lasted 42.8 days from the application to the decision in the first instance (41.44 days with Member States of Brussels II bis; 58.2 days with other States). In 2007 the average was 63.34 days[88]. The average length of proceedings from the application till the final end of proceedings was 68.28 days in 2012. These numbers are already handsome but we still have to try to improve the situation. The longer the proceedings the more difficult the situation gets for all family members, especially for the child.

Which seem to be the factors for this positive development? The concentration of jurisdiction on some courts and a manageable number of judges was extremly helpful. Experience helps to

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other international child protection instruments – Germany, p. 16, The Judges' Newsletter on International Child Protection, autumn 2013, available at < http://www.hcch.net/upload/newsletter/nl2013tome20en.pdf>.

[86] Ibid., p. 17.

[87] Ibid., p. 17.

[88] Statistics of the German Central Authority, available at < https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Statistik/Statistik_node.html>.

gain special knowledge and to handle the various formal requirements as well as the substance of return proceedings. Appeal is shortened to one instance only and the time limit is shortened to 2 weeks.

Special annual conferences are offered to the specialised judges by the German Central Authority. Being the chair of these conferences for years I know that nearly all judges specialised use that possibility to receive general information for newcomers, information about new developments and exchange their experience. Checklists and practical general information are given to and discussed by the judges. Foreign specialists are always invited in order to improve trust in practice.

The German Central Authority is very active in sharing and distributinggeneral information and helping in the individual case. The number of cases in which the German Network judges(five judges in the European Judicial Network and two judges in the International Hague Network of Judges) were asked for help is increasing. Our main task as network judges is working as a help desk for our national colleagues. The better we are known asnetwork judges and are working the more we are asked. This is an ongoing challenge.

4.5.4. Youth Welfare Office

The youth authority is regularly not a participant of the return proceedings. Section 9 IntFamRVG[89] regulates:

"1) Without prejudice to the responsibilities of the Youth Welfare Office in relation to cross-border co-operation, the Youth Welfare Office shall assist the courts and the Central Authority in respect of all measures taken under this Act. In particular it shall

1. give information, upon request, regarding the social background of the child and his or her environment,

2. support an amicable resolution in every situation,

3. give assistance, in appropriate cases, in the conduct of proceedings, also in relation to securing the child's residence,

4. give assistance, in appropriate cases, in the exercise of the right of personal access, in the delivery or return of the child as well as in the enforcement of court decisions.

(2) Competence shall lie with the Youth Welfare Office in whose area the child habitually resides. Where the Central Authority or a court is seized of an application for delivery or return or the enforcement thereof, or where the child does not habitually reside in Germany,

[89] Supra note 49.

or where the competent Youth Welfare Office does not take action, competence shall lie with the Youth Welfare Office in whose district the child is actually residing. In the cases of Article 35 paragraph 2, first sentence, of the Hague Child Protection Convention, local jurisdiction shall lie with the Youth Welfare Office in whose area of jurisdiction the applicant parent habitually resides.

(3) The court shall inform the competent Youth Welfare Office about decisions pursuant to this Act also in those cases where the Youth Welfare Office was not involved in the proceedings."

Practice shows that giving the information to the Youth Welfare Officethat such proceedings on return are pending at the very beginning of the proceedings is useful. They should know about the situation of a child living in their area of responsibility. Asking the youth authority for information about the social background of the child is not compulsory but advisable. The German first instance courts regularly ask for such a report. Having regard to the jurisdiction of the European Court of Justice starting with the Neulinger case and going up to the case of X versus Latvia, asking for an in-depth examination of the family situation, is seems even more advisable to ask for such a report. But all persons involved must be aware of the danger behind it. The report is asked for in return proceedings, not in proceedings dealing with questions of parental responsibility. But such a report often drifts into the merits. The reason is probably that the youth officers in Germany are not specialised. There is no concentration of responsibility in this area. The officer is used to deal with the best interests of the child in the sence of custody and access proceedings. There is not enough time to gain some extra knowledge about return proceedings. Such a report on the merits has to be avoided. Worldwide and also in Germany[90]the abductor is mostly the mother being the primary caregiver. Such a report too often ends with the summary that is is in the best interests of the child to stay with the mother in the situation the wayit is now. Such a report leads to the feeling of security of an abductor which is often in contrast with the judicial situation. In the person of the applicant it leads to frustration and mistrust in the competences and neutrality of the youth authorites. Realizing this problem we try to overcomeitin different ways: One is that the court gives some general information about return proceedings and the differences in comparison to custody proceedings already when asking for the social report. Information about the possibilities to receive further information with the help of the German Central Authority and "ZAnK", the Central Contact Point for Cross-border Family Conflicts based at the German Branch of the International Social Service within the "DeutscherVerein" [91] is added. In a few areas of Germany information about more experts that can be contacted are added. In the area of my jurisdiction the judges of both instances got in contact with the supra-local agency responsible for the public Youth Welfare service. As a result of thiscooperation an officer there became acquainted with return proceedings and offers written and oral information. We can state that the reports made by officers of youth authorities who contacted one of the help desks indicated are much more to the point. There is still much work to improve the situation. The number of published papers is limited. We plan to work on that.

