CHAPTER 5: Common Provisions (Articles 16-20)

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Contents

Chapter II, section 3 of the Brussels IIbis Regulation includes provisions which are common to proceedings of divorce, legal separation and marriage annulment, as well as parental responsibility. These provisions have given rise to a number of queries in practice. It may be crucial to identify the precise point at which a court is to be deemed to have been seised (Article 16), the stage at which the court will examine whether it has jurisdiction (Article 17) and what steps must be taken when proceedings in disputes concerning matrimonial matters and parental responsibility have been brought before the courts of different Member States (Article 19). Aside from this, these common provisions also cover the practicality of service and what must be done if the respondent does not enter an appearance (Article 18), as well as the conditions and certain aspects of granting provisional, including protective, measures (Article 20).

1. Seising of a Court – Article 16

The moment of commencement may be decisive for a number of legal consequences, such as for the interruption of periods of limitation. In particular, the moment when a court is considered to have been seised is decisive in the context of the applicability of the rule on *lis pendens* in Article 19. Member States may adhere to distinct approaches to determine the moment when proceeding is deemed to have been initiated. In some jurisdictions, the decisive moment is when the claim is filed with the court. In others, the moment when the document instituting the proceedings is considered to be served on the counterparty or is rather received by the person responsible for the service determines the moment when legal proceedings are commenced.

The rule in Article 16 of the Regulation seeks to establish a uniform approach in specifying the moment when a court is deemed to have been seised.[1] This provision neither imposes an obligation that a universal notion of the seising of a court is to be applied throughout the procedural law of the Member States, nor does it attempt to unify the existing definitions in national laws. Instead, the purpose is to unify the application of these criteria within the framework of applying Article 16. Presumably for these reasons it has been argued that the scope of Article 16 is rather limited.[2] The methods of determining the moment when the court is seised reflect the approaches that are accepted in the national laws of the Member States. In other words, each of the two methods of filing a claim may be determinative for the moment when the court is seised, as long as the applicant also subsequently follows the other method of instituting proceedings.

Thus, a court is to be deemed to be seised either at the time when the document instituting the proceedings or an equivalent document is lodged with the court (Art. 16(1)(a)), or when it is received by the authority responsible for service if that document has to be served on the respondent before being lodged with the court (Article 16(1)(b)). Which of the two methods is to be followed depends on the applicable national law.

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[1] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 1; Lupsan, G., 'Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges applying Regulation Brussels IIbis' (2014) 7:1 Baltic Journal of Law and Politics, pp. 113-127, p. 118.
[2] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 7.

However, the court will 'be deemed seised only if the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (under the first option), or to have the document lodged with the court (under the second option)'.[3] Accordingly, both methods are put on an equal footing under the Regulation and the applicant may follow either of them. However, the applicant must ensure that the necessary steps are taken so that the document is subsequently submitted in the alternative way as well.

In this way, it is ensured that differences that exist in national laws regarding the moment of the commencement of court proceeding do not hamper the effectiveness of a mechanism for resolving cases of *lis pendens* and dependent actions. Provisions with identical or similar wording can be found in other EU PIL instruments.[4]

In its Impact Assessment, the Commission identified the problems of *forum shopping* and a rush to the court.[5] However, Article 16 does not seem to be relevant in the context of *forum shopping*. In particular, in none of the published cases were the courts seriously and materially in doubt with regard to the question of with which court a document was filed first. In other words, in essence there was no problem of diverging definitions of the moment when a court is seised.[6] Difficulties rather arose in connection with the interpretation of the moment when litigation is considered to have been commenced in a particular Member State, as will be explained in greater detail elsewhere.[7] Articles 16-19 have undoubtedly and seriously affected family lawyers' practice, the more so since case law tends to show that the successful party is usually the one whose proceedings have progressed further in his/her chosen court. Who strikes first might simply gain a jurisdictional and tactical edge.[8] Therefore, the definition in Article 16 is not a fitting solution for an alleged problem of forum shopping and a rush to the court. In other words, no possible alteration to this provision would resolve the alleged problem.

In the literature, a problem is sometimes raised regarding the differences between the English version which refers to a 'time', and the French version which refers to a 'date' (*la date à la quelle*). It has been suggested that the difference should be balanced by reading and understanding the English 'time' as a 'date'.[9] A possible difference in time has no consequence

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[3] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para. 32.

[4] E.g., Article 32 of the Brussels Ibis Regulation (Article 30 of the Brussels I Regulation) and the wording in Recital 21 relating to the aim and purpose of this provision as follows: 'In the interest of the harmonious administration of justice it is necessary minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending for the purposes of this Regulation, that time should be defined autonomously'.

[5] Impact Assessment, p. 42; for more information see Baarsma, N.A., *The Europeanisation of International Family Law* (Asser Press 2011), p.153-154; Buckley, L., 'European Family Law: the Beginning of the End for "Proper" Provision?' (2012) 6 Irish Journal of Family Law, p. 5.

[6] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 4.

[7] See *infra* in this Chapter, under 4 '*Lis pendens and dependent actions – Article 19*'.

[8] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, notes 4-7.

[9] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 10.

for the purposes of determining the time/date of commencement with the purposes of circumventing the rules of *lis pendens.*[10]

A common definition of the moment when a court is deemed to have been seised is relevant for both matrimonial matters and matters relating to parental responsibility. Yet in practice it is more important in cases involving matrimonial matters where the possibility of conflicting sets of proceedings is more likely to occur.[11] The two methods envisioned in Article 16 have several notions in common which will be detailed below.

1.1 Documents instituting the proceedings or an equivalent document

Regarding the filing of a statement of claim, the Regulation uses the wording 'documents instituting the proceedings or an equivalent document'. This notion has been borrowed from Article 27(2) of the 1968 Brussels Convention[12] and later Article 34(2) of the Brussels I Regulation.[13] The same wording is also used in the corresponding provision of Article 30 Brussels I Regulation[14] and in Article 32 of the Brussels Ibis Regulation. Thus, interpretative support can be gained from the jurisprudence of the CJEU in the context of the Brussels I Regulation.[15] However, the CJEU has not provided a formal definition of this concept. Instead, it has employed a functional description which can identify the relevant document by the function it has, independent of its designation or denomination in the respective legal system.[16] The CJEU has described the term as 'the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin'.[17]

As suggested in the literature, the relevant provisions imply that the document instituting the proceedings must be served before an enforceable judgement can be obtained and that it must enable the respondent to decide whether to defend the action.[18] As for the latter, it is to be presumed that the document which instituted the proceedings, or an equivalent document, must contain sufficient information about the subject matter, that the key elements

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[10] See e.g., CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 44, in which the Court held '[w]ith regard to the time difference between the Member States concerned, which would enable proceedings to be brought in France before they could be brought in the United Kingdom, and which could disadvantage certain applicants, such as Ms A, apart from the fact that it does not seem to work against such an applicant in a case such as that in the main proceedings, the time difference is not in any event capable of frustrating the application of the rules of lis pendens in Article 19 of Regulation No 2201/2003, which, taken in conjunction with the rules in Article 16 of that regulation, are based on chronological precedence'.

[11] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht*, *op. cit.*, Article 16, note 1; Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 11.

[12] Stone, *op. cit.*, p.196; See also CJEU Case C-129/83 *Siegfried Zeiger v Sebastiano Salinitri* [1984] ECR 2397, para. 15. Originally, the date of seising was determined in accordance with the above mentioned CJEU ruling: '[...] the question as to the moment at which the conditions for definitive seising [...] are met must be appraised and resolved, in the case of each court, according to the rules of its own national law'.

[13] This wording has been adopted in Article 45(1)(b) of the Brussels Ibis Regulation.

[14] Stone, *op. cit.*, p. 437: 'Article 16 of the Brussels IIA Regulation follows Article 30 of the Brussels I Regulation in specifying that a court is seised at the issue, rather than the service of the document instituting the proceedings'.

[15] *Ibid.*, p. 196-197.

[16] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 13.

[17] CJEU Case C-474/93 *Hengst Import BV v. Anna Maria Campese* [1995] ECR I-2113, para. 19.

[18] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht*, *op. cit.*, Article 16, note 1.

must be brought to the respondent's attention and that the document must be comprehensible.[19] The comprehensibility requirement triggers a further question of whether the document has to be drafted in a language which the respondent is known to understand. When addressing this issue, a reference can be made to the Service Regulation,[20] as the Brussels IIbis Regulation itself in Article 18 refers to Regulation (EC) 1348/2000,[21] the predecessor of the Service Regulation.[22] However, the moment when the defendant has actually received the document according to the conditions under the Service Regulation does not necessarily have relevance regarding the moment of seising the court for the purposes of applying the *lis pendens* rule.

Furthermore, documents which contain additional application that widens or extends the subject matter of the proceedings are also documents which institute proceedings insofar as they apply to such an extension. Correspondingly, documents which strive to establish counter-applications can be documents which institute proceedings, but only insofar as the counter-application goes beyond the substantial scope of application. Thus, a simple counter-application for a divorce in divorce proceedings which are already pending does not suffice.[23] In proceedings for the dissolution of marriage it is uncommon that any additional application might add another party to the proceedings. Yet, if this does occur, the document evidencing such an application is a document instituting proceedings insofar as they relate to the other party.[24]

Additionally, an application for merely preliminary proceedings or an application for injunctive relief insofar as it does not institute the main proceedings, does not qualify as a 'document instituting the proceedings or equivalent document' within the meaning of Article 16.

1.2 Service of documents

Regarding the service of the document, the provision of Article 16 uses the wording 'to take the steps he was required to take to have service effected on the respondent'[25] and when the document 'is received by the authority responsible for service'. Thus, for determining the moment of 'seising the court' within the meaning of Article 16 for the purpose of applying the rule on *lis pendens* it is not the moment of the actual service on the respondent that is decisive.

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[19] Layton, A. and Mercer, H. *European Civil Practice* (Sweet & Maxwell 2004), para 26.032.

[20] 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), and repealing Council Regulation (EC) No. 1348/2000 [2007] OJ L 324/79 (hereinafter: Service Regulation). Article 8 of the Service Regulation reads that the addressee 'may refuse to accept the document to be served at the time of service [...] if it is not written in, or accompanied by a translation into, either of the following languages: (a) a language which the addressee understands; or (b) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected'.

[21] Council 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 [2000] OJ L 160/37.

[22] It is self-explanatory that the 2016 Commission's Proposal suggests a replacement by referring to the current version of the Service Regulation.

[23] Magnus/Mankowski/Mankowski, *op. cit.,* Article 16, note 18.

