CROSS-BORDER PLACEMENT OF CHILDREN: THE CURRENT SITUATION IN SPAIN

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I. Introduction

The importance of Article 56 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*[1] (hereinafter "Brussels IIa Regulation")

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[1] *OJ* L 338, 23/12/2003 P. 0001 – 0029.

Article 56 Placement of a child in another Member State:

1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.

2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.

3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.

4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State

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is reflected in the figures that certain Member States publish in relation to its application. Data for Germany alone shows that between 2013 and 2014 there were 483 cases in which a cross-border placement of a child was processed under the aforementioned provision.[2] There were an additional seven reported German cases where Article 33 of the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* was applied.

It is clear that in practice these are rules of undoubted importance, but it has been since the CJEU ruling in the *Health Service Executive* (*HSE*)[3] case that more attention has been placed in legal doctrine on the analysis of these rules.[4]

Our interest results from the figures published by Germany. The website of the German Central Authority indicates that there were 93 cross-border placements involving Spain in 2013 and 86 such placements in 2014.[5] Spain does not provide official statistics or at least these are not published.

This paper discusses the circumstances giving rise to the application of Article 56 of the Brussels IIa Regulation, the authorities involved, the internal procedures followed in Spain and the conflict between the reality of the measure and the rights of the child.

The discussion begins with an analysis of the CJEU's ruling in the *HSE* case, which highlights the factors of interest to Spain.

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and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.

The European Commission published a *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction recast* COM(2016) 411/2. The proposal concerning cross-border placements foresees the introduction of the following new rules:

Making consent of the receiving State mandatory for all cross-border placements originating from a court or authority in a Member State; introducing uniform requirements for documents to be submitted with the request for consent: the requesting authority has to submit a report on the child and set out the reasons for the contemplated cross-border placement; introducing a rule on translation requirements: the request has to be accompanied by a translation into the language of the requested Member State; channeling all requests through Central Authorities; and introducing a time limit of eight weeks for the requested State to make a decision in relation to the request.

[2] The figures may be seen at <https://www.bundesjustizamt.de/EN/Topics/citizen_services/HKUE/Statistics/Statistics_node.html;jsessionid=6609FED35B30DC6D0E2734D71420C39F.1_cid377>.

[3] CJEU, 26 April 2012, Case C-92, *Health Service Executive*.

[4] A. DUTTA/ A. SCHULZ, First cornerstones of the EU rules on Cross-border child cases: the jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive, *Journal of Private International Law* 2014, Vol. 1, Issue. 1, p. 1-39. S. ÁLVAREZ, *REDI* (2012), 2, p. 234-238. F.J. FORCADA MIRANDA, Revision with respect to the cross-border placement of children, *N.I.P.R.* 2015, Issue 1, p. 36-42.

[5] It would appear that, of the 483 cases reported in the German statistics, Spain is involved as the destination country in 179 of them.

II. The CJEU Ruling in the *HSE* Case

The facts of the ruling being well known, we will only refer to the main ones. A child in Ireland was under the protection of the Irish authorities, who requested the competent Court to issue an order for the placement of the child in a secure institution in England, where the mother lives. In accordance with Article 56 of the Brussels IIa Regulation, the Irish protection authorities contacted the Irish Central Authority so that the latter would request permission from its English counterpart for the transfer. Although, in principle, it appears that the Article 56 procedure had been complied with, the Irish authorities referred to the CJEU for a preliminary ruling to clarify some issues in relation to this provision.

This first issue raises doubts as to whether the measure taken falls within the material scope of the Brussels IIa Regulation given that it deals with detaining a child in a secure institution with deprivation of liberty, and is thus a public law measure. The CJEU finding on this point is fundamental. A response indicating it is within the material scope of the Regulation means submitting such decisions to the parameters of action of Article 56; while if the response is the opposite, the measure would escape the control of the aforementioned precept. In its ruling the CJEU unhesitatingly situates the placement of the child in a secure institution with deprivation of liberty within the material scope of the Brussels IIa Regulation.