[90] Supra note 86.

[91] available at <http://www.zank.de/en-website/index.php>.

4.5.5. Guardian ad litems

Guardian ad litemsalso play an important role in return proceedings in case they are specialised, that means in case they know the special nature and the difficulties of these proceedings. The judge who appoints the guardian ad litem should take care that this knowledge is gained. We inform the specialised judges regularly about this aspect atour annual conferences. MiKKe.V. –Mediation beiinternationalenKindschaftskonflikten[92] is a non-profit organisation that offers special training also for guardian ad litems and a list of specially trained guardian ad litems[93]. This is a field that is expandable.

4.5.6. Lawyers

Lawyers having the right to call themselves „lawyer specialised in family law“ had also some trainings in international family law. But this is not enough for qualifying them as experts in international family law. In addition the representation of a party in the proceedings is not limited to those specialised lawyers. As a result we often deal with lawyers whohave no experience and only few knowledge about the 1980 Hague proceedings. As a result the party is not well informed. There are a few lawyers in Germany specialised in this field. MiKKe.V. runs a non-checked list[94]. Bar associations offer special trainings. The German lawyers are aware of the increase of cross-border family cases. Most of them know about the need for special trainings but till now the number of those possessing special knowledge is too small. The development of standards and special degrees would be desirable.

4.5.7. Rulings on return

A concrete, clear and sufficient obligation in the judgment is very important and condition for the effective enforcement. We discuss the question of how to rule on return in details atour annual conferences becausewe noticed that a judgment only ruling on the return is not enough. The court has to take detailed and concrete measures to ensure the safe return and to prevent further harm to the child. There should be short and clearly specified time-limits for each stage of the return. An effective, enforceable order will include adequate powers if necessary to search for and seize the child and to deliver the child. Where this is appropriate the order will specify arrangements which referto the handover to the applicant. Payment of the costs of return should be regulated in the order especially if lengthy travel is involved. Questions to be considered in making a return order are:

What does „to order the return of the child“ mean? (Art. 12 1980 Hague Convention) What is to be the venue of the return? Who is to accompany the child?What arrangements are to be

[92]more information available at <http://www.mikk-ev.de/english/englisch/>.
[93]< http://www.mikk-ev.de/deutsch/verfahrensbeistandsliste/>.
[94]Available at <http://www.mikk-ev.de/deutsch/anwaltsliste/>.

made for supervision of return?Who has to pay the costs? This includes costs of the court and costs of the enforcement of return.What should go into the order concerning measures of execution if the return order is not carried out by the respondent?

We offer an example of a ruling on return made in Germany to the specialised judges that seems necessary and sufficient to us:

"1.The respondent, and every other person with whom the child remains, are obliged to give the child (name) to the applicant or a person of his or her choice in order to return the child to (state).

2. The respondent can avoid enforcement by returning the child to (state) and within 2 weeks after the date on which the order has legal force proving to the court that this has been done.

3. The court draws the attention of the respondent to the following:-

where the obligation set out under paragraph 1 above is not fulfilled the court is empowered to order a disciplinary fine of up to €25000 and - in case of inability of collection or ineffectuality of such a disciplinary fine – can impose a sentence for contempt of court of imprisonment for up to 6 months.

4. Concerning enforcement the court orders:

a) The [enforcement officer][bailiff] is ordered and empowered to take away the child mentioned under paragraph 1 from the respondent and any other person with whom the child is staying and to give him/her to the applicant or a person empowered by the applicant.

b) The [enforcement officer][bailiff] is ordered and empowered to use direct coercion against every person responsible to give away the child and, if necessary, also against the child with regards to section… .

c) The bailiff is empowered to enter and to examine the respondent's flat and the flat of any other person with whom the child is staying.

d) The [enforcement officer][bailiff] is empowered to take measures for enforcement during nighttime and on Sundays and festivals.

e) The youth welfare office in [name of town] is obliged to make arrangements guaranteeing the safe transfer of [name of] the child to the applicant and if necessary to arrange for the child to be kept in foster care until the return takes place.

