Comments on the Commission Proposal for a *Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction* (recast) (COM (2016) 411 final)

Prepared by the Sub-group "Nationality" of the *Groupe européen de droit international privé*/European Group for Private International Law (GEDIP)[1]

1. On 30 June 2016, the European Commission published its proposal for a revision of Regulation (EC) No 2201/2003, "Regulation Brussels II a"[2]. The proposal includes significant changes of the provisions on parental responsibility including child abduction, and envisages only minor changes regarding matrimonial matters. In respect of the latter, the GEDIP will be proposing textual changes going beyond the Commission Proposal at a later time. The present comments focus on the proposed modifications of the provisions on parental responsibility.

2. The current provisions on parental responsibility have given rise to a number of problems which need to be addressed urgently. The Commission proposal, for good reasons, identifies six main shortcomings of the current Regulation, in respect of ***(i) child return proceedings, (ii) placement of the child in another Member State (MS), (iii) the requirement of exequatur, (iv) hearing of the child, (v) actual enforcement of decisions,*** and ***(vi) cooperation between Central Authorities***.
In its comments below, the Sub-group generally supports the proposals for improvement of the Regulation, not only for the reasons given by the Proposal but also because they will –

- make the Regulation better fit for the evolving reality of cross-border child protection issues,
- align the Regulation more to the wider global legal framework for the international protection of children, notably the 1989 *UN Convention on the Rights of the Child* ("CRC"), the *1980 Hague Convention on the Civil Aspects of International Child Abduction* ("1980 Convention"), and the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition and Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* ("1996 Convention")[3], and
- reduce the divergent approaches between the Regulation, as applied by the CJEU, and the European Convention on Human Rights, as applied by the ECtHR, to the return of children.

A few additional proposals for further improvement of the Regulation will also be made (***infra (vii)***).

[1] The Report submitted by the Sub-group was discussed by the GEDIP during its XXVIth meeting in Milan, 16-18 September 2016. On the basis of these discussions the GEDIP adopted a ***Resolution on the Commission Proposal for a Recast of the Brussels II a Regulation proposed by the Commission***/ **Résolution sur la réforme proposée par la Commission du règlement Bruxelles 2 bis** - hereinafter referred to as the **Resolution**, accessible at http://www.gedip-egpil.eu/ >documents du groupe.
The Sub-group consisted of: Etienne Pataut, (Chair), Paul Lagarde, Hélène Gaudemet-Tallon, Christian Kohler, Andrea Bonomi, Alegría Borrás, Rui Moura Ramos, Peter McEleavy, and Hans van Loon (Rapporteur).
[2] Accessible at https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF
[3] The alignment to the 1980 and 1996 Conventions takes on special importance in light of a possible Brexit. If as a result of the United Kingdom (or parts of the UK) leaving the EU, the Brussels II a Regulation would cease to apply to the UK, the 1980 and 1996 Conventions would continue to govern parental responsibility in the relation between the UK and the remaining EU MS (as is presently the case for Denmark).

(i) Child return proceedings

(a) General Comment

3. The current Regulation seeks to *tighten* the mechanism for the return of wrongfully removed or retained children to "*the* custodial parent", in particular through the certified automatic return order ("*overriding return mechanism*") of Articles 11 (8) and 42. Underlying this effort was the presumption that the 1980 Convention, and in particular the application of the exception provided by its Article 13 (1) b), was not operating satisfactorily. This presumption, however, was already questionable at the time[4]. Moreover, since that time important developments have occurred which, instead of diminishing the importance of the *balance* established by both the 1980 and the 1996 Convention *between the competences of the authorities of the State of origin of the child and the State of refuge* and of the *cooperation between the authorities of both States*, have *accentuated* the importance of this *balance* and *cooperation* in promoting the speedy and safe return of abducted children. These developments concern (1) the strengthening of the legal position of *the child as a subject of rights* and of *the child's right to maintain contact with both parents* as a matter of fundamental rights (CRC Articles 9,10, 12; Article 24 EU Charter), and (2) the *changed profile* of the other protagonists: *the taking parent, who, today in two-thirds of cases is the (joint) primary care-taking parent,* and of *the left-behind parent who is now often using the return mechanism to obtain access to, rather than return of, the child.*

