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Table of Contents

Civil Procedural Law

Florence Guillaume* & Ilaria Pretelli**

Coherences and Incoherences in the Regime of Provisional and Protective Measures in European Private International Law

Table of Contents***

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** Legal adviser, Swiss Institute of Comparative Law (SICL). Author of paras 6, 7, 8.3, and 9. The ideas expressed thereby are my own and do not necessarily reflect those of the SICL.

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1. Introduction

The procedural power to grant interim measures of protection is accepted as a general principle of law in civil and commercial matters.[1] This principle can be found in the law of all Member States of the European Union (EU).

The practical importance of interim measures is well known. The courts frequently order interim measures, particularly in cross-border cases. Such measures are of critical importance to the rest of the procedure. The decision of the court to grant or refuse interim measures often has an influence over the very continuation of the proceedings. When interim measures are granted, the position of the applicant may be considered as being substantially strengthened. This can push the debtor to agree to a settlement. On the contrary, the refusal of interim measures shifts the balance in favour of the debtor and often results in the discontinuation of the proceedings on the substance of the case.[2]

In cross-border cases, interim measures are of even greater practical importance. It is indeed possible to use such measures to impact the jurisdiction on the merits. The problem lies essentially with determining which court has jurisdiction to order interim measures. It is clear that a court having jurisdiction as to the substance of the case can order interim measures. But it is also admitted that a court not having jurisdiction as to the substance of the case can order interim measures in special circumstances. This is an issue of coordination of jurisdiction.

Since there is a risk that interim measures may be used to allow a foreign judge to intervene in the proceedings on the merits, which should be held in another State, the use of interim measures must be governed appropriately. From the standpoint of the coordination of jurisdiction, jurisdiction to order interim measures must therefore be defined in such a way that it is not possible to prevent the court from exercising its jurisdiction to render a decision on the merits, or to prevent a party from filing a lawsuit or defending itself in court. Thus, the regime of interim measures must be defined in such a way as to prevent the courts from being prejudiced or frustrated by the actions of the parties. In particular, such measures should be restricted to being of provisional or protective nature, and not be a way for the creditor to obtain a relief on the merits prior to a hearing of the case on the merits.

The term "provisional and protective measures" is used in EU private international law (PIL) to refer to measures that are temporary and may not amount to a relief on

1 COLLINS, Provisional and Protective Measures, p. 234.
2 See e.g. DICKINSON, Provisional Measures, p. 540-541; BOGDAN, The Proposed Recast, p. 126; GARCIMARTIN, Provisional and Protective Measures, p. 58.

the merits. This wording originates from Article 24 of the Brussels Convention[3]. Interim measures of protection fall under the same definition. Both terms will be used hereafter.[4]

This paper addresses the issue of the jurisdiction to order provisional and protective measures in civil and commercial litigation, including in family law matters. It is based on a cross analysis of all existing EU PIL instruments. We will start by defining the notion of provisional and protective measures (2.) and examine how the EU PIL instruments deal with provisional and protective measures (3.). We will then analyse the circumstances in which the authorities have jurisdiction to order provisional and protective measures in cross-border cases, making a distinction between the jurisdiction of the court having jurisdiction as to the substance of a case (4.) and the jurisdiction of courts not having such jurisdiction (5.). We will then apprehend provisional and protective measures in the specific case of family law matters, in order to stress the analogies and the differences with the general regime both as regards to the notion (6.) and as regards to the two-track system (7.). The recognition and enforcement of provisional and protective measures will also be discussed (8.). On the basis of this analysis, we will be able to determine whether there is a coherent regime of provisional and protective measures in existing EU PIL instruments (9.).

2. The Notion of Provisional and Protective Measures in Civil and Commercial matters

The existence of a general principle of law does not mean that provisional and protective measures are provided under the same conditions in every country.[5] There is indeed a wide variety of provisional and protective measures in the law of all Members States (2.1.). EU PIL instruments are peculiar in that they do not, in principle, define the notion of provisional and protective measures (2.2.).

2.1. A Variety of Provisional and Protective Measures in the Law of All Member States

It appears in comparative law that the regime of interim measures of protection varies considerably from one Member State to another. Indeed, national legal systems provide for many different types of provisional and protective measures. In

[3] Art. 24 of the Brussels Convention uses the term "provisional, including protective, measures". See *infra* 3.1.

[4] In French, the term "*mesures provisoires*" has the same meaning as "provisional and protective measures". In Italian, these terms correspond to those of "*provvedimenti provvisori e/o cautelari*". For the linguistic variations and their meaning see PRETELLI, Provisional and Protective Measures, p. 101-102, footnotes 8-9.

[5] COLLINS, Provisional and Protective Measures, p. 234.

a study that compared national rules on interim measures in the Member States, it was noted that:[6]

> "The laws of the various States include a variety of provisional measures. […] they have different legal regimes (requirements, effects, etc.). But they are also structured differently. In some European states, for example England or Spain, the category of 'interim remedies' embraces a large number of measures serving various purposes. In other European states, courts receive general power to grant protective measures for the purpose of avoiding imminent harm or stopping illegal harm. Yet in other European states, the power to grant provisional measures is organized conceptually, and distinguishes between provisional measures according to their purpose (ie the right they aim to protect)."

One of the main purposes of provisional and protective measures is to guarantee the enforceability of the judgment on the merits. But provisional and protective measures may serve other functions.

On the basis of a recent comparative study of the laws of the Member States, six categories of provisional and protective measures have been identified using the criterion of the function or purpose that they serve.[7] The first category of provisional and protective measures serves the purpose of protecting the rights vindicated in proceedings on the merits. These are, for example, measures designed to protect pecuniary or non-pecuniary interests (e.g. freezing assets of debtor, injunction ordering a particular act or abstention). The second category is that of measures which seek to protect evidence. These are, for example, measures designed to protect evidence to be used during trial (e.g. gather evidence which may otherwise disappear before trial). The third category is that of measures with the purpose of preparing enforcement. These are, for example, measures designed to find information on assets of the debtor (e.g. order to disclose assets). The fourth category is that of measures whose purpose is to grant early satisfaction to the creditor. These are, for example, measures designed to grant early satisfaction for obvious rights (e.g. order provisional payment of a non-disputable debt). The fifth category is that of measures whose purpose is to prepare trial. These are, for example, measures designed to gather evidence (e.g. appoint an expert of fact). The sixth category is that of measures whose purpose is to assess the desirability of initiating proceedings. These are, for example, measures designed to gather

[6] Working Group of the ELI-UNIDROIT Project, First Report of November 2014, p. 4-5. It must be noted that the ELI-UNIDROIT Project is not, by far, the first attempt to harmonise interim measures of protection, or, in a broader approach, procedural law in Europe. Already in 1994, the Storme Working Group drafted unified procedural rules. See, e.g., KRAMER, Harmonisation, p. 305-319.

[7] Working Group of the ELI-UNIDROIT Project, First Report of November 2014, p. 6-9.

information (e.g. an order to disclose information/files/accounts before the initiation of proceedings on the merits).

The variety of provisional and protective measures provided for in the laws of all Member States makes it difficult to define precisely the concept of provisional and protective measures. But it can be established that provisional and protective measures have the following common characteristics:[8]

- These measures are issued without purporting to be final and complete adjudicatory decisions.
- They are granted for reasons of urgency.
- Their purpose is (1) to preserve the opportunity for an eventually complete and satisfactory judicial resolution and enforcement of the claim, or (2) to provide provisional protection of a party's interests in that final outcome.
- There are special constraints on the exercise of the judicial power to grant such remedies and to ensure protection of both parties, in the interests of justice and fairness.

The question remains whether all the existing types of provisional and protective measures in the laws of the Member States may be ordered by the courts which have jurisdiction under the various EU PIL instruments.

2.2. The Lack of a Definition in the EU PIL Instruments

EU PIL instruments circumvent the difficulty of defining the concept of provisional and protective measures by simply providing no definition.

For instance, the Brussels Convention[9] provides no definition of provisional and protective measures even if such measures are part of its scope of application. The definition of provisional and protective measures has subsequently been addressed on several occasions, but with no results.[10]

Recent PIL conventions take an even more radical approach by excluding interim measures of protection from their scope. This is particularly the case of the Hague

[8] Working Group of the ELI-UNIDROIT Project, First Report of November 2014, p. 1.

[9] Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (as amended by the Accession Conventions under the successive enlargements of the European Union), OJ L 299, 31.12.1972, p. 32 (also referred to hereafter as "the Brussels I Convention").

[10] See e.g. POCAR, Explanatory Report, No 125 (regarding the revision of the Lugano Convention).

Convention on Choice of Court Agreements[11] and the Hague Convention on the Recognition and Enforcement of Foreign Judgments.[12] In this context, professor KESSEDJIAN noted that:[13]

> "These measures, in their protective aspect, are normally ordered in emergency cases in order to maintain the status quo, to ensure that certain rights are safeguarded, so that the parties can have a chance to argue their claims on the merits. In essence, they are only meant to be temporary; the exact period for which they are valid and effective is defined in law or by the court which orders the measures, so as to maintain a balance between the rights of the parties. Having said that, the actual picture is extremely complex, as these measures are sought in the context of an international dispute, and will take effect wholly or partly on the territory of a State other than the one in which they were ordered."

Any attempt to find a definition for the provisional and protective measures is extremely complex in view of the significant differences between the laws of the States in this field.[14] As a result, it is very difficult to define the types of interim measures of protection which might come within the scope of the PIL conventions. This is one of the reasons why – in addition to the sensitivity of the issue – these measures have finally been excluded from the scope of application of the Hague Convention on Choice of Court Agreements and the Hague Convention on the Recognition and Enforcement of Foreign Judgments.[15]

[11] See Art. 7 of the Hague Convention of 30 June 2005 on choice of court agreements (OJ L 353, 10.12.2014, p. 5): "Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures."

[12] See Art. 3 para. 1 point (b) of the Hague Convention of 2 July 2019 on the recognition and enforcement of foreign judgments in civil or commercial matters: " ' judgment' means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment."

[13] KESSEDJIAN, Note on Provisional and Protective Measures, No 2, p. 2-3.

[14] For a tentative synthetic definition see PRETELLI, Provisional and Protective Measures, p. 102 and p. 116.

[15] See PERMANENT BUREAU, Explanatory Note (2016), No 52, p. 12.

3. How do EU PIL Instruments Deal with Court Jurisdiction for Provisional and Protective Measures?

Different approaches can be used to deal with the jurisdiction of the courts for granting provisional and protective measures in cross-border cases. A kind of EU model can be identified on the basis of the analysis of the existing EU PIL instruments (3.1.). This model forms the foundation of a two-track system followed in every EU PIL instrument (3.2.).

3.1. The Model of a Specific Rule of General Application

In terms of determining the jurisdiction of the courts in civil and commercial matters, the Brussels Convention has been used as a template for the subsequent EU PIL regulations. This is particularly evident for the provisions regarding provisional and protective measures.

Provisional and protective measures are provided for in Article 24 of the Brussels Convention. This rule of jurisdiction allows courts not having jurisdiction as to the substance of a case to grant provisional and protective measures in special circumstances. Article 24 of the Brussels Conventions reads as follows:

> "Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter."

This rule applies to all types of provisional and protective measures without any distinction based on the purpose that they serve. Thus, it is a rule with a general scope of application.

Taking the Brussels Convention as a model, each EU PIL instrument provides for only one rule of general application aimed at all types of provisional and protective measures.[16] There is therefore no distinction as to the function that such measures may serve. There is also no list of provisional and protective measures that can be ordered.

However, one exception must be mentioned in the EU PIL instruments. The regulation establishing a European Account Preservation Order (EAPO)[17] is devoted to a single type of interim measure of protection. As such, this regulation differs from the other EU PIL instruments with its scope of application limited to one

[16] See *infra* 5.

[17] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59.

particular type of interim measure of protection. It is possible that other types of PIL regulations dealing with one specific interim measure of protection may be adopted in the future, taking the EAPO Regulation as a model.

The EU PIL system therefore has a two-fold approach: a rule with a general scope of application aimed at all types of provisional and protective measures, supplemented by special rules applicable to particular types of interim measures of protection.

On the international stage, it may be observed that the ALI/UNIDROIT Principles of Transnational Civil Procedure follow the same basic approach by providing for a rule with a general scope of application. Article 8 of these Principles is indeed applicable without any distinction as to the type of the interim measure of protection.[18]

3.2. A Two-track System

The only provision in the Brussels Convention which deals with jurisdiction in regards to provisional and protective measures is Article 24. This provision allows the application for interim measures to be made to the courts of a different Contracting State than the one whose courts have jurisdiction as to the substance of the matter. It is however accepted as a general principle of law that the courts having jurisdiction as to the substance of the matter also have jurisdiction for granting provisional and protective measures. But there is no express provision to this effect in the Brussels Convention.