5. The respondent shall pay the costs of the proceeding including costs of enforcement and of the return."

4.5.8. Enforcement

Enforcement is an important topic as it is always a challenge in practice. We try to avoid it by promoting voluntary agreements and voluntary fulfillment of judgments. If this does not work enforcement should take place without delay. Time is an important factor making enforcement regularly more difficult for all involved in case of lapse of time. The court carries out enforcement of return propriomotu, section 44 (3) IntFamRVG[95]. Orders on return are the only orders that a family court enforces propriomotu. This provision was entered into the law to ensure effective and quick proceedings. At the beginning the judges were astonished becausesuch a task was new for them. Section 44 (2) regulates that jurisdiction shall lie with the Higher Regional Court, so far as the order has been declared enforceable, made or confirmed by that court. Practice provesthat this helps effective enforcement. In most of these cases the Higher Regional Court was the last in contact with the party liable. It seems easier, as stated by some Higher Regional Court judges, to decide on the difficult questions of measures necessary by apanel of three judges.

The law gives power to the court to enforce by ruling in section 44 (1) IntFamRVG: "....the court should impose a coercive fine, and in the event of such fine not being recoverable, the court should order coercive detention. Where the imposition of a coercive fine offers no prospect of success, the court should order coercive detention." This empowerment seems necessary and sufficient. But nevertheless the enforcement in the individual case is always a challenge and the exchange of experience on the annual conferences is of big importance.

BothCentral Authoritiesinvolved haveto co-operate in securing the safe return of the child and to promote co-operation amongst the competent authorities of the respective states to secure the prompt return of children, Art.7 1980 Hague Convention. Theyhaveto provide administrative arrangements as necessary to secure the safe return of the child, Art.7 h) 1980 Hague Convention and Conclusion 1.1.12 of the Special Commission of 2006.Early contact between and co-operation among all agencies, notably those concerned with child protection is important to ensure that the return arrangements are adequate, workable and accepted by those involved. This includes the youth authoritieswho should – beside their knowledge to ensure the best interests of the child- know about the special procedures.

4.5.9. Return cases concerning Member States of Brussels

[95] Supra note 49.

In general the specific provisions for return proceedings run fine. But there are still some details that need further discussion[96].

Art. 11 (4) Brussels II seems an adequate regulation but there should be discussions and standards in so far. Does this influence the burden of proof that is generally on the defendant? Who has to „establish", that means who is responsible for obtaining the information?

In addition it is always a challenge to establish the factors as required by Art. 11 (4) Brussels II bis without causing delay. In which way can concrete measures in the Member State of origin be secured? How can they decide on concrete measures if they are not even aware of whether and when the child will be returned? How can they be quickly informed about the situation and asked for their possibilities for taking action in general and in the individual case? There is always a need for creativity, fast ideas including help by the Central Authorities or Network judges.

The priority of the court in the child's former habitual place of residence Art. 11 (6) – (8) Brussels II bisshould remain although it causes some problems. If return was refused, that means the child is still in the other State, proceedings under Art. 11 (6) – (8) Brussels II bisare often difficult. The abductor tries to hide in the other State trying to avoid a judgment. Hearings of the child and the abductor are difficult as they mostly do not comply with summons to attend the hearing. As network judge I know that the procedures of Art. 11 (6) – (8) are not known to all judges- they take place in the „normal" family court, not in the specialied court. There is a need for training. Delay must be avoided.

4.5.10. Mediation

Since 1999 different professionals in Germany involved in return cases are active in building up a landscape of cross-border mediation and promoting mediation. Important national cornerstones are[97]:

Starting 2003 different projects of professional, bi-national co-mediation took place[98]. In 2006 the setting of a national working group of different professionals involved in Hague return proceedings and in mediation helped to find an effective way to implement mediation into

[96] The following is mainly a summary of Brieger and Erb-Klünemann, Revising Brussels II a: Commonly encountered problems with the Regulation and possible solutions, lecture on the Anglophone-Germanophone Conference March 2015, publishing is planned.

[97] for more detailed information: Paul and Kiesewetter (editors), Cross-Border Family Mediation, 2014 and Erb-Klünemann, The 1980 Hague Convention and Mediation – a German Perspective, Japanese Yearbook of International Law 2014, p. 56 - 76 >.

