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EU INSTRUMENTS OF CIVIL JUDICIAL COOPERATION IN MATTERS OF PARENTAL RESPONSABILITY: CONSIDERATIONS ON COMPETENCE AND SCOPE

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Summary: 1. *The background: the EU competence in the area of civil judicial cooperation and the legislation governing matters of parental responsibility.* – 2. *Overview of the "international" notion of parental responsibility.* – 3. *The personal scope of application of Brussels II-bis Regulation.* – 4. *The material scope of application of Brussels II-bis Regulation: the contents of parental responsibility rights.* – 4.1. *Included matters.* – 4.2. *Excluded matters.* – 5. *The territorial scope of application of Brussels II-bis Regulation in the light of Brexit.* – 6. *Final remarks.*

1. The growing mobility of people across EU Member States and the resulting circulation of their personal and family status has been one of the main drivers for the development of an EU competence that was fundamental for the establishment of the Area of Freedom, Security and Justice and, more generally, for the further progress of the European integration. Civil judicial cooperation, indeed, was subject to the so-called "communitarisation" process by means of which, first with the Treaty of Amsterdam and then with the Treaty of Lisbon[1], it became fully integrated in the framework of the EU Treaties, thus being governed by a common set of rules concerning the role of the institutions, the legislative procedures and the judicial review of the Court of Justice of the EU (CJEU). The "Europeanness"[2] characterising the measures adopted in this policy field confers them a distinctive feature as compared

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[1] In particular, as is well known, following the inclusion, by the Treaty of Maastricht, of civil judicial cooperation in the EU's sphere of activity, the Treaty of Amsterdam (signed on 2 October 1997 and entered into force on 1 May 1999) placed this area of competence within the EC Treaty (Art. 61 et seq.), albeit maintaining certain specificities in its regulation. It was then the Treaty of Lisbon (signed on 13 December 2007 and entered into force on 1 December 2009) that provided the definitive asset to this policy, which now falls under the Title V of the TFEU "Area of Freedom, Security and Justice" (Art. 67 et seq.) alongside the other competences of border controls, asylum and immigration, on the one hand, and police and judicial cooperation in criminal matters, on the other hand.

[2] This expressive wording is recurring in the contributions published in *How European is European Private International Law? Sources, Court Practice, Academic Discourse*, edited by Von Hein, Kieninger, Rühl, Intersentia, Cambridge 2019.

to the legal instruments elaborated in the context of other intergovernmental organisations and is specifically regulated in Art. 81 TFEU that provides the legal basis for such measures. In particular, at the very core of this shared EU competence lies the mutual recognition of judgments and non-judicial decisions, which in turn derives from the structural EU law principle of mutual trust between Member States. Art. 81(2) further lists the objectives that the EU measures must pursue, which represent the boundaries of such competence in accordance with the principle of conferral, and stipulates the legislative procedure for their adoption, i.e. the ordinary procedure.

Measures concerning family law with cross-border implications, however, are subject to a partially different regime in view of the sensitive nature of this area of policy making, closely related to national interests. More precisely, a special legislative procedure envisaging that the Council acts unanimously after consulting the European Parliament is laid down in Art. 81(3), but with the same procedural requirements (and on a proposal from the Commission) the Council is allowed to adopt a decision determining the switch to the ordinary procedure for certain aspects of the subject matter (*passerelle* clause). In this latter instance, national Parliaments may make an opposition within six months from the date of the notification of the Commission's proposal, and this would prevent the decision from being adopted. The EU measure may eventually be passed through the implementation of an enhanced cooperation (requiring a minimum of nine Member States), as it was the case with regard to the law applicable to separation and divorce[3], and the comprehensive pieces of legislation in the area of property relations of international couples[4].

By virtue of these procedures, the objectives set out by Art. 81 TFEU allow the EU institutions to enact legislation aimed at harmonising the private international law (PIL) regimes among Member States. On the contrary, substantive private law remains subject to national regulation. Despite this distinction, the EU measures may nonetheless have a further indirect influence on Member States' substantive laws, namely at the level of interpretation of legal concepts employed in domestic rules through the recourse to the so-called autonomous interpretation. This layered approach, however, has been pursued by means of a number of separate legal instruments (mostly regulations), successively adopted on the basis of political and societal needs, thus resulting, at times, in a not so coherent body of legislation that has proven challenging to apply in the Member States' legal systems.

[3] Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in *OJ* L 343 of 29 December 2010, p. 10 et seq.

[4] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, both in *OJ* L 183 of 8 July 2016, p. 1 et seq. and p. 30 et seq., respectively.

As a direct consequence of the sectoral nature of the EU competence, the acts implemented in the field of civil judicial cooperation place a particular importance in the definition of the respective scopes of application that carve out the temporal, personal and material circumstances under which they can operate. The assessment of such conditions is therefore a preliminary and fundamental activity for commentators and practitioners alike when addressing these EU instruments in order to determine their actual applicability. As it has been pointed out[5], these scope limitations are required to differentiate between the respective purviews of the EU acts, therefore promoting their consistency and coordination, but may ultimately create gaps in the exercise of this competence with the result that domestic PIL rules may still come into play.

Against this general background, the paper addresses the EU civil judicial cooperation by selecting the specific topic of cross-border parental responsibility matters, in relation to which the EU institutions adopted secondary legislation in the early 2000s, namely the Regulation No. 1347/2000[6] that was soon repealed by the Regulation No. 2201/2003[7] (hereinafter also "Brussels II*bis* Regulation"[8]), applying as of 1 March 2005 and currently still in force. This Regulation provides for rules concerning jurisdiction, recognition and enforcement of decisions, as well as co-operation between central authorities[9].

Only the applicable law is not covered by the PIL scope of this legal instrument, and is therefore governed by international sources[10], where these are applicable, or by national laws on a residual basis. Starting from 2016, Brussels II*bis* Regulation was subject to a recast exercise that concluded with the adoption of the

[5] MEEUSEN, *Interaction between EU Regulations and Member State Codification of Private International Law: From Patchwork to Network*, in *How European is European Private International Law*, cited above, pp. 61-110, at p. 84.