[24] *Ibid.*

[25] Article 16, para 1(a) of the Brussels IIbis Regulation.

The same holds true when a respondent refuses to accept the document due to the lack of a necessary translation.[26]

Indeed, the moment when the document has been properly served on the respondent remains relevant for other issues, such as compliance with the deadlines and all other issues pertaining to the requirement of 'due process'.

The Regulation expressly refers to the Service Regulation (i.e., its predecessor) in Article 18, addressed *infra* in this Chapter, under 3 '*Examination as to admissibility – Article 18*'.

1.3 Lodging/Filing a Claim

This term, just as the previous one, does not yet have a detailed definition. The best interpretation of its meaning would be a formal one in the sense that it means filing the relevant document with the court i.e. submitting it to the court as the first addressee.[27] The required degree of formalisation is not prescribed by EU law. In this regard the national courts determine the necessary formalities.[28] However, it must be applied and interpreted autonomously in accordance with the actual wording used in the Regulation. Relevant is thus the moment when the document is 'lodged with the court' regardless of the fact that the national procedural law of a Member State does not attach the same relevance to this moment, as will be explained in the following part.

1.3.1 Autonomous interpretation of the definition in Article 16

It should be noted that it is irrelevant whether the moment of filing the claim with the court qualifies for the moment of the commencement of litigation under the national procedural law of the Member State in which the court is seised. Thus, the Regulation provides for a uniform definition of the time when a court is deemed to have been seised. That moment is 'determined by the performance of a single act', depending on the procedural system concerned. Thus, in some Member States it will by the lodging of the document instituting the proceedings with the court and in others by the service of that document on the respondent or rather on the authority responsible for service, always provided that the second act was subsequently actually performed.[29] Once an act instituting the proceedings or other equivalent document has been lodged with the court in a Member State that requires that method for commencing proceedings, that will be the moment when the 'court has been seised', regardless of when it has been served

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[26] See the so-called 'double date' provision in Article 9 of the Service Regulation, the purpose of which is exactly to prevent that an improper service could affect the claimant's right of access to justice. According to this provision, the moment from which the periods of limitation start to run differs with respect to the claimant as compared to the respondent. For the former, the deadline starts to run from the moment when the document has been filed with the bailiff or another 'agent' entrusted to affect the service of the document. For the respondent, it is the moment when the document has actually been properly served on him/her.

[27] Stumpe, F., 'Torpedo-Klagen im Gewand obligatorischer Schlichtungsverfahren – Zur Auslegung des Art. 27 EGBGB' ArbG Mannheim, S. 37, (2008) IPRax, 22, 24.

[28] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 19.

[29] CJEU Case C-173/16 *M.H. v M.H.* [2016] ECLI:EU:C:2016:542, para 25. See also CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 32.

on the respondent or the authority responsible for service, but always provided that it was subsequently actually served.

Within that context, it should be emphasised that the moment when the document has been lodged with the court determines the moment when the court is seised within the meaning of Article 16. It is thereby irrelevant that there may be a different procedural regulation in the national law of a particular Member State providing for another moment for the commencement of litigation, i.e., the moment when the proceeding is considered to be pending. Thus, the moment when the court becomes seised is the moment when the relevant document is actually filed with the court regardless of the fact that the law of the Member State of the seised court provides for another moment when litigation commences. The facts of the CJEU case of *M.H. v. M.H.*[30] are illustrative of this.

One spouse filed a divorce petition which was received by the registry of the competent court in England at 7:53 a.m. on 7 September 2015. That petition was date stamped at the latest by 10:30 a.m. of the same day. The petition was subsequently issued by the Court registry on 11 September 2015 and was served on the other spouse on 15 September 2015. The divorce proceedings so initiated before the Court in England were considered to date from 11 September 2015 and to have been pending before that court since that date and not from 7 September 2015 when it had actually been filed.

The other spouse lodged a judicial separation summons at the registry of the competent Court in Ireland at approximately 14:30 on 7 September 2015, which was issued shortly afterwards on the same day. The summons was served on the respondent in the main proceedings on 9 September 2015. These proceedings in Ireland were considered to date from 7 September 2015 and to have been pending before that court after that date.

The High Court of Ireland had to decide on the contradictory applications of the parties. The party that initiated proceedings in England sought a declaration that the Court in England had been first seised for the purposes of Article 19 of the Regulation. The opposing party requested the court to declare that the Court in Ireland had been first seised. The High Court held that on the basis of Article 16 of the Regulation the Family Law Court in England had been the first seised. The appellant in the main proceedings lodged an appeal against that decision and the Court of Appeal (Ireland) decided to stay the proceedings and to refer the question of how to interpret Article 16(1)(a) to the CJEU.

In the underlying case, the CJEU held that the moment when the document instituting the proceedings is lodged with the court is decisive. It concluded that Article 16(1)(a) 'must be interpreted to the effect that the 'time when the document instituting the proceedings or an equivalent document is lodged with the court' is the time when that document is lodged with the court concerned, even if under national law filing that document does not of itself immediately initiate proceedings'.[31]

[30] CJEU Case C-173/16 *M.H. v M.H.* [2016] ECLI:EU:C:2016:542.
[31] *Ibid.*, para 29.

Accordingly, the rule in Article 16 operates independently from the particularities of the national law on when proceedings are considered to have been initiated. In other words, the moment of filing the claim with the court is relevant, regardless of whether or not this moment is considered as the moment of initiating the litigation under the law of a particular Member State.

We therefore understand that Article 16 comprises an autonomous notion which helps to determine the point in time when the competing proceedings become pending.[32] This intrusion into national law does not do away with national law in its entirety,[33] as it does not impose any obligation on the Member States to introduce this notion into their national law. It is clear that establishing a general notion of when a court is deemed to be seised so as to introduce this into national law would be very inappropriate.[34] In other words, such an autonomously defined notion operates merely within the meaning of Article 16 and for the purposes of applying this provision. All other aspects and consequences attached to the initiation of proceedings remain governed by the national law of the court seised.

1.4 The other method of seising must have subsequently been effected

Article 16 lays down that a court will be seised at the time when proceedings are formally initiated, but only if the necessary subsequent initiations according to another method have been completed.[35] Therefore, paragraph (a) of Article 16(1) provides that a court is only seised by the filing of a claim *if* the necessary steps are subsequently taken to effect the service on the respondent. Paragraph (b) provides that a court is only seised by serving a claim at the authority responsible for service *if* that claim is subsequently filed with the court.

In the situation in which paragraph (a) is applicable, the Regulation wants to discourage the applicant from becoming idle and failing to serve the document. Naturally, this provision is not relevant if the service is to be effected *ex officio*, i.e. by the court with which the claim is filed. Therefore, compliance with the condition under Article 16(1)(a) is only relevant when service is not effected by the court.[36]

Article 16 makes use of the concept of retroactivity, in that the first of the two acts matters, but only *if* the second follows suit. It is important to clearly understand this provision as establishing that the application becomes pending on the date of the first act, and not on the date when the subsequent act is completed.[37]

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[32] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 31.
[33] Layton and Mercer, *op. cit.*, para 22.053.
[34] Fulchiron and Nourissat, *op. cit.*, p. 181, 187.
[35] Mostermans, A.P.M.M. 'Nieuw Europees echtscheidingen onder de loep: de rechtsmacht bij echtscheiding', (2001) NIPR 293, p. 293, 301.
[36] Crawford, E. B., 'The uses of positivity and negativity in the conflict of laws' (2005) 54 4 ICLQ, pp. 829-853, p. 829, 839.
[37] Kohler, C., *Die Revision des Brüsseler und des Luganer Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil – und Handelssachen – Generalia und Gerichtsstandsproblematik*, in Gottwald, *Revision des EuGVÜ – Neues Schiedsverfahrensrecht* (Verlag Ernst und Werner Gieseking 2000), p. 1.

The necessary measures which must be taken for serving the document are subject to the time limits imposed by national law. Therefore, if the national law does not limit the time for attempting service, then avoiding undue delay and acting with appropriate speed should be the yardstick.[38] Should the initial application suffer from formal or substantive flaws, and if the court orders the applicant to correct them, the applicant must do so within the time ordered by the court in which event '*lodging the amended application concludes the applicant's efforts'*.[39] In such a case, the date of lodging the first deficient application will be the date of seisure provided that the applicant corrects the flaws within the time ordered by the court.

If the applicant fails to take the necessary subsequent steps, the effect of *lis pendens* ceases, regardless of what effects are provided by the *lex fori* and whether or not they operate *ex tunc.*[40] For example, in its judgement in the case of *P v. M,* which is detailed *infra* in this Chapter, under 1.6 '*Difficulties in application – CJEU case law*', the CJEU held that the provision of Article 16 requires that merely one condition is to be satisfied, that condition being the lodging of the document instituting proceedings or an equivalent document with the court. The lodging of the document itself renders the court properly seised for the purposes of applying the relevant provisions of the Regulation, provided that the applicant has not subsequently failed to take the required steps to have service effected on the respondent.[41]

Difficulties may arise in connection with establishing the time of the seisure if the *lex fori* requires the parties to undertake efforts to reconcile or exceptionally concerning the requirement that arrangements regarding all issues pertaining to parental responsibility have been made prior to filing a petition for divorce. A requirement that such arrangements imply the 'procedural effects' of the admissibility of a divorce petition may be particularly problematic. It could be argued that reconciliatory attempts should be regarded, as a matter of principle, as integral parts of the divorce proceedings if the *lex fori* considers them as such. However, permitting reconciliatory attempts to affect the concept of seising the court would circumvent the principle of the autonomous interpretation and uniform application of the relevant provisions of the Regulation. Besides, as is rightly pointed out in the literature, it would lead to grave injustice, as this would mean that an applicant who started in a system which requires reconciliatory attempts before trial could never ensure that proceedings are initiated first, as his/her opponent would have a window of opportunity to initiate proceedings in another Member State.[42] Accordingly, such an interpretation would result in an inconsistent application of the Regulation and would encourage a rush to the court.

The same holds true for the requirement of achieving an agreement on all aspects of parental responsibility concerning the children of the spouses as a condition for filing for divorce. Particularly inappropriate would be to apply such provisions of national law in the

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[38] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht, op. cit.*, Article 16, note 7.
[39] Gruber, U. P., 'Die "ausländische Rechtshängigkeit" bei Scheidungsverfahren', (2000) FamRZ, pp. 1129, p. 1129, 1133.
[40] Magnus/Mankowski/Mankowski, *op. cit.*, Article 16, note 53.
[41] CJEU Case C-507/14 *P v M* [2015] ECR OJ C 65, para 37.
[42] Briggs, A., 'Decisions of British Courts during 2005 Involving Questions of Public or Private International Law' (2006) 76 (1) BYIL, p. 655.

context of applying the Regulation when the court seised for a divorce would not even have international jurisdiction to decide on issues of parental responsibility. Indeed, national courts may encounter serious difficulties in 'reconciling' such provisions of national law with the Regulation. It would therefore be most appropriate to deal with these problems by enacting legislation concerning the application of the Regulation on the national level. In any case, such provisions of national law should not be applied in the context of the Regulation as it would hamper the purpose intended to be achieved by the provisions of Articles 16 and 19.