The second question centres on the interpretation of the obligations arising under Article 56. Under the rules, the Central Authority in England and Wales sends the Irish Central Authority a letter confirming the acceptance by the institution in which the measure is to be enforced. Is the acceptance in accordance with the nature of the obligation arising under Article 56? The CJEU makes it clear that a decentralised system is possible, in the sense that two authorities are involved: One authority during the consultation stage, which would be the Central Authority; and another authority responsible for granting consent for the transfer, which would be the authority deemed to be the competent authority, in accordance with the internal procedure of the requested State.

The aforementioned legal arrangements establish who the authorities are in each case and whether or not it is necessary to authorise the transfer of the child. Compliance with this last-mentioned requirement is not negotiable, nor is, in application of Article 56, the time when it must be granted: *always before the authority of the requiring State adopts the measure on placing the child*.[6]

The effective compliance with this requirement raises one of the most delicate questions regarding: first, the necessary balance between swift internal procedures for granting authorisation for the transfer of the child – without forgetting the possible refusal; Second, the need to provide the legal security required in such an important choice for a child, the child's protection measures having to be implemented in a country which, let us not forget, may be completely foreign.

One of the important factors in relation to legal security is that the consent to the transfer may not be granted by an authority belonging to the establishment in which the protection measure will be implemented. It is necessary, according to the CJEU that the consent be granted by a public authority that appreciates in an

[6] According to the wording of Article 56 and also as reiterated by the CJEU.

entirely independent manner *the appropriate nature of said measure*. This statement by the CJEU in its judgment is highly significant; later on we will examine the scope of the consent of the authority of the required State (see *infra* section III.C). It can be said that this communication is not merely for informational purposes and, therefore, it is essential that the consent precedes the transfer. Otherwise, Article 56 itself would be rendered ineffective.

This being so, there are two scenarios in relation to the circumstances surrounding the consent of the required State: firstly, the placement may be ordered by the judge of the requiring State, to be enforced abroad, based on the apparent compliance with the requirements of Article 56 – the situation of the *HSE* case –; secondly, said measure is issued with a complete lack of consent by the authority of the required State. In the first scenario the CJEU is inclined to remedy the situation *a posteriori*; under the second scenario, the procedure would have to be started again, and the authority of the requiring State would not be able to adopt the measure until it has obtained consent from the required State. In either of the two scenarios what does seem unquestionable is that the child may still not have been transferred to the required State.

In the following two questions, the CJEU looks into one of the aspects that has generated the most controversy among legal commentators and within the framework of the ruling itself: the need to recognise and declare the implementation in the required State of the measure adopted by the requiring State before it is implemented in the former.

The stances against such requirement were held by the governments of Ireland and Germany, which based their positions on the automatic recognition by law of Article 21 of the Brussels II Regulation and on the respect for the obligations of Article 56. By contrast, the UK and the Commission were inclined to favour the obligatory declaration of enforceability of the measure in order for the ruling to take effect in the required State.

The CJEU's position was, at first, lukewarm in this respect. Its arguments were based on a strict reading of the wording of the Brussels IIa Regulation; however, the CJEU has subsequently moderated its position with a view to seeking solutions making it possible for the measures to be complied with as swiftly as possible.[7] Thus, at the beginning, it maintained the mandatory nature of the *exequatur* procedure for the parental responsibility measures not contained in Chapter III section 4 of the Regulation, such as in the case of a placement to be enforced in another State. Immediately after, it explored solutions that avoid delaying procedures, opting to expedite the internal procedures of declaration of enforceability and ensuring that appeals cannot cause suspension of the procedures.

Lastly, the final question focusses on the procedure to be followed in the event that the measure is extended. In this connection there is an interesting change in the arguments of some governments.[8] The CJEU is inclined to favour the need

[7] Here it already warns of the possible changes that might be included within the framework of future reform thereof in light of implementation of decisions on cross-border placements.

[8] Germany, among others, defends new permission and new declaration of enforceability when there is an extension.

for new consent by the authority of the required State in the event of the extension of the measure, as well as the need for a new declaration of enforceability in view of this new situation. The CJEU seems to provide a way to avoid such inconveniences: that the measure be adopted for a sufficiently long period to avoid extensions, although there would have to be verification as to whether the measure must be reviewed at specific intervals within the period covered by the declaration of enforceability.

