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Prorogation of jurisdiction – practical aspects regarding parental responsibility and maintenance obligations according to European Union law

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Chapter I. Introductory considerations on jurisdiction in cross-border litigation in matters of parental responsibility and maintenance obligation

Section 1.1. Scope of Regulation No 2201/2203 concerning parental responsibility

Adoption of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 aimed at bringing together the rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility as a single instrument. Given the incidence of rules on parental responsibility in the context of matrimonial proceedings, consideration was given to the usefulness of creating a single set of rules that regulates, within the same framework, both divorce, legal separation or marriage annulment, and those relating to parental responsibility.[1]

From the point of view of the scope, Article 1 of Regulation No 2201/2003 states that it applies, irrespective of the nature of the court, to civil matters which concern, on the one hand, divorce, legal separation and marriage annulment, and on the other hand, attribution, exercise, delegation, restriction or termination of parental responsibility.

Parental responsibility is defined by Article 2 point 7 of Regulation No 2201/2003 as representing all rights and duties relating to the person or to the property of a child which are given to a natural or legal person by judgment, by operation of law or by agreement having legal effect. The term shall include rights of custody and rights of access. The practical application of the notion of parental responsibility is circumscribed by the provisions of Article 1 (2), which mentions, in an indicative and not exhaustive manner, the subjects that fall within the scope of Article 1 (1) (b), as well as by the provisions of Article 1 (3), which indicates the matters excluded from the scope of the Regulation.

From a more practical point of view, the ECJ has determined in its jurisprudence that an action in which one parent asks the court to remedy the lack of agreement of the other parent to their child travelling outside his Member State of residence and a passport being issued in the child's name is within the material scope of Regulation.[2] Also, a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters' for the purposes of that provision (Article 1 (1)), where

[1] The Regulation brings a substantial change to the previous instrument in the field, namely Regulation no. 1347/2000, according to which matters relating to parental responsibility fall within the scope of the Regulation, as they were involved in matrimonial actions (Article 1 (b)). Such a condition is not foreseen in the case of Regulation no. 2201/2003, which applies to jurisdiction, recognition and enforcement of judgments in matters of parental responsibility, irrespective of the existence or otherwise of a connection with a matrimonial action.
[2] Judgment of 21 december 2015, Gogova, C-215/15, EU:C:2015:710

that decision was adopted in the context of public law rules relating to child protection. So even a decision adopted in the context of public law may not exceed the scope of Regulation.[3]

In addition to the aforementioned provisions, it is useful to appeal to the Preamble of the Regulation No 2201/2003, which sets out additional criteria for determining the notion of "parental responsibility". Thus, according to recital 10, it does not apply to matters relating to social security, public measures of a general nature in matters of education or health or to decisions on the right of asylum and on immigration.

Section 1.2. The scope of Regulation No 4/2009 concerning maintenance obligations

In order to preserve the interests of maintenance creditors and promote the proper administration of justice within the European Union[4], the Council of the European Union adopted the Council (CE) Regulation No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

The aim of the Regulation is also the elimination of formalities by enabling a creditor to easily obtain, in a Member State, a decision which will be automatically enforceable in another Member State.[5] The scope of this Regulation covers all maintenance obligations arising from a family relationship, parentage, marriage or affinity. For the purpose of Regulation No 4/2009, according to recital 11 of the Regulation, the term 'maintenance obligation' should be interpreted autonomously.

According to Regulation No 4/2009, the rules on jurisdiction aim to preserve the interests of the maintenance creditor, which is the weaker party, by establishing an alternative jurisdiction[6]. Article 3 (a) and (b) of Regulation No 4/2009 offers only to the creditor the possibility to introduce an application before the court for the place where the defendant is habitually resident, or before the court for the place where the creditor is habitually resident.

One of the specificities of this Regulation concerns the possible prorogation of jurisdiction in matters relating to maintenance obligations in favour of a minor child if the maintenance application is ancillary to proceedings concerning the status of a person or to proceedings concerning parental responsibility. The provisions of Article 3 (c) permit the prorogation of jurisdiction by establishing that in matters relating to maintenance obligations in Member States, jurisdiction shall lie with the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person (for example

[3] Judgment of the Court (Grand Chamber) of 27 November 2007, C, C-435/06, EU:C:2007:714
[4] Recital 15 of Regulation 4/2003
[5] Recital 9 of Regulation 4/2003
[6] L. Cadiet, E. Jeuland, S. Amarani-Mekki, Droit processuel civil de l'Union Europeenne, Lexis Nexis, Paris 2011, p. 107

establishment of parentage). This possibility is opened even if the establishment of parentage is not included in scope of the Regulation No 4/2009. The prorogation of jurisdiction is possible only if the matter relating to maintenance is ancillary to proceedings concerning the status of a person and unless that jurisdiction is based solely on the nationality of one of the parties.

In the same time, the provisions of Article 3 (d) of Regulation No 4/2009 also admit the possibility of a prorogation of jurisdiction. The conditions required in this case will be analysed in the fourth chapter of this paper.

Chapter II. Prorogation of jurisdiction if the parental responsibility claim is ancillary to a divorce, legal separation or marriage annulment application

The Council Regulation (EC) No 2201/2003 introduces flexible solutions concerning the jurisdiction of the courts in parental responsibility matters, which gravitate around the best interests of the child, notion linked to the celerity of taking the evidences. Article 24 (2) of Charter of Fundamental Rights of the European Union mentions that the best interests of the child governs all actions related to children, so this principle is a universal standard which is governing the parental responsibility matters.

