CHAPTER 6: Recognition and Enforcement in Matrimonial Matters

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Contents

1. Introduction 204
2. Scope 205
   2.1 Origin of the decisions 205
   2.2 Temporal scope 205
   2.3 Nature of the decisions 205
      2.3.1 Judgments in relation to the dissolution of matrimonial ties 205
         2.3.1.1 General 205
         2.3.1.2 Application of Articles 1 and 21 – National Reports 206
      2.3.2 Judicial and non-judicial decisions 208
         2.3.2.1 General 208
         2.3.2.2 Application of Articles 2(4), 21 and 63 – National Reports 208
      2.3.3 Negative judgments 210
         2.3.3.1 General 210
         2.3.3.2 Application of Articles 2(4) and 21 – National Reports 210
      2.3.4 Posthumous and third party nullity procedures 210
         2.3.4.1 General 210
         2.3.4.2 Application of Articles 1, 2, 3 and 21 – CJEU case law 210
      2.3.5 Authentic instruments and agreements between parties 211
         2.3.5.1 General 211
         2.3.5.2 Application of Articles 21 and 46 – National Reports 211
3. Recognition regimes 211
   3.1 Automatic recognition 211
   3.2 Procedural recognition 211
   3.3 Incidental procedural recognition 212
4. The grounds for non-recognition 213
   4.1 Public policy 213
      4.1.1 General 213
      4.1.2 Application of Article 22(a) – CJEU case law 215
      4.1.3 Difficulties in the application of Article 22(a) – National Reports 216
   4.2 Respect for the rights of defence when the respondent is in default of appearance 216
   4.3 Irreconcilable judgments 216
   4.4 Application of Article 22 – National Reports 217
5. Member States' national recognition rules 218

1. Introduction

The principles concerning recognition in matrimonial matters are set out in Chapter III of the Regulation. The Regulation provides for three recognition regimes: automatic recognition, recognition through judicial proceedings and incidental recognition in pending procedures.

In principle, the Regulation seeks to establish an automatic and mutual recognition of decisions in matrimonial matters throughout the EU without any intermediate proceedings.[1] By facilitating the automatic recognition of judgments in matrimonial matters, the EU legislators have attempted to enhance the free movement of persons in the EU and to ensure that EU citizens can have the same marital status in all Member States.[2] The court of the Member State with jurisdiction should have the central role in taking its decisions. Hence, the role of other Member States should be limited.

The basis for the automatic recognition can be found in Article 21(1). According to this provision, a judgment from a Member State relating to divorce, legal separation and marriage annulment must be recognised in the other Member State without any special procedure being required.

Since decisions on matrimonial matters have an impact on persons' civil status, Article 21(2) adds that no special procedure shall be required for updating the civil status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State and against which no further appeal lies under the law of that Member State.

Furthermore, the recognition or the confirmation of the non-recognition can be requested in separate judicial proceedings. Article 21(3) allows any interested party to apply for a decision on the recognition of a foreign judgment. The procedure is set out in section 2 of Chapter III of the Regulation (same procedure as for the enforcement of judgments).

In addition, recognition can be requested incidentally in pending proceedings. Article 21(4) provides for the possibility for a court of a Member State to determine the recognition of a judgment raised as an incidental question. Recognition can only be refused on a limited number of grounds. These grounds for the non-recognition of judgments relating to divorce, legal separation or marriage annulment are laid down in Article 22. These grounds were inspired by the grounds in Article 34 Brussels I Regulation (now Article 45 Brussels Ibis Regulation).

In practice, the provisions of Section 2 of Chapter III concerning a declaration of *enforceability* are likely to have limited meaning and relevance. There is rarely any need to enforce a decision on divorce, annulment or legal separation. It is sufficient that the courts or authorities of a Member State recognise that the marriage has been ended/annulled or that the spouses no longer live together in the case of a legal separation. Only when the costs or expenses

[1] This is within the philosophy and the objectives set out by the Tampere European Council of 1999 – Presidency conclusions Tampere European Council 15-16 October 1999, available at: http://www.europarl.europa.eu/summits/tam_en.htm, point 34.