It follows that the Brussels Convention has the particularity of determining the jurisdiction to order provisional and protective measures through a two-track system. The first track is the jurisdiction of the court which has jurisdiction to hear the merits of the case. This jurisdiction is based on one of the general heads of jurisdiction found in the Brussels Convention. The jurisdiction thus lies, in particular, with the courts of the State of the defendant's domicile. This jurisdiction is implicit. The second track provides jurisdiction, under special circumstances, to the courts not having jurisdiction as to the substance of the case. This jurisdiction can be referred to as the court of the place where the provisional and protective measures are to be enforced, since interim measures of protection are usually requested in the State of enforcement. This jurisdiction is provided for in Article 24, which is a special provision of the Brussels Convention. EU PIL regulations replicate this two-track system.

[18] For the ALI/UNIDROIT Principles of Transnational Civil Procedure, see https://www.unidroit.org/instruments/transnational-civil-procedure (accessed on 19.02.2020). By contrast, the draft ELI/UNIDROIT Transnational Principles of Civil Procedure combines the two approaches by providing for a rule with a general scope of application and special rules applicable to specific interim measures of protection.

4. The Jurisdiction of the Court Having Jurisdiction as to the Substance of the Case

The first head of jurisdiction for granting provisional and protective measures in civil and commercial matters is the jurisdiction of the court having jurisdiction as to the substance of the case. We will first consider the origin of this general rule of jurisdiction (4.1.), and then examine the special case of service of documents (4.2.).

4.1. The General Implicit Rule

Granting jurisdiction to order provisional and protective measures to the court having jurisdiction as to the substance of a case is universally accepted. Surprisingly, however, such a jurisdiction is not included in the EU PIL instruments. This basic principle does not appear in the Brussels Convention or in any other subsequent EU PIL instrument.

When interpreting the Brussels Convention, the European Court of Justice (CJEU) pointed out that having jurisdiction on the merits entails having jurisdiction to order necessary provisional and protective measures:[19]

> "The first point to be made, as regards the jurisdiction of a court hearing an application for interim relief, is that it is accepted that a court having jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the [Brussels] Convention also has jurisdiction to order any provisional or protective measures which may prove necessary."

Thus, it follows from the case law that the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the Convention, also has jurisdiction to order provisional and protective measures. This jurisdiction is subject to no further conditions.[20] This rule is implicit in every EU PIL instrument.

[19] CJEU, 17.11.1998, *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line e.a.*, C-391/95, ECR 1998 I-7091, ECLI:EU:C:1998:543, para. 19. See also CJEU, 27.4.1999, *Hans-Hermann Mietz v Intership Yachting Sneek BV*, C-99/96, ECR 1999 I-2277, ECLI:EU:C:1999:202, para. 40.

[20] CJEU, *Van Uden* (footnote 19), para. 22.

Furthermore, it should be mentioned that in the context of the recast of the Brussels I Regulation,[21] a draft Article 35 did provide for this jurisdiction. This draft read as follows:[22]

> "When the courts of a Member State have jurisdiction as to the substance of a matter, those courts shall have jurisdiction to issue provisional, including protective measures as may be available under the law of that State."

But this proposal was not retained in the final revised version. Therefore, the jurisdiction of the court having jurisdiction on the merits to order provisional and protective measures is still an implicit rule in the Brussels I*bis* Regulation.[23]

Provisional and protective measures are usually ordered by the court before which the case has been filed as to the substance of the matter. This does not raise any particular difficulties if the dispute is already pending. But the competent authorities to judge the case on the merits may also have jurisdiction to order provisional or protective measures before the proceedings on the merits have been brought before them (so called "*ex ante* interim measures of protection"). The measures may therefore be granted by any court that would have jurisdiction on the merits. It follows that the jurisdiction of the court for granting provisional and protective measures may be based on any of the heads of jurisdiction laid down by the applicable EU PIL instrument.[24] In our view, this is true even if the court which has ordered the interim measure of protection is not finally seized of proceedings on the merits of the case.[25] But other legal scholars are of the opinion that the jurisdiction of the court granting provisional and protective measures cannot be based on one of the general heads of jurisdiction when the dispute is not yet pending and should be based on a special rule of jurisdiction.[26] Under this opinion, the jurisdiction as to the provisional and protective measures can be based on one of the general heads of jurisdiction only after the court is actually seized of proceedings on the merits over which it has and is able to exercise jurisdiction.

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21 Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1 (no longer in force).

22 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14.12.2010, COM (2010) 748 final.

23 Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1.

24 E.g. Art. 4 or Art. 7 of the Brussels I*bis* Regulation.

25 Same opinion: GARCIMARTIN, Provisional and Protective Measures, p. 61; KROPHOLLER/VON HEIN, Art. 31, No 11, p. 522.

26 See e.g. DICKINSON, Provisional Measures, p. 545-546. The special rule of jurisdiction would be for example Art. 35 of the Brussels I*bis* Regulation. For further developments on this topic, see *infra* 5.2.1.

4.2. The Special Case of Service of Documents

There is an exception to the overall system concerning service of documents. The right granted to the trial judge to order provisional and protective measures is expressly provided for under Article 19 para. 3 of the Service Regulation:[27]

> "[T]he judge may order, in case of urgency, any provisional or protective measures."

This provision appears to have its origin in the Hague Service Convention[28] whose Article 15 para. 3 is identical.

5. The Jurisdiction of Courts Not Having Jurisdiction as to the Substance of the Case

In some cases, other courts than the one having jurisdiction as to the substance of the matter may have jurisdiction for granting provisional and protective measures in civil and commercial matters. This is the second head of jurisdiction for granting interim measures of protection. We will first identify the reference provision (5.1.), and then examine the abundant European Court of Justice case law which sets the framework for this special rule of jurisdiction (5.2.).

5.1. The Reference Provision: Article 31 of the Brussels I Regulation

The jurisdiction of the judge of the place of enforcement of the provisional and protective measures is provided for in a special provision of the EU PIL regulations. As a reference provision, Article 31 of the Brussels I Regulation stipulates that:

> "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter."

[27] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), OJ L 324, 10.12.2007, p. 79. This rule was already at Art. 19 para. 3 of the Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160, 30.6.2000, p. 37.

[28] The Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, OJ L 75, 22.3.2016, p. 3.

This provision is identical to Article 24 of the Brussels Convention,[29] to Article 24 of the Lugano Convention of 1988,[30] and to Article 31 of the Lugano Convention of 2007.[31] The same text was incorporated in Article 19 of the Succession Regulation,[32] in Article 14 of the Maintenance Obligations Regulation,[33] and in Articles 19 of the Matrimonial Property Regimes Regulation[34] and of the Property of Registered Partnerships Regulation.[35]

The same rule can be found in Article 35 of the Brussels I*bis* Regulation but with a slight modification. The words "under this Regulation" were deleted in the process of revision of the regulation:

> "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter."

The purpose of the suppression of the words "under this Regulation" is to make it clear that Article 35 of the Brussels I*bis* Regulation applies even if the jurisdiction on the merits is determined by the national law of another Member State. In other words, this provision applies even if the defendant's domicile is not located in a Member State:[36] In our view, the same was also applicable in the context of the previous EU PIL instruments. The Court of Justice indeed held that Article 3 of the Brussels Convention was not applicable for the special jurisdiction of Article 24 of the Brussels Convention.[37]

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29 See *supra* 3.1.

30 Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 319, 25.11.1988, p. 9.

31 Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3.

32 Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107.

33 Regulation (EU) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1.

34 Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, p. 1.

35 Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, p. 30.

36 GARCIMARTIN, Provisional and Protective Measures, p. 70; BOGDAN, The Proposed Recast, p. 129; SANDRINI, Coordination, p. 273-274, footnote 3.

37 CJEU, *Van Uden* (footnote 19), para. 42.

The key factor for the application of Article 24 of the Brussels Convention and the subsequent EU PIL instruments is that the rights which the provisional or protective measure serves to protect are within the scope of the Brussels Convention or Regulation.[38] The place of the defendant's domicile is not relevant in this respect. The same should apply to the other EU PIL regulations which take the Brussels I Convention or Regulation as a model.

However, the wording of the rules concerning provisional and protective measures found in the Brussels II*bis* and II*ter* Regulations[39] is significantly different from that of Article 31 of the Brussels I Regulation. The origin of these provisions applicable in family matters[40] are in the Brussels II Convention.[41] We will discuss below the consequences of these specific rules.[42]

5.2. The CJEU Case Law

Whether a court which does not have jurisdiction to hear the merits of the case has jurisdiction to order provisional and protective measures has given rise to abundant case law from the CJEU. Even if these decisions concern the interpretation of the Brussels I Convention or Regulation, they should also apply *mutatis mutandis* to the other EU PIL regulations which provide for the same rule as regards interim measures of protection.[43] In any event, the European Court of Justice case law is still valid for the interpretation of Article 35 of the Brussels I*bis* Regulation, unless otherwise specified.

38 CJEU, 27.3.1979, *Jacques de Cavel v Luise de Cavel*, C-143/78, ECR 1979 p. 1055, ECLI:EU:C:1979:83, para. 8. See *infra* 5.2.3.

39 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, OJ L 338, 23.12.2003, p. 1 (Brussels II*bis* Regulation); Regulation (EU) No 1111/2019 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019, p. 1 (Brussels II*ter* Regulation).

40 The same provision as Article 20 of the Brussels II*bis* Regulation was already at Art. 12 of the Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30.6.2000, p. 19 (Brussels II Regulation).

41 See Art. 12 of Council Act of 28 May 1998 drawing up, on basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, OJ C 221, 16.7.1998, p. 1 (never entered into force). The text of Art. 12 of the Brussels II Regulation is reproduced in footnote 102.

42 See *infra* 6.

43 See *infra* 6.2.

5.2.1. A Rule of Jurisdiction Which is No Jurisdiction Rule

When interpreting the Brussels I Convention or Regulation, the CJEU held that Article 24 of the Brussels Convention is not a rule of jurisdiction *per se*. It has then been established that the jurisdiction of the court ordering the provisional or protective measures must be based on a jurisdiction rule of the State concerned, which must apply its own law to determine whether its courts have jurisdiction or not.[44] In other words, the jurisdiction of the court to which an application is made for provisional or protective measures is based on the *lex fori*, regardless of the rules of jurisdiction provided for in the Brussels Convention.[45] This rule does not appear expressly from the wording of Article 24 of the Brussels Convention, but is implicit.

The jurisdiction to order interim measures of protection may even be based on a rule of exorbitant jurisdiction found in the national law. It appears from the case law that:[46]

> "[T]he prohibition in Article 3 [of the Brussels Convention] of reliance on rules of exorbitant jurisdiction does not apply to the special regime provided for by Article 24 [of the Brussels Convention]."

All existing heads of jurisdiction under the laws of the Member States can therefore be claimed in order to seek and obtain provisional and protective measures in civil and commercial matters.

The CJEU also held that Article 31 of the Brussels I Regulation is applicable where the case on the merits has an exclusive place of jurisdiction based on Article 22 of the Brussels I Regulation, provided that:[47]

> "[T]he provisional decision taken by the court before which the interim proceedings have been brought will not in any way prejudice the decision to be taken on the substance by the court having jurisdiction under Article 22 [of the Brussels I Regulation]."

The jurisdiction to order interim measures of protection can, of course, also be based on a rule of forum provided for in the Brussels I Convention or Regulation. It is indeed possible to request provisional and protective measures before the courts of a Member State which would have jurisdiction to hear the merits under the rules of the Brussels I Convention or Regulation, but where the proceedings on the merits were not instituted or were not yet instituted.[48] It therefore follows that the jurisdiction of the court which has ordered a provisional or protective measure may

[44] CJEU, *Van Uden* (footnote 19), para. 42.
[45] See, already, JENARD, Report, p. 42.
[46] CJEU, *Van Uden* (footnote 19), para. 42.
[47] CJEU, 12.7.2012, *Solvay SA v Honeywell Fluorine Products Europe BV et al.*, C-616/10, ECLI:EU:C:2012:445, para. 50.
[48] See *supra* 4.1.

be based on a general rule of jurisdiction of the Brussels I Convention or Regulation (e.g. Article 5) when such court is not the one which is finally seized to determine the merits of the case (which jurisdiction could be based for example on Article 2). The CJEU ruled that:[49]

> "[T]he mere fact that proceedings have been, or may be, commenced on the substance of the case before a court of a Contracting State does not deprive a court of another Contracting State of its jurisdiction under Article 24 of the [Brussels] Convention."

In our view, when the court which has ordered the interim measure of protection is finally not seized of proceedings on the merits of the case, the conditions set out by Article 24 of the Brussels Convention must henceforth be satisfied.[50] In such a situation, this provision is indeed the basis for the jurisdiction as to the provisional and protective measures ordered by another court than the one which will exercise jurisdiction as to the substance of the case.

According to the case law, application may be made to the courts of a Member State for interim measures of protection even if a court of another Member State has jurisdiction as to the substance of the case "provided that the subject-matter of the dispute falls within the scope *ratione materiae* of the [Brussels] Convention".[51] The CJEU held that:[52]

> "However, Article 24 [of the Brussels Convention] cannot be relied on to bring within the scope of the [Brussels] Convention provisional or protective measures relating to matters which are excluded from it".