Right from the beginning, Regulation No 2201/2003 mentions the link between the best interests of the child and the criterion of proximity, which is represented, in most cases, by the habitual residence. The main rule of the Regulation No 2201/2003 is that the child's habitual residence[7] establishes the jurisdiction of a Member State court in parental responsibility matters. Nevertheless, a special solution was adopted by the European legislator in Article 12 (1): the prorogation of jurisdiction, which establishes that jurisdiction in cases relating to parental responsibility, follows the jurisdiction of the court hearing the divorce action if the requirements listed below are cumulatively met.

Prorogation of jurisdiction ceases in the cases established by Article 12 (2) of Regulation No 2201/2003: the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final, proceedings in relation to parental responsibility are still pending on the date referred to in the previous case, a judgment in these

[7] The concept of 'habitual residence' under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. Judgment of the 2 April 2009, A, C-523/07, EU:C:2009:225, paragraph 44. See also Judgment of 22 December 2010, Mercredi, C-497/10, EU:C:2010:829;

proceedings has become final or if the proceedings referred to in the previous cases have come to an end for another reason.

Section 2.1. Requirements to be met under Article 12 (1)

Prorogation of jurisdiction operates in favour of the Member State court hearing a divorce application if the jurisdiction related to the divorce matter is determined under Article 3 (A), if at least one of the spouses has parental responsibility in relation to the child (B), if the spouses and the holders of parental responsibility accept expressly and in an unequivocal manner the jurisdiction of the divorce, legal separation or marriage annulment (C) and if the prorogation is in the best interests of the child (D).

A. The jurisdiction for divorce applications under Article 3

The first requirement for the prorogation of jurisdiction in parental responsibility matters is referring to the jurisdiction of the divorce, legal separation or marriage annulment court, which must be established under Article 3 of Regulation No 2201/2003. This condition excludes the purely internal situations or the cases where the jurisdiction of court which entertains proceedings concerning the divorce application was determined by another international cooperation instrument. The jurisdiction for divorce claims under Article 3 is alternative and, if the listed requirements are met, the parties have the choice of jurisdiction, because there is no hierarchy to be respected[8].

B. At least one of the spouses has parental responsibility in relation to the child

This requirement reflects the best interests of the child, because there are cases where the parental responsibility is attributed to another family member (like aunt, uncle, grandfather) and it is not the best option neither for the child, nor for the person who has the parental responsibility to take part in a procedure which might take place far away from their habitual residence. The parents are allowed to choose the jurisdiction following the rules of Article 3, but the best interests of the child is the limit of the prorogation.

C. Holders of parental responsibility accept the jurisdiction of the court which entertains proceedings concerning the divorce application

The third condition listed in Article 12 (1) is the reflection of the spouses' free will between the limits of Article 3. In order to apply the rules for the prorogation of jurisdiction in parental responsibility matters, it is important to verify if the spouses agreed with the jurisdiction of the divorce court. To do this, it is important to analyse the defendant's conduct

[8] Article 3(1)(a) and (b) of Regulation No 2201/2003 provides for a number of grounds of jurisdiction, without establishing any hierarchy. All the objective grounds set out in Article 3(1) are alternatives. - Judgment of 19 July 2009, Hadadi, C-168/08, EU:C:2009:474, Paragraph 58

during the procedure. Following the path of the conduct, there are three possible solutions. The first one concerns the possibility for the defendant to be present before the judge and to expressly accept the jurisdiction; the presence of the defendant is sufficient, because the complainant already accepted the jurisdiction when the complaint was introduced. The second possibility is that the defendant be present before the judge and contest the jurisdiction of the court; in this case, the prorogation of jurisdiction cannot operate, as the requirement of Article 12 (1) is not met. The third possibility envisions the situation where the defendant is not present before the judge; in this case, the absence of the defendant during the procedure is the equivalent to the lack of acceptance of the jurisdiction.

Article 12 (1) also includes, beside the express acceptance, the hypothesis of the unequivocal acceptance, notion developed by the jurisprudence of the ECJ. The defendant might adopt various conducts to express the acceptance of the jurisdiction. The most frequent conduct is the next one: the defendant submits a counterclaim, without contesting the jurisdiction. In this situation, not contesting the jurisdiction is assimilated to the acceptance of it. On the other hand, if the defendant does not take part at the procedure in any way, his lack of participation is not assimilated to the acceptance.

The lack of participation of the defendant to the procedure could arise another dilemma: does he really know that he is involved in litigation? In this case, the judge must verify if the writ of summons was received in time and the defendant had the opportunity to submit a pertinent answer.[9]

Another situation could be met if the legislation of the Member State of the seised court establishes that if the defendant is missing, a legal representative will be appointed. The legal representative, even though is there on behalf of the defendant, does not know, in the absence of a contact with the party, if the defendant accepts or not the jurisdiction. [10]

D. Best interests of the child

The most important condition, the guiding star in the parental responsibility international cooperation, the best interests of the child is a foggy notion which makes the judge's role crucial in the judicial procedure. This condition comprises the celerity of the