[2] Scott, J.M., 'A question of trust? Recognition and enforcement of judgments' (2015) 1 NIPR, p. 27.

ordered in a judgment relating to matrimonial matters need to be claimed in another Member State can the provisions on enforcement be applicable according to Article 49 of the Regulation.

The National Reports raise only a limited number of existing problems in the application of the principles of recognition in matrimonial matters. When the Reporters mention specific problems in their Member States, these problems will be referred to in the relevant sections.

The 2016 Commission's Proposal also acknowledges that there is hardly any evidence of existing problems with regard to recognition in matrimonial matters. Therefore, the Proposal maintains the *status quo* on the recognition of decisions in matrimonial matters.[3]

In the following sections, we will first explain the recognition regime in matrimonial matters under the Regulation. Furthermore, we will discuss the scope, the different recognition procedures and the grounds of non-recognition.

2. Scope

As mentioned above, the rules governing recognition in matrimonial matters are set out in Chapter III of the Regulation. Chapter III, however, has to be understood within the Regulation's scope of application (see *supra* in Chapter 1, under 2 '*Substantive (ratione materiae) scope of application – Article 1)*'.

2.1 Origin of the decisions

First, there is the limited geographic scope. The recognition of judgments in matrimonial matters under Chapter III of the Regulation is limited to judgments rendered in the Member States. The recognition of the judgments of third countries follows the national rules of private international law of the Member State addressed.

2.2 Temporal scope

As for the temporal scope, only judgments of Member States in proceedings instituted after the date of the entry into force of the Regulation (1 March 2005) can be recognised automatically based on Article 21. However, Article 64 provides a transitional provision for proceedings commenced under or judgments given after the entry into force of the Brussels II Regulation, which had a date of application of 1 March 2001.

2.3 Nature of the decisions

2.3.1 Judgments in relation to the dissolution of matrimonial ties

2.3.1.1 General

Recognition under the Regulation in relation to divorce, legal separation or marriage annulment only affects the dissolution of the matrimonial ties as such. It does not lead to a recognition of the provisions in the judgment on the property of the partners, their maintenance obligations or other measures (Recital 8). The patrimonial (e.g. maintenance obligations between spouses, liquidation of the matrimonial regime, a possible allocation of damages and interest) and

[3] 2016 Commission's Proposal, p. 10-11.

personal (e.g. the question whether a divorced woman can retain the name of her former husband) consequences of the dissolution will be governed by other EU regulations or by the national private international law rules.[4]

As the Regulation does not contain a definition of a 'marriage' or of 'matrimonial ties', it is questionable whether these concepts should be interpreted autonomously or according to the *lex fori* and whether a same-sex marriage and a registered partnership fall within the scope of the Regulation (see *supra* in Chapter 1, under 2.1.1 '*Admissible relationships*'). Therefore, the question arises whether same-sex marriage divorces and registered partnership dissolutions can be recognised under the Regulation. In the Rome III Regulation, the European legislators seem to guide this discussion in the direction of an interpretation according to the national rules.[5]

2.3.1.2 Application of Articles 1 and 21 – National Reports

The National Reports show that there is no consensus in the Member States as to whether the concept of marriage should be interpreted autonomously or according to the national rules. Since there is hardly any case law on the matter, the discussion thus far is solely based on legal doctrine. The National Reports of Spain, France, Greece, Italy, Latvia, Lithuania and Romania explicitly refer to the national rules in order to define the concept of marriage. According to the National Report of Belgium, Belgian legal doctrine tends to prefer an autonomous interpretation.

Relating to same-sex marriages, the National Reports of the Member States tend to include same-sex marriage within the scope of the Regulation when the *lex fori* allows same-sex marriages (Estonia, Spain, France, Ireland, the Netherlands and Portugal), while they tend to exclude it when same-sex marriages do not exist in the Member State (Austria, Bulgaria, Germany,[6] Greece,[7] Hungary, Italy, Latvia, Lithuania, Poland and Romania). Consequently, this will also have an impact on the recognition of the dissolution of same-sex marriages. In that view, the Latvian National Report mentions that 'since the term registered partnership and same-sex marriage do not exist in the Latvian legal system, it is impossible to recognize and enforce judgments taken in another Member State in respect of same-sex marriages or registered partnership'.[8]