1.5 Relevance of Article 16 for the notion of *lis pendens*

Article 16 is essential for the application of Article 19 on *lis pendens*. The purpose of the latter is to prevent parallel proceedings before the courts of different Member States and consequently to avoid conflicts between decisions which might result from such parallel proceedings. With that aim, 'the EU legislature intended to put in place a mechanism which is clear and effective in order to resolve situations of *lis pendens*'.[43]

For the applicability of the *lis pendens* rule in Article 19 it is crucial to determine when the court has been seised. Namely, the provision of Article 19 refers to the 'the court first seised' and to the 'court second seised' in matrimonial matters in paragraph 1 and in cases concerning parental responsibility in paragraph 2. Only the court which is first seised is permitted to continue proceedings in order to decide whether or not it has jurisdiction. Any other court must stay the proceedings until the court first seised has ruled on its own jurisdiction. If the court first seised declares that it has jurisdiction, the court second seised must decline jurisdiction (para. 3). Thus, 'that mechanism is based on the chronological order in which the courts concerned have been seised'.[44] Within that context, Article 16 provides for an autonomous determination of the moment when the court is deemed to be seised, as has already been explained. The provision of Article 19 on *lis pendens* will be addressed *infra* in this Chapter, under 4 '*Lis pendens and dependent actions – Article 19*'.

1.6 Difficulties in application – CJEU case law

The CJEU's case law has provided guidelines on a number of issues raised by the national courts of the Member States. In the already mentioned case of *M.H. v. M.H.*, the facts of which are detailed *supra* in this Chapter, under 1.3.1 '*Autonomous interpretation of the definition in Article 16*'), the CJEU made it clear that Article 16 'must be interpreted to the effect that the time when the document instituting the proceedings or an equivalent document is lodged with the court is the time when that document is lodged with the court concerned, even if under national law lodging that document does not in itself immediately initiate proceedings'.[45]

If a stay of proceedings has subsequently been requested, such a request does not affect the moment when the court is seised. The CJEU judgment in *P v. M*[46] is illustrative in this

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[43] CJEU Case C-173/16 *M.H. v M.H.* [2016] ECLI:EU:C:2016:542, para 22, referring to the CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 29.
[44] *Ibid.*, para 23.
[45] *Ibid.*, para 29.
[46] CJEU Case C-507/14 *P v M* [2015] ECR OJ C 65.

respect. The Court has held that Article 16(1)(a) must be interpreted as meaning that a court is deemed to be seised 'even where the proceedings have in the meantime been stayed at the initiative of the applicant who brought them, without those proceedings having been notified to the defendant or that defendant having had knowledge of them or having intervened in them in any way, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent'.[47]

This case concerned a married couple with two children living in Spain. On 7 July 2011 M initiated proceedings in Spain seeking provisional measures prior to divorce and an action relating to parental responsibility. On 18 July 2011, the applicant requested that the procedure be suspended in order to attempt to reach an amicable agreement. As these attempts had failed, P commenced proceedings in Portugal on 31 August 2011. The next day M requested a continuation of the proceedings in Spain. The Portuguese court refused to hear the case because it held that the Spanish court had been seised first. P filed an appeal against this decision and the Portuguese Supreme Court referred the case to the CJEU for a preliminary ruling.

When interpreting Article 16 of the Regulation, the CJEU held that there were two possible conditions in order for a court to be seised. One is the filing of a writ or summons with the court and the other is the notification of or service on the other party or rather on the authority responsible for service. Only one of the two is required to effect seisure, provided the other follows.[48] Since M had filed the claim with the court in Spain, it was irrelevant that there was then a delay of nearly two months before service on the respondent was effected. Considering that the moment of lodging the claim is the moment the court is seised within the meaning of Article 16, the Spanish court was first seised of the matter.

A number of other cases submitted before the CJEU concerned the interpretation of Article 16. Since these judgments discussed issues closely connected to the *lis pendens* rule, they are discussed in the context of Article 19 (see *infra* in this Chapter, under 4 '*Lis pendens and dependent actions – Article 19*').

2. Examination as to jurisdiction – Article 17

According to a rather unambiguous provision[49] of Article 17 of the Regulation, a court which has been seised must examine whether or not it has jurisdiction over the case. If it concludes that it has no jurisdiction and that jurisdiction lies with a court of another Member State, the court seised must declare of its own motion that it lacks jurisdiction.[50] Thus, this provision requires a court not to trespass on the exclusive jurisdiction of another court if it does not have equivalent jurisdiction itself.[51] Clearly the obligation to determine jurisdiction falls on the court, rather than upon the parties to the proceedings. Yet in practice it is likely that the legal

[47] *Ibid*., para 43.
[48] *Ibid*., para 37.
[49] CJEU Case C-68/07 *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo* [2007] ECR I-10403, para 19.
[50] Kruger and Samyn, *op. cit.*, p. 141.
[51] Briggs, *op. cit,*, p. 527.

representatives of the parties will identify any possible jurisdictional issues.[52] In the absence of such objections and initiatives by the parties the court must decide on jurisdiction *ex officio*.

Article 17 aims to protect the jurisdictional system of the Regulation against attempts to circumvent rules on jurisdiction.[53] Additionally, this verification is closely linked to the principle of the free movement of judgments and the principle of mutual trust. Accordingly, it does not allow the courts to review the assessment made by the first court as to its jurisdiction, and in in this way it avoids the risk of conflicting and irreconcilable statements on jurisdiction.

This rule was thought to prevent attempts of *forum shopping*. Yet such an aim is rather misconceived when the court seised lacks jurisdiction. Namely, Article 17 only requires that the court must decide the matter of its own motion. *Forum shopping* becomes a genuine problem only if and insofar all of the courts concerned are competent according to the relevant rules on jurisdiction, in particular if the court originally seised has jurisdiction.[54] However, Article 17 does not deal with this issue and accordingly does not provide a remedy for this.[55]

Within the EU, a court generally does not have the means to directly transfer the case to a court in another Member State. Article 19(3) and Article 15 are to some extent exceptions to this rule. Article 17 is an attempt to provide an answer to this problem, but only its negative part, that the case cannot be heard before the court actually seised. For the applicant, this might be detrimental with regard to costs, negative conflicts of jurisdiction, and possibly time bars.[56]

Firstly, for Article 17 to be applicable the court seised must lack jurisdiction. This can be assessed under Articles 3-6 of the Regulation for matrimonial disputes and Articles 8-13 in cases of parental responsibility. However, the question remains whether the provisions in Articles 7(1) and 14, which refer to residual jurisdiction, confer jurisdiction on the courts and this jurisdiction is of equal ranking as the provisions of Articles 3-6 and 8. In other words, the question is whether Articles 7(1) and 14 are part of the jurisdictional system of the Regulation. Such an interpretation would be sensible.[57]

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[52] Setright, H., *et. al.*, *International Issues in Family Law* (Jordan Publishing 2015) p. 79.
[53] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht*, *op. cit.*, Article 17, note 1.
[54] According to the Borrás Report: 'Bearing in mind the major differences between internal regulations on the Member States and the interplay of choice-of-law rules applicable, it is easy to imagine that the fact that the grounds of jurisdiction set out in [Article 3 BR II 2003] are alternatives may lead some spouses to attempt to make their application in matrimonial matters before the courts of a State which, by virtue of its choice-of-law rules, applies the legislation most favourable to their interests. For this reason, the court first seised must examine its jurisdiction, which might not happen if the issue were discussed in that Member State only as an exception'.
[55] Magnus/Mankowski/Mankowski, *op. cit.*, Article 17, notes 3-7. On the connection between Article 17 and Article 7, see CJEU Case C-68/07 *Kerstin Sundeling Lopez v. Miguel Enrique Lopez Lizazo* [2007] ECR I-10405, paras 19-20. According to Article 7(1), where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined in each Member State by the laws of that state. However, if different actions are already pending the forum must comply with Article 17 and declare of its own motion that it has no jurisdiction, in favour of the court in the other Member State which is competent by virtue of Article 3. The ranking of Article 7(1) is lower than Articles 3-5, thus if somewhere other than the state of the forum actually seised has jurisdiction based on Articles 3, 4 or 5, the applicant must lodge the application there.
[56] Jost, F., *Recht in Europa. Festschrift für Hilmar Fenge zum 65. Geburtstag Broschiert – 1996* (1 edn. Verlag Dr. Kovac 1996) 63, p. 66-68.
[57] Magnus/Mankowski/Mankowski, *op. cit.*, Article 17, notes 10-11.

In addition to this first prerequisite, another condition for Article 17 to be applicable is that the court of another Member State must have jurisdiction according to the provisions of the Regulation. The wording of Article 17 uses 'and' indicating that it is exact and strictly cumulating.[58] Therefore, if a court lacks jurisdiction, it cannot dismiss the case based on Article 17 if no other court in another Member State does not have jurisdiction. In the event that no other court in a Member State has jurisdiction pursuant to the provision of the Regulation, Article 17 does not require the court seised to dismiss the case. In this case, the seised court is invited to assess whether it can establish its own jurisdiction in light of Articles 6, 7 or 14, in conjunction with national law.[59]

The Practice Guide 2015[60] and the relevant literature[61] indicate several possible situations that can arise, depending on the particular circumstances of the case. In this Guide for Application we make a distinction between matrimonial disputes and cases concerning parental responsibility.

Matrimonial disputes

- Where the court seised reaches the conclusion that it has jurisdiction under the Regulation the court may move on to determine the application even though the court in another Member State may have jurisdiction on the basis of Articles 3-5, provided that this court is seised first.
- Where the court seised reaches the conclusion that it has jurisdiction under the Regulation, and there is no court in another Member State that has a competing jurisdiction in relation to the same subject matter, the court may move on to determine the application.
- Where the court seised reaches the conclusion that it has no jurisdiction under the Regulation, but another Member State does have jurisdiction, the former must declare that it does not have jurisdiction without being required to take any further steps.
- Where the court seised reaches the conclusion that it has no jurisdiction under the Regulation and that no court in another Member State has jurisdiction, the former may establish its jurisdiction relying on its own national rules on jurisdiction.