Therefore, the jurisdiction cannot be based on Article 24 of the Brussels Convention for provisional or protective measures granted in the course of proceedings for divorce "if those measures concern or are closely connected with either questions of the status of the persons involved in the divorce proceedings or proprietary legal relations resulting directly from the matrimonial relationship or the dissolution thereof".[53] Indeed, the subject-matter of such disputes do not fall within the scope *ratione materiae* of the Brussels Convention.[54]

[49] CJEU, *Van Uden* (footnote 19), para. 29.

[50] Same opinion: GARCIMARTIN, Provisional and Protective Measures, p. 61.

[51] CJEU, *Van Uden* (footnote 19), para. 28.

[52] CJEU, *Van Uden Maritime* (footnote 19), para. 30. See also CJEU, *Jacques de Cavel* (footnote 38), para. 9; CJEU, 31.3.1982, *C.H.W. v G.H.J.*, C-25/81, ECR 1982 p. 1189, ECLI:EU:C:1982:116, para. 12.

[53] CJEU, *Jacques de Cavel* (footnote 38), para. 10. See also CJEU, 6.3.1980, *Luise de Cavel v Jacques de Cavel*, C-120/79, ECR 1980 p. 731, ECLI:EU:C:1980:70; CJEU, *C.H.W.* (footnote 52).

[54] See Art. 1 of the Brussels Convention.

The same applies to the other matters excluded from the scope of the Brussels Convention under its Article 1. For example, when the parties referred their dispute to arbitration, an application for provisional or protective measures may be made under Article 24 of the Brussels Convention provided that the subject-matter of the dispute falls within the scope of this Convention.[55]

It remains to be decided by the case law whether the application of Article 24 of the Brussels Convention may be departed from by an agreement of the parties conferring exclusive jurisdiction to the courts of another Member State. Specifically, would the effects of a valid prorogation of jurisdiction under Article 17 of the Brussels Convention extend to the jurisdiction to grant provisional and protective measures? The answer to this question does not raise any issues when the parties have expressly agreed that the prorogation of jurisdiction would apply not only to the jurisdiction as to the substance of the case but also to the jurisdiction as to interim measures of protection. The right of the parties to exclude the jurisdiction of other courts than the one that they have chosen may indeed extend to the grant of provisional and protective measures. However, parties rarely think to include interim measures of protection in agreements on jurisdiction. When the agreement does not specify whether it applies to provisional and protective measures, its effects should not extend to such measures.[56] On this topic, Professor Collins stated that:[57]

> "It is, however, well established in many jurisdictions that the forum may grant provisional or protective measures even though the parties have agreed to the exclusive jurisdiction of the courts of another country. Thus, there can be no doubt that under the Brussels Convention, where jurisdiction clauses are given full effect subject to certain limitations of form, Article 24 allows courts in Contracting States other than the chosen forum to order such measures."

This interpretation is coherent with the approach followed in the Hague Choice of Court Agreements Convention, which does not govern interim measures of protection. Thus, a valid prorogation of jurisdiction under this Convention does not

[55] CJEU, *Van Uden* (footnote 19), para. 24-25. The draft Art. 36 of the Recast of the Brussels I Regulation expressly referred to this rule, but it was deleted later on: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if the courts of another State or an arbitral tribunal have jurisdiction as to the substance of the matter." See Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 14.12.2010, COM(2010) 748 final.

[56] Same opinion: KESSEDJIAN, Note on Provisional and Protective Measures, No 156 and 157, p. 51; GARCIMARTIN, Provisional and Protective Measures, p. 73; GAUDEMET-TALLON/ANCEL, Compétence et exécution, p. 482.

[57] COLLINS, Provisional and Protective Measures, pp. 61-62.

preclude the grant, refusal or termination of such measures by a court of another Contracting State than the one chosen by the parties.[58]

5.2.2. A Special Rule of Jurisdiction

Article 24 of the Brussels Convention lays down an exception to the system of jurisdiction set up by the Convention. This provision derogates in particular from the jurisdiction of the State of the defendant's domicile as provided for in Article 2, and must therefore be interpreted strictly.[59] The CJEU held that the jurisdiction laid down by Article 24 of the Brussels Convention is justified by the fact that it avoids any prejudice to the parties resulting from the length of the proceedings inherent in any international procedure.[60] The aim is to allow provisional and protective measures to be ordered close to the place where they are to be enforced. This reduces the delay between the granting of the measure and its enforcement, which is critical in practice, particularly when the interim measure of protection aims at seizing the assets of the debtor. The applicant may, indeed, waste valuable time if he or she has to make a detour via the recognition and enforcement procedure.

The CJEU made it clear that the special jurisdiction of the State in which the assets that are the subject of the provisional or protective measure are located is justified by the fact that the authorities of that State are in a better position to appreciate the circumstances which may lead to the grant or refusal of the measure requested or to prescribe the terms and conditions which the applicant must comply with in order to guarantee the provisional and protective nature of the authorized measure.[61] The granting of a provisional or protective measure requires the judge to exercise special circumspection and to seek thorough knowledge of the actual circumstances in which the measure sought is to have its effects.[62]

5.2.3. The Notion of Provisional and Protective Measures Under the Special Rule of Jurisdiction

The types of provisional and protective measures that can be granted are determined by the law of the court before which the request for interim measures is filed.[63] It is therefore according to the *lex fori* that the court will decide which interim

[58] HARTLEY/DOGAUCHI, Explanatory Report, No 160, p. 823. See footnote 11 for the text of Art. 7 of the Hague Choice of Court Agreements Convention.

[59] CJEU, 28.4.2005, *St. Paul Dairy Industries NV v Unibel Exser BVBA*, C-104/03, ECR 2005 I-3481, ECLI:EU:C:2005:255, para. 11.

[60] CJEU, *St. Paul Dairy* (footnote 59), para. 12.

[61] CJEU, 21.5.1980, *Bernard Denilauler v SNC Couchet Frères*, Case 125/79, ECR 1980 p. 1553, ECLI:EU:C:1980:130, para. 16; CJEU, *Van Uden* (footnote 19), para. 41; CJEU, *St. Paul Dairy* (footnote 59), para. 14.

[62] CJEU, *Denilauler* (footnote 61), para. 15; CJEU, *Van Uden* (footnote 19), para. 38.

[63] JENARD, Report, p. 42.

measures of protection can be granted and the conditions under which they can be ordered under Article 24 of the Brussels Convention.

However, the CJEU clarified the notion of provisional and protective measures within the meaning of Article 24 of the Brussels Convention. It follows from the *Reichert* case that this concept must be understood as an autonomous concept:[64]

> "'[P]rovisional, including protective, measures' within the meaning of Article 24 [of the Brussels Convention] must […] be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter."

On the basis of this definition, which has not been modified since the aforementioned ruling despite its rather vague character, reference should be made to the function or purpose pursued by the measure to identify its provisional or protective nature. The nature of the rights which the measure serves to protect is the key element in determining whether it is within the scope of the Brussels Convention.[65]

The provisional or protective measures referred to are primarily intended to preserve the status quo pending the determination of the merits of the dispute and, in particular but not limited to, to "freeze" the assets that may be used to satisfy the creditor's claim. The laws of all Member States provide for various types of provisional and protective measures to prevent the debtor from shielding his or her property from his or her creditors (e.g. the *saisie conservatoire* under French law, the *Arrest* under German law, or the freezing injunction under English law). In general, these measures can be classified as provisional and protective measures. But the qualification of certain types of measures is more delicate, as we can see from the European Court of Justice case law.

The CJEU examined several types of provisional and protective measures found in the laws of the Member States to determine whether or not these measures fall within the autonomous concept provided for under Article 24 of the Brussels Convention or under Article 31 of the Brussels I Regulation. It follows from this case law that the *action paulienne* under French law is not a provisional or protective measure.[66] An order for interim payment of a contractual consideration (e.g. the

[64] CJEU, 26.3.1992, *Mario Reichert et al. v Dresdner Bank AG*, C-261/90, ECR 1992 I-2149, ECLI:EU:C:1992:149, para. 34. See also CJEU, *Van Uden* (footnote 19), para. 37; CJEU, *St. Paul Dairy* (footnote 59), para. 13.

[65] CJEU, *Jacques de Cavel* (footnote 38), para. 8; CJEU, *Reichert* (footnote 64), para. 32; CJEU, *Van Uden* (footnote 19), para. 33.

[66] CJEU, *Reichert* (footnote 64), para. 35.

kort geding under Dutch law)[67] is qualified as a provisional or protective measure only if the repayment to the defendant of the sum awarded is guaranteed, should the plaintiff not succeed on the merits, and provided that the measure sought relates only to specific assets of the defendant located within the territorial jurisdiction of the court to which application is made.[68] The issuance of an injunction aimed at excluding the defendant from the proceedings (debarment injunction) or of an injunction ordering the defendant to disclose information and documents within the prescribed deadline under threat of exclusion from the proceedings (disclosure injunction) are provisional or protective measures.[69] But an injunction aimed at prohibiting a person from initiating or continuing proceedings in the courts of another Contracting State (anti-suit injunction) is not a provisional or protective measure.[70] The courts of a Member State ordering an anti-suit injunction on the ground that proceedings before a State court would be contrary to an arbitration agreement, is incompatible with the Brussels I Regulation.[71]

The CJEU also held in the *St. Paul Dairy* case that measures aimed at gathering evidence in order to assess the chances or risks of proceedings on the merits are not provisional or protective measures:[72]

> "Article 24 of the [Brussels] Convention must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of 'provisional, including protective, measures'."

Legal scholars are, however, divided on the exact meaning of this decision.[73] Article 35 of the Brussels I*bis* Regulation does not provide any help since the text of this disposition remains (quasi) unchanged. But Recital 25 of the Brussels I*bis* Regulation provides a clue for interpreting the notion of provisional and protective measures as regards the taking of evidence:

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[67] The same applies for the *référé-provision* under French law. See GAUDEMET-TALLON/ANCEL, Compétence et exécution, pp. 485-486.

[68] CJEU, *Van Uden* (footnote 19), para. 47; CJEU, *Mietz* (footnote 19), para. 43.

[69] CJEU, 2.4.2009, *Marco Gambazzi v DaimlerChrysler Canada Inc. et CIBC Mellon Trust Company*, C-394/07, ECR 2009 I-02563, ECLI:EU:C:2009:219, para. 30-32.

[70] CJEU, 27.4.2004, *Gregory P. Turner v Felix F. I. Grovit et al.*, C-159/02, ECR 2004 I-3565, ECLI:EU:C:2004:228.

[71] CJEU, 10.2.2009, *Allianz SpA et Generali Assicurazioni Generali SpA v West Tankers Inc.*, C-185/07, ECR 2009 I-663, ECLI:EU:C:2009:69.

[72] CJEU, *St. Paul Dairy* (footnote 59), para. 25.

[73] See GARCIMARTIN, Provisional and Protective Measures, p. 80-81, for a summary of the various opinions.

> "The notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to the application of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters."

Article 7 para. 1 of the IP Rights Directive provides that:[74]

> "[T]he competent judicial authorities may […] order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement […]. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary, without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed."

One particular feature of the IP Rights Directive is that:[75]

> "[T]he legal remedies designed to ensure the protection of intellectual property rights are supplemented by actions for damages that are closely linked to them. […] [T]he defendant [is entitled] to claim compensation where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right."

Since such means are not provided for in the Brussels I*bis* Regulation, its Article 35 should be interpreted and applied as strictly as possible when it comes to granting provisional or protective measures aimed at obtaining information or preserving evidence.

It follows that Article 35 of the Brussels I*bis* Regulation does not apply to measures which exclusively aim at gathering evidence in order to assess the chances or risks of proceedings on the merits, in accordance with the *St. Paul Dairy* case law. Again,

[74] Directive (EC) No 2004/48 of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45.

[75] CJEU, 16.7.2015, *Diageo Brands BV v Simiramida-04 EOOD*, C-681/13, ECLI:EU:C:2015:471, para. 74.

the function or the purpose of the measure is the key element.[76] The *Reichert* case law is still valid: the measure must be "intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter".[77] Thus, a measure of which purpose is to protect evidence to be used during trial, such as for example the hearing of a witness who is about to die, enters into the scope of Article 35 of the Brussels I*bis* Regulation. In other words:[78]

> "[Article 35 of the Brussels I*bis* Regulation] applies to measures which are intended to preserve the substantive claim in law, not, however, to the performance of procedural measures such as the taking of evidence."

Finally, it is clear from case law that the interim measures of protection referred to in Article 35 of the Brussels I*bis* Regulation are not only intended to preserve the status quo pending the determination of the merits of the dispute. The notion of provisional and protective measures that fall within the scope of this disposition has a broader sense.

5.2.4. The Real Connecting Link

Since the jurisdiction of courts not having jurisdiction as to the substance of a case is an exception to the general system,[79] the CJEU ruled that this jurisdiction is conditional on the existence of a real connecting link between the subject of the measures sought and the territorial jurisdiction of the State before which court the application for provisional or protective measures is brought.[80]

However, the case law has not defined the concept of "real connecting link". Such a link exists normally with the place where the assets that are to be preserved are located.[81] The courts of the State where the measure is to be enforced have, in any event, jurisdiction under Article 31 of the Brussels I Regulation.[82]

The concept of "real connecting link" can be interpreted henceforth in the light of the fact that interim measures of protection ordered by a court which does not have

[76] See GARCIMARTIN, Provisional and Protective Measures, p. 81-82; NUYTS, Les mesures provisoires, p. 355.