[6] Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, in *OJ* L 160 of 30 June 2000, p. 19 et seq.

[7] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, in *OJ* L 338 of 23 December 2003, p. 1 et seq.

[8] The Regulation is also widely known as "Brussels IIa". However, in this paper it is referred to as "Brussels II*bis*" for reasons of consistency with the designation "Brussels II*ter*" of its successor (see *infra*, footnote 11).

[9] As is well known, Brussels II*bis* Regulation regulates the mentioned PIL aspects in relation to two subject matters, i.e. divorce, legal separation and marriage annulment, on the one hand, and parental responsibility, on the other hand. For the purposes of this paper, only the latter is taken into account.

[10] In particular, the reference is made to the 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, concluded within the framework of the Hague Conference on Private International Law (HCCH). The full text (both in English and French) and the regularly updated status table are available at: www.hcch.net. On this Convention, see further *infra*, Section 2.

new Regulation 2019/1111 on 25 June 2019[11] (hereinafter also "Brussels II*ter* Regulation"), which will apply from 1 August 2022.

In particular, the paper examines the scope of Brussels II*bis* Regulation with regard to parental responsibility (pointing out, whenever relevant, the differences with the previous and future EU instruments), first by providing a preliminary overview of the use of this notion in international legal sources on children protection, and then analysing more in detail the personal, material and territorial conditions for its application. In this latter respect, the applicability of the Regulation (as well as others) is called upon to face an unprecedented phase of the development of civil judicial cooperation, stemming from the consequences of the withdrawal of the United Kingdom (UK) from the EU as of 1 February 2020. The assessment of the scope of application is carried out in light of the relevant CJEU and national[12] case law, in order to address converging and diverging trends between them. Lastly, concluding remarks on the practical implications of a far-reaching understanding of the concept of parental responsibility within the EU legal system are proposed.

2. In relation to the subject matter at issue, Brussels II*bis* Regulation expressly defines its scope of application in Art. 1(1), specifying that it applies "in civil matters relating to (b) the attribution, exercise, delegation, restriction or termination of parental responsibility". Paras. 2-3 of the same provision complement the notion by adding two lists of matters that are, respectively, included in and excluded from the broad wording of Para. 1. Furthermore, Art. 2 lays down a number of definitions of the recurring legal terms used in the Regulation. These definitions are relevant to determine parental responsibility rights for the purposes of their interpretation and application (in particular, Nos. 7-10 of Art. 2)[13].

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[11] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, in *OJ* L 178 of 2 July 2019, p. 1 et seq. In the literature, on the recast of Brussels II*bis* Regulation: *The revision of the Brussels IIbis Regulation (special issue)*, in *Nederlands Internationaal Privaatrecht*, 2015; Baruffi, *La riforma del regolamento Bruxelles II-bis e la tutela dell'interesse superiore del minore*, in *Dialoghi con Ugo Villani*, a cura di Triggiani, Cherubini, Ingravallo, Nalin, Virzo, Cacucci editore, Bari 2017, vol. 2, pp. 1087-1092; Honorati, *The Commission's proposal for a recast of Brussels IIa Regulation*, in *International Family Law*, 2017, pp. 97-114, Carpaneto, *Impact of the Best Interests of the Child on the Brussels II* ter *Regulation*, in *Fundamental Rights and Best Interests of the Child in Transnational Families*, edited by Bergamini, Ragni, Intersentia, Cambridge 2019, pp. 265-286.

[12] The national case law herein cited and commented on has been collected as part of the activities of the "EUFam's"/"EUFams II" projects and filed in a public database available at: http://www2.ipr.uni-heidelberg.de/eufams/index.php?site=entscheidungsdatenbank. In this database, the full text of the decisions is not published, but for each of them a data set is provided that includes the main factual and legal elements, as well as a descriptive summary and a short critique. The alphanumeric code following each decision cited in the footnotes represents the uniform classification tool adopted in order to populate the database.

[13] With specific regard to the provisions on the scope of application concerning parental responsibility, see, e.g., Pintens, *Article 1. Scope* and *Article 2. Definitions*, in *European Commentaries of Private International Law. Brussels II-bis Regulation*, edited by Magnus, Mankowski, Verlag Dr. Otto

Before analysing the actual contents of parental responsibility matters governed by the Regulation, it should be pointed out that this concept has a widespread use in various international instruments concerning the rights of children and their protection. Parental responsibility is generally preferred to the stricter notion of "parental authority"[14]. The most comprehensive source in this regard is the 1996 Hague Convention on the Protection of Children[15]. The EU Regulation parallels this Convention in many respects. Among them, there are the definition of parental responsibility provided for in Art. 1(2) of the Convention, and the included and excluded matters listed in its Arts. 3 and 4, respectively.

A further example comes from the European Convention of 25 January 1996 on the Exercise of Children's Rights established within the framework of the Council of Europe[16]. The objective of this Convention is to set forth a number of procedural rights and facilitate their exercise in proceedings affecting children, especially those "involving the exercise of parental responsibilities" (Art. 1(3)). The use of the plural form is meant to particularly emphasise the scope of the notion as encompassing a wide set of powers, rights, and duties[17]. Neither the international nor the European legal instruments actually define their contents, which are therefore left to the laws of the State where responsibility is under consideration[18]. As regards Brussels II*bis* Regulation, an autonomous interpretation of parental rights and duties is required in

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Schmidt, Köln 2017, pp. 52-81, pp. 81-88; Baruffi, *Articoli 1-2 Regolamento (CE) 27 novembre 2003, n. 2201/2003*, in *Commentario breve al diritto della famiglia*, diretto da Zaccaria, Wolters Kluwer-CEDAM, Milano 2016, pp. 2541-2549.