Cases concerning parental responsibility

- Where the court seised reaches the conclusion that it has jurisdiction under the Regulation, and there is no court in another Member State that has a competing jurisdiction in relation to the same subject matter, the court may move on to determine

[58] Magnus/Mankowski/Mankowski, *op. cit.*, Article 17, note 16.
[59] Magnus/Mankowski/Mankowski, *op. cit.*, Article 17, note 20.
[60] Practice Guide 2015, p. 13-14.
[61] Setright, *et al*., *op cit.*, p. 79 *et seq*.

the application.

- Where the court seised reaches the conclusion that it does have jurisdiction under the Regulation, but another Member State has or may have prevailing jurisdiction under Articles 9 and 10, the seised court must decline jurisdiction pursuant to Article 17 in favour of the court which holds prevailing jurisdiction. In certain cases, Article 19 may be relevant in the first place rather than Article 17. This may be the case so far as Article 12 is concerned. In practice, the court seised after another court has been seised on the basis of Article 12 will have to decline jurisdiction by virtue of the *lis pendens* rule in Article 19. Accordingly, the provision of Article 17 is in this context irrelevant.
- Where the court seised reaches the conclusion that it does not have jurisdiction, and no other Member State has jurisdiction either, the court, under Article 14 of the Regulation, may look to national law to determine its jurisdiction.

2.1 Difficulties in application – CJEU case law

In a number of cases the CJEU has been requested by national courts to provide clarifications in connection with the application of Article 17. In case *A*,[62] which is discussed in greater detail *supra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*', the referring court stayed its proceedings and submitted several questions to the CJEU for a preliminary ruling concerning the interpretation of the Regulation. Amongst the questions asked was the question of whether the court of a Member State that has no jurisdiction under the Regulation must dismiss the case as being inadmissible or whether it must transfer it to the court of another Member State.

First, the Court noted that in the context of the provisions relating to the rules of jurisdiction in matters of parental responsibility, Article 15 was the only one to provide for a possibility to request the court of another Member State to assume jurisdiction.[63] In the view of the CJEU, Article 17 does not provide that the case must be transferred to the court of another Member State.[64] The CJEU held that the court 'must declare of its own motion that is has no jurisdiction, but it is not required to transfer the case to another court'. The court went on to state that 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.[65]

3. Examination as to admissibility – Article 18

Article 18 aims to protect a respondent's right to be heard in proceedings commenced under the Regulation. It provides that 'where a respondent is habitually resident in a state other than the Member State where the action was brought' and he does not attend the hearing, the court must

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[62] CJEU Case C-523/07 *A* [2009] ECR I-02805.
[63] *Ibid*., para 55.
[64] *Ibid*., para 69.
[65] *Ibid*., para 71.

stay the proceedings so long as 'it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all the necessary steps have been taken to this end'.

The burden is placed on the applicant to ensure that the respondent has been served in such a way, and within such a timeframe, so as to protect the rights of the respondent. The staying of proceedings must not be confused with dismissing the application. Article 18 refers to issues of service and not jurisdiction, while dismissing the application demands that the court declares of its own motion that it has no jurisdiction.

The concept of 'service' must be in accordance with the concept in the Service Regulation to which the provision of Article 18 expressly refers. Serving the document may be difficult in practice, in particular in cases in which the respondent has moved to another place which is unknown to the applicant and the court. However, in many cases service can be effected on the respondent's representatives.[66]

Moreover, service requires compliance with the regime which is applicable to issues of service, and the requirements of the Service Regulation must be applied. Here we must again refer to Article 8 of the Service Regulation[67] which confers upon the addressee the right to reject the service if the document is not in a language listed therein. If the addressee rightfully rejects the service on these grounds, service has failed. Article 18(2) applies the provisions of the Service Regulation instead of Article 18(1) where the document instituting the proceedings of the equivalent document must be transmitted from one Member State to another pursuant to that Regulation. Article 18(3) has the same effect where service must be attempted in accordance with the 1965 Hague Convention on Service Abroad.[68]

Article 18(1) is likely to apply in a small number of cases as the scenarios where the other two Service instruments do not apply are limited to cases where the respondent's address is not known or where the respondent is not habitually resident in an EU Member State or a Contracting State to the 1965 Hague Convention.[69]

The effect of staying the proceedings under Article 18(1) is that the reference court, during that time, cannot take any steps and can make no orders while attempts are made to locate the respondent and to effect service on him/her. This interpretation, however, would be inconsistent with both the Service Regulation and the 1965 Hague Convention, as both of these instruments allow the courts to take provisional or protective measures during this time. Article 18 cannot be interpreted in a more restrictive way than the two legal instruments concerning the service of documents.[70]

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[66] Magnus/Mankowski/Mankowski, *op. cit.* Article 16, note 19.
[67] The Service Regulation deals, however imperfectly, with questions of language and translation, CJEU Case C-443/03 *Gotz Leffler v. Berlin Chemie AG* [2005] ECR I-9611.
[68] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter – the 1965 Hague Convention).
[69] Setright *et al*., *op. cit.*, p. 81.
[70] *Ibid*., p. 82.

Therefore, perhaps the best interpretation would be that Article 18 allows the court to exercise provisional and/or protective jurisdiction (see Article 20 of the Regulation) so that measures can be taken to safeguard the child that is subject of the proceedings which are pending until the conditions of Article 18 are met. This interpretation is consistent with Recital 16 of the Regulation.[71]

For Article 18 to be applicable, the respondent must not make an appearance. When the document instituting the proceedings has not been properly served upon the respondent, it is for national law to step in and to provide supplementary rules, and to decide whether the applicant is given a second opportunity to serve the document properly.

Relevant factors in this provision are the respondent's habitual residence and the State to which the document in question must be transmitted. The notion of habitual residence is the same as the one in Article 3(1); Article 18 does not have a different meaning. The State to which the document must be transmitted depends on the factual opportunities concerning where to serve the document, and more importantly on the applicable legal framework referring to service.[72]

The document instituting the proceedings is the document provided by the law of the *forum* to bring the proceedings to the notice of the respondent by its service. It must contain the essential elements of the legal action as the respondent must be informed about the applicant's principal claims and about the ultimate goal of the proceedings.

As for the systematic relationship between the paragraphs of Article 18, paragraph (2) has precedence over paragraph (3) as per the provisions of the Service Regulation[73] which give the Service Regulation precedence over the 1965 Hague Convention. In turn, paragraphs (2) and (3) have precedence over paragraph (1). The rule in paragraph (1) is only applicable in the rare event in which service is to be effected neither in a Member State of the Service Regulation nor in a Member State of the 1965 Hague Convention.[74]

4. *Lis pendens* and dependent actions – Article 19

The aim of Article 19 is to prevent parallel cases concerning the same child and the same subject matter being brought before the courts of two Member States at the same time. If it is applied correctly, this provision should remove the possibility of two Member States rendering different judgments in the same case, and therefore avoid a situation where there are two irreconcilable judgments which might meet the criteria for recognition and enforcement.[75]

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[71] Recital 16 of the Brussels IIbis Regulation reads: 'This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State'.
[72] Magnus/Mankowski/Mankowski, *op. cit.*, Article 18, notes 3 and 5.
[73] Article 20(1) of the Service Regulation.
[74] The Member States of the Service Regulation are the same as the Member States of the Brussels IIbis Regulation: all EU Member States, with the exception of Denmark. The States Parties to the 1965 Hague Convention can be found at: <https://www.hcch.net/en/states/hcch-members>.
[75] Setright, *et al.*, *op. cit.*, p. 82.

The possible conflict is solved by establishing the principle of *prior temporis – qui prior est tempore potior est iure*. The proceedings before the court first seised have precedence, as strict chronological precedence reigns.[76] Effectively, Article 19 establishes a race for who commences proceedings first. This rule is simple and certain and aims to prevent and avoid complex and prolonged arguments over which forum is more convenient.[77] The provision of Article 19 applies to both matrimonial matters (paragraph 1) and to parental responsibility (paragraph 2).

In order to determine whether Article 19 is applicable in cases of parental responsibility the following circumstances must be met: proceedings relating to the child must be commenced before the court of another Member State and they must involve the same cause of action.[78] If these criteria are met the seised court must stay its proceedings until the jurisdiction of the first court seised is established (Article 19(2)).[79] If the court first seised has jurisdiction, the court second seised must decline jurisdiction in favour of the first court (Article 19(3)). Conversely, if the court first seised determines that it does not have jurisdiction, the court second seised may continue the proceedings and decide on its own jurisdiction under Article 17 of the Regulation.

In order to facilitate the proper functioning of this provision, it is necessary for Member States to be able to easily identify the date on which a court has been seised. As already discussed, the moment when the court is considered to have been seised is defined in Article 16. Besides, it is necessary to protect the respondent in the event that an applicant has filed the claim with the court, but thereafter has not taken the required steps to notify the respondent.[80]

Article 19 comes into operation if both proceedings are pending before courts in different Member States. Thus, this provision does not address the situation of *lis pendens* if one of the courts involved is located in a non-Member State – national rules will apply in this case.

Paragraph (1) of Article 19 refers to applications for divorce, legal separation or marriage annulment. It should be emphasised that Article 19(1) does not require that the causes of action must be identical. This is in apparent contrast to the corresponding provision of Article 29 of the Brussels Ibis Regulation (Article 27 of the Brussels I Regulation). The following reasoning by the CJEU in *A v B*[81] is illustrative:

> 'In order then to determine whether a situation of lis pendens exists, it is apparent from the wording of Article 19(1) of Regulation No 2201/2003 that, contrary to the rules in Article 27(1) of Regulation No 44/2001 applicable to civil and commercial matters, in matrimonial matters applications brought before the courts of different Member States are not required to have the same cause of action. As the Advocate General noted in point 76 of his Opinion, while the proceedings must involve the

[76] Magnus/Mankowski/Mankowski, *op. cit.*, Article 19, note 1.
[77] *Ibid*., Article 19, note 3.
[78] Setright, *et al*., *op. cit.*, p. 82-83.
[79] Dutta and Schulz, *op. cit.*, pp. 1-40, p. 12.
[80] *Ibid*., p. 8-9.
[81] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654.