4. These developments, in particular the changed profile of the taking parent and the left-behind parent, have led to important debates on the question whether the return procedure of the 1980 Convention, upon which the return mechanism of the Regulation builds, is still adequate, or in need of (fundamental) revision. The criticism levelled at the 1980 Convention generally went in a direction *opposite* to what motivated the drafters of the Brussels II a Regulation: instead of claiming that the Convention was in need of tightening and of providing *more* automatically for the return of children, it was argued that it should be applied *less* mechanically and less automatically. The question has been extensively discussed in Special Commission meetings of the Hague Conference reviewing the practical operation of the 1980 (and 1996) Conventions. It has also been dealt with by national legislators and by courts, including the European Court of Human Rights (ECtHR).

5. The research and debates conducted in the context of the Hague Conference have led to the conclusion that, while significant changes have occurred since the adoption of the 1980 Convention, these changes should not at this point lead to the Convention's amendment. Rather, accompanying measures are needed, including ratification of the 1996 Convention, which supports the 1980 Convention, including by offering effective protection of the child's safety. It may be noted that since 1 January 2016 the 1996 Convention is in force for all 28 MS.

[4] See the statistical survey of applications for return by N. Lowe, S. Armstrong and A. Mathias, "A statistical Analysis of Applications made in 1999 under the Hague Convention on the Civil Aspects of international Child Abduction", *Preliminary Document no 3 (2001),* available at http://orca. cf. ac.uk60081/1/abd2001pd3e.pdf. The taking parent is now often the primary care-taking mother, often returning to her home country. In many cases the (alleged) reason for the abduction is domestic violence.

6. The ECtHR has addressed the question in a series of judgments, including two Grand Chamber decisions[5], the latter of which clarifies the former. The overall conclusion is, in short, that the 1980 Convention provides an adequate basis for the return of children, but that the child's right to family life (Article 8 of the European Convention of Human Rights (ECHR), cf. Article 7 of the EU Charter) interpreted in light of the child's best interest principle requires a careful, reasoned examination of objections to return, in particular under Article 13 (1) b) of the 1980 Convention. Courts, when ordering the return in the event of a known risk, must satisfy themselves that "*tangible protection measures*" are in place to secure the child's safety.

7. While the EU and its MS have supported the Hague Conference's approach to the 1980 and 1996 Convention (*supra*, No 5), the discussion *within the EU* of the changed profiles of the abducting parent and the left-behind parent on the Regulation's return mechanism has been limited. The CJEU has stressed the mechanism's role as a deterrent, and as a means to obtain de child's return without delay[6], but has not been in a position to discuss specific issues relating to the short-term interest of the child and the taking parent which may arise in the context of the return decision.

8. Admittedly, the ECtHR has adopted a particular position regarding the Regulation's return mechanism[7]. This Court has accepted that when its Articles 11 (8) and 42 apply, an EU MS, notwithstanding a refusal of its courts to order a return of a child, is under strict obligations, following from its EU membership, to enforce a certified return order issued by the courts of the MS of origin. So the only way in such a case to lodge a complaint under the ECHR is to submit it to the authorities of the MS of origin, and only if such an action fails, an application may be lodged with the ECtHR against the MS of origin[8].