[9] The jurisdiction of the courts seised of an application in matters of parental responsibility may not be regarded as having been 'accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings' within the meaning of that provision solely because the legal representative of the defendant, appointed by those courts of their own motion in view of the impossibility of serving the document instituting proceedings on the defendant, has not pleaded the lack of jurisdiction of those courts. *Judgement of 21 October 2015, Gogova, C-215/15, EU:C:2015:710, Paragraph 47*

[10] Furthermore, an absent defendant who is unaware of the action brought against him or of the appointment of a representative to act on his behalf cannot provide that representative with all the information necessary, for the purposes of determining whether the court seised has international jurisdiction, which would enable him effectively to contest that jurisdiction or to accept it in full knowledge of the facts. Nor, accordingly, may an appearance entered by a court-appointed representative be regarded as tacit acceptance, by the defendant, of the jurisdiction of that court. Judgement of 11 September 2014, *A*, C-112/13, EU:C:2014:2195, Paragraph 55

procedure, the active role of the child in the procedure, the bond which must be established between the judge and the child, the effective protection of the child by interfering as little as possible with his/her school schedule and his/her social life and not least the immediacy of taking the evidence. The notion of the "best interests of the child" has already been the object of a preliminary ruling still pending before the Court of Justice of the European Union.[11]

Section 2.2 Best interests of the child in the light of Article 12 (1)

Best interests of the child represents a usual standard in matters related to children, such as adoption or parental responsibility. The Regulation No 2201/2003 does not offer a definition of this notion, but gives to the judge subtle hints in order to analyse the particularities of each case. It is not possible neither for the European legislator, nor for the ECJ to offer a universal solution, because in a matter as sensitive as parental responsibility there are many factors which must be considered, thus, the best option would be establishing a list of flexible criteria and let the judge decide according to the particularities of the case brought before him. The first hint in defining the notion of best interests of the child is found in the Preamble of the Regulation No 2201/2003, which mentions in Recital 12[12] the proximity criterion as a fundamental principle, linking the interests of the minor to his habitual residence. Even though the Regulation No 2201/2003 permits exceptions to the habitual residence, the principal rule cannot be totally erased, as the habitual residence represents the most important connection between the minor and a Member State. In the exceptional case of Article 12 (1), the proximity becomes subsidiary and prevails the relationship between the parents and their child.

Another important aspect which might be analysed when speaking about the best interests of the child is the age of the minor. The age of the child is related to the role he plays in the procedure: the older he is, the more important is his voice in the procedure, considering his maturity and his right to express his opinion. When the minor is very young, under 10 years old, it is very important for the judge to create a connection with the child. In this latter case, hearing the minor is more difficult, as he does not understand every detail of the situation and he cannot express himself in a proper way, therefore all the procedure might become overwhelming for the minor. In this particular situation, considering the minor's age, the best interests of the child would suggest that the proximity criterion should prevail, as for

[11] Opinion of Advocate General delivered on 6 December 2017 in Xylina, C-565/16, EU:C:2017:942

[12] The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

the minor it is less stressful to remain in the comfort zone, to be heard by a judge who speaks the same language as he/she does, to take part to procedures in his/her hometown, or, at least, his/her country, avoiding long journeys. Moreover, if a social inquiry is requested, this evidence will normally be taken where the child lives, where he goes to school and where he spends most of his time, so, even for the judge it would be easier to appreciate the value of the proof, in view of the immediacy.

Section 2.3. Practical application of the aforementioned provisions

The following case was chosen to illustrate the hypothesis of the aforementioned provisions: Ana Ionescu and Adrian Ionescu are spouses and Romanian citizens, having their permanent residence in Spain. They have a minor child, Maria. Maria was born in Spain, she is 10 years old now, she is going to school in Spain and she barely speaks Romanian. The mother Ana Ionescu introduces an application against the father Adrian Ionescu before the Romanian court asking for divorce, shared custody between them regarding Maria – fixing the place of residence with the mother and also establishing a contribution of 5000 euros for the children's maintenance from the father. The defendant introduces a counterclaim agreeing with Ana's claim and not contesting the Romanian jurisdiction.

Article 3 (1) (b) of Regulation No 2201/2003 confers jurisdiction to the Romanian court to rule on the legal separation of the spouses taking into consideration their Romanian citizenship.

Regarding the parental responsibility claim, the reasoning of the Romanian judge should depart from Article 8 which shall be subject to the provisions of Articles 9, 10 and 12 of the same Regulation. As Articles 9 and 10 are not to be applied in this case, the judge shall verify the possible application of Article 12 (1) of Regulation No 2201/2003 and decide upon the prorogation of jurisdiction. According to Regulation No 2201/2003, the parents have the possibility to discuss the parental responsibility claim before the judge seized with their divorce claim, which is the Romanian court. As the first two requirements are met (at least one of the spouses has parental responsibility in relation to the child and the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised - this last requirement is considered to be met as the claimant accepted the Romanian jurisdiction by introducing the application and the defendant also accepted the jurisdiction by introducing a counter-claim), the court has to analyse if the prorogation of jurisdiction responds to the best interests of the child.