> same parties, they may have a different cause of action, provided that they concern judicial separation, divorce or marriage annulment. That interpretation is supported by a comparison of paragraphs 1 and 2 of Article 19 of Regulation No 2201/2003, from which it is clear that only the application of paragraph 2, concerning proceedings relating to parental responsibility, is subject to the proceedings brought having the same cause of action. Consequently, a situation of lis pendens may exist where two courts of different Member States are seised, as in the main case, of judicial separation proceedings in one case and divorce proceedings in the other, or where both are seised of an application for divorce'.[82]

In contrast to that, according to paragraph (2) of Article 19 the same *lis pendens* rule applies if several proceedings related to parental responsibility, relating to the same child and involving the same cause of action, are brought before different courts.

If the conditions in paragraph (1) or (2) are met, this means that if the court first seised has jurisdiction, the court second seised must, of its own motion, stay the proceedings pursuant to paragraph (3) of Article 19. The court second seised does not have to and must not wait for an application to be submitted by either of the parties in that respect. It is not urged to dismiss the case which is pending before it singlehandedly, as the danger of dismissing the case prematurely will then arise. Any further consequences are partially dealt with by paragraph (3).

Under paragraph (3) of Article 19 the court second seised is obliged to decline jurisdiction if the court first seised has established that it has jurisdiction. Hence, the stay (instituted under paragraph (2)) will be transformed into a mandatory dismissal of its own motion.[83] If the court first seised has established that it has jurisdiction, but this decision is subject to an appeal or other judicial review, paragraph (3) is not triggered until the courts in the first state give their final say. In any case, the court second seised must not speculate or guess as to the likelihood of the appeal succeeding.[84] When the court first seised declines jurisdiction, the court second seised may continue with the proceedings pending before it.

4.1 Difficulties in application – CJEU case law

The CJEU's case law has provided guidelines on a number of issues raised by the national courts of the Member States. In the case of *A v B,*[85] Ms A and Mr B, who were French nationals, were married in France in 1997, having entered into a marriage contract under the principle of separate property. They moved to the United Kingdom in 2000. The couple had three children. In June 2010, the couple separated after Mr B moved out. A had initiated a procedure for judicial separation on 30 March 2011 before the family court of the *Tribunal de grande instance de Nanterre*. This procedure was to lapse on 17 June 2014 because of 'no petition (assignation) having been filed within the period of 30 months from the making of the non-conciliation order

[82] *Ibid*., para 33.
[83] Magnus/Mankowski/Mankowski, *op. cit.,* Article 19, notes 53-54.
[84] *Ibid*., Article 19, note 59.
[85] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654.

by the French court, [so that] the provisions of that order expired at midnight on 16 June 2014'. 'On 24 May 2011, the wife filed a petition for divorce and a separate application for maintenance with the courts of the United Kingdom. The court declined jurisdiction over the request for divorce petition on 7 November 2012, on the basis of Article 19 of Regulation, with Ms A's consent.

On 15 December 2011, the family court judge in France declared that the issues relating to the children, including the applications concerning maintenance obligations, were to be dealt with in the United Kingdom, but that the French courts had jurisdiction to adopt certain interim measures. She ordered that Mr B pay Ms A a monthly allowance of EUR 5,000. That order was upheld on appeal by a decision of the cour d'appel de Versailles of 22 November 2012.

The referring court explained that with no petition having been filed within the period of 30 months from the making of the non-conciliation order by the French court, the provisions of that order expired at midnight on 16 June 2014. The wife filed another petition for divorce on 13 June 2014 with a United Kingdom court, whereby she intended 'to ensure that that petition would take effect only from one minute past midnight on 17 June 2014'. On 9 October 2014, Mr B applied to the referring court for Ms A's divorce petition in the United Kingdom to be dismissed or struck out on the ground that the jurisdiction of the French courts had been unambiguously and incontrovertibly established within the terms of Article 19(3).

On 17 June 2017, the husband filed a fresh petition for divorce before the French Court. Thus, because of the time difference between the two Member States, it was impossible to bring an action before a United Kingdom court at the same time (7:20 local time).

The referring court asked whether, in the case of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, Articles 19(1) and 19(3) must be interpreted as meaning that, in a situation in which the proceedings before the court first seised in the first Member State expired after the second court in the second Member State was seised, the jurisdiction of the court first seised must be regarded as not having been established. Additionally, the referring court asked whether the conduct of the applicant in the first proceedings, notably his lack of diligence, and the existence of a time difference between the Member States concerned are relevant for the purposes of answering that question.

The CJEU confirmed that the provisions on *lis pendens* in Article 19 and on seising the court in Article 16 'are based on chronological precedence'.[86] The concept of 'established jurisdiction' must be interpreted independently by reference to the scheme and purpose of the act that contains it.[87] The purpose of the *lis pendens* rules is to prevent parallel proceedings and to avoid conflicting decisions.[88] The mechanism is based on the chronological order in which the courts are seised. As the Advocate General noted in point 76 of his Opinion, while the

[86] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 44; See Magnus/Mankowski/Mankowski, *op. cit.*, Article 19, note 1.
[87] See CJEU Case C-89/91 *Shearson Lehman Hutton* [1993] EU:C:1993:15, para 13; CJEU Case C-1/13 *Cartier parfums-lunettes and Axa Corporate Solutions assurances* [2014] EU:C:2014:109, para 32.
[88] CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163, para 64.

proceedings must involve the same parties, they may have a different cause of action, provided that they concern judicial separation, divorce or marriage annulment.[89] Consequently, a situation of *lis pendens* may exist in situations such as in the main proceedings, where the one court is seised in judicial separation proceedings and the other court is seised in divorce proceedings, or when both are seised of an application for divorce.

In such circumstances, the court second seised must stay its proceedings of its own motion until the jurisdiction of the court first seised is established. In order for the jurisdiction of the court first seised to be established within the meaning of Article 19(1), it is sufficient that the court first seised has not declined jurisdiction of its own motion and that none of the parties has contested that jurisdiction.

However, in order for there to be a situation of *lis pendens* proceedings brought between the same parties and relating to petitions for divorce, judicial separation or marriage annulment should be pending simultaneously before the courts of different Member States. When one set of proceedings expires, the risk of irreconcilable decisions, and thereby the situation of *lis pendens*, disappears. It follows that even if the jurisdiction of the court first seised was established during the first proceedings, the situation of *lis pendens* no longer exists and, therefore, that jurisdiction is not established. In that situation, the court second seised becomes the court first seised on the date of the lapsing of the first proceedings.[90]

Thus, in cases of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, Articles 19(1) and 19(3) must be interpreted as meaning that in a situation where the proceedings before the court first seised have expired after the second court in the second Member State was seised, the criteria for *lis pendens* are not met and therefore the jurisdiction of the court first seised must be regarded as not having been established.

In the landmark case of C *v. M,*[91] the proceedings concerned a child born in France to a French father and a British mother. The details of this case have been discussed *supra* in Chapter 1, under *3.11.2 'Difficulties in application – CJEU case law*'.

The referring court stated that the dispute raised questions of interpretation concerning Articles 2, 12, 19 and 24 of the Regulation. It stated that the French courts were the ones first seised and that their jurisdiction had been accepted by both parents at the time those courts were seised and that those courts asserted that they continued to have jurisdiction with respect to parental responsibility notwithstanding the presence of the child in Ireland. The referring court sought to ascertain whether or not that jurisdiction had ceased in the light of the provisions of Article 12(2)(b) or Articles 12(3)(a) and 12(3)(b) of the Regulation.[92]

On 31 July 2014, the Irish Supreme Court decided to stay the proceedings and issued a request for a preliminary ruling under Article 267 of the TFEU. The Court noted that, since

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[89] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, Opinion of Advocate General Cruz Villalon.
[90] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654, para 37.
[91] CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268.
[92] *Ibid*., para 30.

there is no conflict or a risk of a conflict of jurisdiction between the French and the Irish courts in the main proceedings, Articles 12 and 19, which were mentioned by the referring court, are not relevant.[93]

From here it shows that *lis pendens* can only exist in cases where proceedings are pending simultaneously and both concern the same cause of action. In the underlying case the proceedings concerned an appeal against a divorce judgement and an order for the return of the child under Article 10 and 11 of the Regulation and thus there were no parallel proceedings and no risk of conflicting decisions, since they did not have the same cause of action.

Additionally, the Court noted in its preliminary ruling, *inter alia*, that where the removal of a child has taken place in accordance with a judgment which was provisionally enforceable and which was thereafter overturned, the child's habitual residence must be determined by making an assessment of all the factual circumstances. Whilst it was possible that the child's habitual residence may have changed, account had to be taken of the fact that the judgment authorising the removal of the child could be provisionally enforced and that an appeal had been brought.

In the case of *Mercredi* (dealt with in greater detail *supra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*') it was clarified that there was no *lis pendens* between the proceeding on an attribution of parental responsibility and an application for the return of the child, since these two proceedings have as their objects different 'causes of action'.[94]

5. Provisional, including protective, measures – Article 20

The provisions on provisional measures in the Brussels IIbis Regulation are clearer than in the other European Union Regulations in the field of private international law.[95] However, they have still resulted in a fair share of problems in their application. Provisional measures may be of essential importance in settling cross-border family disputes, particularly in urgent cases. Because of this, it is important to correctly ascertain which court has jurisdiction to grant provisional measures and under which conditions may the courts issue interlocutory measures.[96]

Article 20 enables a court to take provisional, including protective, measures in accordance with its national law in respect of a child situated on its territory, even if a court of another Member State has jurisdiction. It is important to clarify that Article 20 does not confer jurisdiction[97] and, as a consequence, the provisional measure ceases to have effect when the competent court has taken the measures it considers appropriate.[98] This provision is expressly emphasised in Recital 16 of the Regulation as well. Article 20(1) empowers the court of the

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[93] *Ibid*., para 37.
[94] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309, paras 65-66; Dutta and Schulz, *op.cit.*, p. 13.
[95] Kruger and Samyn, *op. cit.*, p. 148.
[96] Magnus/Mankowski/Mankowski, *op. cit.*, Article 20, note 1.
[97] Practice Guide 2015, p. 23.
[98] Lowe, Everall, Nicholls, *op. cit.*, p. 137; and Magnus/Mankowski/Mankowski, *op. cit.* Article 20, note 12.

Member State where the child is present to adopt provisional measures on parental responsibility. Once the court of the Member State having jurisdiction under the Regulation has taken the measures it considers appropriate, Article 20(2) provides that the provisional measures adopted under Article 20(1) no longer apply.[99] Hence, the Regulation indirectly grants the courts which are competent for the substantive proceedings the power to decide on the provisional measures taken by a court outside that Member State.[100]

The Court has ruled that there must be a real connecting link between the dispute and the court granting the measures and that the measures must be provisional and reversible.[101] The Brussels IIbis Regulation has additional built-in limitations, as will be discussed throughout this section. For instance, urgency is an explicit requirement, while this is not the case in Brussels Ibis.[102] The CJEU has made it clear that orders made merely in the exercise of jurisdiction conferred by Article 20 are not enforceable in other Member States.[103]

The concept of jurisdiction based on urgency is also found in the 1996 Hague Convention, though unlike the Convention, Article 20 of the Regulation does not grant jurisdiction in situations of urgency itself.