9. Notwithstanding the courteous respect given by the ECtHR to the Regulation's overriding return mechanism, the divergence of approaches based on the ECHR and the case law of the ECtHR on the one hand, and on the Regulation and the case law of the CJEU on the other, remains unsatisfactory[9]. By making several attempts to adapt the Regulation to the changed paradigm of child abduction, and to align the Regulation better to the 1980 and the 1996 Conventions, the Commission proposal will assist in reducing the current divergence of approaches. These improvements concern, in particular,

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[5] ECtHR, Grand Chamber, 5 July 2010 (41615/07), *Neulinger and Shuruk v. Switzerland*; ECtHR, Grand Chamber, 26 November 2013 (27853/09), *X v. Latvia*.

[6] Cf. CJEU 11 July 2008 (C-195/08), *Rinau*.

[7] As developed since ECtHR 30 June 2005 (45036/98), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*. Recently, following CJEU Opinion 2/13, the Court (referring to its judgment *X.v Latvia*, *supra* fn. 4), has further clarified its position: "*where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law*", ECtHR (Grand Chamber) 16 May 2016 (17502/07), *Avotiņš v. Latvia*, par.116.

[8] As happened, e.g., in ECtHR. 12 October 2011 (14737/09), *Šneersone and Kampanella v. Italy*. In light of the judgment in *Avotiņš v. Latvia* (previous fn.), exceptionally**,** in case of "*a serious and substantiated complaint … to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by [EU[law*", such a complaint may be submitted to the authorities of the MS of refuge.

[9] Cf *Šneersone and Kampanella v. Italy,* previous fn.

hearing of the child (see *infra* ***(iv)***), ***interim protection pending the final custody decision in child abduction cases (b), other measures to enhance the quality, speed and effectiveness of court decisions on return of the child (c), including mediation (d), and the overriding return mechanism (e).***

(b) Protection of children pending the final custody decision

10. Under the Regulation's current system, the court of the MS of refuge, may take protective measures under its own laws Article 20[10]. The effect of this rule is (1) that the jurisdictional basis for such measures is to be found in national law, not in the Regulation itself, and (2) any measures taken under this rule are not covered by the Regulation's provisions on recognition and enforcement, so that they do not require the MS of origin to recognise or enforce such measures[11].

11. In contrast, under the 1996 Convention (Articles 7 (3) and 11), as long as the authorities of the State of origin keep their jurisdiction, the authorities of the State of refuge are expressly authorised to take such urgent measures "*as are necessary for the protection of the person or property of the child*" (including orders for the return of the child subject to certain undertakings by the parties, or imposing restrictions of contact on the left-behind parent). Such measures must be recognised and enforced under Chapter IV of the Convention, and remain effective until the authorities of the State of origin have taken "*the measures required by the Convention*".

12. It is to be welcomed that **Article 12** by offering a jurisdictional basis for provisional, including protective, measures aligns the Regulation to the system of the 1996 Convention. This will not only reinforce the powers of the authorities of the MS of refuge to better protect the child. It will also *facilitate the return of the child*: the Regulation provides that the court of refuge cannot refuse to order the return of the child on the basis of Article 13 (1) b) of the 1980 Convention "*if it is established that adequate arrangements have been made to secure the protection of the child after his or her return*" (Article 11 (4), current text, Article 25 (1) proposed text). This implies that, in the absence of arrangements agreed among the parents, the court of refuge depends on measures taken by the court of origin, so that, failing such measures, the court of refuge may, out of (abundance of) caution refuse the child's return, even in a case where, if the return order could have been combined with a measure of protection, the court would have ordered the return[12]. Article 12 will now make this possible[13].

(c) Other measures to enhance the quality, speed and effectiveness of court decisions on return of the child.

[10] Based on the system of the Brussels I Regulation (cf. Art. 35 Brussels I recast).
[11] CJEU 15 July 2010 (C-256/09), *Purrucker I*.
[12] Cf. the decision of the UK High Court *B.v B.* [2014] EWHC 1804 (Fam).
[13] In addition, **Article 12 (2) new** for good reasons includes an obligation for the court of refuge taking such a measure of protection to inform the authority of the MS of origin having jurisdiction as to the substance of the matter, thus codifying jurisprudence of the CJEU under the current Article 20, CJEU 2 April 2009 (C-523/07), *A*. **Article 25 (1) (b) new**, on the procedure of the return of the child, usefully provides a reminder of Article 12 (2) new as well as (under **(a)**) an obligation to cooperate with the authorities of the MS of origin.

