

Comparative study on enforcement procedures of family rights JLS/C4/2005/06
Summary of the Synthesis Report

Internal law

The legal systems of the member states demonstrate a wide variety in approaches towards and solutions for the effectuation of family law decisions. Notable differences are that some legal systems try to adapt the general rules for enforcement to family law cases whereas other states, often recently, have introduced a specific system for the enforcement of family law decisions, and which may make mediation part of the enforcement process. There are further different approaches as to whether parties (i.e., usually, parents) or the courts are responsible for the actual enforcement.

In the internal legal systems of more and more member states, parental responsibility is seen more and more as an obligation towards the child, which is not dependant on other circumstances, such as the existence of a marital bond. The sentiment is growing that there is a joint responsibility of the parents to fulfil their duties and obligations towards the child. This implies that, from the parent's perspective, a parent has no rights vis-à-vis the child (that can be enforced) but only obligations (that must be fulfilled).

The measures used to enforce a family law decision vary according to the content of family law decisions. Usually, with respect to custody or return orders, more far-reaching measures are available than with respect to visiting arrangements. Measures may be directed towards the child or towards the adult who is obstructing the decision.

There are certain trends with respect to the sharing of parental responsibility, with respect to the position of the child and with respect to the impact of human rights that are found in many member states. There is currently not a clear, universally accepted method for enforcing family law decisions. Two member states recently enacted legislation on the enforcement of family law decisions, Belgium and Sweden. Both systems give a central role to the court but make it possible for the court to achieve voluntary compliance. The decision on the most appropriate measure is left to the court.

Different from enforcement in ordinary proceedings, the object of the enforcement is a human being, the child. The older the child is, the more courts will be prepared to take the opinion of the child into account. The involvement of the child forms a reason to doubt whether an adaptation of ordinary rules on enforcement can lead to suitable solutions.

Cross-border cases

The variety of approaches on the level of internal law continues in cross-border situations. Currently problems may exist as a consequence of insufficient adaptation of internal law to community law provisions, notably in respect of national procedural rules (time limits for appeal and the rule that appeal suspends enforcement). There further appears to be a lack of understanding of the integration of the system of the Hague Abduction Convention (essentially ensuring the swift return of the child) into Regulation 2201/2003 (dealing with jurisdiction for parental responsibility in general). Some member states already adapted their internal legislation as a consequence of this integration.

The principle that the child is to be returned swiftly in order that the court of habitual residence takes a decision on the merits is not well accepted by the actors involved and leads

to draw out court procedures on whether or not to return the child. Acceptance of the principle may be improved by increasing co-operation between courts of the member states. The diversity of actors who can be responsible for enforcement complicates matters. There are doubts whether the usual methods for enforcement in the national legal systems are always compatible with human rights standards.

Empirical survey

Human behaviour is seen as the main source of problems. The person causing problems can be one of the parents or the child, depending on the circumstances. Measures to influence human behaviour should take into account the legal position of the person concerned and will have to target different actors depending on the nature of the case. Concentration of justice is to be considered as a measure to heighten the expertise of judges who have to deal with cross-border enforcement. Judges are thought to balance the main objective, enforcement, with underlying issues such as the interest of the child, a possible conciliation between the adults involved and the opinion of the child. There is however no clear legal framework for this balancing process. Other findings from the empirical study were that enforcement takes too long, that locating the child and the abducting adult in abduction cases is difficult and that there is friction between the mobility granted in the EU and the arrangements made in respect of the child after parents have split.

Conclusions

There is a growing discrepancy between modern approaches in the internal law of the member states and the law applicable to cross-border situations. This is an argument to reconsider the current policy for dealing with cross-border cases, at least between the member states. A catalyst for this is the emphasis the internal law of more and more member states now places on continuous joint parental responsibility.

Any future rules on enforcement should have regard to the type of judgment that is to be enforced. It appears possible to distinguish two distinct situations. Firstly, when prompt action is necessary to protect the child; secondly, when the exercise of the obligations of the parents towards the child must be settled and regulated between all parties involved. The enforcement measures taken should take this distinction into account. Another issue that future rules should resolve is whether enforcement measures must be requested and specified by parties, or decided by a court upon its own motion.

Comparison of the legal systems of the member states does not demonstrate a settled approach of the problem. Recent national legislation could however serve as a point of departure for harmonizing the rules for cross-border situations. This would lead to a model that includes mediation and gives the court a leading role in the enforcement process. Strengthening co-operation between the courts of the member states will be necessary to make this model function in cross-border situations.

To bring successful changes in the current situation much depends on the common perception within the Community on how parental responsibility should be exercised. The report mentions a number of issues the Community may consider before addressing the problems that currently exist. On the basis of the outcome of these considerations, actions can be developed.