Apparently, all requirements of Article 12 (1), seem to be met, but the most important condition, the best interests of the child, involves a deeper analysis. Even if the spouses Ionescu agreed upon the parental responsibility claim, when deciding upon the prorogation of jurisdiction, the judge has to take into consideration the necessity to hear the minor child and consequently the precondition that the child appears before the court. From this point the analysis of the best interests of Maria Ionescu should start: what is better for her? To take part in proceedings before the Spanish judge, in her hometown, only skipping a few classes at school, speaking with the judge in the language she knows or going to Romania possibly multiple times to take part in the proceedings? This second possibility also implies the fact that the minor has to speak with a judge who probably does not speak Spanish and; in this case as the child does not speak Romanian, one more person will be involved in the proceedings (a translator) - meaning that one more person should gain the confidence of the child. In Maria's case it is obvious that taking part in proceeding before the Romanian court is not in her best interests.

Also, as the spouses have their residence in Spain, a social inquiry has to be done in Spain. Therefore, gathering and assessing evidence cannot be done before the Romanian court directly, but through requests to the competent court of Spain to take evidence, procedure which extends the length of the proceedings.

Consequently, as a possible prorogation of jurisdiction does not respond to the criteria of celerity and does not respect the best interests of the child, the Romanian court should not rule on the minor children's maintenance application in this case based on the provisions of Article 12 (1) of Regulation No 2201/2003.

If Article 12 (1) is not applied, the Romanian court also has to analyse Article 8 (1) of Regulation No 2201/2003 and decide upon the habitual residence. The habitual residence of the child should be established in accordance with the criteria settled in the case law C-523/07.[13] Applying these criteria given by the ECJ, the Romanian judge shall notice that the child's habitual residence is in Spain, as he was born and raised in Spain, went to school there, elements which reflect a degree of integration in a social and family environment in this Member State.

In conclusion, excluding Article 12 (1) of Regulation No 2201/2003 which would have permitted a prorogation of jurisdiction for the parental responsibility matter and excluding Article 8 of Regulation No 2201/2003, as the habitual residence of the child is in Spain, according to the provisions of Article 17 of Regulation No 2201/2003, the Romanian

[13] For the analysis of the habitual residence of the child see Judgement of 2 April 2009, A, C 523/07,EU:C:2009:225

court must declare of its own motion that is has no jurisdiction and shall not rule in the matter concerning the parental responsibility.

CHAPTER III. Prorogation of jurisdiction if the parental responsibility claim is not ancillary to a divorce, legal separation or marriage annulment application

Parental responsibility litigations are a favourite area for procedural conflicts, where the urgency of the situation, combined with the lack of sufficient advice, leads the parties into procedural difficulties which could not be imagined at the time of the creation of Regulation No 2201/2003. This was also the case of the third paragraph of Article 12 of Regulation. [14]

The second prorogation of jurisdiction provided by the Brussels IIbis Regulation is that of Article 12 (3). A major innovation of the Regulation No 2201/2003 and an important difference from the 1996 Hague Convention[15] is that it allows parties who agree to do so, to seize a judge other than that of the habitual residence of the child in matters of parental responsibility. It is generally presented as resting on a double foundation bringing together both proximity and autonomy of the will.[16]

Unlike Article 12(1), its essence is not the concentration of litigation before the judge of divorce, but the broader possibility to give some flexibility to the rules of jurisdiction by allowing a Member State to exercise jurisdiction over parental responsibility, even though this judge is not the judge of the habitual residence of the child, provided that it has a close connection with the child. This competence is exercised in the best interests of the child and has to be accepted by the parties. But its exact scope raises questions when it indicates that the courts of a Member State are competent "in proceedings other than those referred to in paragraph 1".[17]

As mentioned in the previous chapter, the first paragraph of Article 12 refers to applications for divorce, legal separation or marriage annulment proceedings. In order to have an effective application of this article throughout the European Union, firstly we must

[14] In the larger context of prorogation of jurisdiction, it states that “The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where: (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child”.

[15] Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children

[16] S. Corneloup, Les règles de compétence relatives à la responsabilité parentale, in H. Fulchiron et C. Nourissat (dir.), Le nouveau droit communautaire du divorce et de la responsabilité parentale, Dalloz, 2005, p. 69

[17] Estelle Gallant, Prorogation de compétence en matière d'autorité parentale, Revue critique de droit international privé 2015, p. 667

determine what are the "other than those referred to in paragraph 1 proceedings" under Article 12 (3) (Section 3.1) and afterwards, the requirements laid out by Article 12(3) (Section 3.2).

Section 3.1. Scope of Article 12 (3) of Regulation No 2201/2003

The usual battleground in which Article 12(3) becomes applicable is the one of relocation disputes. Whatever the label, these cases are private law disputes between separated parents (or other holders of parental rights and responsibilities), where one parent proposes to take the child to live in another geographic location and the other parent objects.[18]

As it is known, the Brussels II bis Regulation on parental responsibility is based on the principle that the competent Court to rule on parental responsibility are those of the habitual residence of the child, according to Article 8 of the Regulation No 2201/2003.

The problem is that the phrasing used by the Regulation No 2201/2003 is ambiguous. It states that this paragraph should be applicable to proceedings other than those referred to in paragraph 1. While it is an easy job to rule out the proceedings that do not enter the scope of this paragraph, however, it is not as easy to determine if these provisions could govern a certain procedure. Given the lack of clarity of the terms used in the provision of the aforementioned article, we have two possible interpretations. Either the article refers strictly to applications on parental responsibility, or it introduces a case of jurisdiction over a principal application that could go beyond the scope of the Regulation No 2201/2003, for example an application in establishing the parentage.