13. Experience with the 1980 Convention has shown that the quality, speed and effectiveness of court decisions in child abduction matters may be considerably improved by concentration of judicial decision-making in a limited number of courts, with specialised judges. Special Commission meetings of the Hague Conference have urged States Parties to take the necessary measures to this effect[14] **Article 22 new** therefore appropriately prescribes such *concentration of local jurisdiction*.

14. The amendments of the second paragraph of **Article 23 (1)** will make it clear that the duty to decide within *six weeks* not only applies to the court of first instance, but *also to the appeal court.* The speed of the procedure will be further increased by the limitation to *only one appeal* (**Article 25 (4) new** – presumably this includes appeals to those highest courts which do not reexamine the facts (cassation) – this should be clarified[15]), and by the possibility given to the court to "*declare the decision ordering the return of the child provisionally enforceable notwithstanding any appeal, even if national law does not provide for such provisional enforceability*" (**Article 25 (3) new**).

15. The proposal to *amend **Article 8** thereby aligning it (except for access rights) to the system of Article 5 of the 1996 Convention* is also to be welcomed. The current text of Article 8 is based on the idea that the authorities of the habitual residence of the child if seised before the child moved to another MS retain their jurisdiction if the child lawfully moves to another MS (*perpetuatio fori*). Practice has shown that the price for the apparent advantage of continuity of proceedings – other than on access rights – is too high. In the relations among EU MS, the rule may lead to complex parallel proceedings and debates – not least in child abduction situations – on where the child's habitual residence is situated[16]. In the relations between EU MS and third States bound by the 1996 Convention, it may lead to frictions, because those third States may, on the basis of the Convention's Article 5, take the view that with the change of habitual residence to that State, its authorities acquire jurisdiction.

(d) Mediation

16. Already the 1980 Convention emphasises the need "*to secure the voluntary return of the child and to bring about an amicable resolution of the issues*" (Articles 7 c), and 10). More broadly, both the Regulation (Article 55 (e)) and the 1996 Convention (Article 31 b)) require Central Authorities to facilitate agreed solutions through *mediation* or similar means for the protection of the child. In recent years, the crucial importance of mediation in child abduction cases has come increasingly to the forefront[17]. Mediation in the context of return proceedings, therefore, may lead to considerable *financial and emotional cost-saving*. Courts in some MS have developed a practice of examining, in an early stage of the proceedings and without prejudice to the expeditious handling of the return

[14] Cf. Hague Conference, *Guide to Good Practice under the 1980 Convention, Part II, Implementing Measures*, Chapter 5, Organisation of the Courts.
[15] The **Resolution** includes a similar recommendation **(I.)**
[16] Cf. CJEU 9 October 2014, C-376/14 PPU, *C. v M*.
[17] The Hague Conference has developed a *Guide to Good Practice on Mediation*, which highlights its role in facilitating the voluntary return of children and contact between the left-behind behind parent and the child during the return proceedings.

proceedings, whether the parties are willing to engage in mediation. The Proposal rightly introduces such a rule, in the context of expeditious proceedings, in its new **Article 23 (2)[18].**

(e) The "overriding return mechanism"

17. The "overriding return mechanism" embodied in Articles 11 (8) and 42 is difficult to reconcile with "*the principle of mutual trust which underpins the Regulation*"[19]. Return decisions are difficult decisions, and if a court of a MS decides, after hearing the child, a guardian ad litem, the parents, and perhaps experts, to refuse return – and refusals are relatively rare – that decision must be presumed not to have been taken lightly. Moreover, as noted *supra* No.6, according to the ECtHR the decision to refuse the return of a child taken under Art 13 of the 1980 Convention should be a careful, well-motivated decision. Where it is based on objections of the child (Art 13 (2)), the court of refuge will have duly weighed the seriousness of the objections. Where the refusal is based on Art 13 (1) b), the court must be convinced that no "*adequate arrangements have been made to secure the protection of the child after his or her return*". That judgment, relating to the *short term* risks of return, should – even more after introduction of the changes proposed by the Commission – in principle be respected by the court of origin as long as that court has not decided, on the basis of a full examination of the child's *long term* interests, on the custody issue.

