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International Judicial Cooperation in Civil Matters

Brussels II *(bis)* Regulation and Provisional Measures

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I. Introduction. General aspects on civil cooperation

In the space of integration and cooperation of the European Union (EU), the issue of solving problems associated to the fading of state borders appeared inevitable, as in all long-term partnerships for that matter. In the years 1960s-1970s, European representatives from the Council and the European Commission set forth the question of how justice related to Community subjects should function in State Members for a more efficient protection of the goals avowed by the European edifice. Far from reaching a compromise on a European judicial code for the unification of civil procedure[1], the answer bore the name of "judicial cooperation in civil matters".

Pursuant to article 220[2] of the Treaty establishing a European Economic Community (EEC), the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels I Convention)[3] was adopted, representing the first step in building a judicial cooperation system in the EU. It was in 1992 under the Treaty of Maastricht on European Union that civil cooperation was made possible through article K.3, within the pillar of Justice and Home Affairs (JHA). Under the Treaty of Amsterdam, judicial cooperation in civil matters was transferred to the first pillar (the European Communities), allowing the adoption of Regulations and, thus, a step forward towards a better integration in this field was made.

In May 1998, civil cooperation was extended to matrimonial proceedings, through the Brussels II Convention, formally named the Convention on Jurisdiction and Enforcement of Judgments in Matrimonial Matters. The project did not include parental responsibility matters.

"Individuals (...) should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States". These were the conclusions of the Tampere European Council of October 1999, which would soon lead to the transformation of the Brussels II Convention into the Brussels II Regulation – 1347/2000 of 29 May 2000. In fact, the Convention never did come into force, as the Commission took advantage of the possibility of adopting regulations in the field, and

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[1] The Storme Commission, instituted by the European Parliament for the purpose of unifying civil procedure and elaborating a judicial code, reached the conclusion that differences between judicial systems and legal cultures in State Members were too important for an efficient European harmonisation (www.storme.be/euroius.html).

[2] *„Member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals: (...) the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards."*

[3] It was agreed by the Member States with the goal of increasing economic efficiency and promoting the single market by harmonising the rules on jurisdiction and preventing parallel litigation.

incorporated the Convention in the above-mentioned Regulation. Subsequently to constant criticism especially concerning its provisions regarding only marital children of both spouses, this Regulation was repealed by Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, hereafter Brussels II *(bis)* Regulation.

Thus, an organization initially founded for economic purposes gradually reached more intimate aspects of life, such as divorce and parental responsibility. The EU involvement in such matters can only strengthen the ties between Member States, regardless of their economic or social nature, and increase the dependence on European instruments, eventually leading to a more efficient integration.

The preamble of the Brussels II *(bis)* Regulation expressly evokes the principle of mutual recognition of judicial decisions, along with other values to be taken into consideration such as the best interests of the child and the priority of an amicable resolution of family disputes. It finally refers to the Charter of Fundamental Rights of the European Union, henceforward the Charter, asserting the respect for the fundamental rights of the child as its cornerstone.

Furthermore, pursuant to these principles, the Regulation offers the possibility for national authorities to take provisional, including protective, measures in respect of persons or assets, in urgent cases, contrary to its provisions regarding jurisdiction. Provided by article 20, these measures are in theory temporary and they cease 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.

In addition to this, following the references of this preamble, one notices that article 24 paragraph 3 of the Charter enshrines the right of a child "to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests". Moreover, article 52 provides that any rights corresponding to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the meaning and scope of those rights are the same as in the latter convention. Otherwise put, Brussels II *(bis)* Regulation is to be interpreted not only in the light of the Court of Justice of the European Union (ECJ) case law as all EU law, but also in that of ECHR case law.

The present paper sets out to analyse as much as possible the consequences of EU law and ECJ case law with reference to the provisional measures pursuant to article 20 of the Brussels II *(bis)* Regulation, also taking into consideration the influence of the European Court for Human Rights (henceforth ECtHR). The analysis will focus on the consequences of provisional measures related especially to persons, leaving aside those concerning assets.

First of all, it will present several of the few preliminary decisions rendered by the ECJ on the Brussels II *(bis)* Regulation and its provisional measures, along with relevant examples of national legislation, after which it will pass onto ECHR case law and its relevant implications, to finally draw the most important consequences and conclusions related to the topic.

II. Legal context and ECJ case law

Article 20 of the Brussels II *(bis)* Regulation states that "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". Otherwise put, this article consists in an exception from the general jurisdiction rules provided by the Regulation taking into account a higher purpose, which is the need for a certain measure to be taken speedily rather than by a court that formally has jurisdiction under the Regulation.

The second paragraph of article 20 sets down the rule of transience, as these measures "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".

ECJ has not had the opportunity to create an abundant case law in respect of the Brussels II *(bis)* Regulation, but it began to establish basic principles in several decisions, among which one can find reference to article 20 of the Regulation.

These principles can also be interpreted through *obiter dicta* in case law relating to other Regulations in civil cooperation, such as Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and help practitioners to better understand this emerging case law. Thus, case law on Regulation 44/2001 is relevant to some extent for the application of the Brussels II *(bis)* Regulation.