III. The Importance of the Issue in Spain and the EU

The statistics published by the German Central Authority, referred to at the beginning of this paper, reveal the importance for Spain of Article 56 of Brussels IIa. Spain is selected in a very notable number of cases as the State in which cross-border placements, as agreed by the authorities of other Member States such as Germany, must be enforced.

The first of the questions which arises in the framework of the measures of Article 56 relates to the type of placement for which Spain is selected as the required State. Different scenarios might arise in this context: for example, a placement in a family – making a distinction between foster families and, why not, extended families[9] –, and a residential placement, with a distinction also being made between a residential placement in an open institution and in a secure institution.[10] The measure is evidently not adopted on the basis of Spain's body of laws, but rather in accordance with the body of laws of the requiring State.

In view of the foregoing, we are especially interested in the German legislation in this context, in particular *Sozialgesetzbuch* (SGB) – *Achtes Buch* (VIII) – *Kinder – und Jugendhilfe* (German Social Code Part VIII), Articles 33 to 35. Under this legislation, it is possible to adopt, with the consent of the biological parents or the legal representatives of the child, placements which may be implemented abroad. These would be intensive socio-educational programmes arranged abroad. The institutional contact between the child and the State in which he/she has been placed is minimal. The German Welfare Office is responsible for placing the child and enters into an agreement with a body recognised as a juvenile services organisation in Germany operating with an establishment in Germany for which permission is required and where socio-educational assistance is provided. Sometimes the German employees of this body are present abroad, accompanying the child or cooperating with a foreign partner who provides care.

[9] New regulation in Spain in Law 26/2015, of 28 July, amending the system of protection of childhood and adolescence ("Ley 26/2015, de 28 de julio, de modificación del sistema de protección a la infancia y a la adolescencia"), Official State Gazette No. 180 of 29/07/2015.

[10] New regulation in Spain in Organic Law 8/2015, of 22 July, amending the system of protection of childhood and adolescence ("Ley Orgánica 8/2015, de 22 de julio de modificación del sistema de protección a la infancia y adolescencia"), Official State Gazette No. 175 of 23/7/2015.

In short, there are two models by which such socio-educational measures for children imported from Germany are implemented in Spain:

(a) cross-border placement of children into institutions in Spain (these institutions are managed mostly by foreign authorities and are under foreign rules); and,
(b) cross-border placement of children into foster families in Spain (these families are foreign families, supervised by foreign authorities under foreign rules).

It is true that under Article 56 other forms of cross-border placement of children are arranged, but the types mentioned are the most common in practice, at least where Spain is the required State.

Having indicated the type of measure adopted in accordance with German legislation which must be implemented abroad in accordance, therefore, with the prerogatives of Article 56, we can now analyse the processing in Spain as the required State.

A. Regulatory Authorisation and the Authorities Involved in Spain

Unlike what has happened in other States,[11] Article 56 has not been implemented in Spain's body of laws; consequently, there is no specific internal regulation or particular procedure for the cross-border placement of children in Spain. We will analyse below how the Spanish authorities have resolved this issue.

The obligation on the competent Spanish public authority to intervene under Article 56 arises from the internal regulatory framework governing placements in Spain. Thus, both in the case of placements in a family – whether extended family or a foster family – and in the case of placements in an institution, the approval of the competent *administrative authority* is required; the decision taken by such authority may be appealed by the biological parents through the courts. In case of placements in a secure institution, and therefore with measures for the deprivation of the child's liberty, the involvement of the *judicial authority* is required.

Consequently, it is clear that the prior consent of the competent authority is obligatory when Spain is the country chosen to implement the measure.[12] There are States in which the consent of the competent authority – generally the

[11] See, for example, Germany. See the website of the Germany Central Authority <https://www.bundesjustizamt.de/EN/Topics/citizen_services/HKUE/placement_children/placement_children_node.html>.