18. The proposal helpfully clarifies that any decision of the court of the MS of origin overriding the decision refusing the return of the child of the court of refuge pursuant to Article 13 of the 1980 Convention must indeed be a *decision on the custody* of the child, and not one preceding such a decision (**Article 26 (4) new**). This will avoid the tossing back and forth of the child that could result from the CJEU's interpretation of the current Article 11 (8) of the Regulation[20]. To clarifiy this even further "the merits of custody" should be substituted for "the question of custody"[21]. The mandatory hearing of the child by this court (**Article 24**) is also an improvement. Moreover, when it comes to enforcement, the enforcing court will have the power to adapt the decision if necessary and to instruct the enforcement officer (**Article 32 (2) new**). Also, it will be possible to invoke a change of circumstances which would make the enforcement manifestly contrary to the public policy of the MS of enforcement (**Article 40 (2) new** – but see *infra* No 25). Finally, the new provisions on the certificate, the form, and the rectification and withdrawal of the certificate, are clear improvements (**Articles 54, 56 new**). With these additional provisions, the sting has been removed from the current system.

19. Nevertheless, there remains an important difference with the systems of the 1980 and 1996 Conventions. While under both of these instruments a custody decision entailing the return of the child also overrides a return refusal by the court of refuge (cf. 1980 Convention, Article 16, 1996 Convention, Article 7), the obligation to recognize – by operation of law – and enforce the custody-cum-return decision is not absolute, and may be refused, e.g., if in these custody proceedings a parent had not been given the opportunity to be heard or if the decisions is contrary to the public

[18] The GEDIP, while supporting Article 23 (2), adopted a more general recommendation concerning the use of mediation in the context of parental responsibilities **(Resolution, (IX.))**.
[19] CJEU 1 July 2010 (C-211/10 PPU), *Povse*, para 59.
[20] CJEU 9 October 2014, C-376/14 PPU, *C v. M*, para 40.
[21] The **Resolution** includes a similar recommendation **(II.)**.

policy of the requested State, taking into account the best interests of the child, cf. 1996 Convention, Articles 23 (2) and 26 (2).

In contrast, the proposed **Articles 38 (2) new** and **40 (1) new** stipulate that the following grounds for refusal may *not* be invoked against a decision (granting rights of access or) entailing the return of the child:
"(a) such recognition and enforcement is manifestly contrary to the public policy of the MS in which recognition or enforcement is sought taking into account the best interests of the child[22]*;*
(b) the decision was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the decision unequivocally;
(c) on the request of any person claiming that the decision infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard".

20. **In the view of some members of the Sub-group,** a full examination of the custody situation (cf. the proposed Article 24) certainly requires that the parent in default of appearance was adequately notified of the proceedings (b), and that parents claiming that the decision infringes their parental responsibility are given an opportunity to be heard (c). Moreover, it is difficult to understand that a custody decision which is manifestly contrary to the child's best interest must nevertheless be recognised and enforced (a). These members would suggest *deleting Articles 38 (2)* and *40 (1) second paragraph, in respect of decisions entailing the return of the child*. At the very least, in their view, the court requested to recognise/enforce the decision should be able to *stay* the recognition/enforcement proceedings pending an appeal in the MS of origin on any of the grounds (a)-(c). While Article 29 (a) on recognition seems to allow this, Article 36 on enforcement allows this only where the enforceability of the decision is suspended in the MS of origin, and in the case of its paragraph 2 (temporary circumstances)[23].