The present chapter will deal with the main issues concerning the provisional measures of the Brussels II *(bis)* Regulation. Thus, it is necessary to analyse aspects relating to jurisdiction and its potential implications and complications such as lis pendens and res judicata, to the conditions that have to be met according to ECJ for these provisional measures to be taken, together with the risks of such lenient rules, relevant provisions in national legislations, and also an analysis of the frame of execution of such measures.

A. Jurisdiction. Res judicata. Lis pendens

Article 20 paragraph 1 of the Regulation provides that the courts of a Member State in which the child is present are entitled, under certain conditions, to take such provisional, including protective, measures as may be available under the law of that State, even if that regulation confers jurisdiction as to the substance of the matter to a court of another Member State.

As the ECJ ruled, this provision is not designed to be a rule which confers substantive jurisdiction. Consequently, the provisional measures cease to have effect when the competent court has taken the measures it considers appropriate.[1]

Thus, Article 20 paragraph 1 covers only measures adopted by courts which do not base their jurisdiction on one of the articles in Section 2 of Chapter II of the Regulation. Such provisional measures can be taken by the courts of a Member State in respect of persons or assets located in that Member State. The national court must verify if the presence of the child in that Member State is due to an unlawful removal, because, if so, it is not entitled to take such provisional measures. It is necessary that the national court proceed at this verification as Article 20 paragraph 1 cannot be interpreted in such a way that it disregards the fundamental right set out in Article 24 paragraph 3 of the Charter, to maintain on a regular basis a personal relationship and direct contact with both parents of the child. This analysis is also useful in order to avoid the risk of an eventual forum shopping.

Under Article 20 paragraph 1, the provisional measures are taken according to national law and, if an urgent measure is adopted in the Member State where the child had been unlawfully removed, the parent abducting the child could choose a Member State in which to emigrate taking into consideration its internal legislation regarding such provisional measures, which could ultimately lead to forum shopping.[2]

As is apparent from the wording of Article 20 paragraph 1, such provisional measures can also be taken by courts which do not have jurisdiction as to the substance of the matter. In that it is an exception from the system of jurisdiction laid down by the regulation and it must be strictly interpreted.

The possibility for the courts referred to in this provision to take such provisional or protective measures is limited, as three cumulative conditions have to be satisfied in order to make a decision granting provisional measures, presented in the following section.

It results that it is not sufficient for a judgment in which it is not clearly mentioned that it has been adopted by a court which has or claims to have substantive jurisdiction to fall

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[1] Case C-256/09, *Purrucker v. Vallés Pérez* [2010] ECR I-0000, par.61 (http://curia.europa.eu).

[2] Case C-211/10 PPU, *Doris Povse v. Mauro Alpago* [2010] – nyr, par.44.

within the scope of the Article 20 paragraph 1, but it will fall within this scope only if it satisfies the conditions laid down by this provision.[1]

However, Article 20 paragraph 1 does not prohibit the courts which have substantive jurisdiction to take provisional measures. However, the substantive jurisdiction of the court which ruled a provisional measure does not have any importance for the effect of this judgment or for the possibility of a court from another State Member to take subsequent provisional measures, as what really matters is whether the new measures fall or not within the scope of Article 20 paragraph 1.

In view of the urgent and temporary character of the provisional measures, a judgment within the scope of the Article 20 paragraph 1 is not vested with force of res judicata. Therefore, a measure falling within the scope of that provision may prevail over an earlier judgment adopted by a court of another Member State, even one which has substantive jurisdiction. On the other hand, a judgment which does not fall within the scope of the Article 20 paragraph 1 because it does not satisfy the conditions laid down by this provision cannot take precedence over such an earlier judgment[2].

This is valid only if both judgments lay down provisional measures, because a final decision rendered by a court having jurisdiction according to the general rules of the Regulation has the force of res judicata as to a following provisional measure[3].

The fact that a provisional measure adopted on a matter of parental responsibility has not the force of res judicata has also consequences on the existence of lis pendens when the first court is seised only for the purpose of its granting provisional measures within the meaning of Article 20 paragraph 1 and the second court, which has substantive jurisdiction, is seised with an action for obtaining the same measures, but by final decision.

In a recent case[4], the ECJ ruled that the provisions of Article 19 paragraph 2 are not applicable in these circumstances.

Article 19 paragraph 2 provides that where proceedings relating to parental responsibility concerning the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay the proceedings until such time as the jurisdiction of the court first seised is established.

As the ECJ has previously ruled in the context of the Brussels Convention, the concept of the "cause of the action" has to be interpreted as comprising the facts and the rule of law relied on as the basis of the action.[5]

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[1] Case C-256/09, *Purrucker v. Vallés Pérez* [2010] ECR I-0000, par. 78.

[2] Case C-256/09, *Purrucker v. Vallés Pérez* [2010] ECR I-0000, par. 81.

[3] Case C-211/10 PPU, *Doris Povse v. Mauro Alpago* [2010] – nyr, par.79.