[14] It is worth mentioning that the paradigm shift occurred at the international level between the term "parental responsibility" instead of the more traditional "parental authority" was also among the grounds underlying the recent Italian legislative reform on the regulation of filiation and parent-child relationships (Law No. 219 of 10 December 2012, *Disposizioni in materia di riconoscimento dei figli naturali*; Legislative Decree No. 154 of 28 December 2013, *Revisione delle disposizioni vigenti in materia di filiazione, a norma dell'articolo 2 della legge 10 dicembre 2012, n. 219*).

[15] In the literature on the 1996 Convention, see, e.g., Lowe, Nicholls, *The 1996 Hague Convention on the Protection of Children*, Jordan Publishing, Bristol 2012; Gration, Curry-Sumner, Williams, Setright, Right, *International Issues in Family Law: The 1996 Convention on the Protection of Children and Brussels IIa*, Jordan Publishing, Bristol 2015; Baruffi, *La Convenzione dell'Aja del 1996 sulla tutela dei minori nell'ordinamento italiano*, in *Rivista di diritto internazionale privato e processuale*, 2016, pp. 975-1019.

[16] The full text of the Convention (both in English and French) is available at: http://rm.coe.int/168007cdaf.

[17] See generally the work of the Commission on European Family Law (CEFL), which has led to the publication of the *Principles of European Family Law regarding Parental Responsibilities* (2007, available at: http://ceflonline.net/principles), with the aim of promoting a degree of harmonisation of family law throughout Europe. In the literature, Boele-Woelki, *The CEFL Principles regarding Parental Responsibilities: Predominance of the Common Core*, in *European Challenges in Contemporary Family Law*, edited by Boele-Woelki, Sverdrup, Intersentia, Antwerp 2008, pp. 63-92.

[18] Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998), prepared by Dr Alegría Borrás (Borrás Report), in *OJ* C 221 of 16 July 1998, p. 65 et seq., para. 24.

order to ensure consistency with the harmonising purposes of EU law. Furthermore, the interpretative solutions should benefit from a mutual influence between the various regulatory frameworks existing in the field of child protection at both the international and regional levels (on the one hand, the United Nations and the HCCH, and on the other hand, the EU and the Council of Europe)[19]. This would indeed ensure that possible gaps in the respective bodies of legislation are filled in accordance with the unifying objectives of these legal instruments.

3. One of the peculiarities of Brussels II*bis* Regulation resides in the personal scope of application, which makes it possible to apply it even in circumstances that are characterised by "external internationality"[20], i.e. also where the case lacks intra-EU implications. As opposed to other EU PIL instruments[21], Brussels II*bis* Regulation does not contain any prerequisites for its "international" application, with the consequence that the EU jurisdictional regime always supersedes national rules whenever an international element (even linked to a non-EU State) exists in the given case[22]. This contributes to a substantial extension of the factual situations potentially falling within the scope of application of EU rules, as clarified also by the CJEU when it stressed that Art. 1 of the Regulation does not make "reference to any limitation"[23] in the definition of its reach from an international perspective.

More precisely, as far as parental responsibility matters are concerned, this "original hierarchy"[24] between EU and national legal sources results from the residual ground of jurisdiction laid down in Art. 14 of Brussels II*bis* Regulation[25]. Art. 14

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[19] In this regard, see further Baker, Groff, *The impact of the Hague Conventions on European family law*, in *European Family Law. The Impact of Institutions and Organisations on European Family Law*, edited by Scherpe, Edward Elgar Publishing, Cheltenham 2016, vol. I, pp. 148-150.

[20] Requejo Isidro, *Regulation (EC) 2201/2003 and its Personal Scope*, in *Yearbook of Private International Law*, 2008, pp. 579-591, at p. 582.

[21] For example, Brussels I-*bis* Regulation (No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ* L 351 of 20 December 2012, p. 1 et seq.), which in principle requires that the defendant is domiciled in an EU Member State in order to be applied (see Art. 4 thereof).

[22] The same does not hold true in the field of recognition and enforcement, where only decisions rendered by Member States' courts are subject to the rules set out in Brussels II*bis* Regulation.

[23] CJEU, Case C-393/18 PPU, *UD* v *XB* [2018], EU: C:2018:835, para. 31.

[24] Pataut, Gallant, *Article 14. Residual jurisdiction*, in *European Commentaries of Private International Law. Brussels IIbis Regulation*, cited above, p. 170.

[25] With regard to matrimonial matters, the corresponding provisions that confer this original character to the applicability of the EU jurisdictional regime are laid down in Arts. 6-7 of Brussels II*bis* Regulation, on which CJEU, Case C-68/07, *Kerstin Sundelind Lopez* v *Miguel Enrique Lopez Lizazo* [2007], ECLI:EU:C:2007:740. For similar considerations in relation to the Regulation's personal scope of application in matrimonial matters, see Baruffi, Fratea, Peraro, *Report on Italian Good Practices*, elaborated within the "EUFam's" project, 2016, p. 3, available at: www.eufams.unimi.it/wp-content/uploads/2017/01 /EUFams_Italian-Exchange-Seminar_Report_Italian_Good_practices_eng_ final3.pdf.

allows the court of a Member State to refer to domestic laws, provided that there is no other court within the EU having jurisdiction pursuant to Arts. 8-13. Notwithstanding this express provision, at times national courts have failed to preliminarily refer to Art. 14 of the Regulation. Instead, they directly applied their domestic PIL statutes in some cases where the habitual residence of the child was located outside the EU[26]. Even though the actual outcomes of the case usually remain unaffected, this nonetheless denotes the mistaken assumption that the EU rules on jurisdiction cannot apply whenever the relevant connecting factor (i.e. the child's habitual residence) is located outside the EU[27].