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[4] Chalas, C., 'Article 21', in: Corneloup, S., *op cit.*, p. 365.
[5] Verhellen, J., 'Brussel IIbis Verordening – Huwelijkszaken', in: Allemeersch, B., Kruger, T. (eds.), *Handboek Europees Burgerlijk Procesrecht* (Intersentia 2015), p. 62.
[6] National Report Germany, question 7: In Germany same-sex marriages are characterized as registered partnerships.
[7] National Report Greece, question 7: 'A foreign provision accepting the validity of such marriage will be considered as contrary to public policy.'
[8] National Report Latvia, question 7.

The National Reports of Cyprus, the Czech Republic,[9] Finland,[10] Luxembourg,[11] Malta, Slovenia,[12] Sweden[13] and the UK are silent on the issue of whether same-sex marriages fall within or outside the scope of the Regulation.

The Belgian Report refers to the Belgian legal doctrine. Most authors view this as an unresolved matter; although some exclude same-sex marriages from the Regulation.[14] The Courts of First Instance of Brussels[15] and Arlon[16] have dealt with cases on same-sex marriages. Both courts considered the provisions of the Regulation, without devoting attention to the question of whether the Regulation actually applies to same-sex marriages. After the courts had determined that the Regulation did not grant them international jurisdiction, they both resorted to the *forum necessitatis* of Article 11 Belgian Code of Private International Law. The Court of Arlon set aside the fact that Article 3 of the Regulation granted international jurisdiction to the French courts. It argued that France did not accept same-sex marriages (at that time) and therefore would not grant a divorce. The Court of Arlon thus applied the Regulation only in order to check whether the Regulation gave jurisdiction to the courts of a Member State that actually recognises same-sex marriages. As this was not the case at that time in France, the court applied the national jurisdiction rules provided for in the Belgian Code of Private International Law.

With regard to registered partnerships, it is generally accepted that they fall outside the scope of the Regulation (see *supra* in Chapter 1, under 2.1.1.3 '*Registered partnership*'). In a case concerning a Dutch 'fast-track divorce',[17] the Belgian Court of First Instance of Mechelen decided that the Regulation does not apply to a 'flitsscheiding', the transformation of a marriage into a registered partnership nor the partnership or its dissolution.[18]

The Greek Report mentions, however, that since the registered partnership for same-sex couples has been introduced in Greece, it falls within the scope of the Regulation.[19] In the Czech Republic, the District Court of Rokycany applied the Regulation for the dissolution of a registered partnership on 20 September 2011. It stated that although registered partnerships were not within the scope of the Regulation, it was feasible to apply it in that particular case *per analogiam*, as the national law did not provide any jurisdictional norm for such partnerships.

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[9] National Report the Czech Republic, question 7: In the Czech Republic a marriage only exists between opposite sex partners, but Czech law does allow same-sex registered partnerships.
[10] National Report Finland, question 7: Same-sex marriage has been legal in Finland as from 01/03/2017.
[11] National Report Luxembourg, question 7: Same-sex marriage is allowed in Luxembourg.
[12] National Report Slovenia, question 7: Same-sex marriage does not exist in Slovenia, only registered same-sex partnerships.
[13] National Report Sweden, question 7: Same-sex marriage exists; however, marriage annulment and legal separation are unknown in Sweden.
[14] National Report Belgium, question 7.
[15] Court of First Instance of Brussels 19 June 2013, *Revue@dipr.be,* 2013/4, p. 70.
[16] Court of First Instance of Arlon 20 November 2009, *Revue trimestrielle de droit familial,* 2012, p. 696.
[17] These are proceedings whereby a marriage has first been transformed into a registered partnership, after which the partnership is terminated.
[18] Court of First Instance of Mechelen 12 January 2006, *Echtscheidingsjournaal,* 2006, p. 153.
[19] National Report Greece, question 7.

2.3.2 Judicial and non-judicial decisions

2.3.2.1 General

It is clear that according to Article 2(4) of the Regulation, all judicial decisions fall under the scope of Chapter III (see *supra* in Chapter 1, under 2.1.2 '*Types of decisions covered*'). This is not to imply that non-judicial decisions cannot be recognised under Chapter III of the Regulation. Two types of non-judicial decisions emerge from the National Reports: administrative procedures and religious decisions.

