

EVALUATION OF RECOMMENDATION CM/REC (2015)4 ON PREVENTING AND RESOLVING DISPUTES ON CHILD RELOCATION



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**REPORT ON THE EVALUATION
OF THE IMPLEMENTATION OF
RECOMMENDATION CM/REC(2015)4
ON PREVENTING AND RESOLVING
DISPUTES ON CHILD RELOCATION**

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I. INTRODUCTION

1. On 11 February 2015 the Committee of Ministers adopted [Recommendation CM/Rec\(2015\)4 on preventing and resolving disputes on child relocation](#). The latter recommends that member states take or reinforce all measures they consider necessary with a view to implementing the principles contained in its appendix. The Committee of Ministers also took note of the Explanatory Memorandum to the Recommendation.

2. The term “Child relocation” is defined in the Recommendation as a change of a child’s habitual residence. Relocations can be within or outside the jurisdiction of a member state.

3. When there are joint holders of parental responsibilities¹ a change of the child’s habitual residence can be decided jointly without further interference from public authorities. Difficulties arise in cases where the person with whom the child habitually resides wishes to relocate with the latter and the other parent or holder(s) of parental responsibilities oppose(s) such a change.

4. If a person relocates with the child without the parent or other holders of parental responsibilities’ consent, the relocation will be considered unlawful unless authorised by the competent authority. In international cases, unlawful child relocation will regularly fall under the child abduction definition under international instruments and trigger the return mechanism provided for under such instruments (the Hague 1980 Child Abduction Convention and within the European Union, Regulation Brussels II bis or ter). Child abduction remains a major concern in international family law and regularly gives rise to cases before the European Court of Human Rights.

5. Disputes between holders of parental responsibilities as regards whether the residential parent is allowed to change the child’s place of habitual residence are among the most controversial topics of modern family law. Relocation disputes confront the interests of the three subjects involved. On the one hand, the person with whom the child habitually resides is entitled to make life-choices that imply relocation of the child: he/she might wish to change habitual residence for a number of legitimate personal and professional reasons. On the other hand, personal contacts between the child and the other parent or other holders of parental responsibilities are likely to become more difficult as a consequence of the move. In the middle stands the child who has a right to maintain personal relationships with both parents or holders of parental responsibilities and is as well unavoidably affected by their personal and economic circumstances.

6. The purpose of the Recommendation is to provide guidance to member States on situations concerning the relocation of a child. The Explanatory Memorandum explicitly

¹ “Parental responsibilities” refers to the collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child in accordance with the child’s evolving capacities, as defined in Recommendation CM/Rec(2015)4 on preventing and resolving disputes on child relocation.

connects this purpose with the deterrence of child abduction. Effectively regulating relocation would contribute to preventing the unilateral, unlawful removal or retention of children.

7. At its 95th plenary meeting (4-5 and 23-24 November 2020) the European Committee on legal Co-operation (CDJC) agreed to evaluate the effectiveness of Recommendation CM/Rec (2015)4 including its implementation in the member States. To this end the CDJC circulated a questionnaire which has formed the basis of the evaluation that follows. In order to contextualise the responses given by member states, the Recommendation's principles on child relocation are briefly outlined. The evaluation also considers the latest findings in legal research.

II. PRINCIPLES ON CHILD RELOCATION

8. The Recommendation contains procedural as well as substantive principles on child relocation. Some of them apply generally in connection to any kind of parental dispute. This is the case, in particular, of principle 2 which establishes that the best interests of the child shall be a primary consideration, as well as principle 3 according to which the child should have the right to be informed and consulted, and to express his or her views. These two principles derive from the UN Convention on the Rights of the Child and have inspired several Council of Europe instruments, in particular the [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#).

9. Principle 4, first sentence, providing that member states should put in place measures in order to avoid disputes on child relocation or its consequences and principle 5 recommending member states to promote alternative means of dispute resolution are also based on a more general trend favouring amicable dispute resolution in parental responsibilities matters. Another principle of a more general nature is principle 11 on facilitating direct judicial communications between the authorities of different states.

10. Other principles contained in the Recommendation are tailor-made to deal with the relocation of a child. This would be the case of principle 4 second indent that encourages member states to adopt legislative reforms that would require the person wishing to relocate with the child to inform the other parent or holders of parental responsibilities prior to the proposed relocation. Such information must be done in writing and within specific time-limits to avoid unilateral relocations. The Explanatory Memorandum explains that such time-limits are of great importance in order to make relocation possible and avoid delaying tactics.

11. The Explanatory Memorandum further suggests that the information that must be provided could take the form of a notification and contain details of the child's proposed new habitual residence, contact details of the child, the date of the proposed relocation and proposals for arrangements for the child's contact with the other parent or holders of parental responsibilities.

12. The Recommendation and its Explanatory Memorandum outline a skeleton procedure for child relocation cases. As mentioned, the person wishing to relocate with the child would need to notify the other parent or holders of parental responsibilities. The purpose would be to try to reach agreement on the relocation of the child, as the Explanatory Memorandum clarifies. The third indent in principle 4 suggests that member states could provide services for advice, counselling and mediation to assist parents or other holders of parental responsibilities in reaching agreement.