It should be also noted that the reference to the national rules on jurisdiction set out in Art. 14 is to be intended in the broader sense, thus encompassing also other international legal sources, insofar as they are applicable, that shall have precedence over the domestic regime. In particular, following the entry into force of the 1996 Hague Convention on the Protection of Children in all EU Member States, this instrument should be referred to in order to determine jurisdiction, whenever no court of a Member State has it pursuant to Brussels II*bis* Regulation, in a case involving a Member State and a Contracting State of the Convention. Such an approach was indeed followed in a recent decision of the Italian Supreme Court, although it was not preliminarily grounded on the rule on residual jurisdiction pursuant to Art. 14 of the Regulation[28].

Furthermore, it must be specified that Brussels II*bis* Regulation does not set a range of age of children to be covered by the scope of application of its rules on parental responsibility, as opposed to other international instruments such as the 1996 Hague Convention on the Protection of Children (children up to the age of 18) or the 1980 Hague Child Abduction Convention[29] (children up to the age of 16). As a result, this aspect shall be defined by Member States' legal systems[30]. It should be noted, however, that the new Brussels II*ter* Regulation fills the legislative gap by inserting two specific rules in this regard. On the one hand, the new Recital 17 expressly

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[26] For example, Cass., 28 May 2014 No. 11915, ITT20140528, regarding a child who was habitually resident in Cuba. See also *First Assessment Report on the case-law collected by the Research Consortium*, edited by VIARENGO, VILLATA and elaborated within the "EUFam's" project, 2016, p. 17, available at www.eufams.unimi.it/wp-content/uploads/2017/01/EUFAMS-First-Assessment-Report-of-the-collected-case-law.pdf.

[27] MAGNUS, MANKOWSKI, *Introduction*, in *European Commentaries of Private International Law. Brussels II-bis Regulation*, cited above, p. 20.

[28] Cass., 13 December 2018 No. 32359, ITT20181213, regarding a petition for termination of parental responsibility over a child in a case involving Italy and the Principality of Monaco (both Contracting Parties to the 1996 Hague Convention).

[29] The full text of the Convention (both in English and French) and the regularly updated status table are available at www.hcch.net.

[30] European Commission, *Practice Guide for the application of the Brussels IIa Regulation*, 2015, para. 3.1.1.1, available at: https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed.

provides for the application of said instrument "to all children up to the age of 18 years", with the exception of the provisions on child abduction that "should continue to apply to children up to the age of 16 years" in order to be consistent with the 1980 Hague Child Abduction Convention. On the other hand, a new definition (No. 6) is introduced in Art. 2 of the Regulation, pursuant to which the term "child" shall mean "any person below the age of 18 years".

Lastly, the personal scope of Brussels II*bis* Regulation in parental responsibility matters covers all children, regardless of their biological origin (Recital 5 of the Regulation). Indeed, it does not require any link with matrimonial proceedings for its application, in contrast to its predecessor, Regulation No. 1347/2000, and this was a significant and very welcomed departure from the previous instrument [31].

4. As mentioned above, Art. 1(1) of Brussels II*bis* Regulation sets forth the general provision concerning its scope in relation to parental responsibility, which includes civil matters covering any legal situation from the very existence of such right ("attribution"), throughout its forms of exercise ("exercise, delegation, restriction"), to its cessation ("termination").

The actual extent of these legal situations, however, is specified by the applicable substantive law (either domestic or foreign law, as determined by the connecting factor laid down in the relevant legal instrument). The concept of parental responsibility is further clarified by the definition provided in Art. 2 No. 7 of the Regulation, which refers to "all rights and duties relating to the person or the property of a child [that] are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect". It follows that under the EU legal framework, the holder of parental responsibility may either be a natural or a legal person (Art. 2 No. 8), and the rights and duties conferred to the holder may derive from a judicial decision, a legislative provision, or a private agreement having legal effect.

The scope of the Regulation resulting from the broad wording of these rules has been specified by the CJEU case law in various instances. The term "civil matters", for example, is an autonomous concept of EU law that is common in other PIL instruments[32]. In particular, measures that would pertain to the public law sphere according to Member States' laws are nonetheless encompassed in the notion of civil matters for the purposes of Brussels II*bis* Regulation, provided that the object of the

[31] Regulation No. 1347/2000 applied only to children of both spouses in the context of matrimonial proceedings relating to divorce, legal separation or marriage annulment. On occasion, also national courts (especially less recently) have underlined this legislative improvement when assessing petitions regarding parental responsibility independently from any connection to matrimonial issues: e.g., AG Leverkusen, 10 August 2006, 33 F 222/05, DEF20060810.

[32] Brussels I-*bis* Regulation: in this regard, e.g., CJEU, Case C-645/11, *Land Berlin* v *Ellen Mirjam Sapir et al* [2013], EU:C:2013:228; Case C-49/12, *The Commissioners for Her Majesty's Revenue & Customs* v *Sunico ApS et al* [2013], EU:C:2013:545.

application requesting that measure falls within its material scope[33]. In this regard, the CJEU has most recently held that the object of an action where the court is called upon to rule on the child's need to obtain a passport and the parent's right to apply for that passport without the agreement of the other parent is the "exercise of parental responsibility for that child"[34] within the meaning of Art. 1(1)(b) in conjunction with Art. 2 No. 7 of Brussels II*bis*. No relevance should be given to the fact that this court's decision would subsequently be taken into account in the administrative procedure for issuing the child's passport, which remains exclusively regulated by domestic law. Also, national case law appears to follow this autonomous interpretation properly. For instance, German courts apply the Regulation even in administrative proceedings involving the *Jugendamt* (youth welfare office)[35].

This general notion of parental responsibility is then complemented by the lists of included and excluded matters provided in Paras. 2-3 of Art. 1, respectively. Each of them is separately analysed in the following subsections.

4.1. The matters listed in Art. 1(2) are merely illustrative, and thus do not cover all issues that could potentially fall within the material scope of Brussels II*bis* Regulation.

Point (a) first refers to "rights of custody and rights of access", which are aspects typically related to the attribution and the exercise of parental responsibility. The former is specifically defined in Art. 2 No. 9 of the Regulation as "rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence". The latter is a less comprehensive right that allows its holder "to take a child to a place other than his or her habitual residence for a limited period of time" pursuant to Art. 2 No. 10[36].