2.3.2.2 Application of Articles 2(4), 21 and 63 – National Reports

Administrative procedures that are officially recognised in a Member State are included within the scope of Article 2(4) of the Regulation.[20] The National Report of Ireland, however, mentions that non-judicial decisions cannot be recognised by the Irish courts. No further explanation has been given in the Report.[21]

With regard to religious proceedings, they were explicitly excluded in the Brussels II Regulation.[22] The Brussels IIbis Regulation did not confirm this exclusion.[23] In the absence of any specific indication of a change in position by the EU legislator, different authors assume that the Brussels IIbis Regulation was also intended to retain this exclusion.[24] This is also confirmed in the National Reports. According to the National Report of the Czech Republic, the Czech doctrine:

> 'interprets the notion of "decision" for the purposes of the recognition of foreign decisions on divorce as a decision of a state's authority (judicial or, where applicable, administrative) and excludes "private" decisions of religious bodies, unless they were given powers to divorce expressly by law'.[25]

The National Report of France, however, states that 'if the religious authority pronouncing the divorce "has jurisdiction" in the Member State to do so, its decision will fall under the Brussels IIbis recognition regime'.[26] Moreover, the Greek National Report states that 'religious decisions or decisions of a private nature are excluded from the scope of the Regulation except

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[20] Proposal for Regulation 1347/2000, Explanatory Memorandum, COM (1999) 220 final 11; this is confirmed by Article 1(1) of the Brussels IIbis Regulation insofar as it defines the scope of the Brussels IIbis Regulation in terms of civil matters 'whatever the nature of the court or tribunal'; Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance, COM (2002) 222 final, where it is confirmed that administrative proceedings are covered.

[21] National Report Ireland, question 15.

[22] Proposal for Regulation 1347/2000, Explanatory Memorandum, Com (1999) 220 final 11.

[23] Gallant, E., 'Compétence, reconnaissance et exécution (Matières matrimoniale et de responsabilité parentale)', in: X., *Répertoire de droit européen (no. 243)* (Dalloz 2013).

[24] Ní Shúilleabháin, *op. cit.*, p.124; Gallant, 'Compétence, reconnaissance et exécution (Matières matrimoniale et de responsabilité parentale)', *op.cit.*, no. 243; Hammjen, P., 'Le règlement (CE) n°2201/2003 du 27 novembre 2003 dit 'Bruxelles IIbis'. Les règles relatives à la reconnaissance et l'exécution', in: Fulchiron and Nourissat, *op. cit.*, no. 87; Wautelet, P., 'La dissolution du marriage en droit international privé – Compétence, droit applicable et reconnaissance des decisions étrangères', in: Wautelet, P., *op. cit.*, p. 129-130.

[25] National Report the Czech Republic, question 15.

[26] National Report France, question 15.

for those that are recognised as equivalent to the decisions of judicial authorities'.[27] Furthermore, the Irish National Report also states that religious decisions cannot be recognised in Ireland.[28]

There is no consensus as to whether a divorce decision obtained under Sharia law and taken by the *mufti*, the religious leaders of the Muslims living in the region of Thrace in Greece, can be recognised under Chapter III of the Regulation. *Mufti* judgments have civil effects in Greece once they have been rendered enforceable by a decision of the Greek civil courts. This recognition of the earlier proceedings by the Greek civil courts is subject to a limited investigation of the relevant mufti's jurisdiction and compatibility with the Greek Constitution. According to Vassilakakis and Kourtis, an exclusion of *mufti* proceedings from the scope of the Regulation would lead to unequal results for this group of European citizens.[29] We note that the Greek Report does not mention any problems with regard to the non-recognition of the Greek *mufti* judgments in other Member States.

Article 63 of the Regulation expressly stipulates that marriage annulment decisions pronounced by the ecclesiastical courts in Italy, Spain and Portugal and based on international treaties concluded between the Holy See and Italy, Spain and Portugal can be recognised subject to the conditions laid down in Chapter III, Section 1 of the Regulation.