13. In the absence of agreement there should be the possibility of bringing the case to the competent authority that would take a decision as quickly as possible. The child's habitual residence should not be changed without a decision of the competent authority, except in circumstances provided for by national law.

14. The Recommendation also provides some guidelines in connection with the decision-taking process. Principle 9 states that the decision of the competent authority should be made without any presumption for or against changing the child's habitual residence. Principle 8 further specifies that all relevant factors should be taken into consideration, giving such weight to each factor as appropriate in the circumstances of the individual case. The aim should be to determine the best interests of the child after analysing the relevant factors.

15. The Recommendation does not contain a list of the relevant factors. The Explanatory Memorandum refers, however, to the lists contained in the [Washington Declaration on International Family Relocation](#)² and Principle 3: 21 of the [Principles of European family law on parental responsibilities](#) adopted by the Commission on European Family law (CEFL).³

III. ASSESSMENT OF THE RESPONSES TO THE QUESTIONNAIRE

16. Eighteen member States have provided replies to the questionnaire. Since the United Kingdom provided different responses for England and Wales, Northern Ireland and Scotland there were 20 different replies to the questionnaire.⁴ When looking at the specific questions it should be noted that not every question was addressed by all respondents. The results of the responses to the questionnaire are presented in the Appendix.

² The Washington Declaration was adopted in 2010 at the close of a Conference organised by the Hague Conference of Private international law and the International Centre for Missing and Exploited Children.

³ The Commission on European Family law is a scientific organisation that drafts principles on the basis of extensive comparative Research that includes also the international instruments in force in Europe. As explained in the Commentary to Principle 3:21 CEFL decided to include a principle dealing with relocation in order to respond to an ever-increasing mobility in European society. Account was taken, in particular of developments in the United States.

⁴ Replies were received from Austria, Belgium, Croatia, Czech Republic, Finland, France, Georgia, Germany, Greece, Latvia, Lithuania, Poland, Portugal, Russian Federation (member state at the time of circulation of the questionnaire), Spain, Sweden, United Kingdom and Ukraine.

17. Responses by the member States to the questionnaire seem to indicate that the impact of the Recommendation has been rather low. This finding stands at odds with the fact that relocation is generally described as a very controversial family law topic in the relevant literature, as will be explained in Section V of this report. Judges themselves have stated, sometimes in their decisions, how difficult it is to decide whether to allow or refuse the relocation of the child.

18. A possible explanation for the above-mentioned paradox is that child relocation disputes have not been singled out by member states as a type of parental dispute requiring special rules. The skeleton procedure for relocation that can be derived from the principles and the Explanatory Memorandum is not always noted by member States responding to the Questionnaire. The fact that some of the key elements for deciding cases, such as reference to the lists of factors to be considered, are only included in the Explanatory Memorandum is of little assistance in this regard.

19. Member states have generally considered the principles set out in the Recommendation as sufficient to guide their national policies on child relocation. However, it should be noted that around 30% of the responding member states considered the principles not applicable because national policies on child relocation were already in place prior to the 2015 Recommendation. Some states indicated that there were special rules either in statutory legislation or case-law about child relocation as a specific kind of parental dispute, whereas in other cases this seems not to be the case. The more general principles contained in the Recommendation do however apply to disputes about the exercise of parental responsibilities, including relocation disputes.

20. In this context it may be noted that a child relocation dispute is a dispute on the exercise of parental responsibilities. The common core of European law in parental responsibilities matters is that joint parental responsibilities holders are required to take decisions on the exercise of parental responsibilities jointly. In case of dispute, national law always provides a system for solving such disputes. The matter may often be brought to the competent authority that either takes the decision itself or allocates the decision taking power to one of the holders of parental responsibilities. Many of the principles referred to in the Recommendation - e.g., the best interests of the child and the right of the child to be heard - apply generally in connection to all kinds of parental disputes and also to child relocation cases under national law, even when such law does not provide for special rules and procedures to specifically deal with child relocation.

21. In connection with the identification of new trends and the collection of statistical data, it is also quite clear that there is no disaggregated statistical data available that would allow a detailed evaluation of the practice of child relocation in the member states. Lack of data is also often mentioned as one of the reasons for not being able to evaluate whether case-law has taken the Recommendation into account.

22. It appears from the responses received that the Recommendation is not widely known among stakeholders. It has only been translated in a few states.⁵ The reasons for not doing so vary. In some cases, it was felt unnecessary because national law already contains the principles advocated for. Whether this applies both in connection to the more general principles or also to those more specific to child relocation is not always clear.

23. Some member states indicate that the Recommendation is largely unknown among practitioners (e.g., Lithuania, Portugal) which is connected to the fact that translations of the Recommendation and the Explanatory Memorandum have not been made available.

24. Some of the principles contained in the Recommendation are generally respected in parental responsibilities matters. This is particularly the case in connection with the best interests' principle and the right of the child to be informed and consulted and to express his or her views on the proposed relocation. The promotion of agreements and alternative means of dispute resolution also applies more generally. No specific implementation measures were required if such general principles already apply. In some cases, states responded that there are reforms underway to, for example, promote out of court dispute resolution, as set out in principle 5. The Recommendation might have contributed to this development which is however a general one.