[12] On the German Central Authority website it is interesting to read section b) of the regulation on cases of "Placement of children abroad by German Courts and authorities": "If a child is already in another EU State without the German Court or authority placing the child having carried out the necessary consultation and consent procedure in the State, in general this must be done subsequently without delay". Therefore, the existence of such cases is taken as read and to this end a solution of sorts is decided on, which is valid for Germany, but what effect does it have for the required State?.

administrative authority responsible for child protection – must be approved by a judicial authority.[13]

It follows that the first question to be clarified is which is the *competent Spanish authority to grant such consent.* The complexity of the Spanish State leads us first to clarify that competency in the matter of child protection is conferred on the Autonomous Regions under Article 148.1.20 of the Spanish Constitution relating to "social welfare". Consequently, it will be the public entity of the Autonomous Region in which the placement is going to take place which will have to authorise or deny the consent requested by the foreign authority.

Taking the foregoing into account, Spain, within the scope of Article 56 of the Regulation, is an example of a *decentralised* system of authorities to the extent that: on the one hand, the Spanish Central Authority, which is the Ministry of Justice, is responsible for receiving the consultation from its counterpart in the requiring State, in compliance with Article 56.1; and, on the other hand, in reality, the authority with "competence" to grant the consent is the Public Authority of the corresponding Autonomous Region, thus identifying the authority referred to in Article 56.2.

B. The Procedure to Be Followed in Spain as the Required State

Let us turn now to the procedure for channelling the provisions of Article 56 in Spain as the required State. The precept has not been implemented in Spain's body of laws.[14]

The lack of internal regulation has caused confusion outside of Spain, and foreign authorities are unaware as to how to act when dealing with Spain. Cases of confusion have also been noted in the *modus operandi* of certain of the Autonomous Regions. In addition, the Spanish authorities are alarmed about the increasingly frequent selection of Spain as the State in which cross-border placement has been implemented.

The combination of these two factors, led to a meeting of the institutional coordination body of the Spanish Autonomous Regions in matters of children, *i.e.* the Inter-Regional Committee of Director Generals of Childhood, in order to: address the matter of cross-border placement of children in Spain and to adopt appropriate agreements.

The outcome was the Agreement of the Inter-Regional Committee of Director Generals of Childhood of 17 July 2012[15] (hereinafter "the Agreement") that was reached among the competent authorities of the various Autonomous

[13] This is the case in Italy or Germany, when they act as the required State therefore for incoming children, in accordance with Article 47 of the International Family Law Act (hereinafter IFLA).

[14] Unlike other articles of Brussels Regulation II which were implemented through domestic legislation.

[15] This Agreement has not been published. I am grateful to the General Directorate of Services for the Family and Childhood for having given me the opportunity to consult the Agreement. Also I am grateful for the information provided regarding the application of Article 56 of the Brussels IIa Regulation in Spain.

Regions and the other authorities involved – such as the Ministry of Justice as the Central Authority. From this Agreement, a recommendation was made for the application of Article 56 to cases in which Spain is the country required to implement cross-border placement of children.

The agreements of the Inter-Regional Committee of Director Generals of Childhood are recommendations; therefore, they are not binding. However, previous examples, in other child protection matters, show that the Autonomous Regions apply them once they have been adopted. Moreover, this Agreement is not only useful for the purpose of internal coordination; it would have been very advisable that the foreign authorities were informed, in particular the Central Authorities, as mentioned in Article 56, so that the procedure was known.

What are the most noteworthy points of this Agreement? Aware of the current reality in Spain regarding cases of cross-border placement of children, the Spanish authorities have chosen to divide the cases into blocks: on the one hand, measures dedicated to cases of children who are already in Spain; and on the other hand, measures dedicated to processing new requests for the cross-border placement of children.

The first block deals with children who are already in Spain. The measures of the Agreements are centred on identifying them in order to ascertain their situation, inspecting and checking the types of "homes" or family placements intended to receive these children, reviewing opening licenses, and other administrative requirements. The schooling of the children is also checked.

As regards the measures dedicated to processing new requests for the cross-border placement of children, the Agreement focuses on:

(a) reiterating to the foreign competent authorities the demand that the children are not displaced without the prior approval of the Child Protection Public Entity of the Autonomous Region;

(b) requiring the foreign Central Authority to attach a series of obligatory documents to the request for the displacement of a child;

(c) requiring the approval of the displacement by the Autonomous Region in which the placement measure is planned;

(d) requiring that the foreign Central Authority, in compliance with the ruling of the CJEU of 26 April 2012, requests the declaration of enforceability of the resolution reached in the country thereof, before the corresponding Spanish jurisdictional body, as a prior requirement of its enforcement; and

(e) requiring the displacement of the child if such recognition is positive.