The National Reports do not mention case law or problems regarding the recognition of decisions based on international treaties with the Holy See. The National Report of Spain, however, mentions that:

> 'according to Article VI.2 of the Agreement between the Holy See and Spain on legal affairs of 3 January 1979, declarations of annulment and pontifical decisions concerning a valid but unconsummated marriage shall be considered valid under the civil law if they were declared to be in compliance with State Law by a decision by the competent Civil Court'.

The Reporter mentions two main problems in that regard. Firstly, the Reporter stresses that the mentioned provision does not exclusively refer to judgments rendered by the Spanish Ecclesiastical Courts. Therefore, the Reporter concludes that this stipulation could be interpreted as meaning that the Ecclesiastical judgments of other member states regarding the nullity or dissolution of a non-consummated marriage can have civil effects in Spain as long as they are valid under Spanish civil law. Secondly, the reporter explains what should be understood by the wording 'under civil law'. The Reporter refers to Article 80 of the Spanish Civil Code. That provision states that Ecclesiastical judgments will have civil effects in Spain as long as they obtain the exequatur according to the Spanish private international law recognition rules. Finally, the Reporter notes that new recognition and enforcement rules are

[27] National Report Greece, question 15.
[28] National Report Ireland, question 13.
[29] Vassilakakis, E. and Kourtis, V., 'The impact and application of the Brussels IIbis Regulation in Greece', in: Boele-Woelki and Gonzalez Beilfuss, *op. cit.*, p. 137-138.

now applicable in Spain since the entry into force of Law 29/2015 of 30 July 2015 on international judicial cooperation in civil matters.[30]

2.3.3 Negative judgments

2.3.3.1 General

It is also contested whether negative judgments fall under the recognition mechanism of the Regulation. Negative judgments refer to judgments that refuse the dissolution of matrimonial ties. Different authors and the Borrás Report state that only decisions that grant a divorce, legal separation or annulment can be the object of recognition under the Regulation.[31]

2.3.3.2 Application of Articles 2(4) and 21 – National Reports

Only the National Report of Lithuania mentions a case in which a Lithuanian Court interpreted and clarified the definition of a 'judgment' in relation to the recognition of a negative judgment.[32] According to the Reporter, the court clarified that only court judgments which positively create or alter the interests of a claimant might be recognised. Judgments that reject a request and which do not create or alter the interests of a claimant cannot be recognised in the jurisdiction of Lithuania based on the Regulation.[33]

2.3.4 Posthumous and third party nullity procedures

2.3.4.1 General

According to some of the national legislations, one spouse can request the annulment of a marriage if the other spouse is deceased. Some also accept that a third party with an interest in the validity of the marriage can request this annulment. The Regulation does not address the question of whether the recognition of such a judgment falls within its scope. The Borrás Report expressed that posthumous annulments fall outside the scope of the Regulation. However, Borrás did not address the matter of third party annulments.[34]

2.3.4.2 Application of Articles 1, 2, 3 and 21 – CJEU case law

The CJEU has provided some clarification. In a decision of 13 October 2016 in relation to the application of Article 3 on jurisdiction, the CJEU[35] ruled that an action for the annulment of a marriage brought by a third party following the death of one of the spouses falls within the scope of the Regulation (see *supra* in Chapter 1, under 2.1.2.3 '*Marriage annulment*').

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[30] National Report Spain, question 15.

[31] Borrás Report, no. 60; Gaudemet-Tallon, H., 'Le Règlement 1347/2000 du Conseil du 29 mai 2000: Compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs' (2001) JDI, p. 406; Heyvaert, A., *Belgisch internationaal privaatrecht – een inleiding* (Mys & Breesch 2001), p. 25; Mostermans, P., 'De wederzijdse erkenning van echtscheidingen binnen de Europese Unie' (2002) NIPR, p. 263; Wagner, R., 'Die Anerkennung und Vollstreckung von Entscheidungen nach der Brüssel II-Verordnung (2001) IPRax, p. 76; Storme, H., in: Erauw, J. *Handboek Belgisch internationaal privaatrecht* (Kluwer 2006), p. 176.

[32] Court of Appeal of Lithuania 7 March 2014, No 2T-29/2014; National Report Lithuania, question 15.