This latter hypothesis is reinforced by the fact that in the case of Article 12 (3) there is no mention of the fact that the main proceedings should fall within the scope of the Regulation No 2201/2003. However, such an indication appears in the case of the prorogation of jurisdiction regulated by Article 4, which is why we can conclude that its inexistence in Article 12(3) is an argument that supports the possibility of overcoming the material scope of the Regulation No 2201/2003 and not a possible omission.

Therefore, if the proceeding is in relation to parental responsibility, but it is not a proceeding concerning divorce, legal separation or marriage annulment, the following question arises: could Article 12 (3) be applicable even where no other proceedings are pending before the chosen court? Luckily, this was question that was addressed by a Czech Court to the ECJ in the Case C‑656/13, L v. M.. The Court established in this case that Article 12(3) must be interpreted as allowing, for the purposes of proceedings in matters of parental responsibility, the jurisdiction of a court of a Member State which is not that of the

[18] Rob George, Family Law in Britain and America in the New Century, 2016, Brill, pp. 235

child's habitual residence to be established even where no other proceedings are pending before the chosen court.[19]

Without excluding the prorogation of jurisdiction over another main application, under Article 12 (3) it is not mandatory to have a main application in order for the jurisdiction to be prorogued on this basis. Thus, the Court argues in the sense that the prorogation of jurisdiction provided by Article 12 (3) of Regulation No 2201/2003 may be established without the need for the proceedings in this matter to be related to any other proceedings already pending before the court in respect of which the prorogation of jurisdiction is sought. In this respect, it should be taken into account the different terminology used by Regulation No 2201/2003 in paragraph 3, by reference to the provisions of paragraph 1. Thus, if Article 12 (1) refers to the court of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or annulment of marriage, paragraph 3 uses the notion of "other proceedings" rather than "other applications". Consequently, Article 12(3) establishes an equality of treatment for married and separated or unwedded parents because under Article 12(1) only married parents could have benefited from the prorogation of jurisdiction.

Therefore, as long as the other requirements of Article 12(3) are met, the parties in a parental responsibility proceeding can choose the jurisdiction of a court of a certain Member State. Certainly, there are limits to this possibility of the parties to choose the jurisdiction of a certain Member State, other than the one of the child's habitual residence, but this ECJ ruling allows them to rely on Article 12(3) even if no other proceeding is pending before the chosen court.[20]

However, the Court has also established that the jurisdiction of the Court on the basis of Article 12(3) "is valid only in relation to the specific proceedings for which the court whose jurisdiction is prorogued is seised and that that jurisdiction comes to an end, in favour of the court benefiting from a general jurisdiction under Article 8(1) of that regulation, following the final conclusion of the proceedings from which the prorogation of jurisdiction derives".[21]

[19] Judgment of 12 november 2014, L v. M, C-656/13, ECLI:EU:C:2014:2364, paragraph 52

[20] The Court has founded its decision, among others, on the Recital 5 of the Regulation. Consequently, some may say that the phrase "independently of any link with a matrimonial proceeding." may have to a certain extent anticipated the decision of the Court. However, the title of article 12 is "Prorogation of competence" and by being able to have the jurisdiction of a court of a Member State which is not that of the child's habitual residence to be established even where no other proceedings are pending before the court chosen is not really a prorogation, but a right given to the parties to choose themselves a certain Member State as being competent to rule on the proceeding.

[21] Judgment of 1 October 2014, E v. B, C-436/13, EU:C:2014:2246, paragraph 49

Section 3.2. Requirements to be met under Article 12 (3)

Article 12 (3) requires three imperative elements to be met, namely the close connection of the child with the Member State, the express and unequivocal acceptance of the jurisdiction by all the parties to the proceedings and that the jurisdiction established on the basis of this provision to be in the best interests of the child.

Examining the requirements provided by paragraph 3 in relation to those referred to in paragraph 1, we can infer that the prorogation of jurisdiction provided by paragraph 3 operates under more restrictive conditions. Moreover, the additional requirements in this case derive precisely from the possibility provided by the Regulation No 2201/2003 to establish jurisdiction over an action excluded from its scope because if the three aforementioned requirements are met, the court competent to rule on claims other than those which are subject to Article 1 (1) (a) may extend its jurisdiction to decide upon parental responsibility claims.

Therefore, it might be seen in the spirit of these provisions, the purpose of making the administration of justice more efficient and protecting the best interests of the child in the case of applications that have close links, in order to determine the opportunity of their solution by the same court even if they fall under different normative instruments.

The more restrictive approach under paragraph 3 is visible for each of the requirements. For the first one that requires that the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State, from the phrasing of the provision it results that only if one of the two hypotheses is found in a particular cause, the condition is fulfilled. Moreover, ECJ has established that when Article 15 of Regulation No 2201/2003 lists the cases where the child shall be considered to have a particular connection to a Member State in Article 15 (3) points a) to e), those five cases are listed exhaustively. The Court has also stated that cases where those factors are lacking are immediately excluded from the transfer mechanism.[22] Therefore, by doing a purposive interpretation, it can be concluded that where Article 12(3) a) states that the child must have a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State, these two hypotheses are also listed exhaustively. Consequently, there can be no other situation apart from these where the child is considered to have a substantial connection with a certain Member State.