[77] CJEU, *Reichert* (footnote 64), para. 34. See *supra* 5.2.3.

[78] Opinion of Advocate General KOKOTT, delivered on 18 July 2007, *Alessandro Tedesco v Tomasoni Fittings Srl and RWO Marine Equipment Ltd*, Case C-175/06, ECR 2007 I-7930, ECLI:EU:C:2007:451, para. 91.

[79] See *supra* 5.2.2.

[80] CJEU, *Van Uden* (footnote 19), para. 40.

[81] BOGDAN, The Proposed Recast, p. 131. See also WILKE, The impact of the Brussels I Recast, p. 138, who has doubts as to the theoretical and practical significance of the real connecting link in the context of the Brussels I*bis* Regulation.

[82] See HEINZE, Reform of Brussels I, p. 609; GAUDEMET-TALLON/ANCEL, Compétence et exécution, pp. 496-497.

jurisdiction as to the substance of a case will not, in principle, be recognised and enforced in another State.[83] It is indeed expressly stated in the Brussels I*bis* Regulation that provisional and protective measures ordered by a court which by virtue of this Regulation does not have jurisdiction as to the substance of the matter (i.e. under Article 35 of the Brussels I*bis* Regulation) cannot be recognised and enforced in the other Member States.[84] This suggests that such measures have to be granted in the State in which they must be enforced.

5.2.5. The Urgency

It is interesting to note here that urgency is not a condition required for admitting the jurisdiction of courts not having jurisdiction as to the substance of a case to grant provisional and protective measures in civil and commercial matters. The Brussels I Convention and Regulation do not require that the measure sought is a matter of urgency. Nor is this condition discussed in the CJEU case law.

It can be assumed, as a general rule, that provisional or protective measures may only be granted in urgent cases.[85] Urgency is indeed a "classical" prerequisite for interim measures of protection.[86] We are of the opinion that the condition of urgency should be considered in the context of the national law applicable to the provisional or protective measure sought.[87] It is for the court to determine whether, and to what extent, urgency is requested for granting the measure sought.

But it is surprising that this rule has never been expressed in the context of the Brussels I Convention or Regulation. By contrast, urgency is requested, for example, in Article 7 of the EAPO Regulation, in Article 19 para. 3 of the Service Regulation, and in Article 20 of the Brussels II*bis* Regulation, now recast in Article 15 of the Brussels II*ter* Regulation.

6. The Specific Notion of Provisional and Protective Measures in Family Matters

In legal theory, a dichotomy of provisional and protective measures based on the subject-matter and using the civil-commercial *versus* family legal area hasn't been traced yet. Hence, among the various types of provisional and protective measures offered by the systems of civil procedure of single countries, those on family matters

[83] See *infra* 8.2.2.

[84] See Art. 2 point (a) of the Brussels I*bis* Regulation.

[85] This is a controversial issue. See NUYTS, Les mesures provisoires, p. 355.

[86] See *supra* 2.1.

[87] See CJEU, 6.6.2002, *Italian Leather SpA v WECO Polstermöbel GmbH & Co.*, C-80/00, ECR 2002 I-4995, ECLI:EU:C:2002:342. In this decision, the CJEU implicitly acknowledged that the court may assess the urgency under the law applicable to the interim measure of protection.

are rarely built as a category apart. The EU PIL instruments also make use of a synthetic notion (6.2.). However, the notion of interim measures of protection in family matters has evolved in the recent EU PIL instruments towards a distinction that echoes that of the Hague Conventions on the protection of children (6.1.), in particular in the Brussels II*ter* Regulation.

6.1. The Dichotomy employed by the Hague Conventions: Urgent Measures and Provisional Measures

Prior to the EU PIL instruments, the two Hague Conventions on the protection of children have had a special focus on the need to adapt the regime of provisional measures to the special needs of family related proceedings.

The Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants adopts a supranational dichotomy which is still present in the Hague 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, although in a modified version.

These conventions differentiate "urgent measures of protection" (see Article 11 of the 1996 Hague Convention and Article 9 of the 1961 Hague Convention)[88] from "measures of a provisional character for protection" (see Article 12 of the 1996 Hague Convention and Article 8 of the 1961 Hague Convention)[89].

In the more recent convention, urgent measures of protection have the following regime:[90]

> "(1) In all cases of *urgency*, the authorities of any Contracting State in whose territory the child or property belonging to the child *is present* have jurisdiction to take any *necessary measures of protection*. (2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by

[88] Art. 9 of the 1961 Hague Convention reads: "In all cases of *urgency*, the authorities of any Contracting State in whose territory the infant or his property is, may take any *necessary measures of protection*. When the authorities which are competent according to the present Convention shall have taken the steps demanded by the situation, measures taken theretofore under this Article shall cease, subject to the continued effectiveness of action completed thereunder" (emphasis added).

[89] Art. 8 of the 1961 Hague Convention reads: "[...] the authorities of the State of the infant's habitual residence [as opposed to those of the infant's nationality] may take *measures of protection* in so far as the infant is *threatened by serious danger to his person or property*. The authorities of the other Contracting States are not bound to recognise these measures." (emphasis added).

[90] Art. 11 of the 1996 Hague Convention.

> the situation. (3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question".

Whilst measures of a provisional character for protection are subject to the following rules:[91]

> "(1) Subject to Article 7 [on child abduction proceedings], the authorities of a Contracting State in whose territory the child or property belonging to the child is *present* have jurisdiction to take *measures of a provisional character for the protection of the person or property of the child* which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10. (2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation. (3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question."

The dividing line between these provisional measures and the aforementioned urgent measures is not always easy to trace and perhaps not so important to justify a different regime for each of the two kinds of measures.[92]

In addition, there seems to be no "settled practice" on what constitutes "a case of urgency" and under which conditions an urgent measure of protection may be taken. Thus, we may only list here the examples thought of by the authors of the text who mention the following circumstances as "cases of urgency":[93] *i)* an order to impose a medical treatment necessary to save the child's life; *ii)* an order to immediately suspend contact with the person taking care of the child in case of allegations of physical, included sexual, abuse; *iii)* an order to rapidly sell

[91] Art. 12 of the 1996 Hague Convention.

[92] For the distinction, it is interesting to read PICONE, La nuova convenzione dell'Aja sulla protezione dei minori, p. 720, and the examples quoted, with reference to Italian law, by BONOMI, La convenzione dell'Aja del 1961, p. 646. On the law applicable to provisional measures in family matters see PRETELLI, Provisional Measures in Family Law and the Brussels II Ter Regulation, p. 138.

[93] PERMANENT BUREAU, Practical Handbook (2014), No 6.4, p. 70.

perishable property of the child; *iv)* measures accompanying the safe return of a child wrongfully removed or retained.

6.2. A Synthetic Notion of Provisional and Protective Measures in Civil, including Family Law, Matters

As in civil and commercial matters, also in family disputes the granting of provisional or protective measures strengthens the position of the applicant. Hence, every legal order implements provisional measures in order to tackle urgent situations challenging families' structures and well-being.

Ratione materiae family matters may include a very broad set of provisional and protective measures, covered by at least five European PIL specific provisions of as many Regulations. A bird's eye view embraces Article 14 of the Maintenance Obligations Regulation;[94] Article 19 of three regulations: the Matrimonial Property Regimes Regulation,[95] its twin Property of Registered Partnerships Regulation,[96] and the Succession Regulation;[97] last but foremost, Article 20 of the Brussels II*bis* Regulation now recast in Article 15 of the Brussels II*ter* Regulation.[98]

Although all of these may be included in a large, comprehensive notion of "provisional and protective measures in family matters" the present part of this paper draws solely on the latter, for two decisive reasons.

First, as opposed to the former types of measures, whose purpose is to secure property or richness in the framework of family-related events, the latter type of measure may have consequences on the social life of persons and their freedom of movement, included those of children. The second reason, that is a consequence of the first, is that Article 20 of the Brussels II*bis* Regulation and Article 15 of the Brussels II*ter* Regulation significantly differ, in their wording, from the other rules, all identical or not substantially divergent from the reference rule.[99]

Article 14 of the Maintenance Obligations Regulation and Article 19 of the Matrimonial Property Regimes Regulation, of its twin Property of Registered Partnerships Regulation, and of the Succession Regulation all read as follows:

> "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter."

[94] For references see footnote 33.
[95] For references see footnote 34.
[96] For references see footnote 35.
[97] For references see footnote 32.
[98] For references see footnote 39.
[99] See *supra* 5.1.

We may therefore conclude that this version is consolidated. Furthermore, it is exactly the same provision as Article 35 of the Brussels I*bis* Regulation.[100] This rule traces its origins to the Brussels and Lugano Conventions.

Having verified the coherence of the European system of provisional and protective measures as designed by the aforementioned supranational legal instruments, it becomes necessary to investigate the reasons for the textual differences emerging from Article 20 of the Brussels II*bis* Regulation and Article 15 of the Brussels II*ter* Regulation. These differences, that appear outstanding as compared to the copy-paste rule of the other EU PIL instruments, need to be reconciled with the inherent logic of the European area of freedom, justice and security. As a matter of fact, in contrast to The Hague Conference and even the various UN legislative bodies, the EU aims at the construction of a comprehensive legal order through the progressive elaboration of supranational legislation.

6.2.1. The Specific Rule on Provisional Measures in the Brussels II*bis* Regulation

Article 20 of the Brussels II*bis* Regulation reads as follows:

> "1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter. 2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate."

The first paragraph copies the text of Article 12 of the Brussels II Convention (which is never entered into force).[101] The rule was drafted during the last decade of last century with a view to concluding an intra-European treaty, that would complement the Brussels Convention.[102] Article 12 of the proposed convention is clearly inspired by the "urgent measures" of the 1961 and 1996 Hague Conventions.[103]

[100] See *supra* 3.1 and 5.1.

[101] For references see footnote 41.

[102] Art. 12 of the Brussels II Convention reads: "In urgent cases, the provisions of this Convention shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Convention, the court of another Member State has jurisdiction as to the substance of the matter".

[103] See *supra* 6.1.

However, on the one hand, the Brussels II Convention does not contemplate any extraterritorial effect for these "urgent measures of protection", whereas "measures of provisional character for protection" – both interim measures of protection under Article 12 of the 1996 Hague Convention or taken in cases of urgency under Article 11 of the 1996 Hague Convention – are entitled to recognition and enforcement abroad under the conventional regime.

In this respect, the Hague regime guarantees continuity in the handling of family matters and, thus, a more efficient and perhaps less bureaucratic coordination between the court taking action in the best interests of the child, and the court that has jurisdiction as to the substance. On the other hand, the Brussels II Convention has abandoned the dichotomy between urgent and provisional measures of the Hague regime. Thus, there is no need for a judge to determine whether the measure is urgent or not in order to know under which regime the provisional measure will circulate. In this respect, Article 12 of the Brussels II Convention is more coherent with Article 24 of the Brussels I Convention and less similar to the rule of the Hague Conventions.

As pointed out in the Explanatory Report of the Brussels II Convention, the rule of Article 12 goes "further than the provisions of Article 24" of the Brussels I Convention,[104] since it doesn't concern solely provisional and protective measures falling within the scope of the imagined treaty, but also measures related only in part with it. As an example, the report mentions a measure taken on the basis of a marriage contract. It states that even measures "relating to matters excluded from the scope of the Convention will continue to apply until appropriate judgments are given by a court with jurisdiction for, for example, marriage contracts".[105]

The main – or rather the sole – reason to differentiate the regime of provisional and protective measures in family matters is related to the object of the measure, which is not merely material (e.g. a sum of money, the property of an object, etc.), but consists in a substantial interference on the self-determination of one or more persons.

Against this background, Article 20 of the Brussels II*bis* Regulation validates and clarifies the regime already thought of for provisional measures by its preceding Brussels II Convention.

[104] BORRÁS, Explanatory Report, No 59, p. 48.
[105] *Ibidem.*

6.2.2. Echoes of the Dichotomy traced by The Hague Conventions in the Brussels II*ter* Regulation

A further specialisation of the regime of interim measures of protection, to the end of ensuring the best possible protection of children, is sought by Article 15 of the Brussels II*ter* Regulation (not yet in force):

> "Provisional, including protective, measures in urgent cases
>
> 1. In urgent cases, even if the court of another Member State has jurisdiction as to the substance of the matter, the courts of a Member State shall have jurisdiction to take provisional, including protective, measures which may be available under the law of that Member State in respect of:
>
> (a) a child who is present in that Member State; or
>
> (b) property belonging to a child which is located in that Member State.
>
> 2. [*omissis*: *rule on the duty to inform the central authority and courts exercising jurisdiction as to the substance that a measure has been granted*].
>
> 3. The measures taken pursuant to paragraph 1 shall cease to apply as soon as the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.
>
> [*omissis: rule on the duty of courts exercising jurisdiction as to the substance to inform the court having taken provisional measures that a measure repealing it has been granted*]".