In particular, the notion of rights of custody needs to be interpreted independently of any domestic legislation in order to be consistent with a uniform application of EU law[37], and is further relevant to determine whether a child's relocation may amount to a "wrongful removal or retention" within the meaning of Art. 2 No. 11[38].

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[33] CJEU, Case C-435/06, *C* [2007], EU:C:2007:714; Case C-523/07, *A* [2009], EU:C:2009:225. Both decisions are further analysed *infra*, Section 4.1.

[34] CJEU, Case C-215/15, *Vasilka Ivanova Gogova* v *Ilia Dimitrov Iliev* [2015], EU:C:2015:710, para. 29.

[35] OVG Lüneburg, 20 January 2016, 4 LB 14/13, DEA20160120. Against VG Augsburg, 13 April 2015, 3 E 15.251, DEA20150413, even though the ruling of this court does not seem convincing. See also *First Assessment Report on the case-law collected by the Research Consortium*, cited above, p. 17.

[36] Both definitions are clearly inspired by those provided in the 1980 Hague Child Abduction Convention (Art. 5).

[37] CJEU, Case C-400/10 PPU, *J. McB.* v *L. E.* [2010], EU:C:2010:582, para. 41.

[38] The Regulation's provisions on child abduction (Arts. 10-11) fall outside the scope of this paper. On the interpretation given by national courts to the notion of custody rights in the context of child abduction proceedings, see, e.g., Najvyšší súd, 30 June 2009, 2 M Cdo 23/2008, SKT20090630; Najvyšší súd, 30 April 2013, 6 Cdo 1/2013, SKT20130430; Trib. minorenni Catania, 1 July 2015, ITF20150701.

In this specific regard, account must be given to custody rights that were both (a) conferred under Member States' laws applicable in each case, i.e., those of the place of habitual residence of the child immediately before the removal or retention; and (b) effectively exercised by their holder (either jointly or alone).

As established by the CJEU[39], it follows that the wrongful nature of the conduct depends on the actual place of a child's habitual residence immediately before the relocation. The court of the place where the child was removed or retained can order the return only if it is able to determine – on the basis of the factual circumstances of each case – whether the child's habitual residence was located in the Member State of origin. It was precisely in the context of an alleged wrongful removal of three children by their parents that the CJEU has ruled on the inclusion within the material scope of Brussels II*bis* Regulation of "a decision making [those] children wards of court and directing that [they] be returned", on the ground that such decision concerned rights of custody and/or guardianship[40]. More specifically, the wardship jurisdiction exercised by the national court in the main proceedings at hand (resulting in the attribution of the rights of custody over the children to a public authority) was deemed to involve the exercise of rights related to the welfare and education of the children (Art. 1(2)(a) of the Regulation) or aspects of guardianship and curatorship (Art. 1(2)(b) thereof)[41].

As far as the interpretation of the concept of rights of access is concerned, a preliminary ruling of the CJEU regarding the range of persons exercising these rights should be mentioned[42]. The question referred sought to establish whether such notion as referred to in Arts. 1(2)(a) and 2 No. 10 of Brussels II*bis* Regulation encompassed also the rights of access of persons other than parents, namely the grandparents in the case at issue. Following the guidance offered in the opinion of Advocate General Szpunar[43], the CJEU reasonably supported a positive answer, which was inferred from the textual analysis of the provisions of the Regulation, as well as from its *travaux préparatoires*. In addition, the significant transformation of the society in the EU has resulted in a substantial change of the family life of citizens, and thus the diversifica-

[39] CJEU, Case C-376/14 PPU, *C* v *M* [2014], EU:C:2014:2268, para. 57.

[40] CJEU, Joined Cases C-325/18 PPU and C-375/18 PPU, *Hampshire County Council* v *C.E. and N.E.* [2018], EU:C:2018:739, paras. 54-61.

[41] *Ibidem*, para. 58.

[42] CJEU, Case C-335/17, *Neli Valcheva* v *Georgios Babanarakis* [2018], EU:C:2018:359.

[43] Opinion of Advocate General Szpunar in Case C-335/17, *Neli Valcheva* v *Georgios Babanarakis* [2018], EU:C:2018:242, arguing that "the textual, teleological, systematic and historical analysis" of the provisions of the Regulation points to the extension of the meaning of rights of access as including the rights of access of grandparents to their grandchildren. The reasoning carried out in this opinion best illustrates the "cross-fertilisation" between the international and EU legal instruments on child protection (see *supra*, Section 2), as the Advocate General has interpreted the scope of application of the notion of rights of access under Brussels II*bis* Regulation in light of the 1996 Hague Convention on the Protection of Children, as well as the 2003 Convention on Contact concerning Children.

tion of family members who may be granted rights of access to children is a direct consequence of these changes.

This transformation must also be properly recognised in the interpretation of the relevant provisions of Brussels II*bis*. Otherwise, should applications for rights of access by persons other than the parents be excluded from the scope of the Regulation, the jurisdiction to rule on those claims would be determined on the basis of non-harmonised PIL rules, with the "risk that conflicting or even irreconcilable decisions might be adopted"[44]. Such a broad understanding of the holders of rights of access within the meaning the Regulation has been followed in the national case law and even extensively applied also in purely internal situations[45], thus confirming the impact of the autonomous interpretation under EU law on the corresponding notions found in the substantive domestic legislations.

Furthermore, the scope of application of rights of access includes the enforcement of a penalty payment imposed in order to ensure the effectiveness of such rights, in accordance with the CJEU ruling in *Bohez*[46]. Indeed, it has been deemed as an ancillary measure that serves to protect a right falling within the scope of Brussels II*bis* Regulation, rather than that of Brussels I Regulation (and the current Brussels I*bis*) that generally applies to civil and commercial matters. The background of this holding is in well-established CJEU case law, which initially considered the inclusion of interim measures within the scope of the Brussels Convention in relation to the "nature of the rights which they serve to protect"[47]. This holding was then more broadly applied to interpret the notion of civil and commercial matters under the Brussels I regime according to "factors characterising the nature of the legal relationships between the parties to the action or the subject-matter of the action"[48]. The practical impact of the *Bohez* decision appears to have been overlooked in a case regarding compensation for damages sought for a breach of rights of access pursuant to Art. 709-*ter*(2) of the Italian Civil Procedural Code, where the national court did not carry out any specific assessment of the relevant PIL aspects[49].