25. Other principles contained in the Recommendation are tailor-made for child relocation cases and would thus have required specific implementation measures. Some responses (e.g., Austria, France) indicate that such rules were already in place under national law prior to the adoption of the Recommendation, others (e.g., Belgium, Lithuania) specify that national law does not follow the Recommendation in this regard. There are a few states (e.g., Finland, Ukraine) indicating that the Recommendation triggered legislative reform in connection to these more specific child relocation related principles.

26. The overall impression given by the responses is that the more relocation-specific principles have passed relatively unnoticed among stakeholders. Legislative bodies might have considered that they already had rules on parental responsibilities matters incorporating the key principles and that specific legislation on child relocation was unnecessary. Judges and authorities deciding relocation cases might not know about the Recommendation because it is not available in their national language. The fact that the Recommendation is a non-binding instrument and that many of the more practical measures and interesting ideas are set out in the Explanatory Memorandum, which may be even less known than the Recommendation itself, could further explain that this legal instrument has not received the attention it merits.

27. It would thus seem that the impact of the Recommendation has been limited. In some cases, there was already specific legislation or case-law on child relocation that made implementation measures unnecessary. In some other cases, member states indicated that the principles contained in the Recommendation generally applied in parental responsibilities

⁵ According to the responses to the Questionnaire, the Recommendation has been translated by the Czech Republic (unofficially), Germany, the Russian Federation and Ukraine (recently). A translation was under way in Croatia.

matters. This again implies that child relocation has not been singled out as a particular type of parental dispute that requires special rules. Specific elements of the Recommendation that are tailor-made to child relocation disputes have thus not been implemented. There are only a few States (namely Finland and the Russian Federation) which indicated that the Recommendation was instrumental in legal reform and case-law.

IV. RELOCATION AS AN EMERGING FAMILY LAW TOPIC IN EUROPE

28. The fact that this Recommendation has passed relatively unnoticed may be connected to the fact that this remains a new family law topic for many member states. A recent article published in a leading French periodical⁶ pointed out that the increased mobility of individuals combined with the frequency of divorce or separation rates made the relocation of children a recurrent issue. It stated that since French law did not have specific rules that are tailored to the matter, courts settled disputes by using the general rules on parental responsibilities. The article compared this situation with the more sophisticated relocation - specific mechanisms that have been established in other jurisdictions, notably in the Anglo-American world - and suggested that French law would gain if it were to incorporate them. This is precisely what the Council of Europe covered in its Recommendation.

29. Relocation disputes can be expected to increase in Europe. As the European society becomes increasingly mobile, the numbers of international couples with children grow exponentially. It is not uncommon that parents or holders of parental responsibilities want to live in different locations if they separate or divorce. If they cannot agree about the place of habitual residence of the child, they will resort to the competent authority. It has been stated that “*given the enormous number of people who now move from one country to another in search of work or because they are displaced, it seems inevitable that relocation cases will increase and become one of the central issues in modern family law.*”⁷

30. Legal literature also suggests that the factual circumstances going to court are becoming more and more complex. The so-called “Re-relocation cases” arising in situations where families moved abroad together with the underlying assumption that they would eventually return to the base country appear not to be uncommon.⁸ Another recurring pattern is that of relationships entered into on-line that led to the relocation of one partner for family formation. There are also situations where the custodial holder of parental responsibilities becomes unable adequately to take care of children and their relocation to a state where

⁶ See SALAMÉ, G. and KESSLER, G: “Séparation parentale et déménagement international de l’enfant - Perspectives comparatives “, *R. critique de droit international privé*, 2021, pp.563-593.

⁷ See LOWE, N. and NICHOLLS, M.: *International Movement of Children. Law, Practice and Procedure*, Bristol, 2016, p. 267.

⁸ See SCHUZ, R.: “The Hague Child Abduction Convention and Re-relocation disputes”, *International Journal of Law, Policy and the Family*, 2021, pp. 1-36.

another (potential) holder of parental responsibilities resides, is contemplated for child protection purposes.⁹

31. Relocation cases are generally considered as very difficult, almost intractable, cases. The general “best interests of the child principle” that is regularly applied by judges in parental disputes, does not provide enough guidance in such cases. If one parent or holder of parental responsibilities wishes to relocate with the child and the other parent objects it cannot be taken for granted that the parent wishing to relocate will decide not to move if he or she is not allowed to take the child. The competent authority will thus have to choose between two unknown scenarios. Is the child better off if he or she leaves or if custody shifts and is granted to the parent or holder of parental responsibilities opposing the relocation? A list of factors to be considered like the one provided for in the Memorandum of the Recommendation can assist the judge in formulating the right questions before deciding.

32. Legal literature also reveals that relocation cases reflect the contradicting demands on the post-divorce family to a much higher degree than other parental disputes and must therefore receive special treatment. On the one hand, divorce is meant to provide a clean break so that former spouses have the chance to start out again and shape their lives as they deem fit. On the other hand, however, former spouses or partners are expected to continue being co-parents. The modern trend is namely that joint parental responsibilities continue after separation or divorce and should be exercised jointly. What is problematic and less apparent is that the obligation to meet these expectations produces inequitable results.¹⁰ The custodial holder of parental responsibilities will not be able to relocate freely because, in order to take the child, she/he needs the other parental responsibilities holder’s consent or authorisation by the competent authority, whereas the non-custodial parent will be free to relocate even when this implies that personal contact with the child will become very difficult.