(ii) placement of the child in another Member State

21. The summary procedure of Article 56 of the Regulation for the cross-border placement of a child in a foster family or institutional care has given rise to practical difficulties[24]. By providing further details, including on the role of Central Authorities, **Article 65** clarifies the procedure. No justification is given, however, for the additional rule according to which the Commission should be informed of acceptances of requests for the placement of children in another MS (**Article 65 (2) in fine**).

(iii) the requirement of exequatur

[22] Emphasis added.
[23] The GEDIP in its aforementioned Resolution adopted the following consideration: "The changes brought to the overriding return mechanism are to be welcomed in principle. There is however a concern in the Group that the proposed improvements could not fully meet the need to ensure that the quest for speed, efficiency and mutual trust between the courts of Member States serve the overriding goal of safeguarding the best interests of the child and respect for family life in all cases." **(Resolution, (III))**.
[24] Cf. CJEU 26 April 2012 (C-92/12) *Health Service Executive v S. C., A.C*.

22. The abolishment of the exequatur procedure (**Article 30**) is to be welcomed, because it will put an end to cumbersome proceedings in certain MS. Nevertheless, some procedural safeguards are indispensable. The proposal is, therefore, rightly coupled with a detailed procedure for the recognition and enforcement of decisions, which –subject to the further improvement suggested *supra* No. 20 – provides adequate safeguards at the enforcement stage.

(iv) hearing of the child

23. The Proposal provides a general right of children capable of expressing their own views to express before the authorities their views regarding issues of parental responsibility (**Article 20 new**) including child abduction (**Article 24**). It clarifies the distinction between the right to be heard and the weight the authorities should give to the child's views (cf. Article 20, paragraphs 1 and 2 new). This aligns the Regulation with Article 12 of the CRC, as well as with Article 24 (1) of the EU Charter.

24. As a consequence, when it comes to *recognition* of a judgment relating to parental responsibility, the proposal, in **Article 38 (1)** deletes Article 23 (b)[25] – enabling refusal of recognition where the child, except in urgency cases, had not been given an opportunity to be heard in the MS of origin, if this is in violation of fundamental principles of procedure of the requested MS – and now relies fully on the correct application of these principles by the authorities of the MS of origin, based on the idea of mutual confidence between MS. While this clearly prohibits the authorities of the requested MS to refuse to recognise a decision on the mere fact that a hearing of the child in another MS was done *differently* in comparison with the standards of these authorities, presumably Article 38 (1) (a) (violation of public policy, taking into account the child's best interests) may still provide relief in cases – other than "overriding return decisions", Article 38 (2) – where the authorities of the MS of origin did *not at all* respect these principles. This might be clarified in a **Recital**[26].

(v) actual enforcement of decisions

25. The right of the child to be heard is reinforced by the proposed **Article 40 (2) (a)** according to which the enforcement of a decision in matters of parental responsibility may be refused where, by virtue of a change of circumstances since the decision was given, the enforcement would be manifestly contrary to the public policy of the MS of enforcement because "*the child being of sufficient age and maturity now objects to such an extent that the enforcement would be manifestly incompatible with the best interests of the child*". This proposal, qualified by paragraph (3), apparently seeks to avoid situations where the enforcement of decisions – in particular given by the authorities of the MS of origin – meets with strong resistance of the child (and where, in fact, enforcement may be impossible in practice). The risk, of course, especially in cases of child abduction[27], is that the provision would encourage abduction parents to systematically invoke a change of circumstances, arguing that the child has changed its views. On the other hand, this provision will provide relief in some cases where the Regulation maintains the system of the "overriding return mechanism".

[25] This provision corresponds with Article 23 (2) b) of the 1996 Convention.
[26] The **Resolution** includes a similar recommendation **(IV)**. .
[27] Unlike Article 40 (1), Article 40 (2) does not exempt decisions granting rights of access or entailing the return of the child.