[4] Case C-296/10, *Bianca Purrucker v. Guillermo Vallés Pérez* [2010] ECR I – 0000, par.86.

[5] Case C-406/92, *Tatry v. Maciej Rataj* [1994] ECR I-5439, par.39.

The objective of Article 19 paragraph 2 of the Regulation is to avoid the existence of two or more judgments ruled in cases with the same cause of action. Lis pendens within the meaning of Article 19 paragraph 2 can therefore exist only where two or more proceedings with the same cause of action are pending before different courts and the applicants claim to obtain a judgment which can be recognized in another Member State than that of the court with substantive jurisdiction.[1]

This risk cannot appear in the application of Article 20 of the Regulation as this provision ensures that there cannot be a contradiction between the decision made in a judgment granting provisional measures and the judgment ruled by the court which has jurisdiction as to the substance of the matter, since it provides that the provisional measures within the scope of Article 20 paragraph 1 shall cease to apply when the court with substantive jurisdiction has taken the measures it considers appropriate.

However, the court second seised has the obligation to verify whether, under the national law of the court first seised, the claim relating to provisional measures or even the decision made in a judgment granting such measures and the claim brought subsequently relating to matters of substance are linked one to the other so that they constitute a procedural unit.

The court second seised can fulfil this obligation by seeking information from the parties or directly from the court first seised as the application of the Regulation is based on judicial cooperation and mutual trust. If, despite the efforts made, it has no information which allows to determine the cause of action of the proceedings brought before the other court and if, in view of the interest of the child, the ruling of a judgment is required, the court second seised, after the expiry of a reasonable period, has to proceed with consideration of the action brought before it. The duration of that reasonable waiting period must take into account the best interests of the child in the specific circumstances of the proceedings concerned.[2]

B. The main characteristics of provisional measures

As previously presented, under Article 20 paragraph 1 of the Brussels II *(bis)* Regulation, in urgent cases, courts of a Member State can adopt urgent transitory measures. It follows from the very wording of Article 20 paragraph 1 that the adoption of measures in matters of parental responsibility by courts of Member States which do not have jurisdiction as to the substance of the matter is subject to three cumulative conditions, namely: the

[1] Case C-296/10, *Bianca Purrucker v. Guillermo Vallés Pérez* [2010] ECR I – 0000, par.72.

[2] Case C-296/10, *Bianca Purrucker v. Guillermo Vallés Pérez* [2010] ECR I – 0000, par.81-83.

measures concerned must be urgent; they must be taken in respect of persons or assets in the Member State where the court seize of the dispute is situated, and they must be provisional[1].

These measures are applicable to children who have their habitual residence in one Member State but stay temporarily or intermittently in another Member State and are in a serious situation likely to endanger their welfare, including their health or their development, thereby justifying the immediate adoption of protective measures.

While, in its case law, the ECJ did not reveal how the conditions of urgency and temporary effect of the measure should be interpreted, it however indicated the distinctive meaning of the term "persons" in some circumstances. Therefore, a provisional measure ordering a change of custody of a child should be taken not only in respect of the child but also in respect of the parent to whom custody of the child is now granted and of the other parent who, following the adoption of the measure, is deprived of that custody.[2]

The ECJ took into consideration the right set out in Article 24 paragraph 3 of the Charter, to maintain on a regular basis a personal relationship and direct contact with both parents of the child. As mentioned in the previous section, Article 20 paragraph 1 cannot be interpreted in such a way that it disregards this fundamental right. In the context of custody, this right should be understood as also offering the possibility to both parents to maintain on a regular basis a personal relationship and direct contact with their child.

The Regulation does not include substantive provisions concerning the type of urgent measures which must be applied. Article 20 paragraph 1 provides that the provisional or protective measures are those "available under the law of that Member State". In this context, it 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.

Another issue that has been solved was whether after a protective measure has been taken, the case must be automatically transferred to the court of another Member State having jurisdiction. Under Article 15 paragraph 1 (b) of the Brussels II *(bis)* Regulation, the court of a Member State having jurisdiction as to the substance of the matter may, if it considers that a court of another Member State with which the child has a particular connection would be better placed to hear the case, request a court of that State to assume jurisdiction. In the context of provisions relating to the rules of jurisdiction in matters of parental responsibility, Article 15 is the only one to provide a request to the court of another Member State to assume jurisdiction.

Consequently, the Regulation does not require the national courts which adopt provisional or protective measures to transfer the case to a court of another Member State after

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[1] Case C-523/07, *A.* [2009] ECR I-2805, par. 47.

[2] Case C-403/09 PPU, *Jasna Detiček v. Maurizio Sgueglia* [2009] ECR I-000, par. 51.

those measures have been taken[1]. Still, there is a difference between the obligation to transfer the case to a court that has jurisdiction and the obligation to inform this court, in the best interest of the child, as stated by the ECJ: "where the court of a Member State does not have jurisdiction at all, it must declare of its own motion that it has no jurisdiction, but is not required to transfer the case to another court. However, in so far as the protection of the best interests of the child so requires, the national court which has declared of its own motion that it has no jurisdiction must inform, directly or through the central authority designated under Article 53 of the Regulation, the court of another Member State having jurisdiction."[2]

It must also be said that, when the protection of the best interests of the child so require, the national court which has taken provisional measures must inform, directly or through the central authority designated under Article 53 of the Regulation, the court of another Member State having jurisdiction.