Most recently, however, the Italian Supreme Court has ruled precisely on the ancillary nature existing between claims concerning the exercise of parental responsibility over children habitually residing in London and a further action based on

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[44] CJEU, *Valcheva*, cited above, para. 35.

[45] Cass., 25 July 2018 No. 19779, ITT20180725, and Cass., 25 July 2018 No. 19780, ITT20180725a, both referring to the internationally shared definition of rights of access in relation to grandparents, as results from the case law of the CJEU and the European Court of Human Rights, which was applied to interpret the domestic institution provided by Art. 317-*bis* of the Italian Civil Code.

[46] CJEU, Case C-4/14, *Christophe Bohez* v *Ingrid Wiertz* [2015], EU:C:2015:563.

[47] CJEU, Case 143/78, *Jacques de Cavel* v *Louise de Cavel* [1979], EU:C:1979:83 para. 8.

[48] CJEU, Case C-406/09, *Realchemie Nederland BV* v *Bayer CropScience AG* [2011], EU:C:2011:668, para, 39. Previously, see CJEU, Case C-420/07, *Meletis Apostolides* v *David Charles Orams and Linda Elizabeth Orams* [2009], EU:C:2009:271, para. 42.

[49] Trib. Benevento, 12 March 2015, ITF20150312.

Article 709-*ter*(2) of the Italian Civil Procedural Code, whose subject matter in this case was the alleged breach of maintenance obligations towards them and the consequent compensation for damages[50]. In this regard, it held that the cause of action of the latter claim was inherently based in tort (i.e., the breach of maintenance obligations), and thus was not ancillary to the action on parental responsibility. As a result, jurisdiction to rule on tort claims had to be established under Brussels I Regulation (applicable *ratione temporis*), and not Brussels II*bis* Regulation[51].

Art. 1(2) of Brussels II*bis* Regulation further provides that "guardianship, curatorship and similar institutions" are among the matters covered by the notion of parental responsibility (Point (b)). Also, "the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child" (Point (c)) and "the administration, conservation or disposal of the child's property" that qualify as measures of protection are similarly governed by the Regulation (Point (e)). The peculiar nature of these latter two cases is well underlined by Recital 9. It specifies that whenever the measures relating to the children's property do not concern their protection (i.e., do not involve disputes between the parents), they rather fall within the scope of application of Brussels I (currently I*bis*) Regulation[52]. As an example following this purposive approach, it is worth mentioning an Italian case where the judge supervising guardianships (*giudice tutelare*) applied Brussels II*bis* Regulation to a joint application lodged by the parents on behalf of their children for the appointment of a special guardian authorised to represent them in the purchase of an immovable property (in particular, it held that such action fell within the scope of Art. 1(2)(c))[53].

Lastly, Art. 1(2)(d) considers "the placement of the child in a foster family or in institutional care". These particular situations could be inherently regulated by public law within Member States' legal systems, but the CJEU has regarded them as measures affecting the rights of custody over a child, and thus as matters relating to parental responsibility under Brussels II*bis* Regulation[54]. This holding is also consis-

[50] Cass., 15 November 2017 No. 27091, ITT20171115, commented by Baruffi, *Competenza della giurisdizione internazionale su misure di responsabilità genitoriale e obbligazioni alimentari*, in *Il Quotidiano giuridico*, 14 December 2017, available at www.quotidianogiuridico.it.

[51] Although falling outside the more limited purposes of this paper, it should be nonetheless mentioned that the actual scope of application of the penalty measures envisaged in Art. 709-*ter* of the Italian Civil Procedural Code has been subject to much debate in both case law and literature. More precisely, the wording of the provision only refers to cases of breach of custody rights. However, courts do impose these measures also in cases of breach of obligations financial in nature, such as maintenance. Anyway, and notwithstanding their nature based in tort, it could be argued that they fall within the scope of Brussels II*bis* Regulation, as being essentially aimed at protecting the best interests of the child.

[52] See also *Practice Guide for the application of the Brussels IIa Regulation*, cited above, para. 3.1.1.4.

[53] Trib. Padova, 14 September 2017, ITF20170914.

[54] CJEU, *C*, cited above, paras. 32-53; *A*, cited above, paras. 21-29.

tent with the autonomous interpretation given to the term "civil matters", which has been analysed above. Moreover, the Regulation's material scope includes a judgment rendered by a court of a Member State that orders the placement of a child in an institutional care in another Member State even where such decision entails "a period of deprivation of liberty [of that child] for therapeutic and educational purposes"[55]. This further aspect is in fact qualified as a measure for protection of the child, and not as a "punishment for the commission of a criminal offence"[56] that would be excluded from the scope of the Regulation (Art. 1(3)(g)).

4.2. As opposed to the matters addressed above, the list of those excluded from the material scope of Brussels II*bis* Regulation is exhaustive. Generally speaking, the grounds underlying the choice of excluding a particular matter can be grouped into two categories: some of them are typically governed by national laws (and thus Member States enjoy a wide margin of discretion); others are regulated at the EU level, but in specific acts other than Brussels II*bis* Regulation.

The former category comprises the matters listed in Points (a)-(d) and (g) of Art. 1(3), which refer, respectively, to "the establishment or contesting of a parent-child relationship", "decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption", "the name and forenames of the child", "emancipation"[57] and "measures taken as a result of criminal offences committed by children".