The scrupulous compliance with the measures adopted to process the procedure of Article 56 in Spain as required State clearly involves lengthening the procedure. The delay has rightly been strongly criticised and it has even been qualified as going against the *interest of the child*; but should we not ask where the child's interest lies if the transfer takes place without compliance with the formalities established in the body of laws of the required State, which under Article 56 is the procedure to be followed?

C. Analysis of the Requirements Established in the Light of CJEU Case Law

It is worth examining whether the provisions of the Agreement guarantee compliance with Article 56, and whether they are in accordance with CJEU case law.

(1) Approval of the measure by the authority of the required State prior to the transfer of the child. Two elements come into play in a cumulative manner: consent and the prior nature thereof.

With regard to consent, it is necessary to determine its scope at this point in the procedure. In the *HSE* case, when assessing the appropriateness of the authority that consented to the transfer of the child, the CJEU implies, in some of its statements, that the scope of the consent is greater than that which Advocate General KOKOTT granted in her Opinion. Thus, the CJEU states: "[…] An independent assessment of whether the proposed *placement is appropriate* constitutes an essential measure for the protection of the child […]."[16] Consequently, it is clear that the authority of the required State may assess the appropriateness of the placement, and on the basis of such assessment decide whether or not to authorise the displacement. However, the Advocate General insists that such authority cannot review the appropriateness of the placement or whether the placement respects the interests of the child; its decision shall be taken only to govern, in advance, aspects such as the conditions of the stay in the receiving country, in particular immigration laws, or cost-sharing.[17] Subsequently the CJEU, when examining the conditions which, for the declaration of enforceability, can be challenged by the authority of the required State, agrees with the position taken by the Advocate General on this issue.

The requirements established in the Agreement for dealing with new cases in Spain are in line with the idea of clarifying and resolving in advance any obstacles that may arise after the child's stay. The Agreement states that a series of mandatory documents must be included with the request for authorisation so that the Spanish authority can make a judgment in relation to the consent.[18] It is noteworthy that, as part of the documentation to be sent, the date of entry and exit of the child from the Spanish territory must be expressly shown, and that this

[16] Section 88.

[17] Sections 37 and 38.

[18] Documentation required: Full name and date of birth; Regime of custody or guardianship that applies; Time of stay in Spain, specifying entry and departure dates; Reason that justifies the presence of the child in Spain; Institution with responsibility for the child, and that has taken over his legal guardianship; Personal project and occupation; Document held by the child proving the legality of the child's stay in Spain (current and valid passport or National Identity. Document, when their stay is less than three months in Spanish territory, or registration certificate certifying Community resident registration in the Foreigners Central Register, if the child's stay in Spain is for more than three months); Body responsible for the child; Certificate of the father, mother or legal guardian of the child who has given permission for the child to travel and stay in Spain under the legal guardianship of the responsible institution; Address where the child will reside; Documentation verifying the therapeutic and educational support that the child is going to receive.

therefore involves the exact establishment of the duration of the measure in Spain. Consequently, approximate or incomplete dates cannot be given, though this clearly happens in practice.

If such documentation is not complete, the consent of the competent Spanish authority will be conditional on the correct delivery of the same. Therefore, a request will be made through the Central Authorities that the missing documentation be added. This evidently delay the proceedings. But it does not have to mean the denial of authorisation. To avoid such delay, it is very important that the internal procedures are not just speedy but also well-known by the competent authorities of the various States.

The German legislation, IFLPA, on the scope of consent to authorise the cross-border placement of children in Germany, is noteworthy in this context. Article 46 thereof states: "consent to the request should as a rule be granted where: carrying out the intended placement in Germany is in the *best interest of the child, in particular because he or she has a particular connection with the country.*" Therefore, the competent German authority will evaluate, when authorising the transfer, if such measure is in the *interest of the child*, and taking into account, in particular, the child's connection with Germany. It does not appear that this is the scope that the CJEU intended to give to consent in the HSE case.