[22] Judgment of 27 october 2016, Child and Family Agency, Case C-428/15, paragraph 51

The second one requires that the jurisdiction of the court to be accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised. The simple lack of opposition from the other party is not sufficient. In reference to this matter the Court has stated "that Article 12(3)(b) of Regulation No 2201/2003 must be interpreted as meaning that it cannot be considered that the jurisdiction of the court seised by one party of proceedings in matters of parental responsibility has been 'accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings' within the meaning of that provision where the defendant in those first proceedings subsequently brings a second set of proceedings before the same court and, on taking the first step required of him in the first proceedings, pleads the lack of jurisdiction of that court."[23]

Also, if the courts appoint a legal representative to the defendant of their own motion in view of the impossibility of serving the document instituting proceedings on the defendant and he does not plead a lack of jurisdiction on behalf of the defendant, we cannot consider the competence of that court as being "accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings"[24].

The jurisdiction established in this manner should be in the best interests of the child. The Court has not interpreted yet the meaning of the "best interests of the child" under Article 12 (3), but we consider that the mentions regarding this matter under Article 12 (1) and developed in the previous sections are valid also here.

The prorogation of jurisdiction may also be established even if the child does not habitually reside in a Member State. At first surprising glance, this possibility is nevertheless organized by Article 12 (4). Thus, in the case where the child's habitual residence is in a third State not party to the 1996 Convention, the Regulation No 2201/2003 allows the judge of the Member State to decide on parental responsibility, presuming that this jurisdiction is in the best interests of the child "especially when proceedings are impossible in the third State".

Article 12 (4) does not deal with the situation in which the child is habitually resident in a third State that is party to the 1996 Convention; this is, however, not necessary, since in this case the Regulation does not apply and allows the provisions of the 1996 Convention to be implemented. The latter contains, in Article 10, a mechanism for the prorogation of jurisdiction which is very similar to that of the Regulation No 2201/2003, which will allow the holders of parental responsibility to focus the litigation concerning parental responsibility

[23] Judgment of 12 november 2014, C-656/13, EU:C:2014:2364, paragraph 59
[24] Judgment of 21 october 2015, Case C-215/15, EU:C:2015:710, paragraph 47

at the court having jurisdiction to entertain proceeding concerning the divorce application on relatively similar terms.[25]

Chapter IV. Dilemmas regarding the prorogation of jurisdiction in matters relating to maintenance obligations according to Council Regulation No. 4/2009

Section 4.1. Situations concerning the prorogation of jurisdiction in maintenance obligations covered by Regulation No 4/2009

As the judge of a Member State seised with a case according to Bruxelles II bis Regulation has to verify, of its own motion, if it has jurisdiction under this Regulation or not, likewise has to do the judge of a Member State seised to decide upon any disputes in matters relating to a maintenance obligation based on Regulation No 4/2009.

According to Regulation No 4/2009, the situations in which the prorogation of jurisdiction is possible are covered by Article 3 (c) and Article 3 (d) of the same Regulation.

Article 3 (c) of the Regulation No 4/2009 states that in matters relating to maintenance obligations in Member States, jurisdiction shall lie with the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person (for example establishment of parenthood). The prorogation of jurisdiction is possible only if the matter relating to maintenance obligations is ancillary to proceedings concerning the status of a person, excluding the situation where that jurisdiction is based solely on the nationality of one of the parties.

In the same time, Article 3 (d) of Regulation No 4/2009 establishes that in matters relating to maintenance obligations in Member States, jurisdiction shall lie with the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

Nonetheless, Article 5 of Regulation No 4/2009 covers a different situation, based on the will of the defendant. According to this Article, apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.

However, this process of prorogation of jurisdiction according to the provisions of Regulation No 4/2009 is not always very simple and sometimes it requires that the judge does

[25] L. Cadiet, E. Jeuland, S. Amarani-Mekki, Droit processuel civil de l'Union Europeenne, Lexis Nexis, Paris 2011, p. 212

not apply *ad litteram* the provisions of Regulation No 4/2009. In certain cases an interpretation and application of this Regulation according to its purpose is necessary.

Following the aforementioned remark, could a national judge analyse on its own Article 3 (d) and Article 5 of Regulation No 4/2009 and establish a hierarchy between those two Articles in order to pursue the objectives of this Regulation – preserving the interests of maintenance creditors and promoting the proper administration of justice within the European Union.[26]

Section 4.2. Factual situations not covered by Regulation No 4/2009

For a better exemplification of this hypothesis, the factual situation regarding the parties Ana Ionescu, Adrian Ionescu and their minor child Maria described in the second chapter, will be analysed this time with reference to the maintenance obligations in respect of the minor children. In this case, as it was showed before, the Romanian judge has to decide whether it has jurisdiction to entertain procedures regarding the legal separation, parental responsibility and whether it has jurisdiction to rule on the minor children's maintenance application. As it was exemplified in the second chapter, the Romanian court has jurisdiction to rule on the parties' divorce (on the basis of Article 3 (1) (b) of Regulation No 2201/2003), but it does not have jurisdiction to rule on the parental authority (neither on the basis of Article 12(1) of Regulation No 2201/2003, nor on the basis of Article 8 of the same Regulation).

Apart from deciding upon the jurisdiction regarding the divorce and the parental authority, the Romanian judge has to decide whether in this case the Romanian court has jurisdiction to entertain an application relating to the child's maintenance. According to Article 5 of Regulation No 4/2009, apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.