The provisional measures will be taken under the law of the Member State, but the Regulation does not distinguish if it refers to procedural or also substantive law. Most reasonably, one should consider it as including both procedural and substantive law, because *ubi lex non distinguit nec nos distinguere debemus (*where the law does not distinguish, we ought not to distinguish*)*.

As Article 20 refers to national law, it is hence necessary to examine some of the aspects of Member States legislation relating to the topic, showed in ECJ case law, along with pertinent Romanian statutes.

C. National legislation

The Regulation does not specify the type of measures courts can adopt and, so, given its phrasing, an overview of national legislations can be an indication of how Article 20 can be put into practice.

Under Article 1 paragraph 2 (b) and (c) of the Regulation, an emergency situation in which a child with EU citizenship can find himself in Romania can be the following: a family travels by car on holiday from Member State A to Romania. In Romania they are involved in a car accident and they are all injured. The child suffers minor injuries, but both his parents are in a coma. The Romanian authorities must take immediate provisional measures to protect the child which has no relatives in Romania. According to the Regulation, the fact that the courts from Member State A have jurisdiction as to the substance of the matter does not prevent

[1] Case C-523/07, *A*. [2009] ECR I 2805, par. 56.

[2] Case C-523/07, *A*. [2009] ECR I 2805, par. 66-71.

Romanian courts from taking such measures. However, they cease to apply when the court of Member State A has taken the measures it considers appropriate.

In such situations, the state authorities will place the child in a special protection service and, if he owns assets, they will appoint a person to administrate them until the court that has jurisdiction renders its decision. This is done according to Law No. 272/2004 on the protection and promoting of children's rights[1] that allows special provisional measures to be taken, such as the placement of a child in a foster family or in institutional care, measures established by Article 55. Article 56 of this law sets forth the cases in which placement measures can be taken and one of them brings up the situation of the child who cannot be left in the care of his parents, without any culpability of the latter.

In the Romanian legal system, a provisional measure can be taken through an interlocutory injunction, stipulated by Article 581 of The Civil Procedure Code. This is a special procedure whereby the court may order interim measures in urgent cases, to preserve a right that could be damaged as a consequence to the delay, to prevent imminent and irreversible damage, or to remove obstacles that may arise during the enforcement of a judgment.

Another possible situation is the one found in Case No. 4861/301/2009 of Bucharest Court of First Instance No. 3[2]. It was the case where taking a provisional measure awarding temporary custody of the child is necessary during a pending divorce.

Bucharest Court of First Instance No. 3 was seised with a divorce complaint, while another divorce complaint was pending before the Court of District Josefstadt, Vienna, Austria since 2006, which was the court first seised.

In addition to this, a trial for rights of sole custody and rights of access regarding the child MMG was pending before the Court of District Josefstadt, Vienna since 2005. This court adopted, among other measures, the withdrawal of the rights of custody, awarded initially to the mother, and granted sole custody to the father. Both the initial measure and the latter were provisional measures taken temporarily until the procedures regarding custody become final.

Taking into consideration the development of the proceedings, the Romanian court considered that the facts that initially justified the request for an interlocutory injunction no longer existed. Therefore, the request was dismissed as lacking an object.

In the case set forth, the Romanian court acted similar to the ECJ in the *Detiček* case in which it was established that Article 20 of the Regulation does not allow, in certain circumstances, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is on the territory of that Member State to one

[1] Published in The Official Journal No. 557/23.06.2004

[2] Decision No. 9353/25.08.2009, http://portal.just.ro.

parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment temporarily giving custody of the child to the other parent, and that judgment has been declared enforceable on the territory of the former Member State[1].

In other Member States, one can find similar provisions, as it was revealed by the ECJ in its decisions.

For instance, in Slovenia, legislation at the moment of the proceedings in 2009, stipulated that: "In the course of proceedings relating to matrimonial disputes and disputes in the relationships between parents and children the court may, on application by a party or of its own motion, order provisional measures concerning the custody and maintenance of children of both parties and provisional measures concerning the revocation or limitation of the right of access or concerning the manner in which the right of access is exercised. The provisional measures referred to in the previous paragraphs shall be adopted on the basis of the law governing protective measures." (Article 411 (1) and (3) of the Code of Civil Procedure).[2]

In Finland, in 2007, according to paragraph 15 (1) of the Law on Social Care ('Law 710/1982'), in urgent cases or where the circumstances so require, a municipality is to ensure that institutional care and other social services are provided for persons staying in its area other than municipal residents. Also, under paragraph 16 of the Law on the Protection of Children ('Law 683/1983'), a social welfare body of the municipality must provide assistance without delay where the health or development of a child or young person is endangered or not safeguarded by the conditions in which he is being raised.[3]

The Swedish Care of Young Persons Act lays down measures for the protection of children, such as taking into care and placement against the will of the parents. If the health or development of the child is at risk, the social welfare board of the municipality may request the Länsrätt (County Administrative Court) to adopt appropriate measures. In urgent cases, that board may itself order those measures, subject to their confirmation by the Länsrätt.[4]

Thus, briefly looking over some of the Member States legislation, as presented in European case law, it is noticeable that there is sufficient legal internal basis for the adoption of provisional measures. Some of them, such as Romania and Slovenia, give jurisdiction for these cases to judicial courts, while some – as Sweden – for purposes of speediness, allow administrative authorities to adopt protective measures in extremely urgent circumstances.