It is also surprising that the measures taken by the German authorities on the basis of the *Sozialgesetzbuch* (SGB) – *Achtes Buch* (VIII) – *Kinder – und Jugendhilfe* allow the transfer of children from Germany to, for example, Spain, though there is zero connection between the child and the territory where the measure is going to be implemented. Is this not inconsistent with the pertinent regulations given in the IFLA for incoming children? Are the child's interests different depending on whether they are incoming or outgoing?

In relation to the *prior nature of the consent* to the transfer of the child, one of the most distorting aspects of the practice analysed in Spain is the extemporaneous manner of the request for consent to the transfer. The request to the Spanish authority has to be made before the adoption of the measure by the requiring State, because the consent will prevent any obstacles – including administrative impediments – that may arise during the child's stay in the territory. Such request must always be made prior to the actual transfer of the child to Spain. But in practice, children are residing in Spain for months, or even years, and the request for authorisation arrives a long time after the transfer. Nor can it be considered, even if the formality is complied with, that the purpose sought has been achieved by the request for consent when requests for transfer arrive at the Spanish Central Authority just days before the date set for the same.

How is the delivery of the request for authorisation channelled to the Spanish authority with the competence to grant it? The complexity of internal laws requires the intervention of the Central Authority in order to clarify the route to be followed. In the case of Spain, the foreign Central Authority sends the request for consent to the Spanish Central Authority within the Ministry of Justice. Requests arriving at the Ministry of Justice shall be sent to the Ministry for Equality, Health and Social Issues, which will send them on to the Public Entity of the Autonomous Region in the territory where the child's transfer is planned. In this connection the Central Authority's involvement is crucial. The route for transfer in Spain rules

out, therefore, any direct contact between the foreign authorities – whether it is the Central Authority or public entities with competence in child protection matters – with the competent public entity of each Autonomous Region in Spain. Requests, therefore, must be channelled through the Central Authority; whereby, the Ministry for Equality, Health and Social Issues serves as a bridge between the Spanish Central Authority and the Autonomous Regions.

(2) Of the requirements established in the Agreement, and following the case law of the CJEU in the HSE case, the most controversial is that of the declaration of enforceability of the measure in the required State. In the Agreement adopted by the Spanish authorities, it is a mandatory requisite, and consequently it extends to all the situations in which there is a transfer to Spain within the framework of Article 56.[19] Indeed, the cross-border placement decision is a measure in relation to the exercise of parental responsibility that is not contained within those envisaged in Chapter III, section 4 of the Regulation, *i.e.* those that are exempted from the declaration of enforceability.

In practice, various considerations arise: the need to combine the principle of "mutual trust", the interests of the child and the obligation to comply with the requirements of Article 56. In this context, if the authority of a Member State has already evaluated the child's interest and this is best served by placement and its implementation in another State, it appears that the declaration of enforceability would not sit very well with the principle of mutual trust.[20]

The declaration of enforceability does not appear to be compatible with speed and urgency. However, as the CJEU established in its judgment, circumstances of particular urgency may not result in measures for enforcement in a second State being based on a decision in relation to which enforceability has not been declared.

Taking the above into account, for the purpose of future progress, it might be useful to evaluate opinions based on the type of placement that is planned in another State. A residential placement in a secure institution in which the child's fundamental rights such as his/her right to liberty are at play is not the same as a placement in a family, even (as Article 56 has been used on occasions in practice) an extended family. The latter case, which in reality is commonplace in cross-border placements, is generally chosen with the agreement of all parties and involves the child residing with relatives located in other States. For it to be effective it requires speed, as in the other cases; in addition, the prior cooperation of the competent authorities in both States is evidenced, and in particular the Central Authorities, in the adoption process as a result of the obligations under Article 55 of the Brussels IIa Regulation.

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[19] Among legal commentators there are voices that are very strongly against the requirement for the declaration of enforceability, A. DUTTA/ A. SCHULZ (note 4), at 36-37.

[20] With regard to the abolition of the declaration of enforceability prior to the enforcement of a decision of parental responsibility in other Member States, see recital 33 of the *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction recast.*

Future reform must take into account the current practice under Article 56, and this is a different case from that of placement in extended family or even in institutions under the full control of the authorities of the destination State.