Three core elements are noticeable in the Brussels II*ter* Regulation.[106] The first is the insistence on urgency: it is striking both for being repetitive and redundant. The second is the focus on the protection of the child, both as a person and as an owner of property. The third is the coordination called for by paragraphs 2 and 4 between the courts involved in the treatment of the case.

These three elements are reinforced by an additional rule on interim measures of protection, specifically conceived for assisting the execution of return orders pronounced in cases of wrongful removal or retention of a child.[107] In addition to

[106] Compare the text of Art. 15 of the Brussels II*ter* Regulation with the one of Art. 20 of the Brussels II*bis* Regulation, which is reproduced *supra* 6.2.1.pli.

[107] The new regulation significantly adopts a terminology suggested during the preparatory works: see in particular PRETELLI, Critical Assessment of the Legal Framework Applicable to Parental Child Abduction, p. 55, arguing for the need to differentiate different situations of "abduction" to prevent the stigmatization of wrongful behaviors adopted in the best interests of the child. In those cases, the "emotive force" of the term "abduction" may generate an altered description of reality. Regrettably, the new terminology coexists with the old one. See also PRETELLI, Child

the general rule of Article 15, these are to be dealt through a regime described by Article 27 para. 5 of the Brussels II*ter* Regulation. Said Article reads as follows:

> "Where the court orders the return of the child, the court may, where appropriate, take provisional, including protective, measures in accordance with Article 15 of this Regulation in order to protect the child from the grave risk referred to in point (b) of Article 13(1) of the 1980 Hague Convention, provided that the examining and taking of such measures would not unduly delay the return proceedings".

Further elucidations on the future regime are given by a series of Recitals, all focused on proceedings generated by the wrongful removal or retention of a child. In these proceedings, the coordination between the courts of the countries involved – one of which may be granting provisional and protective measures and the other vindicating jurisdiction as to the substance – has proved difficult, sensitive and critical.[108]

The need to protect the child functions as an important deterrent to the adoption of decisions on return. In this respect, Recital 45 of the Brussels II*ter* Regulation explains that the main objective of the taking of provisional and protective measure consists in measures of protection aimed at eliminating any threat to the child, because these may prevent a return order, pursuant to point (b) of Article 13 para. 1 of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction. Examples of measures ensuring a safe return to the child include a court order prohibiting the left behind parent from coming close to the child or prescribing a particular type of contact; measures allowing the child to stay with the abducting parent until a decision on the substance of custody is available, etc. Central authorities, European or Hague Convention network judges and

Abduction and return procedures, p. 8, observing that "[a]s revealed by the Commission's consultants in the Impact Assessment study, some of the "abductions" occurring within the European Area are an unintended illegal behavior since they are carried out in the firm belief that the transfer is an exercise of parental responsibility".

[108] Acknowledgement of the difficulties in the application of art. 15 led us to imagine, as an ideal solution, a co-decision by Member States involved. See again PRETELLI, Critical Assessment of the Legal Framework Applicable to Parental Child Abduction, p. 23, suggesting that the mechanism of transfer of jurisdiction "be adapted in order to allow a joint or binational decision whenever the dispute between parents involves, at the same time, two opposing European legal orders. To this end, the courts of Member States involved in the family dispute should cooperate from the early stages of the judicial proceedings, in particular through the channel of the European Judicial network." and PRETELLI, Child Abduction and return procedures, p. 13, stressing that "Whenever there is a clear unbalance in the degree of integration of one parent as compared with the other in the State from which the child was transferred, it seems important to favour to a maximum extent joint decisions by the courts of the two Member States involved".

professionals may be involved in the decision on which type of arrangement is adequate for the particular child at risk.

Recital 46 of the Brussels II*ter* Regulation significantly prescribes that such measures have extraterritorial effect:

> "Those measures should be recognised and enforced in all other Member States including the Member States having jurisdiction under this Regulation until a competent court of such a Member State has taken the measures it considers appropriate."

The statement, at odds with the well-established rule on the exclusive territorial effects of provisional and protective measures decided by a court not having jurisdiction as to the substance,[109] recalls the coordination mechanism of the two Hague Conventions of 1961 and 1996 on the protection of children.[110]

7. Jurisdiction for Provisional and Protective Measures in the Brussels II*bis* and II*ter* Regulations

The rationale of the allocation of jurisdiction in the Brussels II*ter* Regulation – as well as in the Brussels II*bis* Regulation – is coherent with the one of the Brussels I system. The proceedings to grant provisional and protective measures may be subject to the same jurisdiction as the one competent on the merits, but may also be subject to a different head of jurisdiction.

The Brussels II*ter* Regulation makes it possible for the court of a Member State to order provisional or protective measures: *i)* if it has jurisdiction as to the substance of the case (7.1.), and *ii)* if it has jurisdiction to pronounce a provisional and protective measure on the basis of the special rule of jurisdiction in Article 15 of the Brussels II*ter* Regulation (7.2.). Hence, the court of the habitual residence of a child may adopt provisional and protective measures on the basis of – for instance – Article 8 para. 1 of the Brussels II*ter* Regulation, in the framework of a pending divorce proceeding. In the same context, the court of another Member State where the child is temporarily present may take measures by virtue of Article 15 of the Brussels II*ter* Regulation. Thus, the Brussels II*ter* Regulation retains the existing system of the Brussels II*bis* Regulation, which reflects the structure of the Brussels and Lugano Conventions.

The Brussels II*ter* Regulation also introduces a new rule for the coordination of jurisdiction between provisional justice and substantive justice (7.3.). This rule will prove useful to determine which court has the priority for granting interim

[109] See *supra* 5.2.4 et *infra* 8.2.2.
[110] See *supra* 6.1.

measures of protection between the court of the Member State in charge of the divorce proceeding and the court of the other Member State where the child is temporarily present.

7.1. The Court Having Jurisdiction as to the Substance of the Case

If a court is vested of the power to decide the merits, *a fortiori* it will be vested with the power to decide provisional and protective measures. No doubts have ever been raised on the principle that the court deciding on the merits also has jurisdiction to order provisional or protective measures *ex ante*, during, or after a case has been filed.

Recital 59 of the Brussels II*ter* Regulation explicitly acknowledges that "provisional, including protective, measures [may be] ordered by a court having jurisdiction as to the substance of the matter" and, in this case, that their circulation "should be ensured". As it is often the case with Recitals in EU PIL Regulations, Recital 59 anticipates the point (b) of Article 2 para. 1 that innovates in respect of other Regulations since it includes, within the autonomous notion of "decision" adopted by the Regulation "provisional, including protective, measures ordered by a court which by virtue of this Regulation has jurisdiction as to the substance of the matter". Attention needs to be paid to the circumstance that the definition of "decision" included in the point (b) of Article 1 para. 2 is a "sub-notion" of the general autonomous notion of "decision" used by the Regulation. Article 1 para. 2 of the Brussels II*ter* Regulation specifies that such sub-notion is specifically conceived for the circulation of the decisions pronounced by virtue of the Regulation under its Chapter IV. One may cast doubts on the actual practical needs of a distinctive notion of "decision" specifically conceived for the circulation of judgements in order to focus on the rule, whose meaning is that of prescribing the circulation of provisional measures granted by the court having jurisdiction as to the substance. The sophistication that ensues challenges the actual capacity of the average lawyer and legal officer to swiftly manage cross-border cases. However wise or unwise it may be, this choice of policy results from the text and it is now taken as a fact.

Whenever a provisional or protective measure is granted *ante causam*, it can be difficult to assess whether the court judging on the measure is the same one that will take jurisdiction on the merits. The Brussels II system, even more than the Brussels I system – with few albeit significant exceptions[111] – allows multiple *fora*. It suffices to take a look at Article 3 of the Brussels II*bis* Regulation to see how many alternative *fora* are available to someone applying for a divorce.

[111] Reference is made to Art. 10 of the Brussels II*bis* Regulation on "jurisdiction in case of child abduction".

Furthermore, the CJEU made it clear that:[112]

> "The fact that a court of a Member State is seised in the context of proceedings to obtain interim relief […] and there is nothing in the action brought […] which indicates that the court seised for the interim measures has jurisdiction within the meaning of Regulation No 2201/2003 does not necessarily preclude the possibility that […] there may be an action as to the substance of the matter which is linked to the action to obtain interim measures and in which there is evidence to demonstrate that the court seised has jurisdiction within the meaning of that regulation."

In these circumstances, even though the court may have jurisdiction as to the substance *in the future*, the adoption of provisional and protective measures will nevertheless need to satisfy the conditions set in Article 20 of the Brussels II*bis* Regulation,[113] unless the court has stated, in clear terms, that it grounds its decision on provisional measures on one of the heads of jurisdiction listed in Articles 8 to 14 of the Brussels II*bis* Regulation. The CJEU ruled that:[114]

> "It follows from the above that where the substantive jurisdiction, in accordance with Regulation No 2201/2003, of a court which has taken provisional measures is not, *plainly, evident* from the content of the judgment adopted, or where that judgment does not contain a statement, which is *free of any ambiguity*, of the grounds in support of the substantive jurisdiction of that court, with reference made to one of the criteria of jurisdiction specified in Articles 8 to 14 of that regulation, it may be inferred that that judgment was not adopted in accordance with the rules of jurisdiction laid down by that regulation".

The CJEU has thus introduced a rebuttable presumption according to which provisional measures granted *ante causam* fall under Article 20 of the Brussels II*bis* Regulation. The same is true in the new regime laid down by the Brussels II*ter* Regulation: such measures will fall under Article 15 of the Brussels II*ter* Regulation.

[112] CJEU, 9.11.2010, *Bianca Purrucker v Guillermo Vallés Pérez*, C-296/10, ECR 2010 I-11163, ECLI:EU:C:2010:665, para. 86. See HONORATI, Purrucker I e II, p. 66, FERACI, Riconoscimento ed esecuzione all'estero, p. 107-134 and IDOT, The ECJ Judgments "Deticek", "Povse" and "Purrucker", pp. 118-127.

[113] CJEU, 19.9.2018, *Hampshire County Council v C.E., N.E.,* Joined Cases C-325/18 PPU and C-375/18 PPU, ECLI:EU:C:2018:739, para. 86; CJEU, 15.7.2010, *Bianca Purrucker v Guillermo Vallés Pérez*, C-256/09, ECR 2010 I-7353, ECLI:EU:C:2010:437, para. 78.

[114] CJEU, *Purrucker* (footnote 113), para. 76 (all emphasis added).

7.2. The Exercise of Jurisdiction under Article 20 of the Brussels II*bis* Regulation and Article 15 of the Brussels II*ter* Regulation

European Court of Justice case law on the jurisdictional power of the courts which do not have jurisdiction as to the substance of the case to order provisional or protective measures under the Brussels II*bis* Regulation only includes orders protecting children. Most cases concern children who were victims of parental cross-border child abduction.

Within this framework, the CJEU has progressively set a test for the operation of Article 20 of the Brussels II*bis* Regulation that consists of three conditions: the measure must be urgent, it must be taken in respect of persons or assets in the Member State concerned, and it must be provisional.[115]

In addition, the interpreter should always bear in mind that "in that it is an exception to the system of jurisdiction laid down by the Regulation, [Article 20 of the Brussels II*bis* Regulation] must be interpreted strictly".[116] The same principle is also applicable to Article 15 of the Brussels II*ter* Regulation.

7.2.1. The Urgency

The test for urgency requires the judge to consider "the child's circumstances, his likely development and the effectiveness of the provisional or protective measures adopted".[117] Moreover, in its *Deti ek* decision,[118] the CJEU stressed that the concept embraces not only a situation of fact – the danger to which the child is exposed – but also the lack of action of the competent court:[119]

> "[T]he concept of urgency in that provision relates both to the situation of the child and to the impossibility in practice of bringing the application concerning parental responsibility before the court with jurisdiction as to the substance".

In the *Deti ek* case, a *periculum in mora* was radically absent. The court having jurisdiction as to the substance had already issued provisional measures. As a result, the child had been targeted by two provisional measures incompatible with each

[115] CJEU, *Hampshire County Council* (footnote 113), para. 85; CJEU, *Purrucker* (footnote 113), para. 78; CJEU, 23.12.2009, *Jasna Deti ek v Maurizio Sgueglia*, C-403/09 PPU, ECR 2009 I-12193, ECLI:EU:C:2009:810, para. 39; CJEU, 2.4.2009, *A.*, C-523/07, ECR 2009 I-2805, ECLI:EU:C:2009:225, para. 47.

[116] CJEU, 26.4.2012, *Health Service Executive v S.C. and A.C.*, C-92/12 PPU, ECLI:EU:C:2012:255, para. 130.

[117] CJEU, *A.* (footnote 115), para. 60.

[118] See BRIÈRE, Bruxelles II bis, p. 1056-1058; GOUTTENOIRE, Les droits de l'enfant, pp. 627-634; GUEZ, Les mesures urgentes et provisoires, p. 47-49.