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[1] Case C-403/09 PPU, *Jasna Detiček v. Maurizio Sgueglia* [2009] ECR I-000, par. 61.

[2] Case C-403/09 PPU, *Jasna Detiček v. Maurizio Sgueglia* [2009] ECR I-000, par.13.

[3] Case C-523/07, *A.* [2009] ECR I 2805, par.12-13.

[4] Case C-435/06, *C.* [2007] ECR I-10141, par. 12.

D. Enforcement of provisional measures

As stated in Recital 21 of the Brussels II *(bis)* Regulation, the recognition and enforcement of judgments from a Member State handed down in matters of parental responsibility should be based on the principle of mutual trust.

This principle implies that the court of a Member State which has to make a decision in a matter related to parental responsibility must determine whether it has jurisdiction according to Articles 8 to 14 of the Regulation and it must clearly mention this in the judgment. Furthermore, in view of the principle of mutual trust, as stated in Article 24 of the Regulation, the courts of another Member State where the recognition and enforcement is claimed may not review the assessment made by the first court of its jurisdiction.

It is also this principle that made possible the establishment of a simplified mechanism for the recognition and enforcement of decisions handed down in matters of parental responsibility.

By way of interpretation and comparison between the wording of Article 12 of the Brussels II Convention, which is at the origins of Article 20 paragraph 1 of the Regulation, and Article 24 of the Brussels Convention, the ECJ decided that the measures falling within the scope of Article 20 do not qualify for the system of recognition and enforcement provided under that regulation[1]. The ECJ explained that, the difference in wording between the two provisions was that "the measures to which Article 24 (…) refers are restricted to matters within the scope of the Convention [and] (…) on the other hand, have extraterritorial effects". Otherwise put, while Article 24 of the Brussels Convention has a clearly defined scope, under Article 20 of the Brussels II *(bis)* Regulation, measures can be adopted in areas that do not strictly fall within its scope. Thus, recognizing the possibility of enforcement for such measures would create the risk of avoiding the application of Regulation (CE) No 44/2001. Still, these derogations from the scope of the Brussels II *(bis)* Regulation must be seen as applicable in accordance with other European provisions, such as Regulation (CE) No 44/2001.

Finally, the ECJ concluded that the most important reason why the measures covered by Article 20 paragraph 1 cannot be recognized and enforced in other Member States is the eventual "risk of circumvention of the rules of jurisdiction laid down by that regulation and of forum shopping" that would disregard the objective of the regulation to respect the best interests of the child by ensuring that decisions relating to the child are taken by the closest court to his habitual residence.

Thus, the problem of effectiveness of provisional measures comes to light in the context of non-recognition in another Member State. If a court from State Member X takes

[1] Case C-256/09, *Purrucker v. Vallés Pérez* [2010] ECR I-0000, par.86.

such a measure that needs to be enforced in State Member Y and the latter refuses recognition based on the previous arguments, one could consider that measure as futile.

A potential answer was provided by the ECJ. Notwithstanding the fact that provisional measures do not qualify for the system of recognition and enforcement established by the Regulation, the ECJ states that Member States should not to be reserved about the recognition and enforcement of those measures if this would be in accordance with other international or even national legislation compatible with the Regulation. Moreover, Member States can rely even on the provisions of the Regulation relating to judicial cooperation between the central authorities of the Member States if they find it appropriate.[1]

Consequently, the ECJ essentially leaves the matter to be solved by the Member States, which puts into question the very consistency of the application of Article 20 paragraph 1 of the Regulation. If each Member State decides whether to recognize and enforce a provisional measure or not, its utility depends only on the will of the Member State of enforcement.

Another potential issue at hand is to which extent enforcement can be refused if the court of enforcement has doubt whether the measure has been taken with the observation of human rights. Taking into consideration the ECJ's opinion formerly mentioned, where a Member State is encouraged to enforce provisional measures based on other international instruments, such reasoning would allow the same State, in the presence of a violation of human rights, to refuse enforcement on the basis of the similar international conventions, in this case – the ECHR. On the other hand, such an analysis could come against Article 26 of the Regulation that forbids the revision of a judgement as to its substance by the court of enforcement; and a refusal on the grounds of violation of human rights could come only after an analysis of the judgement in all its aspects, which would substitute each Member State doing so to the ECtHR.

Therefore, in the presence of strong contradicting arguments for and against the recognition and enforcement of provisional measures, it is difficult to draw a conclusion. Specific conditions and criteria are needed in order to uniformly apply the Regulation.