(vi) cooperation between Central Authorities

26. In the system of the 1996 Convention, and in particular the 1980 Convention, *Central Authorities* play a crucial role. In comparison, the current Regulation puts full emphasis on court intervention, and reserves a relatively modest place for cooperation between Central Authorities. The Proposal rightly seeks to give Central Authorities a *more prominent and better defined* role in the operation of the Regulation. **Articles 61-66** reinforce their duties, and also, importantly, insist on adequate resourcing (Article 61). The duty of Central Authorities to provide assistance in discovering the whereabouts of a child, of particular importance in cases of child abduction (cf. Article 7 (2) a) of the 1980 Convention, see also Article 31 c) of the 1996 Convention), is made explicit (**Article 63 (1) (a) new**). There is, however, no reason to limit this duty to cases where the assistance is sought by sister Central Authorities: the proposal *should also make it possible for holders of parental responsibility to contact Central Authorities of other MS directly for that purpose*, and **Article 63 (2)** new should be amended accordingly[28]. Paragraphs (1) (b), (2) and (3) of **Article 64** usefully complete the existing Article 55 (b) with provisions parallel to Articles 32, 34 and 35 of the 1996 Convention, subjecting the duty to provide information to a maximum delay.

27. Reinforcing the role of Central Authorities and thereby of cooperation between MS is also of particular importance in circumstances in which (unaccompanied) children – including refugee and asylum seeking children – find themselves in vulnerable situations in which they may be subject to exploitation and other risks[29] [30]. The Regulation makes specific provision for jurisdiction of the courts in relation to "*refugee children or children internationally displaced because of disturbances occurring in their country*" (based on the simple presence of children on the territory of the MS concerned, Article 13). But in addition cooperation of Central Authorities with the authorities in charge of registration of children seeking international protection should be encouraged and facilitated, to enable adequate follow up of (unaccompanied) child refugees[31]. Channels of cooperation should be established between authorities in charge of the registration of children seeking international protection under the Common European Asylum System (CEAS) and the network of Central Authorities under the Regulation, so that Central Authorities would be informed of such registrations and could, where necessary, follow up on the activity of the CEAS authorities, and vice versa. Articles 63 and 64 are broad enough to permit cooperation between Central Authorities and the CEAS authorities, but it would be useful if the **Recitals** would specifically refer to these authorities[32].

(vii) Additional proposals

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[28] The **Resolution** includes a similar recommendation **(V.)**.

[29] On the urgent need to pay more attention to the interrelationship between the European Common Asylum System and the protection of children (as well as adults) under civil law, cf. the *Declaration on the Legal Status of Applicants for International Protection from Third Countries to the European Union* adopted by the GEDIP at its 25th meeting in Luxembourg, 18-20 September 2015, http://www.gedip-egpil.eu/gedip_documents.html, *Rev. crit. DIP* 2015 (4), pp. 1069-1071, *NILR* 2016 (1), pp.95-97, *IPRax* 2016 (4), pp. 400-401.

[30] According to UNICEF, in its Report published 7 September 2016, there are currently 50 million child refugees, half of the world's refugees.

[31] In an interview with *The Observer*, 30 January 2016, Europol's Chief of Staff Brian Donald drew attention to the fact that, after being registered, more than 10.000 child refugee children were missing in Europe.

[32] The Resolution includes a similar recommendation, but, in addition, recommends to reinforce this necessity of cooperation by a specific reference in Article 63 (3) **(Resolution (VI.))**.

Relocation

28. While abduction is the *unlawful* removal of a child from the child's habitual residence, relocation is the *lawful* permanent move of the child, usually with the primary care-taker to a new country. Increasingly courts, all over the world, are called to deal with relocation cases, for which, in contrast to abduction, no specific international binding arrangement is yet in place, and for which no specific provision is foreseen in the 1996 Convention. Courts, therefore, have to decide on the basis of their national law.