[98] For more detailed information: Carl and Walker, Mediation in Action, in: Paul and Kiesewetter, supra note 95, p. 84 - 91.

court proceedings without causing delay. In 2008 foundation of the non-profit organisation "MiKKe.V." took place. MiKKprovides support and advice, offers services to parents and professionals. The organization provides information about the possibilities and limitations of mediation at no cost or obligation for individual cases and can aid in initiating a professional binational co-mediation. MiKK currently has a network of some 150 specialized and experienced mediators who together can speak more than 30 languages. These mediators are qualified for specialized work in bi-national co-mediation teams representing two cultures and two languages as well as the gender of the parents. To be listed, a mediator must show proof of at least 160 hours of family mediation training, practical experience as well as further training and specialisation in international cases involving parents and children. The mediators in this network have agreed to allow their work to be evaluated to ensure quality.In 2012 the German Law on Mediation[99] came into force.

From 2007 to April 2015 90 bi-national co-mediations, organised by MiKK took place. In the first 4 months of this year in more than 50 cases counsel by MiKK took place. Last year 22 mediations were applied for at the German Central Authority.

We already reached a good level in so far but there are ongoing needs to improve the situation. Someideasforfutureeffortsare

- To informmore parents about the possibilites of mediation although the economic situations are often limited;
- Further information of professionals involved;
- To think about online mediation;
- To think about easier ways to create writ of execution valid in all States involved;
- To promote the possibility of mediation at the stage of enforcement of a return decision;
- To creat a concept of mediation in cases with Non-Member-States ("Malta process").

5. Conclusions

Cross-border child protection is a growing field. It occurs in various ways and touches various stakeholders. Good knowledge of the judicial background is needed as well as national and international cooperation. Youth Welfare Officesare important actors in so far. They should be prepared, cooperate within their State and cross-border. They should learn from neighbours. There are already programms existing in different Member States. Some bi-national dialogues[100] and international comparisons and case studies took already place[101]. An example are the state responses to violence against women and children from 2011 comparing

[99] Available at <http://www.gesetze-im-internet.de/mediationsg/BJNR157710012.html>.

[100] As an example: Grupper, Koch and Peters, Challenges for child and youth care: a German-Israeli dialogue, 2009

[101] As an example: Müller andNüsken, Child protection in Europe, Von den Nachbarn lernen- Kinderschutz qualifizieren, 2010.

the structures of dealing with endangerment of the child in nine European States[102]. The research findings are about obligations to report in case of endangerment of a child[103], child protection and criminal justice[104] and hearing and involvement of the child in the proceedings[105].The expert meetings on transnational child protection organised by the Children‘s Unit at the Council of Baltic Sea States (CBSS)[106] with support by the EU Return Fund are an important initiative.Initiatives in so far such as the present initiative in Slovakia should be strengthened.

The European Forum on the Rights of the Child107 is an important EU-initiative. It is a permanent group for the promotion of children's rights in the EU's internal and external action. It is chaired by the Commission and meets annually.

Askedbythe European Commissionthe EU Agency for Fundamental Rights (FRA) isactuallymappingchildprotectionsystems in the EU[108]. FRA wants to develop an overview of national child protection systems. It will examine the scope and key components of national child protection systems across the EU. The focus will be on the systems' laws, structures, actors and how the systems function, as well as human and financial resources and the existing accountability mechanisms. The research will explore how these systems operate and how they address the specific needs of particular groups of children, examining also national and transnational coordination and interagency cooperation.

Additional efforts to co-ordinate and to bundle information on a more global level, for example supported by the Permant Bureau of the Hague Conference of Private International Law (HCCH) are desirable.

There is a special need to focus on children in manifold cross-border situations as their factual situation and the judicial evaluation are often most complicated. They are often more vulnerable. Cross-border child protection should offer a secure general framework. The authorities should act coordinated. There is a need for national and cross-border co-operation. There is much too do. The Slovakian initiative hopefully serves as an important step.

[102]Available at <https://www.dijuf.de/tl_files/downloads/2011/Projekte/RRS-Report_(Forschungsbericht_EN)_2011.pdf>.
[103]available at <https://www.dijuf.de/tl_files/downloads/2011/Projekte/RRS-Forschungsergebnisse_kompakt-1_Meldepflicht_bei_Kindesmisshandlung_oder_Vernachlaessigung.pdf>.
[104]Available at <https://www.dijuf.de/tl_files/downloads/2011/Projekte/RRS-Briefing_Paper-2_Child_Protection_and_Criminal_Justice.pdf>.
[105]Available at <https://www.dijuf.de/tl_files/downloads/2011/Projekte/RRS-Forschungsergebnisse_kompakt-3_Anhoerung_und_Beteiligung_des_Kindes.pdf>.
[106]More information available at <http://www.childcentre.info/12824/>.
[107]More information available at <http://ec.europa.eu/justice/fundamental-rights/rights-child/european-forum/index_en.htm>.
[108] More informationavailableat< http://fra.europa.eu/en/project/2014/mapping-child-protection-systems-eu >.