As recital 33 of the Brussels II *(bis)* Regulation refers to the Charter insofar as fundamental rights are concerned and as the Charter explicitly evokes the ECHR in Article 52 paragraph 3[2] as the lens through which all protection of human rights will pass, the necessity of analysing the impact of the influence of the ECHR becomes all the more manifest.

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[1] Case C-256/09, *Purrucker v. Vallés Pérez* [2010] ECR I-0000, par.92-93.

[2] „In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

III. The EU and the ECHR. Different means and converging purposes

The fact that all EU Member states are also High Contracting Parties to the ECHR and, moreover, according to both Article 59 of the ECHR, as amended by Protocol no. 14, and Article 6 TEU, EU can accede to the ECHR, brings to question the problem of a double standard in what concerns the observance of human rights in the EU.

To examine the scope and consequences of the provisional measures of Article 20 of the Brussels II *(bis)* Regulation through the lens of the ECHR, this section will present the particular relationship between the two entities, the ECHR and EU, including the relation between the ECtHR and ECJ, as well as the relevant ECHR standards.

It is necessary to be said that most situations arise for the moment at an abstract hypothetical level, given the scant case law on the topic.

A. An uncommon European relationship

Before the Treaty of Lisbon, the Treaty on European Union specified in Article 6 paragraph 2: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles for Community Law."

It was not until 2000 that the EU had its own human rights instrument, the Charter of Fundamental Rights of the European Union, adopted by the European Council of Nice on the 7th of December 2000 and come into force the 1st of December 2009. Also, after the Treaty of Lisbon, Article 6 paragraph 2 TEU has a new content: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

Over the years, the two courts, the ECJ and the ECtHR, have shown signs of collaboration and mutual respect, despite occasional case law frictions. Before the Treaty of Lisbon and before debates on the subject of human rights and ECHR had begun to be seen as a priority, the ECJ often appealed to the ECtHR case law as a source of inspiration.[1]

After the Treaty of Lisbon, the ECHR and the EU relationship acquires depth and new dimensions. In a recent decision, the ECJ has stated the relation between the Charter and the ECHR, reinforcing the provisions of Article 52 paragraph 3 of the Charter, as well as the limits of the scope of the Charter: "the Charter does not extend the field of application of European Union law beyond the powers of the Union". To render its preliminary ruling, the ECJ took

[1] *J.-C. Gautron*, Droit européen, 12e édition, Ed. Méméntos Dalloz, Paris 2006.

into account relevant ECtHR case law: „that court ruled, in essence, that national legislation granting, by operation of law, parental responsibility for such a child solely to the child's mother is not contrary to Article 8 of the ECHR, interpreted in the light of the 1980 Hague Convention, provided that it permits the child's father, not vested with parental responsibility, to ask the national court with jurisdiction to vary the award of that responsibility"[1].

However, potential problems of the connection between the two entities have not yet been revealed in practice, yet they have been intensely discussed on several occasions, under the guidance of the Steering Committee for Human Rights (CDDH), which set up a Working Group on the Legal and Technical Issued of a Possible CE/EU Accession to the ECHR[2].

More relevant to the topic, the EU accession implies complications regarding substantive aspects, such as the correlation between EU law and the ECHR.

Potential complications derive from the fact that there is a double filter to which these measures are eventually submitted – the national one and the ECHR one. As distinctly underlined by the ECJ[3], these provisional measures and their binding nature are determined in accordance with national law. As stated before, all provisions of the Regulation must be in compliance with the ECHR. Thus, in the absence of a clear definition of what is an "urgent case" or an acceptable "provisional measure" and in the absence of a comprising EU case law, the risk is that the diversity of State members' legal systems and their understanding of the abovementioned notions may compromise the unification purposes of the Regulation.

The Brussels II *(bis)* Regulation is to be analysed in view of the ECHR and especially of its Article 8, safeguarding the right to private family, an abstract notion elaborated by the ECtHR in decades of relevant case law.

B. The scope of ECHR relevant for Article 20 of Brussels II *(bis)* Regulation

As it appears from the title of the Regulation, its scope is to provide rules concerning the jurisdiction, the recognition and enforcement of judgments in matrimonial and parental responsibility matters. However, the Regulation also reveals the importance of the protection of fundamental rights in these matters. Recital 33 of the Preamble of the Regulation provides that it recognises the fundamental rights and observes the principles of the Charter. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter.

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[1] Case C-400/10 PPU, *J. McB. v. L. E.* [2010] – nyr, par. 51 and 54.

[2] 6th Working meeting of the CDDH informal working group on the accession of the EU to the ECHR (CDDH-UE) with the European Commission.

[3] Case C-523/07, *A.* [2009] ECR I 2805, par.52.

Because the EU has not yet ratified the ECHR, the Charter's objective is to complete the mechanism of the protection of human rights in the EU. From a pragmatic point of view, in matters where the EctHR case law stagnated, the protection was ensured by the ECJ, as the two courts have different backgrounds and it is necessary to complete each other before they unify. However, the fusion will never be perfect, each one will have to renounce and borrow features from the other.