29. Relocation and abduction are obviously linked, and already the fourth Special Commission of the Hague Conference on the operation of the 1980 Convention noted in this regard: that "*Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognised that a highly restrictive approach to relocation applications may have an adverse effect on the operation of the 1980 Convention*"[33].

30. In light of the freedom of movement and residence of EU citizens, it is important to facilitate the movement of parents with children in cases where the parents cannot agree on a new common residence, and to prevent or resolve disputes on child relocation. This suggests that the Regulation should include a rule for court decisions on relocation – which are, contrary to abduction orders, decisions on the merits – in addition to and preceding the Articles on abduction. The following proposal respects the fact that MS courts will have to decide on the basis of their internal laws. The proposal is inspired by the 2015 Recommendation of the Council of Europe to on preventing and resolving disputes on child relocation[34].Moreover, the second paragraph and the second sentence of paragraph 3 are inspired by Articles 24 and 23 (2), respectively, of the Commission proposal (cf. *supra* Nos 23 and 16). At least – pending a more complete rule on relocation – a Recital should draw attention to the increasing importance of relocation procedures.

Article 8A Relocation

1. A court to which an application concerning the relocation of a child is made shall, while considering all relevant factors in its examination, give primary consideration to the best interests of the child.
2. When applying this Article, the court shall ensure that the child is given the opportunity to express his or her views in accordance with Article 20 of this Regulation.
3. The court shall act expeditiously. Before issuing its judgment, the court shall first examine whether the parties are willing to engage in mediation to find, in the interest of the child, an agreed solution[35].

Applicable Law

31. The proposed **Article 75** purports to clarify the relationship between the Regulation and the 1996 Convention including in respect of the applicable law, for which the Regulation does not provide rules, and which is dealt with by Chapter III of the 1996 Convention. While the proposed text of

[33] *Conclusions*, par. 7.3, at https://assets.hcch.net/upload/concl28sc4_e.pdf .
[34] Recommendation CM/Rec (2015)4 of the Committee of Ministers of the Council of Europe to member States on preventing and resolving disputes on child relocation (11 February 2015).
[35] The **Resolution** includes a similar recommendation **(VII.)**.

Article 75 (3) is helpful, the provision only figures towards the end of the Regulation. Moreover its relationship to Article 75 (1) (a) ("*this Regulation shall apply…where the child concerned has his or her habitual residence in the territory of a Member State*") is not clear. It would therefore be preferable to put the content of paragraph 3 (only) of Article 75 in a separate Article and not in the final Chapters of the Regulation. This will help avoiding, e.g., that courts traditionally accustomed to apply the law of the nationality of the child to issues of parental responsibility, will continue to apply that law instead of the law of the child's habitual residence (Article 15 (1) of the 1996 Convention); or the law applicable before a child's change of habitual residence in cases where the child has acquired a new habitual residence (Article 15 (3)); or overlook the important and innovative provisions of Article 16 (to be read in conjunction with Article 21), in particular its paragraphs 3 and 4, which provide solutions for the attribution of parental responsibility in the event of a change of the habitual residence of the child to another State. It is therefore proposed to include the content of Article 75 (3), before Chapter IV (Recognition and Enforcement), in a new Chapter IIIA (Applicable Law to parental responsibility), as follows:

Article 26A –Applicable law

The law applicable to parental responsibility shall be determined in accordance with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Reasonability and Measures for the Protection of Children*, in particular its Chapter III (Applicable Law) (Articles 15-22). The reference in Article 15 (1) of that Convention to 'the provisions of Chapter II' shall be read as 'the provisions of Section 2 of Chapter II of this Regulation'.*

This technique has a precedent in 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, Chapter III, Article 15. This method has been well received, and it is all the more justified here as all EU MS are now bound by the 1996 Convention[36].

[36] The **Resolution** includes a similar recommendation **(VIII.)**.