[119] CJEU, *Deti ek* (footnote 115), para. 42.

other: one taken by the court having jurisdiction as to the substance, the other by a court claiming jurisdiction under Article 20 of the Brussels II*bis* Regulation. In these circumstances, it was indeed difficult, and it in fact proved impossible, to argue that the measure taken under Article 20 of the Brussels II*bis* Regulation was justified, since the court in charge of the substance had already taken action.

Hence, the court of the Member State where the child is present may take action only to the extent that the court having jurisdiction as to the substance of the case is not in the position to protect the child. If a change in circumstances unknown to the competent authority and endangering fundamental human rights of the child requires action, Article 20 of the Brussels II*bis* Regulation may authorise the use of a national ground for jurisdiction.

The CJEU had the occasion to deal with a case where a family formed by three children, their mother and a stepfather had lived in Finland and then in Sweden. After some time, they moved again to Finland but, because of the errancy of their dwelling in that country, they did not seem to establish a new habitual residence there. The Finnish authorities, who had already, in the past, placed into care the elder children to protect them from their stepfather's violence, placed again into care the three children. The decision was challenged by the mother on grounds that the children were Swedish nationals with a permanent residence in Sweden. Therefore, the CJEU held that the case fell within the jurisdiction of the Swedish courts.[120]

In a case like the above, regardless of the initiatives taken by the competent court in respect of the children involved, the authorities benefiting from a proximity with the child have a specific duty to act. Even though they merely find a *nihil obstat* in Article 20 of the Brussels II*bis* Regulation, allowing the exercise of jurisdiction at certain conditions, States are responsible for children present in their jurisdiction. Such a responsibility finds its origin in international law and can be inferred from Articles 2 and 9 of the UN Convention on the rights of the child.

7.2.2. The Presence of the Person or Assets

As in civil and commercial matters, a departure from the competent forum may not find any other justification than the principle of effectiveness.[121] Provisional measures issued on grounds of the special rule of jurisdiction are not able to cross the borders of the issuing State. In this respect Article 20 of the Brussels II*bis* Regulation is coherent with the reference provision of Article 31 of the Brussels I

[120] CJEU, *A.* (footnote 115), pronouncement.

[121] CJEU, *A.* (footnote 115), para. 47. PERTEGÁS SENDER, Art. 20, No 255, observes that the "presence" test of Art. 20 of the Brussels II*bis* Regulation is different from that of the Brussels I system.

Regulation.[122] To impose measures issued on grounds of the special rule of jurisdiction on the judge who has "wider" jurisdictional power – and is making use of that power – is considered to impair the logic on which these instruments are built.

7.2.3. The Provisional Character

The CJEU has often stressed that:[123]

> "[I]t is for the national legislature to lay down the measures to be adopted by the national authorities in order to protect the best interests of the child and to lay down detailed procedural rules for their implementation".

The provisional character of a measure needs thus to be extracted from national rules of civil procedure.[124]

At any rate, the CJEU has also made it clear that:[125]

> The provisional nature of a measure "arises from the fact that, […] they cease to apply when the court of the Member State having jurisdiction as to the substance of the matter has taken the measures it considers appropriate".

In other words, the problem solved by Article 20 of the Brussels II*bis* Regulation is one of coordination between the authorities taking action to expeditiously protect persons through provisional measures available *in loco* and the authorities that, absent a tight time pressure, decide the best possible redress of a family crisis.[126]

7.2.4. Other Conditions?

European Court of Justice case law on Article 20 of the Brussels II*bis* Regulation is not abundant. However, it is interesting to recall that a point was raised in relation to an administrative measure taken by authorities *prima facie* deprived of jurisdiction as to the substance of the matter.

The CJEU stated that the public law origin of a measure should not be regarded as an obstacle to its subsumption in Article 20 of the Brussels II*bis* Regulation, as long as the measure aims at protecting children in the framework of a family dispute falling within the scope of the Brussels II*bis* Regulation. This principle has been affirmed in a case concerning the order of placement taken by a Finnish public body under the Finnish law. The CJEU observed that the administrative nature of the

[122] See *supra* 5.1.
[123] CJEU, *A.* (footnote 115), para. 51.
[124] PERTEGÁS SENDER, Art. 20, No 255.
[125] CJEU, *A.* (footnote 115), para. 48.
[126] See *infra* 7.3.2.

measure at stake did not entail that the order fell outside the scope of the Brussels II*bis* Regulation.[127]

Furthermore, it is clear that Article 20 of the Brussels II*bis* Regulation, as well as Article 15 of the Brussels II*ter* Regulation, are not rules of jurisdiction *per se*. The jurisdiction of the court ordering the provisional or protective measures must be based on a jurisdiction rule of the *lex fori*. This implicit rule derives from the overall system of jurisdiction set up by the Brussels and Lugano Conventions which was already established by European Court of Justice case law related to Article 24 of the Brussels Convention.[128]

7.3. The Coordination Between Provisional Justice and Substantial Justice

7.3.1. *Acquis* on the Brussels II*bis* Regulation

The reciprocal autonomy of provisional justice and justice on the merits has found an additional confirmation by the CJEU, in the second *Purrucker* case. The court has thereby stated that:[129]

> *Lis pendens* is excluded "where a court of a Member State first seised for the purpose of obtaining measures in matters of parental responsibility is seised only for the purpose of its granting provisional measures within the meaning of Article 20 of that regulation and where a court of another Member State which has jurisdiction as to the substance of the matter within the meaning of the same regulation is seised second of an action directed at obtaining the same measures, whether on a provisional basis or as final measures".

Article 19 of the Brussels II*bis* Regulation – which deals with *lis pendens* – is inapplicable in those circumstances. In point of fact, there is no risk of contradictory judgements because the final judgment will overcome the provisional one.

Despite the clarity of this logic, when children and, more generally, when the self-determination and freedom of movement of persons is involved, it is important to open the door to exceptions that may be grounded on fundamental principles, such as the best interests of the child, and may authorise the coexistence of measures of provisional character taken by two courts, provided they are not incompatible.

It should also be stressed that, under Article 15 of the Brussels II*bis* Regulation, the two courts involved in the family dispute may agree on which of them shall take

[127] CJEU, *A.* (footnote 115), para. 27 and 28, arguing that Recital 10 of the Regulation limits the exclusion from the scope of the Brussels II*bis* Regulation to those public measures that are "of a general nature in matters of education or health".

[128] See *supra* 5.2.1.

[129] CJCE, *Purrucker* (footnote 112), para. 86.

responsibility for the decision on the merits. However,"[a]fter the protective measure has been taken, the national court is not required to transfer the case to the court of another Member State having jurisdiction".[130]

7.3.2. New Forms of Coordination in Brussels II*ter* Regulation

Highly emotional cases of wrongful cross-border removal and retention of children have led to a reconsideration of the rigid coordination mechanisms provided for in the Brussels II*bis* Regulation. On the one hand, Article 15 of the Brussels II*bis* Regulation has not proved successful in practice, since the culture of a cross-border collaboration among judges is still a goal to achieve. On the other hand, the judge, within whose jurisdiction the child habitually resident abroad is present, may feel that his or her inability to grant extraterritorial measures of protection is tantamount to a denial of justice. This has led to conflicting decisions and the famous dyscrasy between the European Court of Justice and the European Court of Human Rights.[131]

Brussels II*ter* Regulation attempts to reconcile the vision of advocates of the exclusive jurisdiction of the "State of habitual residence" and advocates of a more flexible approach. Article 12 of the Brussels II*ter* Regulation contains a detailed rule on the transfer of jurisdiction from the court having jurisdiction as to the substance of the matter to a court "better placed to assess the best interests of the child". In the specific case of provisional measures, it may be unnecessary to proceed to a formal transfer, since the measures taken by a judge that has no jurisdiction as to the substance of the matter automatically elapse when the competent judge has overtaken the case. In this respect, Articles 2, 27 para. 5 and 15 of the Brussels II*ter* Regulation introduce an exception to favor the taking into care of children wrongfully removed or retained. The exception, as expressed in the words of Recital 30, is the following (emphasis added):

> "This Regulation should not prevent the courts of a Member State not having jurisdiction over the substance of the matter from taking provisional, including protective measures, in urgent cases, with regard to the person or property of a child present in that Member State. Those measures should not be recognised and enforced in any other Member State under this Regulation, *with the exception of measures taken to minimise the risk referred to in point (b) of Article 13(1) of the 1980 Hague Convention*. Measures taken to minimise that risk *should remain in force* until a court of the Member State of the habitual residence of the child has taken the measures it considers appropriate. Insofar as the protection of the best interests of the child so requires, the court should inform, directly or through the Central Authorities,

[130] CJEU, *A.* (footnote 115), para. 56.

[131] MARI, L'interesse superiore del minore, pp. 295-314; WALKER/BEAUMONT, Shifting the Balance Achieved by the Abduction Convention, p. 231-249.

> the court of the Member State having jurisdiction over the substance of the matter under this Regulation about the measures taken. The failure to provide such information should however not as such be a ground for the non- recognition of the measure. A court only having jurisdiction for provisional, including protective measures should, if seised with an application concerning the substance of the matter, declare of its own motion that it has no jurisdiction."

In sum, Brussels II*ter* Regulation recognises an extraterritorial effect, albeit limited in time, to a specific category of provisional and protective measures granted by the judge not having jurisdiction as to the substance. It is a significant innovation for interim measures of protection ordered in family matters and a substantial difference from provisional and protective measures in civil and commercial matters in general.

8. The Recognition and Enforcement of Foreign Provisional or Protective Measures

The question of recognition and enforcement of provisional or protective measures must be raised since such measures do not determine the substance of the dispute and are not final. Interim measures of protection granted in a Member State may nevertheless be recognised and enforced in other Member States under certain conditions. We will first identify the reference provision (8.1.), and then consider the recognition and enforcement of provisional or protective measures in civil and commercial matters, on the one hand (8.2.), and in family matters, on the other hand (8.3.).

8.1. The Reference Provision: Article 32 of the Brussels I Regulation

The recognition and enforcement of a foreign provisional or protective measure both follow the same rules as the recognition and enforcement of other types of foreign decisions. As a reference provision, Article 32 of the Brussels I Regulation stipulates that:

> "For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court."

This provision is identical to Article 25 of the Brussels Convention, to Article 25 of the Lugano Convention of 1988, and to Article 32 of the Lugano Convention of 2007. This provision was a source of inspiration for the subsequent EU PIL instruments. Even if the notion of decision has been moved to the article containing

all the definitions at the beginning of the subsequent EU PIL regulations, Article 32 of the Brussels I Regulation is nevertheless reproduced, sometimes with a few little variations, in Article 3 para. 1 point (g) of the Succession Regulation, in Article 2 para. 1 of the Maintenance Obligations Regulation, and in Article 3 para. 1 point (d) of the Matrimonial Property Regimes Regulation and of the Property of Registered Partnerships Regulation.

The same rule can also be found in point (a) of Article 2 of the Brussels I*bis* Regulation, but the new wording includes an additional paragraph on the recognition and enforcement of provisional and protective measures:

> "For the purposes of this Regulation: 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.
>
> For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement."

It is therefore clear that only provisional or protective measures granted by the court of a Member State having jurisdiction as to the substance of the case may be recognised and enforced in other Members States. Provisional and protective measures ordered by other courts are not to be recognised and enforced pursuant to the Brussels I*bis* Regulation.

The procedure for the enforcement of the measure is governed by the law of the Member State in which the recognition and enforcement is requested (Article 41 para. 1 of the Brussels I*bis* Regulation). When the measure is unknown in the law of that Member State, the measure "shall, to the extent possible, be adapted to a measure […] known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests" (Article 54 para. 1 of the Brussels I*bis* Regulation).[132] It is thus not possible to refuse the enforcement of a foreign provisional or protective measure for the sole reason that there is no identical measure in the law of the Member State where the enforcement is sought.

The wording of point (a) of Article 2 of the Brussels I*bis* Regulation is modelled on the CJEU case law regarding the recognition and enforcement of foreign provisional

[132] Recital 28 of the Brussels I*bis* Regulation specifies: "How, and by whom, the adaptation is to be carried out should be determined by each Member State".

or protective measures in civil and commercial matters.[133] It can be inferred that the regime of recognition of such measures between the Member States is the same in the various civil and commercial matters. However, the recognition and enforcement of interim measures of protection ordered in family matters follow specific rules prescribed by the Brussels II*bis* Regulation and, in the future, by the Brussels II*ter* Regulation.[134]

8.2. The CJEU Case Law Regarding the Recognition and Enforcement of Foreign Provisional or Protective Measures in Civil and Commercial Matters

The European Court of Justice case law that led to the introduction of point (a) of Article 2 of the Brussels I*bis* Regulation concerns primarily Article 25 of the Brussels Convention. Again, we must distinguish between interim measures of protection granted by a court having jurisdiction as to the substance of the case and those granted by a court without such a jurisdiction.

8.2.1. The Recognition and Enforcement of Measures Ordered by the Court Having Jurisdiction as to the Substance of the Case

It was clear from the beginning that the Brussels Convention allows the recognition and enforcement of foreign provisional or protective measures:[135]

> "Article 25 emphasizes in terms which could hardly be clearer that every type of judgment given by a court in a Contracting State must be recognized and enforced throughout the rest of the Community. The provision is not limited to a judgment terminating the proceedings before the court, but also applies to provisional court orders."