33. The issue of relocation could also be gendered, because, for the most part, it is mothers who are primary caregivers and want to move together with their children and fathers oppose the move. The gender aspects connected to relocation disputes are more obvious if these disputes are singularised and not treated as an ordinary parental responsibilities conflict. Otherwise, there could be a presumption that their resolution is inadvertently shaped by a motherhood ideal that might have changed less over the years than what is assumed. In the past, mothers were expected to curtail their individual plans and ambitions in order to preserve the relationship. A “good mother” might still be expected to sacrifice for the sake of the best interests of the child.¹¹

34. Legal research further shows that relocation disputes might require special approaches in order to reach an amicable settlement of the dispute. It is important to realise that there is no middle ground in which the parties can meet when the issue at stake is to either leave or stay. A resolution of the conflict requires that one of the parties gives in, if possible,

⁹ See WELSTEAD, M.: "Beware of International Relationships", *International Survey of Family Law*, 2020, pp. 71-98.

¹⁰ See LOWE, N. and NICHOLLS, M.: *cit.*, p. 264-265.

¹¹ See DI MASI, M.: “L’interesse del minore come limite alle libertà genitoriale” in *Diritti Comparati*, 2021 posted on December 16 (<https://www.diritticomparati.it/>).

without resentment. In order to reach this goal special techniques have been resorted to. One possibility would be, for example, to write an entire parenting plan in the assumption that the holders of parental responsibilities will not live in the same location, without however deciding with whom the child will live.

35. The exercise of the child's right to express his or her views also requires special consideration in relocation disputes. There are different proposals in this connection. Some authors have argued in favour of granting older children a veto right. A veto right does not guarantee however that the status quo will be preserved. The choice might be between two unknown situations, namely continuing to reside with the custodial parent or holder of parental responsibilities but in a new location or shifting custody to the other holder of parental responsibilities while staying in the same location. Measures should be taken in order to foster a realistic assessment by the child of the situation. An excessive fear of the unknown is as potentially damaging as an over-optimistic romanticised picture of the proposed change.

36. The interrelationship between relocation and child abduction has also been explored in legal literature. It has been pointed out that the "apply don't fly principle" that is argued in order to prevent child abductions does not work in practice. Primary caregivers are being told that they should not relocate without authorisation by the competent authority, but, in many jurisdictions, obtaining authorisation is still too costly, too time-consuming and the outcome too unpredictable. Member states have a vested interest in a satisfactory resolution of relocation disputes not only in their own jurisdiction but also in other member States. If a primary carer, possibly even a citizen of state A, cannot by any means obtain authorisation to relocate from state B to state A, she/he might be tempted to unlawfully remove the child to state A. State A might then be confronted with a return petition coming from state B. state A is, therefore, not only interested in its relocation rules and policy but also in the relocation law and policy of state B. The issue cannot be solved satisfactorily merely by a national approach but calls for concerted efforts.

37. Legal research also suggests that international relocation poses specific problems that distinguish it from internal relocation. In practice, distance and communication might be better between Barcelona and Toulouse than between Barcelona and the Spanish city of Salamanca. There is a difference though in terms of jurisdiction and the applicable law and also the enforcement of agreements and judicial decisions. International relocation cases have private international law implications that must be considered.

V. CONCLUSION AND PROPOSED RECOMMENDATIONS

38. Eight member states indicated that there is no need to take further action to improve the Recommendation's impact.¹² Six member states suggested that the Recommendation should be updated to take further account of post-2015 developments, including relevant case law.¹³ Seven member states proposed that the Recommendation should be disseminated among relevant stakeholders.¹⁴ These three options will be analysed hereinafter.

39. Some member states indicated that there is no need for a regular follow up of the implementation of the Recommendation nor for taking any action to improve its impact. This is consistent with the views expressed by them that the Recommendation was in fact not applicable in those member states because national policies already existed prior to the Recommendation.

40. Nonetheless, even in such a case, it would make sense to collect information about the practice of child relocation in Council of Europe member states. As explained earlier, member states have a vested interest in developments not only in their own jurisdiction but also in other jurisdictions. The fact that child abduction cases continue to pose so many difficulties giving rise to an increasing number of cases before the European Court of Human Rights suggests that efforts should be made to increase the number of lawful child relocation requests by providing sound relocation rules and procedures. It is furthermore necessary to understand not only the law in theory but also the law in practice as it is regularly applied by decision-making authorities in different member states.

41. Practices on child relocation diverge considerably. Whereas some member states have developed a coherent body of law in this area, in others it is virtually impossible to obtain authorisation to relocate lawfully with the child. In other States, the outcome of judicial proceedings can sometimes be highly unpredictable and much dependent on the idiosyncrasy of the individual judge. As analysed in the previous section there is also a presumption that gender roles, namely what is expected from a mother or a father, may bias the decision. These are all matters worth exploring further.