In the aforementioned case, as the defendant entered a counterclaim and did not contest the Romanian jurisdiction, according to Article 5 of Regulation No 4/2009, the Romanian court should establish its own jurisdiction to rule on the matter of maintenance obligation of the defendant towards the child. But, is this in accordance with the best interests of the child, that a court without jurisdiction to entertain procedures regarding parental responsibility, to rule on the matter of the minor children's maintenance application?

[26] Recital 15 of Regulation 4/2009

In this context, the Romanian judge has to decide whether a court having jurisdiction to entertain procedures regarding the divorce, but without jurisdiction to rule on the parental responsibility matter should have jurisdiction to rule on the minor children's maintenance application on the basis of Regulation No 4/2009.

Generally, an *ad litteram* application of the Regulation's No 4/2009 provisions would confer jurisdiction to the Romanian court in the matter of children maintenance obligation based on the Article 5 of Regulation No 4/2009. In the same time, it is important to take into consideration the aim of the Regulation – the safeguard of the creditor's rights.

Moreover, taking into consideration the jurisprudence of the European Court of Justice, we appreciate that in our case taken as an example, the Romanian judge should give priority to Article 3 (d) of Regulation No 4/2009 instead of Article 5 of the same Regulation in order to determine the jurisdiction for the maintenance claim.

As settled by the European Court of Justice in the case-law A v. B[27], Article 3(c) and (d) of Regulation No 4/2009 must be understood as meaning that, in the event that a court of a Member State is seised of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving that same child, an application relating to maintenance concerning that child is ancillary only to the proceedings concerning parental responsibility, within the meaning of Article 3(d) of that Regulation.

Nonetheless, it should be mentioned that in the aforementioned case-law A v. B, the preliminary ruling concerned whether Article 3(c) and (d) of Regulation No 4/2009 must be interpreted as meaning that, where a court of a Member State is seised of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving that child, a maintenance request pertaining to that same child may be ruled on both by the court that has jurisdiction to entertain the proceedings involving the separation or dissolution of the marital link, as a matter ancillary to the proceedings concerning the status of a person, within the meaning of Article 3(c) of that Regulation, and by the court that has jurisdiction to entertain the proceedings concerning parental responsibility, as a matter ancillary to those proceedings, within the meaning of Article 3(d) of that Regulation, or whether a decision on such a matter must necessarily be taken by the latter court.

[27] Judgement of 16 July 2015, A v. B, C-184/14, EU:C:2015:479

Therefore, when applying the reasoning of the European Court of Justice behind the case-law A v. B, the Romanian judge should take into consideration the factual situation in the case-law A v. B and the factual situation in our exemplified case: in case-law A. v B. there were two seised courts (one seised with the divorce claim and the child's maintenance claim and another one seised with the parental responsibility claim), whereas in our case is only the Romanian court seised with all three claims (divorce, parental responsibility and maintenance). In this latter situation, if the Romanian judge decides that the Romanian court does not have jurisdiction concerning the maintenance claim, this application will remain unresolved because no other court has been seised.

Even if in the case-law A v. B the problem regarding the maintenance allowance is slightly different than in our exemplified case presented above, we consider that the reasoning of the ECJ concerning the maintenance claim should be applied as well. The ECJ explained in the case-law A. v B why the court with jurisdiction to rule in the matter of parental responsibility and not the court with jurisdiction to rule in the matter of the divorce should have jurisdiction to rule in matters concerning the children maintenance.

As the ECJ settled, an application involving maintenance in respect of minor children is not necessarily linked to divorce or separation proceedings. Moreover, such proceedings do not necessarily lead to obligations to pay maintenance towards a minor child being imposed.[28]

The court with jurisdiction to entertain proceedings concerning parental responsibility, as defined in Article 2(7) of Regulation No 2201/2003, is in the best position to evaluate in concreto the issues involved in the application relating to child maintenance, to set the amount of that maintenance intended to contribute to the child's maintenance and education costs, by adapting it, according to (i) the type of custody (either joint or sole) ordered, (ii) access rights and the duration of those rights and (iii) other factual elements relating to the exercise of parental responsibility brought before it[29].

In our case, even if the Romanian court has jurisdiction in the matter of child's maintenance (according to Article 5 of Regulation No 4/2009), it is basically impossible for the Romanian judge to establish a maintenance allowance in favour of the minor children before the Spanish court (having jurisdiction according to Article 8(1) of Regulation No 2201/2003 as mentioned above) decides upon the parental responsibility matter. Usually a maintenance obligation is ancillary to a parental responsibility claim, as the maintenance

[28] Ibidem, Paragraph 42
[29] Ibidem, Paragraph 43

allowance has to be evaluated in connection with the custody type (joint or sole) and in connection with the child's residence (established either with the mother or the father).

In the case-law A v. B, in order to decide that a maintenance claim is ancillary to the proceedings concerning parental responsibility, the ECJ took into consideration the best interests of the child saying that the interests of maintenance creditors is guaranteed, in that, first, the minor child will easily be able to obtain a decision relating to his maintenance claim from the court with the best knowledge of the key elements for assessing his claim[30]. The ECJ also recalled that in matter of maintenance claims, the jurisdiction is designated in accordance with the rules on jurisdiction under EU law in order to satisfy the best interests of the child[31].

Last but not least, the ECJ settled that the implementation of Regulation No 4/2009 must occur in accordance with Article 24(2) of the Charter of Fundamental Rights of the European Union, according to which, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration[32].