An application for interim relief can be filed before the court which has jurisdiction as to the substance of the case, or before another court, subject to the conditions of Article 20. Respectively, this provision allows an applicant to seek provisional or protective measures from a court, even if another court has jurisdiction as to the substance of the case.[104]

Additionally, the mere fact that proceedings on the substance of the case have not yet commenced does not deprive a court of its jurisdiction under Article 20. However, the measures will cease to have effect when the court which has substantive jurisdiction adopts final measures, also meaning that a court is no longer empowered to grant provisional measures when a judgement on the merits has been rendered.[105]

As regards the geographical scope of this provision, in the absence of any indication to the contrary, Article 20 does not apply when the substance of the matter falls outside the territorial scope of application of the Regulation.

There can be no *lis pendens* between the proceedings for the return of child and proceedings concerning any issue on the merits of parental responsibility, such as the right of custody, rights of access or any other issue following from Article 1(2) of the Regulation. An order for the return of the child to the Member State of origin from the Member State where the child was removed or retained 'does not concern the substance of parental responsibility and

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[99] Lenaerts, *op. cit.*, pp. 1302-1328, p. 1318.
[100] Dutta and Schulz, *op cit.*, p. 14.
[101] CJEU Case C-391/95 *Van Uden* [1998] ECR I-7091 and CJEU Case C-99/96 *Mietz* [1999] ECR I-2277.
[102] Kruger, T., 'The Disorderly Infiltration of EU Law in Civil Procedure' (2016) 63:1-22 Netherlands International Law Review, p.12.
[103] *Ibid*.; CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, paras 76-83 and 86-91.
[104] Magnus/Mankowski/Mankowski, *op. cit.*, Article 20, note 2.
[105] Magnus/Mankowski/Mankowski, *op. cit.*, Article 20, note 5-6; see also: Kruger, 'The Disorderly Infiltration of EU Law in Civil Procedure', *op. cit.*, p. 12.

therefore has neither the same object nor the same cause of action as an action seeking a ruling on parental responsibility'. Besides, the provision of Article 19 of the 1980 Hague Convention expressly provides that a decision brought under the Convention upon the request for a return 'is not to be taken to be a determination on the merits of any custody issue'.

As already discussed *supra* in Chapter 4, under 2.2 '*Difficulties in application – CJEU case law*' (*Povse* judgment), a provisional measure cannot be considered a 'judgment on custody that does not entail the return of the child' for the purposes of interpreting Article 10(b)(iv). As such, it does not present the basis for a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed. A provisional measure cannot be considered as a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv). Accordingly, it cannot be relied upon so as to confer jurisdiction on the courts of the Member State to which the child has been unlawfully removed.[106]

In *Deticek*, discussed in greater detail *infra* in this Chapter, under 5.4 '*Difficulties in application – CJEU case law*', the CJEU provided clarification on Article 20. Thus, a court of a Member State is not permitted to provisionally grant custody of a child present in that Member State to one parent, if a court of another member State, having substantive jurisdiction, has already delivered a judgment provisionally granting custody to the other parent and if that judgment has been declared enforceable in the territory of the former Member State.[107]

The provisions on provisional measures are merely permissive: they allow a digression from the normal framework of jurisdictional rules that the Regulation has laid down.[108] The provisional measures which can be granted fall under the limitations of *lex fori;* however, not every provisional measure which is available under the national legal system falls under the scope of Article 20. According to the relevant literature and CJEU case law,[109] the limits set out by this provision are:

(i) Article 20 can only be invoked in urgent cases;[110]

(ii) the measures must respond to a specific objective – the protection of persons or assets;[111] and

(iii) the measures must be geographically and temporarily delimited.

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[106] CJEU Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673, para 46-50.
[107] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 61.
[108] Kruger, 'The Disorderly Infiltration of EU Law in Civil Procedure', *op. cit.*, p. 12; see also Borrás Report, paras 58-59.
[109] Magnus/Mankowski/Mankowski, *op. cit.*, Article 20, note 17; CJEU Case C-523/07 *A* [2009] ECR I-2805, para 47.
[110] For an overview of the assessment of the concept of urgency, see CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 41-44. According to the Court's view, there is no urgency in the case of a wrongful removal of a child from his/her habitual residence, even if the return of the child to his/her original place of residence can affect his/her psychological situation and the Court also established that the request for provisional measures was not compliant with the second condition indicated by the Court, i.e. the territorial link; For more information, see Mellone, M., 'Provisional measures and the Brussels IIbis Regulation: an assessment of the status quo in view of future legislative amendments' [2015] 1 NIPR, p. 23.
[111] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 39.

Therefore, the characteristic elements of the measures are urgency, the protection of persons or assets with the Member State of the seised court, and a temporary limitation.[112] These shall be detailed in the following.

5.1 Urgency

The condition of urgency for the application of Article 20 is a *sine qua non* condition. However, this raises the issue of how this urgency must be assessed. The notion of urgency is not defined within the Regulation,[113] and an interpretation based on national law is difficult in the light of diverging national criteria on this condition.[114]

5.2 Protective finality

As a second condition, the provision of Article 20 may be relied upon for the protection of persons or assets within the Member State of the seised court. This second requirement is two-fold. On the one hand, it is needed for the measure to have a protective finality. In the case of matrimonial disputes, the limited scope of application of the Regulation (divorce, legal separation and marriage annulment) and the aim of the measures of Article 20 may be difficult to reconcile. Only measures such as an authorization to abandon the spouses' common residence or a provisional allocation of the spouses' common residence to one of them, or the updating of the civil status records with the divorce claim may be available under Article 20.[115]

On the other hand, in cases relating to parental responsibility, provisional, including protective, measures which could be taken are more diverse. As such, these measures range from those taken to protect a child or a child's assets, provisional placement in care institutions and provisional measures relating to the care of a child. As for the latter, such measures are within the scope of the Regulation, regardless of the fact that they have to be requested before the administrative courts and are considered to be public measures under the applicable law.[116] Also, measures aimed at furthering provisional arrangements on care, custody and rights of access with regard to children are all available under Article 20.

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[112] Thus, when it comes to the scope of application of this rule, the CJEU has pointed out that, given the express reference to persons and assets, Article 20 goes beyond the scope of application of Brussels IIbis. For more information, see CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, para 86; in favour of the CJEU's position, see Mosconi, F., Campiglio, C., *Diritto internazionale private e processuale* (UTET Giuridica 2013), p. 118; for a different perspective, see Magnus/Mankowski/Pertegas, *op. cit.*, Article 20, note 17; Kruger, 'The Disorderly Infiltration of EU Law in Civil Procedure', *op. cit.*, p. 12.

[113] Carpaneto, *op. cit.*, p. 272; the author refers to CJEU Case C-523/07 *A* [2009] ECR I-2805 (at para 48) where the CJEU clarified that the urgency requirement is satisfied in a situation which is likely to endanger the children's welfare, including his/her health or development. In the following *Deticek* case, the CJEU further noted that the concept of urgency under Article 20 relates to both the situation of the child and the impossibility in practice of bringing the application concerning parental responsibility before the court with jurisdiction as to the substance.

[114] Vandekerckhove, K., *Voorlopige of bewarende maatregelen in de EEX-Verordening, in de EEX-II en in de Insolventieverordening,* in: de Leval, G. and Storme, M., (eds.) *Le Droit Processuel & Judiciaire Européen* (2003), p. 119.

[115] Garcia, A., *Crisis matrimoniales internacionales. Nulidad matrimonial, separación y divorcio en el nuevo derecho internacional privado español* (Universidade de Santiago de Compostela 2004), p. 317.

[116] See in this sense CJEU Case C-523/07 *A* [2009] ECR I-2805, para 22, with reference to a previous CJEU judgement (CJEU Case C-435/06 *C.* [2007] ECR I-10141).

Yet there is a strict requirement of territoriality for issuing such protective measures. Article 20 allows the courts to take measures relating to persons or assets as long as these are present in the Member State of the court seised.[117] This condition is not surprising as it would be counter-intuitive to request a measure where the targeted individuals or assets are not present. If the individuals or the assets to which the provisional measures relate are relocated to another State, this should have no impact on the applicability of Article 20. However, this raises the question of the enforceability of such measures in another Member State. In this respect in *Purrucker I* the CJEU noted that the rules in Chapter III of the Regulation are not applicable to measures ordered solely on the basis of Article 20.[118]

5.3 Temporary limitation

The provisions of Article 20 clearly indicate that the measures must be of a temporary nature as they cease to apply when, under the Regulation, the court vested with jurisdiction as to the substance of the proceedings has taken appropriate measures. In the case of *A* this condition was emphasised by the CJEU.[119] Advocate General *Kokott* suggested that the duration of the provisional measures cannot *a priori* be considered problematic, because the fundamental objective is to avoid a lacuna in the care arrangements in cases of parental responsibility. Therefore, it is in the interest of the applicants to terminate the effects of the provisional measures by filing proceedings on the merits.[120]

5.4 Difficulties in application – CJEU case law

In its case law, the ECJ has interpreted Article 20 in a highly restrictive manner. It has thereby emphasised that the provisional character of the measure is a requirement that must be fulfilled together with the first two conditions – the urgency of the measure and the measure having a specific objective.[121]

The operation of Article 20 has been considered by the CJEU in the case of *Purrucker I.*[122] There the CJEU clarified that orders made in the exercise of jurisdiction based solely on Article 20 are not enforceable in other Member States. In mid-2005, Ms Purrucker, a German national, moved to Spain to live with Mr. Vallés Pérez, where she gave birth to twins prematurely. After the relationship deteriorated, Ms Purrucker wanted to return to Germany with her children, while Mr Vallés Pérez was, initially, opposed to this. On 30 January 2007 the parties signed an agreement before a notary which had to be approved by a court in order to be enforceable, which stated that the twins were subject to the parental responsibility of the father and the mother, both of whom would have custody, without prejudice to the father's right

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[117] See also CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193.
[118] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, paras 83 and 87; see for full details *infra* in this Chapter, under 5.4 '*Difficulties in application – CJEU case law*'.
[119] CJEU Case C-523/07 *A* [2009] ECR I-2805, para. 65.
[120] *Ibid*., Opinion of Advocate General Kokott, paras 61-64.
[121] Dickinson, A., 'Provisional Measures in the "Brussels I" Review: Disturbing the Status Quo?' (2010) 6:3 Journal of Private International Law, pp. 519-564, p. 538; CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, paras 77-78; CJEU Case C-523/07 *A* [2009] ECR I-2805, para 48; CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, paras 39-40.
[122] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353.

of access to his children, which he could freely exercise at any time and as he wished. Additionally, the couple agreed that Ms Purrucker was to move with the twins to Germany where she was to establish a permanent place of residence, provided that she recognised the father's access rights which allowed him to visit his children at any time.