42. As stated by several responding states, the Recommendation and its Explanatory Memorandum would certainly benefit from a wider dissemination. Translations into national languages are pivotal to this effect so that the principles reach the relevant stakeholders. The Recommendation should regularly be brought to the attention of judicial authorities in the framework of training activities such as those held by the HELP Programme of the Council of Europe, the European Judicial Training Network and the Academy of European Law (ERA).

¹² Austria, Belgium, Finland, France, Germany, Greece, Ukraine and United Kingdom.

¹³ Croatia, Czech Republic, Georgia, Latvia, Lithuania and Portugal.

¹⁴ Croatia, Czech Republic, Latvia, Lithuania, Poland, Portugal and Ukraine.

43. In order to disseminate the Recommendation and raise awareness, it might be worthwhile exploring the possibility of organising an International Conference on child relocation. This could be done in co-operation with a research institution or training provider.

44. Last, there is merit in considering a possible update of the Recommendation. As already mentioned, the text of the Recommendation at times could be considered as unclear. The skeleton procedure it proposes in order to adequately deal with child relocation matters is not immediately apparent. The list of factors contained in the Explanatory Memorandum could be reviewed and updated, if considered necessary, and moved into the main body of the Recommendation's principles. The need to provide a decision in a timely manner could be made clearer in the text.

45. The Recommendation could also incorporate more elements about the portability of agreements. There are some references in the Explanatory Memorandum that could be further developed considering the findings made by the Expert Group on Family Agreements convened by the Hague Conference on Private international law. This Expert Group examined in detail the steps that need to be taken in order to secure that an agreement reached in one State is valid and enforceable in other states, which may serve as an interesting element to build upon. In this connection it might be interesting to liaise with the Hague Conference on Private international law.

46. The Recommendation would also greatly benefit if the connections between child relocation and other topics, in particular contact rights, child abduction and the exercise of parental responsibilities in the post-divorce or separation scenario were made more explicit.

47. Nothing excludes that all the proposed measures be combined, should the CDCJ consider embarking on one or more of the proposed follow-up actions.

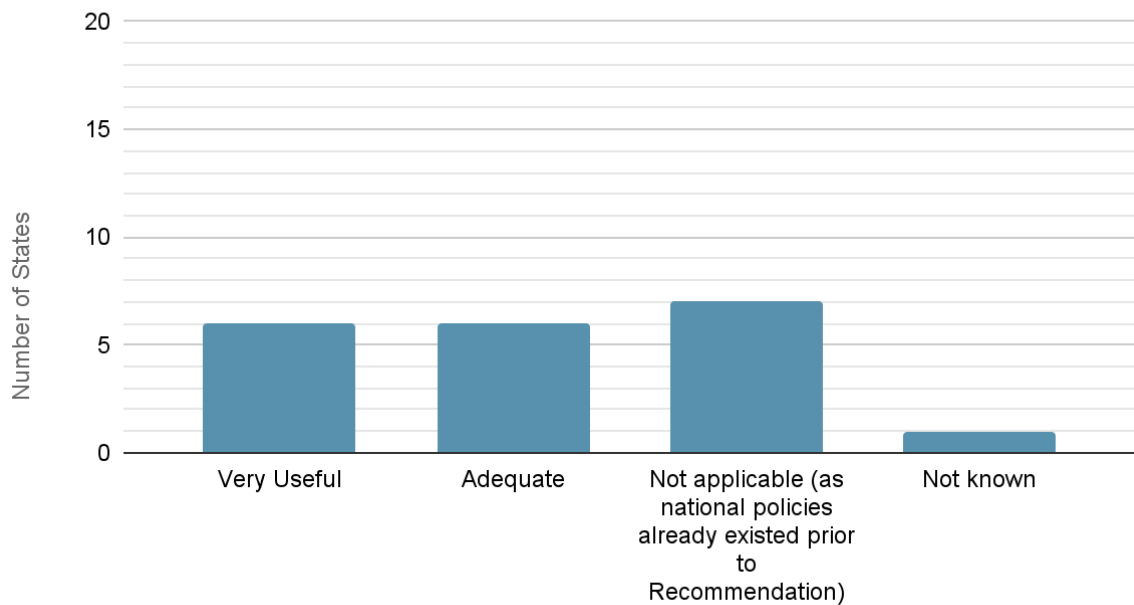
APPENDIX

RESULTS OF THE RESPONSES TO THE QUESTIONNAIRE

The member States' replies to the questions are visually represented by a column chart. The Y axis indicates the number of replies to the specific question. The X axis reflects the aggregated results.