In addition, Recital 10 clarifies the reasons for excluding the establishment of parenthood and, more generally, questions relating to the status of a person, stressing that these aspects differ from the attribution of parental responsibility. Member States courts appear fairly attuned to the interpretation of these exclusions, and no issues have arisen in the case law. For instance, an Italian court has properly held that the assessment of the state of neglect of a child, being a preparatory measure in order to possibly declare his adoption, falls outside the scope of Brussels II*bis* Regulation pursuant to Art. 1(3)(b)[58]. This holding also appears in line with a recent CJEU ruling, in which an injunction sought against a public body of a Member State in order to prevent that body from commencing or continuing in that Member State proceedings for the adoption of children who were residing there, was excluded from the scope of the Regulation for being a decision on adoption and the measures preparatory to it[59]. Another proper example comes a Slovak

[55] CJEU, Case C-92/12, *Health Service Executive* v *S.C. and A.C.* [2012], EU:C:2012:255, para. 63.

[56] *Ibidem*, para. 65.

[57] In particular, given that emancipated children can exercise a number of rights before reaching the age of majority without the assistance of parents or guardians, the Regulation becomes inapplicable to them according to the age limit provided for in each national legal system (in Italy, for example, the possibility of emancipation is given at 16 years): see BARUFFI, *Articoli 1-2*, cited above, p. 2548.

[58] Trib. minorenni Roma, 25 January 2008, ITF20080125.

[59] CJEU, *Hampshire County Council*, cited above, paras. 92-93.

court of first instance, which applied the domestic PIL Act to a petition requesting the change of the surname of a child as this fell outside the scope of the EU Regulation[60].

As for the matters listed in Points (e) and (f) that are governed by different EU legal instruments (such as maintenance obligations and successions) the relevant instruments are the Maintenance Regulation[61] and the Succession Regulation[62], respectively. Unlike Brussels II*bis*, both Regulations provide for rules covering all PIL aspects (jurisdiction, applicable law, recognition and enforcement of decisions), thus offering complete legislation that should facilitate the courts' ability to rule on these specific matters. Nonetheless, the fragmentation of proceedings between various regulatory regimes still poses occasional difficulties upon national courts[63], which sometimes fail to assess each claim according to the correct EU or international instrument that should be applied[64].

An issue posing practical uncertainty is precisely related to the demarcation between the scope of application of Brussels II*bis* and the Maintenance Regulation, and namely the assessment, under a PIL perspective, of the petition for the award of the family home. In the Italian case law, various approaches emerge in this regard: in some instances, this claim was interpreted as pertaining to the protection of children, and thus subject to the jurisdictional regime of Brussels II*bis* Regulation[65]; while in other cases, it was considered ancillary to the maintenance claim and thus falling within the scope of the Maintenance Regulation[66]. In the absence of clear guidance from the CJEU, this divergence is left to be resolved by national courts, which should, however, refrain from relying too heavily on domestic categories when approaching such claim in a cross-border dispute.

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[60] Okresný súd Humenné, 8P/290/2018, SKF20190725.

[61] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in *OJ* L 7 of 10 January 2009, p. 1 et seq.

[62] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in *OJ* L 201 of 27 July 2012, p. 107 et seq.

[63] This issue was also highlighted in another "EUFam's" project deliverable: BARUFFI, FRATEA, DANIELI, PERARO, *Report on the outcomes of the online questionnaire*, 2017, pp. 55-56, available at www.eufams.unimi.it/wp-content/uploads/2017/06/EUFAMS-Report-Outcomes-Online-Questionnaire.pdf.

[64] For some examples regarding the interplay between Brussels II*bis* and Maintenance Regulations, see Županijski sud u Puli Gž-1532/14, 16 September 2014, CRS20140914; Trib. Modena, 7 February 2017, ITF20170207. The distinction between the respective material scopes of application of these two Regulations has been recently reiterated also in CJEU, Case C-759/18, *OF* v *PG* [2019], ECLI:EU:C:2019:816, paras. 46-54, with regard to parental contributions to the costs of a child's care and upbringing, which fall under the notion of maintenance and not that of parental responsibility.

[65] Trib. Cremona, 15 September 2014, ITF20140915; Trib. Parma, 4 April 2018, ITF20180404.

[66] Trib. Parma, 23 May 2018, ITF20180523.

Furthermore, with specific regard to the exclusion provided in Art. 1(3)(f), the CJEU has recently established that Brussels IIbis Regulation applies to an inheritance settlement agreement concluded between the surviving spouse and a guardian *ad litem* on behalf of minor children, even though the approval of the agreement has been requested in the context of succession proceedings[67]. This view is again supported by the purpose of protection of the children underlying such measures, which is required to account for their limited legal capacity and thus aimed at safeguarding their best interests. The provisions of the Succession Regulation also confirm this holding by expressly excluding the status and legal capacity of natural persons from its scope of application (Art. 1(2)(a)-(b) thereof).

5. As is well known, three Member States enjoy a particular position in relation to the above mentioned "communitarisation" of measures of civil judicial cooperation: on the one hand, Denmark does not take part in such measures and they are not binding upon nor applicable in that Member State[68]; on the other hand, Ireland and the UK reserved the right to notify their intention to participate in the adoption of such measures[69]. With specific regard to Brussels IIbis Regulation, Ireland and the UK have declared to join the judicial cooperation regime laid down by that instrument, which has therefore a territorial scope covering all EU Member States except Denmark.

This situation has now changed as of 31 January 2020 (at 12 a.m. CET), when the UK ceased to be an EU Member State. According to the Withdrawal Agreement concluded between the two parties[70], which entered into force on that same date, a transition period is currently in place and expiring earliest on 31 December 2020 (possibly extended once, by up to one or two years)[71]. During this phase, the UK applies EU law and the EU, in principle, treats the UK as if it were a Member State, with the exception of the UK's participation in EU institutions and bodies. With particular reference to Brussels IIbis Regulation, the Agreement further specifies that it continues to apply to proceedings that have been instituted before the end of the transition

[67] CJEU, Case C-404/14, *Marie Matoušková* [2015], EU:C:2015:653. Also this holding has its background in the "mutual influence" between the various international child protection instruments (see above, s I): indeed, the Explanatory Report on the 1996 Hague Child Protection Convention by Paul Lagarde (1998, available at: https://assets.hcch.net/docs/5a56242c-ff06-42c4-8cf0-00e48da47ef0.pdf) was expressly recalled to support the interpretation given by the CJEU.