Relating to family life, EU law recognises that the rights in this matter should be interpreted in the light of Article 8 of the Convention and the case law of the ECtHR. [1]

Member States have an obligation to follow the decisions of the ECtHR in every aspect. In practice, this means that the ECJ weaves ECHR principles throughout its reasoning. For example, in the *Baumbast* case, the ECJ held that when a child has a right of residence in a Member State according to Union law, this also means that his parent(s) should also have a right of residence due to the principle of respect for family life enshrined in Article 8 of the ECHR.[2]

Thus, the interpretation and application of Article 8 of the ECHR should be taken into consideration in all matters encompassed by the scope of the Brussels II *(bis)* Regulation as defined in Article 1: rights of custody and rights of access; guardianship, curatorship and similar institutions; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; the placement of the child in a foster family or in institutional care; measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

When taking a provisional measure, the national court should ensure the effectiveness of the right of the child to maintain on a regular basis a personal relationship and direct contact with both parents. It should take into consideration that a temporary custody awarded provisionally to one of the parents can transform into a final one in matters relating to family life, especially in the case of a small child who can become rapidly and deeply attached to a parent and an environment. Consequently, in such circumstances, urgent action is required in order to prevent an estrangement from the other parent.[3] In these matters, the priority is to safeguard the best interests of the child by respecting its two objectives: to ensure the

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[1] Case C-249/86, *Commission v. Germany* [1989] ECR 1263.

[2] Case C-413/99, *Baumbast and R. v. Secretary Of State For The Home Department* [2002] ECR I-7091, par. 68: „In the case of minor children who have spent all their life living with their mother and continue to do so, the refusal to afford her a right of residence during the continuation of the children's education is an interference with their rights which impairs the exercise of those rights. They also submit that such a refusal is a disproportionate interference with family life, contrary to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms".

[3] ECtHR, 5.12.2002, *Hoppe v. Germany,* Serie A No 28422/95 (http://www.echr.coe.int).

development of the child in a healthy environment and the stability of the relationship with his family[1].

The ECtHR ruled that the notion of "best interest of the child" included aspects relating to his development and psychological balance, his welfare and health, his rights and liberties[2].

Concerning the procedure, the ECtHR decided that the interim measures should respect the safeguards provided by Article 6 of the Convention[3]. The Court reached this conclusion as most Member States ensured the safeguards of Article 6 to interim proceedings in different ways. While some Member States do not distinguish between the stage or type of the proceedings and the safeguards are applied in the same manner as to the substantive proceedings, other Member States have particular provisions on interim measures which stipulate how the safeguards should be ensured.

In the provisional proceedings, the hearing of the child is not compulsory, the national court should decide if it is useful "depending on the circumstances of the case and taking into consideration the age and maturity of the child"[4].

According to this reasoning, it was also established that it would be excessive to force national courts to order a psychological expertise; their utility should be analysed on the above mentioned criteria[5].

In the case of *McMichael v. United Kingdom*[6], the ECtHR stipulated explicitly the autonomy of the Article 8 as a basis of the procedural protection of the parents' rights. The inherent procedural demands of Article 8 encompass both the administrative and judicial proceedings; therefore, the safeguards of Article 8 interrelate with those of Article 6 of the ECHR.

Analysing the two, one can easily notice that both instruments come together to achieve the same purpose: the protection of family life and the best interests of the child.

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[1] ECtHR, 19.09.2000, *Gnahoré v. France*, Recueil 2000-IX.

[2] ECtHR, 26.04.2007, *Schmidt v. France.*

[3] ECtHR, 15.10.2009, *Micallef v. Malta.*

[4] ECtHR, 8.07.2003, *Sahin v .Germany.*

[5] EctHR, 8.07.2003, *Sommerfeld v. Germany.*

[6] ECtHR, 24.02.1995, *McMichael v.United Kingdom.*

IV. Possible guidelines when dealing with Article 20. Conclusion

Taking into consideration the context and the purpose of this paper, it is accordingly needed to outline the potential gradual steps a national judge can follow in trying a case concerning a request for taking provisional measures under Article 20 of the Brussels II *(bis)* Regulation.

First of all, the national court analyses whether it has jurisdiction as to the substance of the matter, according to the Regulation. If it has such a jurisdiction, then applying Article 20 does not appear as necessary; the national court can rule based on the general rules of jurisdiction stipulated in the Regulation.

Secondly, provided the national court does not have jurisdiction as to the substance of the matter, then Article 20 is applicable and the court should examine whether there is national legislation that institutes a procedure and concrete measures that can be adopted by a court in urgent situations.

The Regulation does not impose certain protective measures, but merely institutes an exception from its jurisdiction provisions. If the national legislation does not provide such a possibility, then the analysis stops here concerning the Brussels II *(bis)* Regulation. As earlier observed upon the overview of national legislations, State Members generally have national provisions allowing the adoption of such measures.

Also, EU rules do not impose a certain procedure, for example the mandatory hearing of the child after a certain age required for instance in Romanian legislation; EU provisions set up the cooperation framework in which State Members can adopt non-contradicting measures.