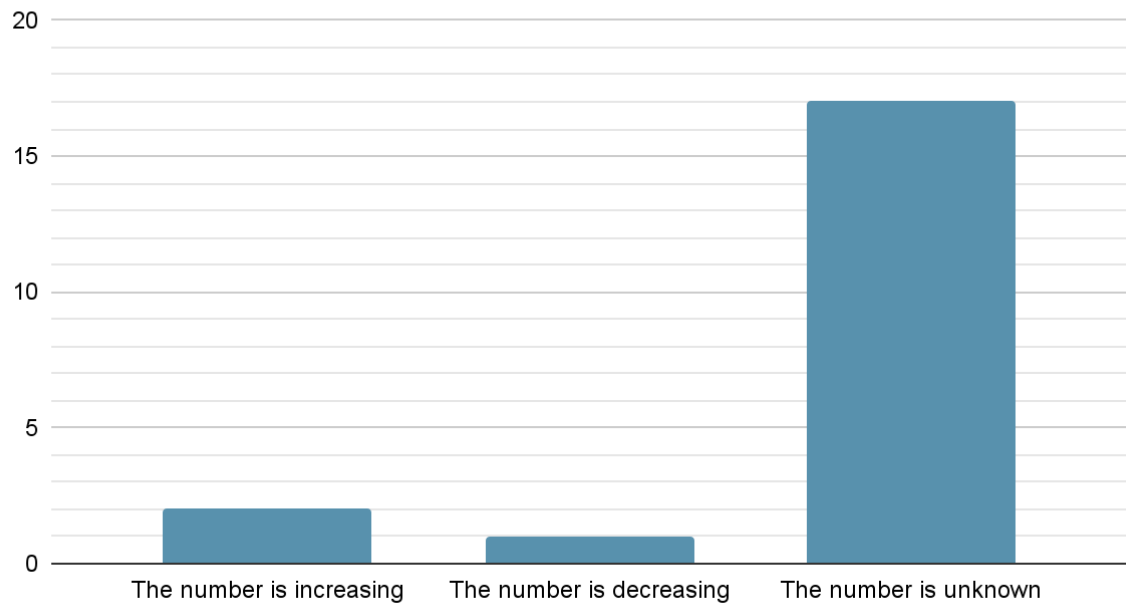
1. **Taking into consideration the principles set out in the CM/Rec (2015)4 on preventing and resolving disputes on child relocation, how would you assess them for the purpose of guiding the policies?**

Answer 1



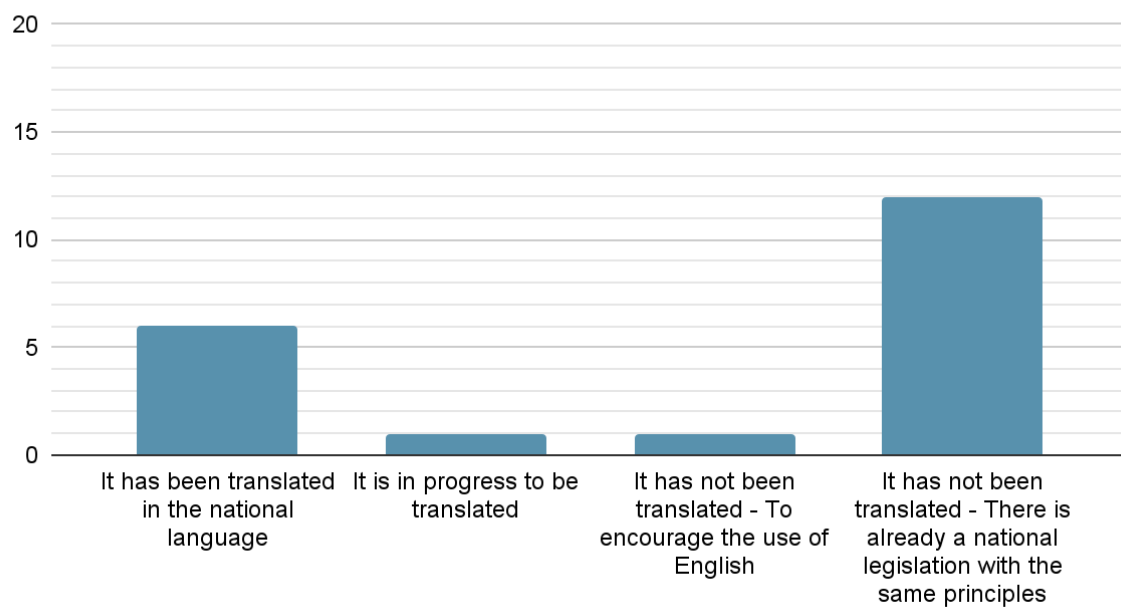
2. What trend is shown by case numbers over the last five years in your country with respect to child relocation?

Answer 2



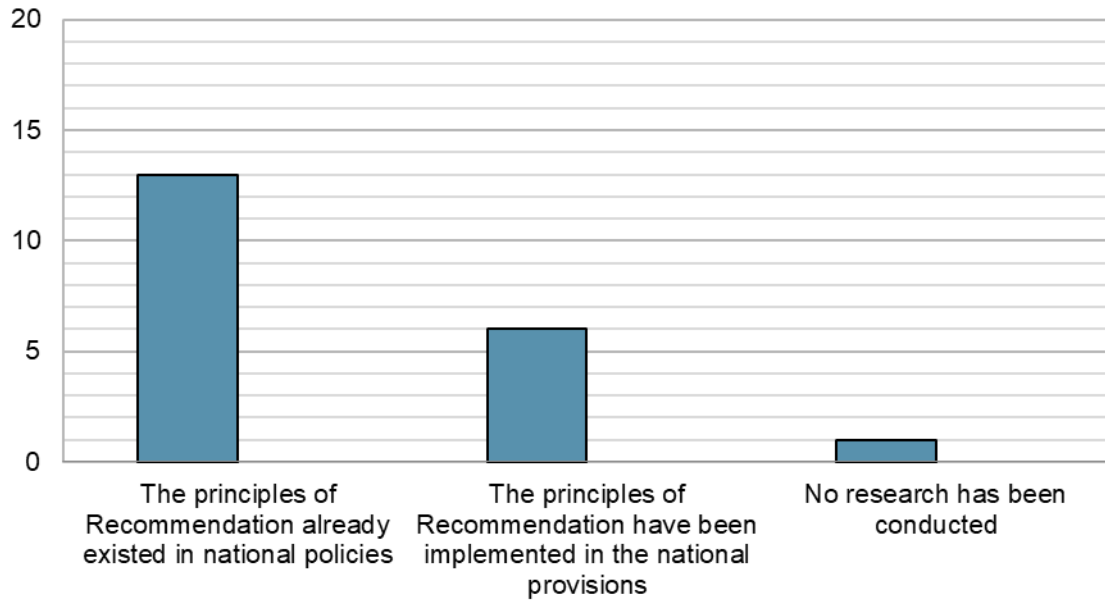
3. Has Recommendations CM/Rec (2015)4 on preventing and resolving disputes on child relocation been translated? If not, for what reason?