[33] National Report Lithuania, question 15.

[34] Borrás Report, no. 27.

[35] CJEU Case C-294/15 *Edyta Mikołajczyk v Marie Louise Czarnecka and Stefan Czarnecki* [2017] ECLI:EU:C:2016:772.

Consequently, the recognition of an annulment of a marriage which had been requested by a third party following the death of one of the spouses falls within the scope of the Regulation.

2.3.5 Authentic instruments and agreements between parties

2.3.5.1 General

The Regulation indicates in Article 46 that authentic instruments and agreements between parties that are enforceable in one Member State should be treated as judgments. Therefore, such authentic instruments and agreements should be recognised under the same conditions as judgments. Under the Brussels II Regulation only court-approved agreements were covered. By amending the language in the Brussels IIbis Regulation, the EU legislator extended the terminology to encompass private agreements, without requiring that they should be in writing or authenticated.[36]

2.3.5.2 Application of Articles 21 and 46 – National Reports

The Spanish National Report refers to notarial divorce procedures where notaries are allowed to grant a divorce provided that the spouses agree and as long as they do not have responsibility for any minor or disabled persons.[37] The Reporter further states that the recognition of such a notarial divorce deed falls within the scope of the Regulation.[38] The other National Reports do not address this issue.[39]

3. Recognition regimes

3.1 Automatic recognition

As mentioned above, Article 21(1) of the Regulation provides for the automatic recognition of a judgment relating to divorce, legal separation and marriage annulment delivered in another Member State. Although no special procedure is required, the authorities of the Member States may refuse *ex officio* the recognition of a judgment delivered in another Member State based on one of the grounds for non-recognition listed in Article 22 of the Regulation (see *infra* in this Chapter, under 4 '*The grounds for non-recognition*').

3.2 Procedural recognition

An automatic recognition, however, is neither irrevocable nor absolute. The parties may contest the recognition or the refusal thereof. According to Article 21(3) of the Regulation, any interested party can commence proceedings to apply for a court decision concerning the recognition of a judgment from another Member State. If a party decides to contest the automatic recognition of a divorce decision and the court decides not to recognise the decision,

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[36] Ní Shúilleabháin, *op. cit.*, p. 128.

[37] National Report Spain, question 3.

[38] *Ibid.*, question 15.

[39] However, this is a very topical issue. Since 1 January 2017, France also has a divorce procedure by means of a mutual contractual agreement without the intervention of a judge. The agreement must only be deposited with a notary who checks on compliance with formal requirements. The depositing of this agreement gives it a certain date and enforceability. See Hammje, P., 'Le divorce par consentement mutuel extrajudiciaire et le droit international privé. Les aléas d'un divorce sans for' (2017) Revue critique de droit international privé, p. 143.

the automatic recognition will retroactively lose its international force.[40] Scott argues that the possibility of such an application to a court should continue to exist in order to deal with the rapid changes in family law, for example concerning the recognition of judgments relating to a civil partnership or a same-sex marriage.[41]

The competent court is the court mentioned in the list pursuant to Article 68, while the intern territorial jurisdiction is determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought (Article 21(3), 2nd paragraph Brussels IIbis Regulation).

The procedures can be requested by any interested party. However, the Regulation does not define the term 'interested party'. Therefore, the law of the relevant court will determine whether the applicant has an interest in the proceedings.[42] The concept of an interested party should be widely interpreted and is not limited to the parties to the original proceedings.[43] Creditors of the spouses, heirs of the spouses and the government could be interested parties.[44] It should be noted that the National Reports do not mention any specific problems concerning these matters.

According to Article 31, the court can only refuse recognition on the grounds specified in Article 22 of the Regulation (see *infra* in this Chapter, under 4 '*The grounds for non-recognition*'). The applicant has the burden of proof concerning the existence of one of the grounds in Article 22 of the Regulation.