As one of the twins, Samira, could not yet be discharged from hospital, Ms Purrucker left for Germany on 2 February 2007 accompanied only by her son Merlin and her son from a previous marriage. Samira would be brought to Germany after being discharged from hospital.

There were three sets of proceedings pending simultaneously, involving Ms Purrucker and Mr. Vallés Pérez, namely one brought in Spain by Mr Vallés Pérez in June 2007, concerning the granting of provisional measures, which, under certain conditions, could be regarded as substantive proceedings concerned with awarding rights of custody concerning the children Merlín and Samira.

The second application was brought in Germany by Ms Purrucker on 20 September 2007, concerning the awarding of rights of custody over the twins. By a judgment of 8 December 2008, the German Amtsgericht held that the Spanish court was first seised within the meaning of Articles 16 and 19(2) of the Regulation, and therefore stayed its proceedings until the Spanish judgment acquired *res judicata*. Ms Purrcuker appealed against this judgment and on 14 May 2009 this judgment was set aside for reconsideration by the Oberlandesgericht, observing that the application for rights of custody brought in Spain in June 2007 by Mr Vallés Pérez was part of the proceedings brought for the granting of provisional measures, whereas the application for rights of custody brought in Germany on 20 September 2007 by Ms Purrucker was an action relating to the substance of the matter. Additionally, it held that Article 19 did not confer exclusive jurisdiction on any of the courts seised to decide which court had been first seised.

The third and last case was brought in Germany by Mr Vallés Pérez, concerning the enforcement of the judgment of the Spanish court of 8 November 2007 granting provisional measures. These were the proceedings that gave rise to the reference for a preliminary ruling.

One of the questions was whether the provisions laid down in Article 21 of the Regulation are also applicable to provisional measures within the meaning of Article 20 of that Regulation or, in contrast, whether it applies only to judgments on the substance of a matter. The issue of the enforceability of decisions on provisional measures under Article 21 of the Regulation had been subject to considerable debate in academic writing.

The CJEU explained as follows: '[W]here the substantive jurisdiction …of a court which has taken provisional measures is not, plainly evident from the content of the judgement adopted, or where that judgement does not contain a statement, which is free from any ambiguity, of the ground in support of the substantive jurisdiction of that court, with reference made to one of the criteria of the jurisdiction specified in Arts 8-14 of that regulation, it may be inferred that that judgement was not adopted in accordance with the rules of jurisdiction laid down but that regulation. (…) [N]onetheless, that judgement may be examined in the light of Art 20 of the regulation, in order to determine whether it falls within the scope of that

provision'.[123] The CJEU held that Article 20 orders did not enjoy extra-territorial recognition and enforcement under Article 21 as other decisions on the merits. In the view of the Court, this was not what the drafters had intended. Additionally, the Court held that the provisions laid down in Article 21 of the Regulation did not apply to provisional measures within the meaning of Article 20 relating to rights of custody.[124] In short, measures issued by a court of a Member State not having substantive jurisdiction according to the rules of the Regulation in Articles 8-14 are not enforceable under Article 21.

In the case of *Purrucker II*, the CJEU had to determine whether the adoption of provisional measures under Article 20 of the Regulation could trigger the application of the *lis pendens* rules as laid down in Article 19. In this case, three sets of proceedings were under way involving Ms Purrucker and Mr Vallés Pérez: the first, brought in Spain by Mr Vallés Pérez, concerned the granting of provisional measures. It is conceivable that, under certain conditions, these proceedings could be regarded as substantive proceedings concerned with the awarding of rights of custody over Merlín and Samira. The second was brought in Germany by Mr Vallés Pérez, and concerned the enforcement of the judgment of the Spanish court granting provisional measures, and this was the subject of the judgment in *Purrucker I*, which is discussed *supra*. The third and last application was brought by Ms Purrucker in Germany and concerned the awarding of rights of custody over the twins. These were the proceedings which gave rise to this reference for a preliminary ruling in *Purrucker II*. The referring court asked whether Article 19(2) is applicable where the court of a Member State first seised by one of the parties in order to obtain measures in matters of parental responsibility is only seised of an action to obtain an order for provisional measures and where a court of another Member State is second seised by the other party to an action with the same object seeking to obtain a judgment as to the substance of the matter. The CJEU ruled that the *lis pendens* rule of Article 19 does not apply in relation to proceedings before the court of another Member State initiated to obtain provisional measures.[125] Firstly, the Court referred to its ruling in *Purrucker I*: 'it is evident from the position of Article 20 in the structure of the Regulation that it cannot be regarded as a provision which determines substantive jurisdiction for the purpose of that Regulation'.[126] Second, provisional measures cease to produce effects as soon as appropriate provisional or definitive measures have been adopted by the national court having substantive jurisdiction.[127]

Additionally, the Court stressed the fact that it is not the nature of the proceedings before a national court that determines the application of the *lis pendens* rule of Article 19. For example, prior to ruling on the substance of the matter, national law may require the adoption of provisional measures. Hence, the application of Article 19 requires national courts to engage in a comparative analysis of the claims of the respective applicants. To that effect, if the facts of the case and the claim of the applicant reveal no elements indicating that the court first seised

[123] *Ibid.*, para 76.
[124] *Ibid*., para 100.
[125] Lenaerts, *op. cit.*, p. 1320; CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163, paras 73-77.
[126] CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163, para 61.
[127] Lenaerts, *op. cit.*, p. 1321.

is called upon to exercise its substantive jurisdiction, then the *lis pendens* rule does not apply.[128] This complies with the principle that the court must consider the object of the measures requested.[129]

It can be concluded that the provision of Article 19(2) does not apply where a court of a Member State is first seised only for the purpose of granting provisional measures within the meaning of Article 20 and where a court of another Member State has jurisdiction as to the substance of the matter.

In *A*,[130] which is set out in greater detail *supra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*', the CJEU was asked whether the seised Finnish court, which concluded that it did not have jurisdiction, had to transfer the matter to the court having jurisdiction. The CJEU interpreted the provisions of Article 20 as containing an implicit duty of information. It held that 'insofar as the protection of the best interest of the child so requires, the national court which has taken provisional or protective measures *must* inform, directly or through the central authority designated under Article 53 of the Regulation, the court of another Member State having jurisdiction'.[131] Thus, the CJEU underlined the indispensability of mutual co-operation and respect between courts of different Member States for the application of the Regulation.

As regards the urgency criterion as a condition for the application of Article 20, the CJEU held that this requirement was met 'in a situation likely serious to endanger (the children's) welfare, including their health or their development'.[132] The Court further elaborated that in the case of provisional measures concerning parental responsibility, 'the concept of urgency in Article 20 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'.[133] Additionally, the Court found that the provision is applicable when a child stays temporarily or intermittently in a state other than the State of his or her habitual residence.[134]

In the case of *Mercredi*[135] (discussed in greater detail *supra* in Chapter 3, under 4.3 '*Difficulties in the application of Article 8 as regards habitual residence – CJEU case law*') the referring court sought, *inter alia*, an answer concerning the relevance of a non-return decision in one Member State for the decision on the jurisdiction of the court in a Member State of the child's habitual residence to decide on parental responsibility. The CJEU concluded that such a non-return order brought on the basis of the 1980 Hague Convention had no effect on judgments which have to be delivered in that other Member State in proceedings relating to

[128] CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163, paras 73-77.
[129] Kruger and Samyn, *op. cit.*, p. 149.
[130] CJEU Case C-523/07 *A* [2009] ECR I-2805.
[131] *Ibid*., para. 66.
[132] *Ibid*., para. 48.
[133] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, paras 42-49.
[134] CJEU Case C-523/07 *A* [2009] ECR I-2805, para 48.
[135] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.

parental responsibility which were brought earlier and are still pending in that other Member State.[136]

The issue of provisional measures was also discussed in the case of *Detiček.*[137] Ms Detiček, and Mr Sgueglia, spouses involved in divorce proceedings, had lived in Rome (Italy) for 25 years. Their daughter Antonella was born on 6 September 1997. On 25 July 2007, the Tribunale di Tivoli provisionally granted sole custody of Antonella to Mr Sgueglia and ordered her to be placed temporarily in the children's home of the Calasantian Sisters in Rome. On the same date, Ms Detiček took her daughter to Slovenia.

By a judgment of 22 November 2007 by the Regional Court of Maribor, Slovenia, confirmed by a judgment of the Supreme Court of Slovenia of 2 October 2008, the order of the Tribunale di Tivoli of 25 July 2007 was declared enforceable in the territory of the Republic of Slovenia. Enforcement proceedings were brought before the District Court of Slovenia for the child to be returned to Mr Sgueglia. However, by an order of 2 February 2009, that court suspended enforcement until the final disposal of the main proceedings. On 28 November 2008 Ms Detiček applied to the Regional Court of Maribor for a provisional and protective measure giving her custody of the child. By an order of 9 December 2008, that court allowed Ms Detiček's application and awarded her provisional custody of Antonella. Mr Sgueglia challenged that order before the same court, which dismissed his action by an order of 29 June 2009. Against this order, Mr Sgueglia brought appellate proceedings before the Court of Appeal of Slovenia.

In those circumstances, the Regional Court of Maribor decided to stay the proceedings and to submit a question to the CJEU on the interpretation of Article 20. The CJEU concluded that this provision does not permit a court of a Member State to take a provisional measure granting custody of a child present in the territory of that Member State to one parent if a court of another Member State having substantive jurisdiction under the Regulation over the custody of the child has already delivered a judgment provisionally granting custody over the child to the another parent and that judgment has been declared enforceable in the territory of the former Member State. In other words, the court not having substantive jurisdiction is not allowed to decide provisionally on the custody of the child when a court in another Member State having substantive jurisdiction has provisionally granted the custody to another parent and this decision was declared enforceable in the former Member State.