It also follows from the case law that provisional or protective measures granted in a Member State can be recognised and enforced in the other Member States.[136]

According to settled case law, the Brussels Convention applies to the recognition and enforcement of foreign decisions which respect the rights of defence and in particular the right to be heard. Indeed, the CJEU ruled that:[137]

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133 See *infra* 8.2.

134 See *infra* 8.3.

135 SCHLOSSER, Report, p. 126.

136 CJEU, 14.10.2004, *Maersk Olie & Gas A/S v Firma M. de Haan en W. de Boer*, C-39/02, ECR 2004 I-9657, ECLI:EU:C:2004:615, para. 46. ("[Article 25 of the Brussels Convention] is not limited to decisions which terminate a dispute in whole or in part, but also applies to provisional or interlocutory decisions.").

137 CJEU, *Denilauler* (footnote 61), para. 13. See also CJEU, *Maersk Olie & Gas* (footnote 136), para. 50.

> "All the provisions of the [Brussels] Convention […] express the intention to ensure that, within the scope of the Convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed. It is because of the guarantees given to the defendant in the original proceedings that the Convention, in Title III, is very liberal in regard to recognition and enforcement. In the light of these considerations it is clear that the Convention is fundamentally concerned with judicial decisions which, before the recognition and enforcement of them are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversary proceedings."

Therefore, when a court of a Member State grants a provisional or protective measure *ex parte*, i.e. without any prior possibility for the defendant to participate in the proceedings, the decision must be served on the defendant prior to enforcement in another Member State. It is indeed essential that the defendant has been given an opportunity to be heard, at least in the context of appeal proceedings against the decision granting the interim measure of protection. Failing that, the interim measure of protection cannot be recognised and enforced in the other Member States.

The CJEU also had the opportunity to examine the issue of the recognition and enforcement of a freezing order that sought not only to deprive one of the parties access to the assets concerned but was also directed at a third person who held rights over those assets. The court ruled that the recognition and enforcement of such an order cannot be regarded as manifestly contrary to public policy in the Member State in which enforcement is sought, or manifestly contrary to the right to a fair trial, in so far as that third person was effectively entitled to assert his or her rights before the courts of the State of origin.[138]

It is not disputed that foreign provisional or protective measures granted by the court of a Member State having jurisdiction as to the substance of the case are decisions that can be recognised and enforced in other Member States under the Brussels I Convention or Regulation.[139] Similarly, Recital 33 of the Brussels I*bis* Regulation states that:

> "Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, provisional, including

[138] CJEU, 25.5.2016, *Rudolfs Meroni v Recoletos Limited*, C-559/14, ECLI:EU:C:2016:349, para. 54.

[139] POCAR, Explanatory Report, No 127. ("Measures ordered by the court having jurisdiction as to the substance of the case by virtue of the [Brussels] Convention are undoubtedly decisions that must be recognised under Title III of the Convention.").

> protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law."

Recognition and enforcement of *ex parte* measures are therefore subject to the prerequisite that the defendant was effectively entitled to assert his or her rights before the court of origin. This condition is deemed to be fulfilled when the decision granting the measure has been served to the defendant prior to enforcement, i.e. served by the court of origin. This allows a reasonable balance to be achieved between the right to be heard of the defendant and the effectiveness of the right of access to justice of the plaintiff.[140] But it has to be said that this method reduces to a large extent the element of surprise. Thus, the plaintiff loses the main impact that he or she had expected with the provisional or protective measure. The non-recognition of the interim measures of protection deprives them of their practical value in cross-border cases.[141]

This rule is now also expressly provided for in point (a) of Article 2 of the Brussels I*bis* Regulation and in point (c) of Article 42 para. 2 of the Brussels I*bis* Regulation. Thus, the decision granting the measure must be served on the defendant prior to enforcement if the plaintiff wants the decision to have effect in other Member States. Otherwise, the plaintiff will have to request provisional or protective measures in all the Member States where they are needed. But it must be noted that, according to Recital 33, a Member State may apply its national law to recognise and enforce *ex parte* measures granted in another Member State even if the defendant was not aware of the order. There is no element in the Regulation that could explain this assessment. The adequacy of the application of national law is therefore questionable.[142]

In any case, the element of surprise can be preserved by asking for provisional or protective measures before a court not having jurisdiction as to the substance of the case in accordance with Article 35 of the Brussels I*bis* Regulation. But the recognition and enforcement of such interim measures of protection in the other Member States raise special problems.

[140] See DICKINSON, Provisional Measures, p. 564; WILKE, The impact of the Brussels I Recast, p. 136.

[141] WILKE, The impact of the Brussels I Recast, p. 136.

[142] See, on this topic, SANDRINI, Coordination, pp. 280-281; GARCIMARTIN, Provisional and Protective Measures, p. 65; WILKE, The impact of the Brussels I Recast, p. 137; NUYTS, Les mesures provisoires, p. 353.

8.2.2. The Recognition and Enforcement of Measures Ordered by Courts Not Having Jurisdiction as to the Substance of the Case

The CJEU ruled in the *Denilauler* case that:[143]

> "Article 24 does not preclude provisional or protective measures ordered in the State of origin pursuant to adversary proceedings – even though by default – from being the subject of recognition and an authorization for enforcement on the conditions laid down in Articles 25 to 49 of the Convention. On the other hand the conditions imposed by Title III of the Convention on the recognition and the enforcement of judicial decisions are not fulfilled in the case of provisional or protective measures which are ordered or authorized by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party."

Thus, it can be inferred from the European Court of Justice case law that provisional and protective measures granted under Article 24 of the Brussels Convention can be the subject of an enforcement order under the Convention.[144] Even if such measures are not normally intended to have effects abroad, when ordered by the court of the place where the interim measure of protection is to be enforced, they are nevertheless decisions that can be recognised and enforced under the Brussels I Convention or Regulation.

But the legal situation has gradually evolved. In the Explanatory Report of the Lugano Convention of 2007, it is stated that:[145]

> "[I]t seems natural that the decisions taken on the basis of the jurisdiction provided for by Article 31 should not, in principle, give rise to recognition and enforcement abroad."

It is then expressly stated in point (a) of Article 2 of the Brussels I*bis* Regulation that only provisional or protective measures granted by a court which "by virtue of this Regulation has jurisdiction as to the substance of the matter" can be recognised and enforced in the other Member States under this Regulation.[146]

Recital 33 of the Brussels I*bis* Regulation states clearly that:

> "Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the

[143] CJEU, *Denilauler* (footnote 62), para. 17.
[144] See also CJEU, *Mietz* (footnote 19), para. 56 (*a contrario*); CJEU, *Italian Leather* (footnote 87), para. 41.
[145] POCAR, Explanatory Report, No 127.
[146] See *supra* 8.1.

> effect of such measures should be confined, under this Regulation, to the territory of that Member State."

A provisional or protective measure ordered by a court not having jurisdiction as to the substance of the case must thus be restricted to assets in the territory of the forum. Such measure should not purport to have extra-territorial effects. The jurisdiction is indeed justified in this case by the fact that the measure must be rapidly effective to be efficient.[147] This seems rather contradictory with a recognition and enforcement procedure, even if it is significantly simplified as is the case under the Brussels I*bis* Regulation.

Therefore, should measures ordered pursuant to Article 35 of the Brussels I*bis* Regulation be recognised and enforced in another Member State, the recognition and enforcement procedure provided for in the Brussels I*bis* Regulation is not applicable. This restriction probably aims to avoid abusive forum shopping, by preventing the application for a provisional or protective measure before the court of a Member State for the sole and exclusive purpose of obtaining the recognition and enforcement of that measure in another Member State.[148] The CJEU had already pointed out with regard to the Brussels Convention that:[149]

> "[I]t is important to ensure that enforcement, in the State where it is sought, of provisional or protective measures allegedly founded on the jurisdiction laid down in Article 24 of the [Brussels] Convention, but which go beyond the limits of that jurisdiction, does not result in circumvention of the rules on jurisdiction as to the substance set out in Articles 2 and 5 to 18 of the Convention."

The risk of abuse makes it all the more important that the court must found its jurisdiction to grant interim measures of protection on a national rule of jurisdiction, pursuant to Article 35 of the Brussels I*bis* Regulation, when it does not have jurisdiction on the merits.

The question arises as to whether a provisional or protective measure can be recognised and enforced under the Brussels I*bis* Regulation when the measure has been granted by the court of a Member State whose jurisdiction was based on a general rule of jurisdiction of the Regulation (e.g. Article 7) but such court is not the one which is finally seized to determine the merits of the case (this jurisdiction could be based for example on Article 4). This assumption is not merely theoretical since

[147] Hence the prerequisite of the existence of a real connecting link between the subject of the measure sought and the territorial jurisdiction. See *supra* 5.2.4.

[148] BOGDAN, The Proposed Recast, p. 132; NUYTS, Les mesures provisoires, p. 350.

[149] CJEU, *Mietz* (footnote 19), para. 47. See also CJEU, *Van Uden* (footnote 19), para. 46.

the CJEU ruled that the jurisdiction to order interim measures of protection could be based on a rule of forum provided for in the Brussels Convention.[150]

In the above-mentioned situation, the court had jurisdiction as to the substance of the matter when the provisional or protective measure was ordered, but the plaintiff finally decided to start proceedings on the merits before the court of another Member State which also had jurisdiction as to the substance of the matter. Insofar as we believe that when the court which has ordered the interim measure of protection is not finally seized of proceedings on the merits of the case, the conditions set out by Article 35 of the Brussels I*bis* Regulation must henceforth be satisfied,[151] it must be concluded that such measures cannot be recognised and enforced under the Brussels I*bis* Regulation.[152] Therefore, the regime of recognition (or rather: non-recognition) of provisional and protective measures ordered by a court not having jurisdiction as to the substance of the case is the same when the jurisdiction of the court which ordered the measure must be based (even a posteriori) on Article 35 of the Brussels I*bis* Regulation.

But how to deal with the recognition issue during the period between the granting of the measure in a Member State and the day on which the plaintiff starts proceedings on the merits before the court of another State when both courts have potentially jurisdiction as to the substance of the matter? Assuming that the court had expressly indicated that it had based its jurisdiction for granting the provisional or protective measure on its national law and/or Article 35 of the Brussels I*bis* Regulation, it would not have been possible to recognise and enforce the measure under the Regulation. However, if the court is silent as to the basis of its jurisdiction, the CJEU admitted that there should be a presumption that the jurisdiction was based on the national law:[153]

> "[W]here the court of origin is silent as to the basis of its jurisdiction, the need to ensure that the [Brussels] Convention rules are not circumvented […] requires that its judgment be construed as meaning that that court founded its jurisdiction to order provisional measures on its national law governing interim measures and not on any jurisdiction as to substance derived from the Convention."

It can be inferred that it is up to the applicant for recognition and enforcement to prove that the court which granted the provisional or protective measure did not base its jurisdiction on Article 35 of the Brussels I*bis* Regulation and, therefore, that the measure can be recognised and enforced under the Brussels I*bis* Regulation. Should the applicant fail to prove this element, then the provisional or protective

150 CJEU, *Van Uden* (footnote 19), para. 29.
151 See *supra* 5.2.1.
152 Same opinion: NUYTS, Les mesures provisoires, p. 352.
153 CJEU, *Mietz* (footnote 19), para. 55.

measure will not be recognisable and enforceable under the Regulation. This is confirmed by point (b) of Article 42 para. 2 of the Brussels I*bis* Regulation which specifies that the applicant for recognition and enforcement shall provide the competent enforcement authority with a certificate stating in particular that the court (or, at least, the Member State) which ordered the measure had jurisdiction as to the substance of the matter. This also means that the jurisdiction of the court of origin may be reviewed when recognising and enforcing provisional and protective measures. In other words, point (a) of Article 2 of the Brussels I*bis* Regulation makes an exception to the general rule that the jurisdiction of the court of origin may not be reviewed during the recognition and enforcement procedure (Article 45 para. 3 of the Brussels I*bis* Regulation).[154]

Therefore, the former CJEU *Denilauler* case law is no longer valid in civil and commercial matters. Provisional or protective measures are now "judgments" entitled to recognition under the Brussels I*bis* Regulation only if the court which ordered them had jurisdiction as to the substance of the matter under the Regulation.

We must also assume that a provisional or protective measure ordered by a court of a Member State not having jurisdiction as to the substance of a case cannot be recognised and enforced in another Member State. Such measures given by a Member State are not intended to circulate freely in the other Member States. The question as to whether the recognition and enforcement procedure could be conducted under the national law is yet to be answered. In our view, Article 35 of the Brussels I*bis* Regulation and Article 2 point (a) of the Brussels I*bis* Regulation put in place a mechanism which is binding as such on the Member States. Therefore, a Member State should not recognise and enforce provisional or protective measures ordered by a court not having jurisdiction as to the substance of the case by applying its national law.[155]

The indirect consequence of the extinguishment of the possibility of obtaining the enforcement of provisional or protective measures in the other Member States is that the plaintiffs must be very careful in the choice of the State where they initiate proceedings on the merits. The range of interim measures of protection provided for in the national laws of the Members States is now one of the main criteria that plaintiffs use to select the forum.[156]

[154] However, the question arises whether the enforcement authority could restrict this review to a prima facie verification that the court of origin has indeed confirmed in the certificate that it had jurisdiction as to the substance of the matter. See NUYTS, Les mesures provisoires, p. 352.