It is also our understanding that not only will the review of Article 56 have to take into account the combination of principles and requirements to be met, but it is also essential to promote, in the regulation, the effective compliance with the rights of the children involved.

IV. The Child's Interests and Rights: Their Promotion in Cases of Cross-Border Placement

There is no doubt that when the authority of the requiring State takes a decision in relation to the cross-border placement of a child, it does so because it considers that it is in the *child's interests*, but we want to go further by looking at this from the perspective of guaranteeing the child's rights.

The child's rights have to be respected both in the procedure in which the measure is adopted, when it is being implemented and, also, at the time of the end of the placement, whether through reintegration in the family or, even, because the person has reached adulthood.[21]

One of the most often talked-about rights is the *child's right to be heard* in the procedure. Within the framework of internal legal systems, this involves facilitating the child's participation in all legal or administrative processes which have to do with that child, without his/her opinion in this regard having to coincide with the evaluation of his/her interests made by the competent authority.[22] Otherwise stated, what has to be guaranteed is the child's exercise of the right to be heard, which may involve taking into account his/her opinion depending on age and degree of maturity. In relation to the actual exercise of this right one has to take special care in the case of a measure that is to be implemented abroad.

The placement of the child outside his or her family environment is an exceptional measure;[23] and in the event it is in the child's interests not to remain in the child's family of origin, there will be a preference for a placement in a family rather than a residential placement. Given that the placement has an exceptional nature, even more so if its implementation must take place abroad, the statistics offered above are worrisome.

Within the framework of the child's right to remain in its family environment, there is an important aspect in the effective development of this right,

[21] The following may serve as a foundation for formulating rules that guarantee effective compliance with children's rights in cross-border placements: SOS Children's Villages International, "Children and young people in care. Discover your rights – Building a Europe for and with children," <www.coe.int/children.

[22] As occurred in the HSE case in which the child was against the measure being taken.

[23] See for example Article 21 of the Convention on the Rights of the Child.

namely the child's right to *keep contact with his/her family*.[24] As a result, within the framework of the cross-border placement of children, this is a right that will have to be protected, especially knowing that, due to the place where the measure will be implemented, actually complying with it may be made more difficult.

Likewise, it is clear that the measure's exceptional nature in itself means that it must not take longer than necessary, given that it must be in the child's interests, which in this case are *the reintegration of the child in society* and, if it is in the child's interests, once again *in the child's family of origin*. Consequently, special care must be taken with the duration established for the measure, ensuring that very long periods are not established solely in order to avoid legal inconveniences and in any event always ensuring that the necessary reviews take place.

Finally, although there are without doubt many more rights to be guaranteed, it is particularly important when developing the measure that it respects the *child's right to education* (Article 28 of the UNCRC). Effective compliance with this means the same right to education as children or young people living with their families of origin. The question arising in reality with these measures in Spain is, can its effective compliance in the terms specified really be verified if the child's contacts with the country where the measure is being implemented are minimal?

Therefore, it is not only a case of principles and procedures in the implementation of cross-border placement, but also of effective compliance with children's rights.

V. Further Considerations

It is true that the cross-border placement of children took place between Member States before the Brussels IIa Regulation. Its incorporation within the scope of the material application of the text, even on the understanding that some modes are of public law, is in our opinion a very positive development. Only in this way has the importance of the measure been revealed, not only from the perspective of the figures provided, but also in terms of the implementation of such measures in the Member States.

Provisions as to its amendment must be oriented towards benefiting the child's interests and ensuring effective compliance with children's rights from beginning to end. Without doubt, many of the aspects would have to be improved, and one might even think about formulating a common procedure for handling the situations for all States; but one of the essential keys to the success of the precept will be based on tightening cooperation between all the authorities involved, *i.e.* between those that are involved in deciding on the measure in the requiring State and those that operate in the required State where it is implemented. Cooperation will bring trust and a respect for deadlines and procedures, but above all a respect for children's rights.

[24] Convention on the Rights of the Child. Article 9.3. See: SOS Children's Villages International (note 20), at 24.