Answer 3



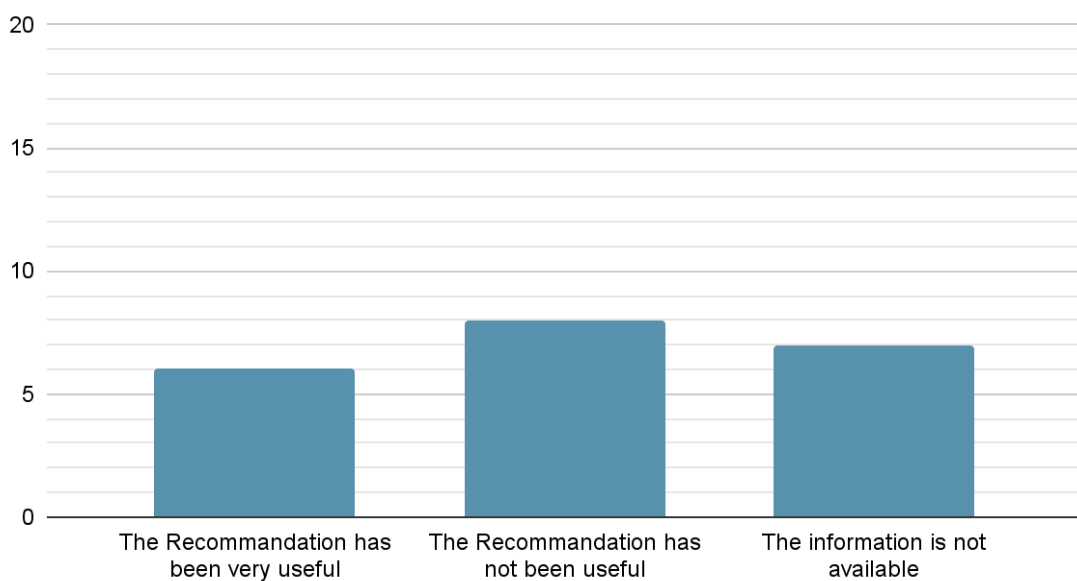
4. Taking into consideration the principles set out in the Recommendation CM/Rec (2015)4, did your national authorities take any measures with a view to implement them?

Answer 4



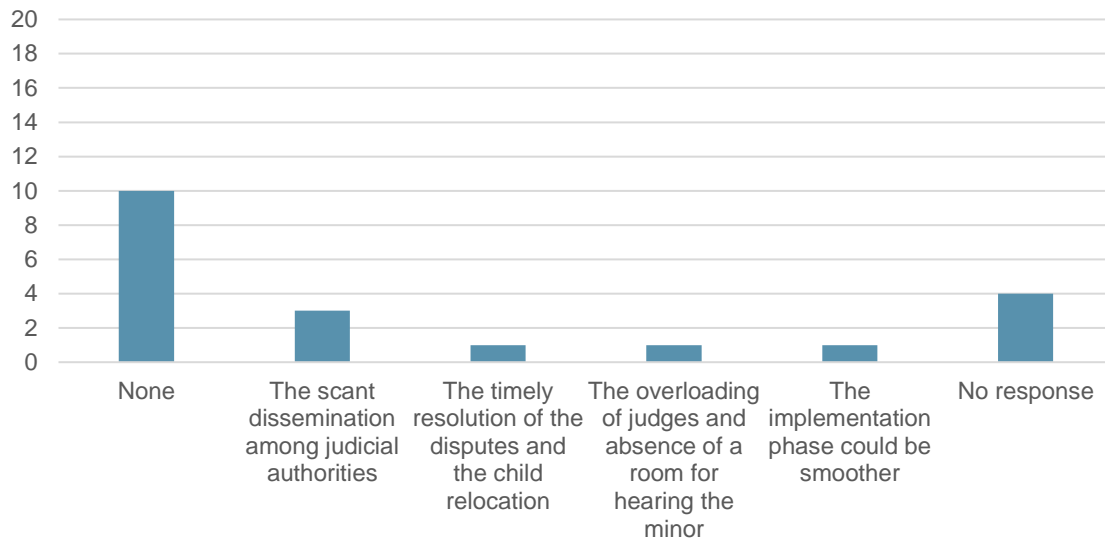
5. Has the Recommendation been helpful to the courts or relevant competent authorities dealing with disputes on child relocation? In what way has it been considered helpful?