[155] Same opinion: GARCIMARTIN, Provisional and Protective Measures, p. 78; HEINZE, Reform of Brussels I, pp. 614-615; WILKE, The impact of the Brussels I Recast, p. 135.

[156] Same opinion: DICKINSON, Provisional Measures, p. 543; NUYTS, Les mesures provisoires, pp. 350-351.

As regards the recognition and enforcement of provisional or protective measures in civil and commercial matters, we can conclude that these measures have an extra-territorial effect only if they have been granted by the court having jurisdiction as to the substance of the matter and they have been served to the defendant prior to enforcement. We will now see if the same restrictions apply to the recognition and enforcement of interim measures of protection in family matters.

8.3. The Recognition and Enforcement of Foreign Provisional or Protective Measures in Family Matters, with a Focus on Measures Aimed at the Protection of Children

The structure of the system of recognition of provisional measures, as described above, has the advantage of being extremely clear and thus ensures legal certainty. The Brussels II*ter* Regulation marks an additional step with regard to the recognition and enforcement of provisional measures in so far as it is more explicit than the other EU PIL instruments in this respect since it codifies part of the *acquis* on recognition and enforcement of provisional measures.

The system of recognition and enforcement of provisional measures in family matters is, in principle, coherent with the reference one[157] in that provisional measures pronounced by the court that have jurisdiction as to the substance of the case always carry, in principle, an extraterritorial effect. This is true for the Brussels II*bis* Regulation as well as the Brussels II*ter* Regulation as specified by point (b) of its Article 2 para. 1. The condition for an *ex parte* measures to circulate, that prescribes its service to the defendant prior to enforcement, is also present in both instruments.[158]

On the other hand, following a case law rule, well established since the first *Purrucker* case, the system of recognition and enforcement prescribed by chapter III of the Brussels II*bis* Regulation does not apply to "provisional measures, relating to rights of custody, falling within the scope of Article 20 of [the Brussels II*bis*] regulation".[159] This rule will still be valid in the scope of the Brussels II*ter* Regulation.

Despite the foreseeability ensured by such a system, it has encountered critics of excessive formalism with regards to provisional measures pronounced in order to protect children, a subject that requires an attentive scrutiny of the actual family situation involved.[160] Differences in the system of recognition and enforcement

[157] See *supra*, 8.2.2.

[158] See Art. 2 para. 1, last sentence of the Brussels II*ter* Regulation.

[159] CJEU, *Purrucker* (footnote 113), para. 26.

[160] MERLIN, Le misure provvisorie, *passim*, regrets the scarce attention to the needs of litigants already within the Brussels I system, that may eventually lead a party to seek

seem thus justified *ratione materiae* when it comes to protect – instead of property or valuables – the physical person of a child.

Among these critics, we will recall a suggestion of Advocate General Eleanor Sharpston in the second *Purrucker* case. In that occasion, she had stressed that "[a]rticle 20 [of the Brussels II*bis* Regulation] creates no bar to seising the court having substantive jurisdiction under the Regulation, whose decisions will immediately supersede those taken on the basis of Article 20".[161] Accordingly, in her view there could not be a possible "danger of undermining the overall scheme of the Regulation or the general rule conferring jurisdiction on the courts of the Member State of the child's habitual residence if provisional measures taken in the circumstances set out in Article 20 are recognised or enforced in Member States other than that in which they were issued"[162] at least until the baton is passed to the *other* jurisdiction concerned by the dispute. The lack of any kind of extraterritorial effect, on the opposite, carries the risk that "the efficacy of measures taken [ex Article 20] – which are, by definition, urgently necessary – would be potentially easy to avoid […] if their enforceability were to evaporate as soon as the child was taken across a national border".[163]

In this respect, following the experience of EU Regulation 606/2013,[164] an interesting option would be that of elaborating a specific regime for the recognition and enforcement of provisional and protective measures that affect children, instead of remaining with a general rule tailored on bad practices experienced in the very specific context of child abduction cases.[165]

The Brussels II*ter* Regulation addresses in part these critics, but it opts for a narrower exception, that does not impair the prevailing principle through which the

provisional measures in every country where his or her counterparty may be present or have property. Similar critics, but with a focus on family matters, are expressed by HONORATI, Purrucker I e II, p. 71. Very critical on the inflexibility of the repartition of jurisdiction between the courts involved in proceedings of wrongful removal or retention of a child is PRETELLI, Critical Assessment of the Legal Framework Applicable to Parental Child Abduction, pp. 82-83.

161 Opinion of Advocate General SHARPSTON, delivered on 20 May 2010, *Bianca Purrucker v Guillermo Vallés Pérez*, Case C-256/09, ECR 2010 I-7353, ECLI:EU:C:2010:296, para. 169-170.

162 *Ibidem.*

163 *Ibidem.*

164 Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181, 29.6.2013, p. 4.

165 According to DUTTA, Cross-border protection measures, p. 180-184, a protection measure falling within the scope of the Protection Measures Regulation (footnote 164) could constitute an "adequate arrangement" accompanying a return order on grounds of Art. 11 para. 4 of the Brussels II*bis* Regulation. In that case, such measure would circulate under the Protection Measures Regulation.

1980 Hague Child Abduction Convention is interpreted: the need to ensure a prompt return of each child wrongfully removed or retained, regardless of the reasons of the removal or retention.[166] It thus introduces an exception to the principle of strict territoriality of provisional measures. In this respect, a provisional or protective measure ordered by a court of a Member State not having jurisdiction as to the substance of the matter, but taken in international child abduction case and aimed at protecting a child from a grave risk of harm – a risk targeted by point (b) of Article 13 para. 1 of the 1980 Hague Convention – should have the extraterritorial effect it needs and should continue to apply until overturned by a measure taken by the court having jurisdiction over the substance of the matter. This results from the combined application of Articles 2 para. 1 point (b), 27 para. 5 and 15 of the Brussels II*ter* Regulation.

The procedure for the enforcement of the measure is governed by the law of the Member State in which the recognition and enforcement is requested. This classic rule is in Article 51 para. 1 of the Brussels II*ter* Regulation and in Article 47 para. 1 of the Brussels II*bis* Regulation. The Brussels II*ter* Regulation specifies that decisions concerning children – in particular decisions on rights of access and decisions entailing the return of a child wrongfully removed – are "privileged decision" in that they enjoy a more expeditious enforcement.[167]

In this respect, Article 53 para. 3 of the Brussels II*ter* Regulation specifies, in derogation of the reference rule stating that a partial enforcement is always possible, that interim measures of protection pronounced in a decision on the return of a child wrongfully removed, necessarily need to be enforced and implemented with the decision on return. The return of a child exposed to a risk of harm is *per se* difficult to justify – the only possible argument being that of deterrence[168] – it is thus essential that implementation of such a hazardous return does not take place with the interim measures of protection accompanying it. This is a significant improvement produced by the recast of the Brussels II*bis* Regulation.

[166] BEAUMONT/MCELEAVY, The Hague Convention on International Child Abduction, p. 30 and the references in footnote 10; RIPLEY, The Grave Risk Exception in the Hague Child Abduction Convention, p. 464-.... See also PRETELLI, Critical Assessment of the Legal Framework Applicable to Parental Child Abduction, p. 30-32 and 86-89, arguing that the needs of "deterrence" need to be resized as a consequence of the , enlargement of the scope of the notion of "child abduction" that now embraces cases of "wrongful removal or retention" of children.

[167] See Art. 42 to 50 of the Brussels II*ter* Regulation.

[168] LINDHORST/EDLESON, Battered Women, Their Children, and International Law, *passim*.

9. Conclusion: a Regime of Provisional and Protective Measures Generally Coherent

With regard to the notion of provisional and protective measures, the system built by the EU PIL Regulations does not need to differentiate civil and commercial matters from the family matters which are covered by the Brussels II*bis* Regulation and will soon be covered by the Brussels II*ter* Regulation. In the silence of the text and with the inspiring *dicta* of the CJEU, we may conclude that a comprehensive definition of "provisional, including protective, measures" is apt to encompass the measures that are characteristic in family matters, as the taxonomy adopted by the EU PIL Regulations confirms.

Such a notion includes all measures granted on the basis of the appearance of right requiring protection – *fumus boni iuris* – whenever there is a danger in the wait necessary for a decision on the merits to be issued – *periculum in mora*.

The general notion encompasses a series of measures and is embodied in a rule, that is systematically copy-pasted in all EU PIL instruments. However, the general rule is supplemented by special rules applicable to particular types of interim measures of protection. In the present article, we have mentioned the EAPO measures and measures for the protection of children.

To sum up, the general rule on provisional and protective measures, common to the EU PIL Regulations in force, prescribes a two-track system.

In principle, the Regulations examined in the framework of the present paper are all coherent in prescribing that:

i) the court having jurisdiction as to the substance of the case may issue provisional and protective measures;

ii) the decision granting provisional and protective measures on the basis of the general heads of jurisdiction on the merits are "decisions" subject to recognition and enforcement abroad;

iii) the rules on jurisdiction on the merits do not hinder the taking of provisional and protective measures by a court not having jurisdiction on the merits, but capable of enforcing the measures that it has granted within the borders of its own jurisdiction;

iv) the court not having jurisdiction as to the substance of the case must be empowered with jurisdiction to take the provisional and protective measure under its own domestic law, since the specific rules on provisional and protective measures of the EU PIL Regulations do not create a specific head of jurisdiction for provisional and protective measures.

As regards the jurisdiction of the court not having jurisdiction as to the substance of the case, the rules of the Brussels II*bis* and II*ter* Regulations present certain incoherencies with the reference provision of the Brussels I system.

In the first place, the CJEU has advanced that, for the system to be efficient, the definition of provisional and protective measures granted by the court not having jurisdiction as to the substance need to receive a narrow interpretation and need to be subject to strict conditions such as the real connecting link and the urgency. Hence, they should not be enforced abroad.

On the other hand, interim measures targeting persons, especially when aimed at protecting children, have a series of specificity, that explain the departure from the copy-paste rule – the reference rule – and the drafting of special rules. These thoughts are at the origin of the distinctive features of Article 20 of the Brussels II*bis* Regulation that have been further developed in Article 15 of the Brussels II*ter* Regulation. With regard to the latter, the specificities of interim measures of protection granted by a court not having jurisdiction as to the substance of the case may be resumed in the following rules:

i) Interim measures issued by the court not having jurisdiction as to the substance of the case may be granted on the basis of national law on a subject-matter that is excluded from the scope of the Brussels II*ter* Regulation and yet be governed by this instrument when the measure is connected to a proceeding falling within its scope.

ii) Interim measures issued by the court not having jurisdiction as to the substance of the case may have an extraterritorial effect when it is in the best interests of the child that there is no gap in jurisdiction and an authority is in charge of its protection (reference is made to the necessity of preventing a grave risk of harm as specified in Article 27 para. 5 of the Brussels II*ter* Regulation).

iii) As a result of the admission of an extraterritorial effect of the interim measure of protection, a coordination between the courts involved is foreseen and special rules aim at facilitating it (see Article 12 of the Brussels II*ter* Regulation).

iv) Consequently, recognition and enforcement of provisional measures is limited to those pronounced by the court having jurisdiction as to the substance of the case, with the exception of measures aimed at protecting the child from a grave risk of harm (see Article 51 of the Brussels II*ter* Regulation).

To sum up, in family law matters, the European legislator differentiates between measures targeting credits or property – maintenance obligations, matrimonial property, etc. included – and measures that may interfere with self-determination and freedom of movement of persons, including children in family law. The reference rule, which appears consolidated, has not been copy-pasted to family law provisional measures since these necessarily need to reflect the underlying principle

of the best interests of the child. A principle that is, needless to say, absent in civil and commercial matters.

Generally speaking, the regime of provisional and protective measures in the European private international law is general in that it sets uniform rules of coordination of national civil procedural rules. Similarly, it does not interfere significantly with national schemes of provisional and protective measures. National rules appear to play in practice a decisive role, both as rules establishing grounds for jurisdiction and as rules designing specific provisional and protective measures. In other words, national rules serve both as rules on which the judge will base its jurisdictional power to issue provisional and protective measures, and as rules that provide a specific interim relief that the judge may grant to the claimant.

However, a new form of coordination is emerging by the establishment of specific European provisional and protective measures, such as the European Account Preservation Order (EAPO). The success of these "transversal regulations", setting uniform civil procedural rules, is still under scrutiny.[169] It is however possible that other specific interim measures of protection, enjoying a uniform civil procedure in the whole Area of Freedom, Justice and Security, will be adopted in the future, taking the EAPO Regulation as a model and concurring with provisional and protective measures available in national laws.

[169] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1; Regulation (EC) No 861/2007 of The European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure OJ L 199, 31.7.2007, p. 1.

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