Furthermore, in accordance with *A.* case law[1], the national court examines whether the three cumulative conditions are met in order for the derogation stipulated in Article 20 to operate: the measures concerned must be urgent; they must be taken in respect of persons or assets in the Member State where the court seised with the dispute is situated, and they must be provisional.

The court would also need to establish whether the child is within its jurisdiction, whether he or she was unlawfully removed, and whether the request for a provisional measure has indeed serious grounds or it is just a form of forum shopping. All these aspects come in connection with the condition of urgency previously mentioned.

Additionally, though consisting in few decisions on the topic, the ECJ case law is a source to be looked at before rendering a judgment on protective measures. If a court having jurisdiction as to the substance of the matter has already taken a provisional measure, the national court under Article 20 can subsequently take another provisional measure, if there are

[1] Case C-523/07, *A.* [2009] ECR I-2805.

circumstances justifying a new measure according to the Regulation. In case such circumstances do not exist, further analysis of the facts of the case is futile. Also, in the presence of a ruling concerning final measures with the same object taken by a court having jurisdiction as to the substance of the matter, the national court second seised cannot take a provisional measure, as the force of res judicata prevents it from doing so.

In the situation where the national court under Article 20 is first seised with a provisional measure and a court having jurisdiction as to the substance of the matter is second seised with the same measure, Article 19 paragraph 2 of the Regulation, concerning lis pendens, is not applicable.[1] The first court can take the measure, as well as the second one, although – according to Article 20 paragraph 2 – the first measure will cease to apply when the court with substantive jurisdiction has taken the measures it considers appropriate.

After analysing the before mentioned aspects and the conditions of the interlocutory injunction or any other type of measure provided by the national law, the court will research the relevant case law of the ECtHR, in quest for rules regarding family life and also the right to a fair trial.

Any measure taken by the national judge should therefore be in compliance with three sets of rules: EU jurisdiction, national procedures, and ECHR provisions as to the protection of the substance of the fundamental rights involved.

From another point of view, if a national court is seised with a request for the recognition of a provisional measure taken in another Member State under Article 20, the judge will not be able to grant this recognition on the basis of EU law and case law, but could do so after examining other international instruments, such as conventions that Member State is a party of.[2]

Thus, one considers the mechanism instituted by Article 20 of the Brussels II *(bis)* Regulation as a flexible means to protect the purposes of the Regulation against its own jurisdiction rules, trusting the national judge with the power to evaluate the necessity of a certain measure despite the court not having jurisdiction according to the general rules of the Regulation.

The application of Article 20 is therefore left to a certain extent at the discretion of national courts, covering situations that, due to their potential diversity, could not have been thoroughly anticipated in the Regulation, but could be encountered in applications filed on a national level.

However, there are certain issues previously identified in the paper that need to be more clearly defined through future amendments.

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[1] Case C-296/10, *Bianca Purrucker v. Guillermo Vallés Pérez* [2010] ECR I – 0000, par.86.

[2] Case C-256/09, *Purrucker v. Vallés Pérez* [2010] ECR I-0000, par.92-93.

In what concerns the problem of recognizing a provisional measure taken in another Member State, we consider that, for purposes of uniformity, the matter cannot be dealt with only by the national courts. Therefore, at a future amendment of the Regulation, we suggest that a provision be introduced concerning the possibility or the interdiction to recognize a provisional measure taken in another Member State. Thus, we think it is not sufficient for a uniform application of Article 20 for Member States to rely on general rules of civil cooperation, if they find appropriate.[1]

Furthermore, the question of recognizing a provisional measure taken in another Member State, when the national court suspects there has been a violation of the ECHR, should be answered on the grounds of the principle of mutual trust, as stated in recital 21 of the Brussels II *(bis)* Regulation. As we earlier emphasized, a national court cannot substitute itself to the ECtHR performing a control as to the conformity of a provisional measure to the ECHR. As it is generally accepted that mistrust comes as a reaction to the unknown, we believe a possible remedy for this lies in the reform operated through the Treaty of Lisbon. As follows, Article 81 (ex-Article 65) paragraph 2 (h) TFUE, related to civil cooperation, stipulates that the European Parliament and the Council shall adopt measures aimed at ensuring support for the training of the judiciary and judicial staff.

Thus, mutual trust between courts of different Member States can be consolidated through seminars with magistrates that would allow them to interact and to know the legal mechanisms from other Member States. The types of events we envision are similar to the context in which the present paper was elaborated.

To conclude, given the complexity of the situations that can arise, it is for the national judge to balance all the instruments at hand, along with the best interest of those come before the national court, and to consequently decide. In the absence of more clearly defined elements of *hard law* to solve the problems one has come across in the paper, it is for non-legislative instruments, such practitioners' seminars and specialized studies, to assure the effectiveness of civil cooperation in this area and to even out the manner in which the Brussels II *(bis)* Regulation is applied. We consider it as a particular application of the concept of unity in diversity, acting upwards from the "individual" level of national courts to a macroscopic one, which is the area of freedom, security and justice.

[1] Case C-256/09, *Purrucker v. Vallés Pérez* [2010] ECR I-0000, par.92-93.