In this context, in our presented case, we consider that giving effect to the legal provisions of Article 5 of Regulation No 4/2009, would be equivalent with disregarding the essential arguments comprised in the judgment given by the ECJ in the case A v. B.

From this standpoint, the appearance of the defendant in accordance with Article 5 of Regulation No 4/2009, in this specific situation, should not determine the Romanian court to declare itself competent in the matter of maintenance obligations as long as the Romanian court has no jurisdiction in the matter of parental responsibility and as long as no other court decided upon the parental responsibility claim.

In this context, Article 5 of Regulation No 4/2009 finds its application only after a competent court has decided upon the parental responsibility claim because an application relating to child's maintenance is intrinsically linked to the proceedings related to parental responsibility.

Therefore, in our case there are two possible solutions for the Romanian judge. The first one envisions the possibility for the Romanian judge to give priority to Article 3 (d) over Article 5 of Regulation No 4/2009 and declare of its own motion that the Romanian court does not have jurisdiction concerning the maintenance claim. In this case, the parties can seise the Spanish court to decide upon both claims - parental responsibility (on the basis of Article

[30] Ibidem, paragraph 44
[31] Ibidem, paragraphs 37 and 45
[32] Ibidem, paragraph 46

8 of Regulation No 2201/2003) and child's maintenance (on the basis of Article 3 (d) of Regulation No 4/2009).

The second option envisions the possibility for the Romanian judge to apply the provisions of Article 5 of Regulation No 4/2009 *ad litteram*, establishing the jurisdiction of the Romanian court (as long as the defendant entered an appearance before the Romanian court and did not contest the jurisdiction) and not taking into account a possible hierarchy between Article 3 (d) and 5 of Regulation No 4/2009. In this case, the parties can introduce before the Spanish court a parental responsibility claim (on the basis of Article 8 of Regulation No 2201/2003) but they cannot introduce a child's maintenance claim before the same court. In this latter case, as the Romanian court established its jurisdiction, according to Article 12 (2) related to lis pendens, the Spanish court shall decline jurisdiction in favour of the Romanian court. But as the child's maintenance claim is ancillary to the proceedings concerning parental responsibility, the Romanian court will be able to decide upon the maintenance claim only after the Spanish court decides upon the parental responsibility claim. In this case, as the Romanian court has to wait until the Spanish court decides upon the parental responsibility, procedure which request more time, we consider this second solution not being in accordance with the superior interest of the child.

Even if this first solution is equivalent with creating a hierarchy between Article 3 (d) and 5 of Regulation No 4/2009, we consider that this interpretation is in accordance with the ECJ jurisprudence and with the purpose of the Regulation - preserving the interests of maintenance creditors and promoting the proper administration of justice within the European Union[33] because this solution allows the Spanish court to have competence on both parental responsibility and maintenance claims and decide upon both of them at the same time.

CONCLUSIONS

The European Union offers nowadays to every citizen the possibility to move over the territory of the Member States with his family – de jure or de facto – to establish their residence, to work, to get married, to divorce or simply travel. This huge area of rights offered by the European Union to their citizens is possible thanks to the cooperation instruments developed between the Member States during the last decades.

In most of the cases, the courts of the Member States are not seised with a sole application relating to divorce, parental responsibility or child's maintenance obligation but

[33] Recital 15 of Regulation 4/2009

with more complex claims which include all of these. In order to respect the best interests of the child, the European Union legislator envisioned the necessity, that in some situations, only one court should decide upon all of the three claims mentioned before. The rules concerning the prorogation of jurisdiction comprised in Article 12 of Regulation No 2201/2003 and in Article 3 (c) and (d) of Regulation No 4/2000 aim to respond to the desideratum of ensuring the celerity of judicial proceedings in matters related to minor children.

Article 12 (1) of Regulation No 2201/2013 establishes the rules in finding the competent court when the parental authority claim is decided in a divorce litigation. Even if the intention of the European legislator was to implement flexible rules, the central point remains the best interests of the child. All requirements comprised in Article 12 (1) gravitate around the protection of the child and as this procedure tries to protect the child from the negative effects of the divorce there are, however, limitations of this flexibility.

The head of jurisdiction provided for in Article 12(3) of Regulation No 2201/2003 is an exception to the criterion of proximity, under which it is in the first place for the courts of the Member State of the child's habitual residence to decide on applications concerning parental responsibility for that child, and of which Article 8(1) of the Regulation No 2201/2003 is an expression. This exception is intended to allow the parties a certain autonomy in matters of parental responsibility. The condition that the acceptance of the jurisdiction of the courts seised by all the parties to the proceedings is unequivocal must therefore be interpreted strictly.[34]

As the rules of Regulation No 4/2009 concerning the prorogation of jurisdiction for maintenance obligations, do not cover all the possible situations which can appear before a court, the judge has to interpret the provisions of Regulation in the light of the jurisprudence of the ECJ. Our analysis showed the possibility for the judge to apply the provisions of Article 5 of Regulation *ad litteram* or to apply Article 3 (d) with priority to the detriment of Article 5 of Regulation No 4/2009, despite the fact that all the formal requirements of this latter Article are met. We do not consider this hierarchy between Article 3 (d) and Article 5 as being an artificial one, but a solution which follows the finality of Regulation No 4/2009 and the jurisprudence of the ECJ as well.

[34] Judgment of 21 december 2015, Gogova, C-215/15, EU:C:2015:710, paragraph 41