The CJEU further addressed the conditions provided under Article 20(1) providing the possibility for the courts of a Member State in which the child is present to take such provisional, including protective, measures. The Court discussed three cumulative conditions that must be satisfied, namely that the measures concerned must be urgent, they must be taken in respect of persons or assets in the Member State where those courts are situated, and they

[136] *Ibid*., para 71.
[137] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193.

must be provisional.[138] A failure to comply with any one of those three conditions therefore has the consequence that the measure contemplated cannot fall within Article 20(1).[139]

The 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. The CJEU conceded that in the case at hand the requirement of urgency within the meaning of that provision had not been met.[140]

Next, provisional measures must be taken in respect of persons[141] in the Member State in which the courts with jurisdiction to take such measures are located. A provisional measure in matters of parental responsibility ordering a change to the custody of a child is taken not only in respect of the child but also in respect of both parents.[142] In the present case, the father resided in another Member State.

Finally, the above considerations are supported by the requirements which follow from Recital 33. It states that the Regulation recognises fundamental rights and observes the principles of the EU Charter of Fundamental Rights. The right set out in Article 24(3) of the EU Charter of Fundamental Rights is such a right. It assumes the right of the child to maintain, on a regular basis, a personal relationship and direct contact with both parents. Article 20 of the Brussels IIbis Regulation cannot be interpreted so as to disregard that fundamental right.[143]

As to the concept of urgency, the CJEU held that allowing a gradual change of circumstance to fulfil the requirement of urgency would undermine, on the facts of the present case, the principle of the mutual recognition of judgments and the Regulation's objective of deterring the wrongful removal of children from Member States.[144] Article 20 cannot therefore be interpreted in such a way that it can be used by the abducting parent as an instrument for prolonging the factual situation caused by his or her wrongful conduct or for legitimating the consequences of that conduct.[145]

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[138] CJEU Case C-523/07 *A* [2009] ECR I-2805, para 47.
[139] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 40.
[140] *Ibid*., para 44.
[141] The strict interpretation of persons obviates the very purpose of the rule, namely to protect children in urgent situations, see: van Iterson, D., *Ouderlijke verantwoordelijkheid en kinderbescherming* (Maklu 2011), p. 127-128; Magnus/Mankowksi/Sender, *op. cit.,* Article 20. Advocate General Sharpston has expressed the view that the interpretation that the child and the persons exercising parental responsibility must be present in the Sate granting the provisional measures is wrong, see his Opinion in CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353.
[142] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, paras 40-52; see also Kruger and Samyn, *op. cit.*, p. 149: 'this is so because the measures are also aimed at the parents in the sense that they influence their exercise of parental responsibility. This judgment seems to imply that provisional measures can only be granted if all persons involved are present on the territory of the court'.
[143] Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 55.
[144] Dickinson, *op. cit.*, p. 538.
[145] Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193, para 57.

GUIDELINES – Summary

Article 16 – moment when a court is seised

A court is to be deemed to be seised, depending on the applicable national law, either:

- at the time when the document instituting the proceedings or an equivalent document is lodged with the court (Art. 16(1)(a)),
    - And if the applicant has not subsequently failed to take all the necessary steps to have service effected on the respondent; **or**
- when it is received by the authority responsible for service if that document has to be served before being lodged with the court (Article 16(1)(b)),
    - And if the applicant has not subsequently failed to take all the necessary steps to have the document lodged with the court.

Document

The CJEU has described this term as 'the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin'. These include:

- documents which contain additional application which extend the subject matter of the proceedings, insofar as they apply for such an extension;
- documents which strive for establishing counter-applications, insofar as the counter-application goes beyond the substantive scope of application;
- a document for additional application in the dissolution of a marriage, insofar as such a document relates to the other party.

Autonomous determination of the moment in time when the court is seised – the moment of filing the claim with the court

Article 16 comprises an autonomous notion which helps to determine the point of time when the competing proceedings become pending. It is irrelevant whether the moment of filing the claim with the court qualifies for the moment of the commencement of litigation under the national procedural law of a Member State in the court seised. Thus, Article 16 provides for a uniform definition of the time when a court is deemed to be seised. That moment is 'determined by the performance of a single act', i.e., by filing the claim with the court (the CJEU case of *M.H. v M.H*[146] and the case of *P v M*[147]).

[146] CJEU Case C-173/16 *M.H. v M.H.* [2016] ECLI:EU:C:2016:542.
[147] CJEU Case C-507/14 *P v M* [2015] ECLI:EU:C:2015:512.

A claimant's request to stay the proceedings does not affect the moment when the court has been seised (the CJEU case of *P v M* [148]).

Article 17 – Examination as to jurisdiction

Firstly, for Article 17 to be applicable the operative court (the court seised) must lack jurisdiction. Secondly, the condition of another court having jurisdiction must be met. If a court lacks jurisdiction, it cannot dismiss the case based on Article 17 if no other court in another Member State does not have jurisdiction. In the event in which no other court in a Member State has jurisdiction, the seised court is invited to assess whether it can establish its own jurisdiction in light of Articles 6, 7 or 14, in conjunction with national law.

That Article 17 does not provide for a transfer of the case to the court of another Member State (the CJEU case *A*[149]).

Article 18 – Examination as to admissibility

The staying of the proceedings must not be confused with dismissing the application. Article 18 refers to issues of service and not jurisdiction, while dismissing the application demands that the court declares of its own motion that it has no jurisdiction. Article 18 allows the court to exercise a provisional and/or protective jurisdiction so that measures can be taken to safeguard the child if the conditions of Article 18 are met. For Article 18 to be applicable, the respondent must not make an appearance. This appearance does not require that the respondent replies as to the substance of the proceedings.

When the document instituting the proceedings has not been properly served upon the respondent, it is for the national law to step in and provide supplementary rules, and to decide whether the applicant is to be given a second opportunity to serve the document properly. Paragraph (2) of Article 18, has precedence over paragraph (3) as per the provisions of the Service Regulation, which give the Service Regulation precedence over the 1965 Hague Convention. In turn, paragraphs (2) and (3) have precedence over paragraph (1).

[148] *Ibid*.
[149] CJEU Case C-523/07 *A* [2009] ECR I-2805.

Article 19 – Lis pendens and dependent actions

In order to determine whether Article 19 is applicable the following 3 circumstances must be met:

- proceedings relating to the child must be commenced before the court of another Member State;
- these proceedings must be related to parental responsibility;
- and they must involve the same cause of action.

If these criteria are met the seised court must stay its proceedings until the jurisdiction of the first court seised is established (Article 19(2)). If the court first seised has jurisdiction, the court second seised must decline jurisdiction in favour of the first court (Article 19(3)). When the court first seised declines jurisdiction, the court second seised may continue with the proceedings pending before it.

The rules of *lis pendens* in Article 19 of the Regulation are intended to prevent parallel proceedings before the courts of different Member States and to avoid conflicts between decisions which might result therefrom. For that purpose, the EU legislature intended to put a mechanism in place which was clear and effective in order to resolve situations of *lis pendens*. As was clear from the words 'court first seised' and 'court second seised' in Articles 19(1) and 19(3) of the Regulation, that mechanism was based on the chronological order in which the courts were seised (the CJEU case of *A v B*[150]).

Lis pendens can only exist when two or more sets of proceedings with the same cause of action are pending before different courts and where the sets of proceedings are directed to obtaining a judgment capable of recognition in a Member State other than that of the court seised as the court with jurisdiction as to the substance of the matter. The provisions of Article 19(2) are not applicable where a court of a Member State first seised for the purpose of obtaining measures in matters of parental responsibility is only seised for the purpose of its granting provisional measures within the meaning of Article 20 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 concerning an action directed at obtaining the same measures, whether on a provisional basis or as final measures (the CJEU case of *Purrucker II*[151]).

[150] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654.
[151] CJEU Case C-296/10 *Purrucker II* [2010] ECR I-11163.

Article 19(2) applies in the case of a conflict between two courts of different Member States before which, on the basis of the Regulation, proceedings have been brought relating to parental responsibility over a child with the same cause of action (the CJEU case of *Mercredi*[152]).

There is no conflict or risk of a conflict of jurisdiction between a case whose object is the return of a child and a case seeking a ruling on parental responsibility, since the former does not concern the substance of parental responsibility and therefore has neither the same object nor the same cause of action as the latter. There can therefore be no *lis pendens* between such actions (the CJEU case of C *v M*[153]).

Paragraph (1) of Article 19 refers to applications for divorce, legal separation or marriage annulment and does not require that the causes of action must be identical. In order for there to be a situation of *lis pendens*, it is important that the proceedings are pending simultaneously. In cases of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, Articles 19(1) and 19(3) must be interpreted as meaning that in a situation where the proceedings before the court first seised expired after the second court in the second Member State was seised, the criteria for *lis pendens* are not met and therefore the jurisdiction of the court first seised must be regarded as not having been established (the CJEU case of *A v B*[154]).

Article 20 – Provisional measures

Article 20 enables a court to take provisional, including protective, measures in accordance with its national law in respect of a child situated on its territory even if a court of another Member State has jurisdiction. It is important to clarify that Article 20 does not confer jurisdiction, and as a consequence, the provisional measure ceases to have effect when the competent court adopts final measures, also meaning that a court is no longer empowered to grant provisional measures when a judgement on the merits has been rendered.

According to the relevant literature and CJEU case law, the limits set by this provision are:

- Article 20 can only be invoked in urgent cases
    - *Conditio sine qua non*;
- the measures must respond to a specific objective – the protection of persons or assets; and
- the measures must be geographically and temporarily delimited

[152] CJEU Case C-497/10 *Mercredi v Chaffe* [2010] ECR I-14309.
[153] CJEU Case C-376/14 PPU *C v M* [2014] ECLI:EU:C:2014:2268.
[154] CJEU Case C-489/14 *A v B* [2015] ECLI:EU:C:2015:654.

- persons or assets must be present in the Member State of the court seised;
- the measures must be of a temporary nature.

Therefore, the characteristic elements of the measures are urgency, the protection of persons or assets within the Member State of the seised court, and a temporary limitation.

Orders made in the exercise of jurisdiction conferred by Article 20 are not enforceable in other Member States (the CJEU case of *Purrucker I*[155]).

The provision of Article 20 is to be interpreted as containing an implicit duty of information and it underlines the indispensability of mutual co-operation and respect between the courts of different Member States for the application of the Regulation. As regards urgency as a condition for the application of Article 20, this requirement is met 'in a situation likely serious to endanger (the children's) welfare, including their health or their development' (the CJEU case of *A*[156]).

In the case of provisional measures concerning parental responsibility, 'the concept of urgency in Article 20 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' (the CJEU case of *Detiček*[157]).

[155] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353.
[156] CJEU Case C-523/07 *A* [2009] ECR I-2805.
[157] CJEU Case C-403/09 PPU *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I-12193.