[68] Protocol (No. 22) on the position of Denmark, annexed to the EU Treaties.

[69] Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the EU Treaties.

[70] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, in *OJ* C 384I of 2 November 2019, p. 1 et seq. (hereinafter also "Withdrawal Agreement").

[71] See Arts. 126 and 132 of the Withdrawal Agreement.

period (Art. 67 of the Withdrawal Agreement)[72]. As a result of this provisions, the Regulation is now vested with a peculiar territorial scope of application, which extends to a former EU Member State, at least for the given transitional period.

The long-term perspective after Brexit, however, remains surrounded by legal uncertainty, and possible legislative and political options are necessarily speculative, at least for the time being[73]. Indeed, the significant implications on the PIL regime in the UK, as well as in the EU (in its new 27 Member States format) cannot be underestimated and should require an extensive regulation in order to ensure, to the highest extent possible, the level of legal certainty and access to justice that is currently available under the existing EU instruments of civil judicial cooperation to which the UK is (still) bound.

In relation to children protection issues, in particular, the 1996 Hague Convention will become the primary legal source applicable to the resolution of cross-border disputes. According to the first available data, it should be further specified that the UK plans to "clarif[y] in legislation the domestic implementation" of the 1996 Convention through the enactment of the Private International Law (Implementation of Agreements) Bill, with the aim of continuing to have, even after Brexit, "clear and effective legal rules agreed between the UK and other countries"[74].

6. It appears safe to conclude that the contents of parental responsibility under Brussels II*bis* Regulation are indeed far-reaching, and it is also no coincidence that the CJEU has consistently supported a wide interpretation of the rules governing its scope of application (Art. 1) and the related definitions (Art. 2). More precisely, the key element that needs to be considered in order to establish whether a specific action or legal institution actually falls within the scope of the Regulation is the purposive nature, in the sense that it should ultimately aim at protecting the children and their interests. In accordance with the international legal framework, it follows that parental responsibility is a harmonised and child-centred notion also from an EU perspective[75].

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[72] The same regime also applies to other EU instruments in the field of civil judicial cooperation regarding both civil and commercial matters, as well family law (e.g. Brussels I*bis* Regulation, Maintenance Regulation).

[73] Some proposals were discussed, for example, in the study requested by the JURI Committee of the European Parliament, *The Future Relationship between the UK and the EU following the UK's withdrawal from the EU in the field of family law*, October 2018, PE 608.834, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608834/IPOL_STU(2018)608834_EN.pdf.

[74] This information is found in the background paper of the Queen's Speech delivered on 19 December 2019 and available at: https://assets.publishing.service.gov. uk/government/ uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_background_briefing_notes.pdf. At the time of writing, however, no further information is available on the progress of the Private International Law (Implementation of Agreements) Bill 2019-20 through Parliament.

[75] For a more comprehensive assessment, see FERRER-RIBA, *Parental responsibility in a European perspective*, in *European Family Law. Family Law in a European Perspective*, edited by SCHERPE, Edward Elgar Publishing, Cheltenham 2016, vol. III, p. 284.

However, partially different considerations may be relevant with regard to the separate concepts of the holding and exercise of parental responsibility. As illustrated above, the actual contents of these rights continue to be governed by domestic laws of each Member State, under which also public authorities and parties other than the parents can play a significant role. Consequently, the practical application of Brussels II*bis* Regulation may face occasional inconsistencies, which are counterbalanced by the unifying purpose of the EU-autonomous notion of parental responsibility.

These points are also confirmed by the general trends emerging from the national case law that have been assessed. Indeed, Member States' courts are well accustomed to applying the Regulation to all claims concerning attribution, exercise, and termination of parental responsibility over a child, in accordance with the broad definition provided in Art. 1(1)(b) thereof. Albeit infrequently, there are still some difficulties in addressing the relevant PIL issues regarding claims that are ancillary to proceedings on parental responsibility rights (e.g., measures of enforcement related to a breach of rights of access), or claims that may actually appear borderline between the scopes of application of different EU legal instruments (e.g., the award of the family home). At times, these aspects may not be assessed, or otherwise by referring to the wrong EU or international legal source. In these cases, the qualified guidance provided by the CJEU and the overarching principles of Brussels II*bis* Regulation (especially the best interests of the child) should always be borne in mind.

In addition, EU cross-border disputes in matters of parental responsibility will certainly be affected by Brexit being now effective. However, even after the expiry of the transitional period, the mentioned mutual influence in the interpretation of international and EU instruments could further guarantee consistency in the application by UK courts of the 1996 Hague Convention, to which Brussels II*bis* Regulation is largely inspired.

EU INSTRUMENTS OF CIVIL JUDICIAL COOPERATION IN MATTERS OF PARENTAL RESPONSIBILITY: CONSIDERATIONS ON COMPETENCE AND SCOPE

ABSTRACT: *The paper addresses the EU competence in civil judicial cooperation by selecting the topic of parental responsibility matters, currently governed by Regulation No. 2201/2003 (Brussels II-bis Regulation). In particular, it focuses on the provisions that define the scope of application of this instrument, which are particularly relevant as a direct consequence of the sectoral nature of the competence conferred to the EU in this field, and it carries out a practice-oriented analysis on the basis of CJEU and national case law. In addition, specific mention is made to two significant developments that affect the application of the Regulation: on the one hand, the adoption of the new Brussels IIter Regulation on 25 June 2019; and on the other hand, the impact of the withdrawal of the UK from the EU.*

KEYWORDS: *EU civil judicial cooperation; Parental responsibility; Regulation No. 2201/2003; Scope of application.*