Answer 5



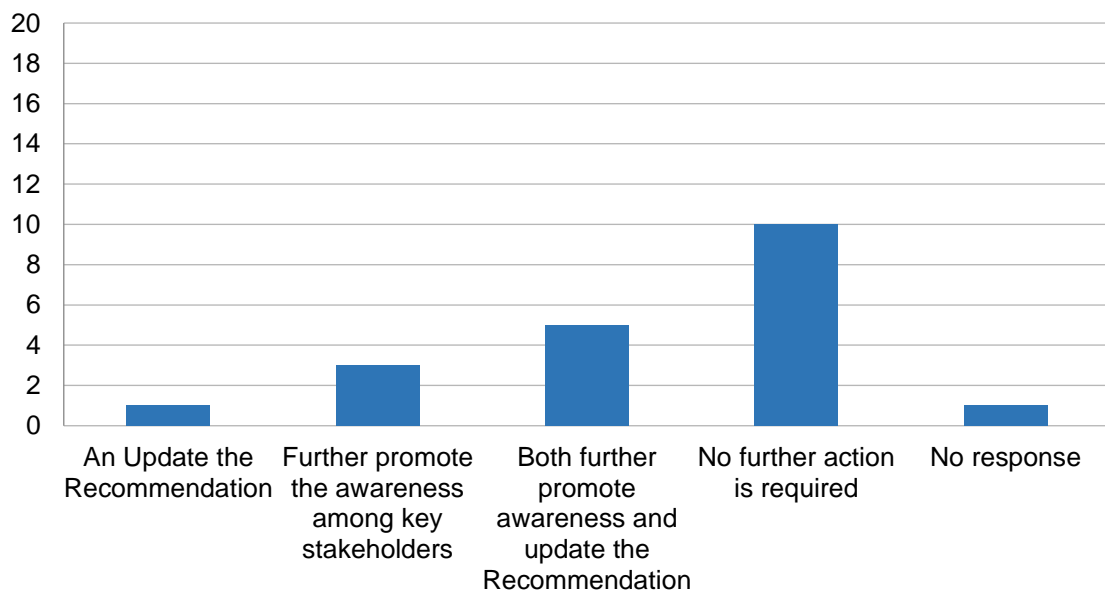
6. What obstacles, if any, have been encountered in the implementation of the Recommendation and guiding principles set out therein?

Answer 6



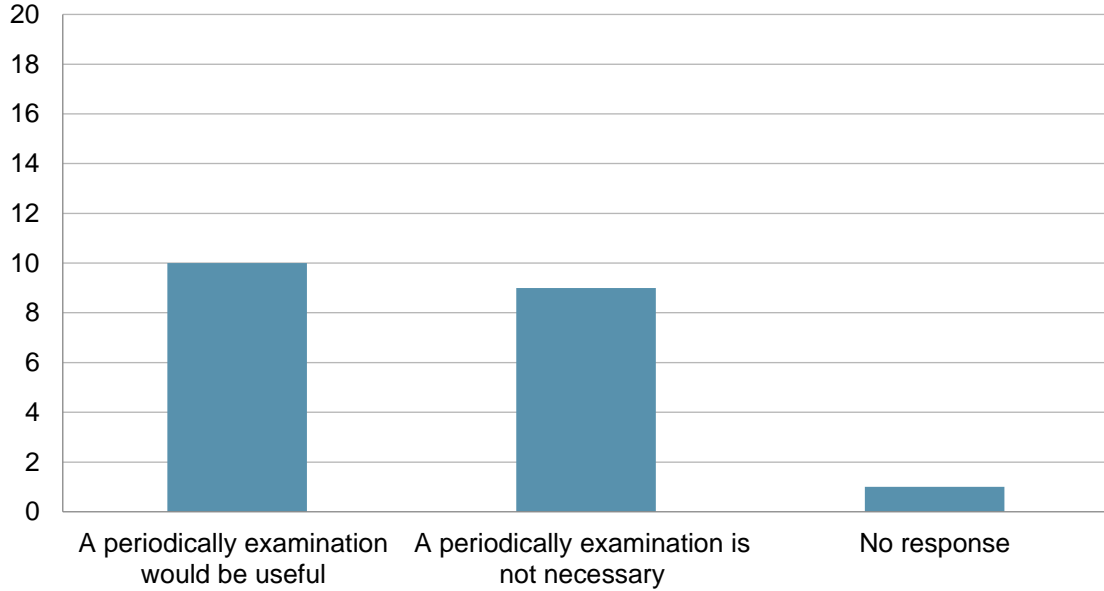
7. In your view, what actions among the following should be taken to improve the Recommendation's impact in your country?

Answer 7



8. Should the CDCJ continue examining periodically the implementation of this Recommendation? If so, should examinations in future concentrate on specific issues, and if so, which specific issues would you recommend examining?

Answer 8



9. Are there any issues on which the Recommendation and its Appendix or Explanatory memorandum should be revised or expanded? If so, please indicate them.

Answer 9