3.3 Incidental procedural recognition

The recognition or non-recognition of a decision can also be determined by a court answering an incidental question. According to Article 21(4), whenever a party invokes the authority of the *res judicata* of a judgment pronouncing a divorce, legal separation or marriage annulment before a court of a Member State, that court is competent to decide incidentally upon the recognition of that judgment. This court does not have to refer the question of recognition to the court which is competent according to Article 68 of the Regulation. The court where the issue of recognition is raised as an incidental question may itself determine this issue; however, the court can only use the grounds of non-recognition listed in Article 22. When a court decides incidentally on the recognition of a foreign judgment, it is no longer possible to file a request for the recognition of that judgment at another court of the same Member State, not even at the court that has been specifically designated according to Article 68 of the Regulation.[45]

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[40] De Vareilles – Sommières, P., 'La libre circulation des jugements rendus en matière matrimoniale en Europe', *Gazette du Palais,* 1999, no 352, p. 15, no 75; Chalas, *op. cit.*, p. 370.
[41] Scott, *op. cit.*, p. 29.
[42] Chalas, *op. cit.*, p. 375.
[43] Teixeira de Sousa, M., 'Article 22', in : Corneloup, S., *op cit.*, p. 385; Borrás Report, no. 65; Helms, T., 'Die Anerkennung ausländischer Enscheidungen im Europäischen Eheverfahrensrecht', FamRZ, p. 2001, 261.
[44] Chalas, *op. cit.*, p. 375.
[45] X., *Comment on EC Regulation Brussels II*, Article 21, available at: <www.europeancivillaw.com>.

4. The grounds for non-recognition

The grounds for the non-recognition of judgments in matrimonial matters are provided in Article 22 of the Regulation. The list of grounds is limited to the public policy exception (Article 22(a)), the fair process exception (Article 22(b)) and the incompatibility exception between different judgments (Article 22(c) and Article 22(d). It is not possible to invoke another ground for non-recognition based on national law.[46] Some authors argue that the grounds of Article 22 are compulsory. Accordingly, if one of the grounds is present, the judgment may not be recognised and the courts do not have any discretionary authority.[47]

The grounds for non-recognition are further limited by Articles 24, 25 and 26. Under no circumstances may the court review the judgment as to its substance (Article 26), and the court also cannot question the jurisdiction of the court of origin (Article 24). Furthermore, the court of recognition may not control the law applied by the court of origin (Article 25).The Regulation does not mention any effectiveness requirement in the judgment's State of origin. It does not require that the judgment is final. The National Reports do not indicate any problems resulting from the lack of an effectiveness requirement in the judgment's State of origin.

In this section, we will briefly analyse the different grounds for non-recognition. Consequently, we will elaborate on the application thereof in practice.

4.1 Public policy

4.1.1 General

According to Article 22(a) of the Regulation, a divorce, legal separation or marriage annulment judgment cannot be recognized 'if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought'.

The public policy ground in the Brussels IIbis Regulation has – in accordance with the jurisprudence of the CJEU relating to the Brussels Ibis Regulation – a very limited scope.[48] It is not for the Court to define the content of the public policy of a Member State, although it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing the recognition of a judgment emanating from a court in another Member State.[49] This prohibits the court of the Member State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and the rule that would have been applied by the court of the State in which enforcement is sought. Similarly, the court of the Member State in which recognition is sought may not review the

[46] Vandenbosch, A. and Muylle, M., 'Commentaar bij Artikel 22 en 23' in: Couwenberg, I., Hansebout, A. and Vanfraechem, L., *Duiding Internationaal Privaatrecht* (Larcier 2014), p. 317-318.

[47] Borrás Report, no. 67; Vandenbosch and Muylle, *op. cit.*, p. 318; Couwenberg, I., 'Tenuitvoerlegging in België van buitenlandse beslissingen' in: Pertegas, M., Brijs, S. and Samyn, L., *Betekenen en uitvoeren over de grenzen heen* (Intersentia 2008), p. 107.

[48] CJEU Case C-145/86 *Hoffmann v Krieg* [1988] ECR 645 (on the 1968 Brussels Convention); Ní Shúilleabháin, *op. cit.*, p. 255.

[49] CJEU Case C‑420/07 *Apostolides* [2009] EU:C:2009:271, para 57 and the case law cited.

accuracy of the findings of law or fact made by the court of the Member State of origin.[50] As such, an appeal against a refusal of recognition based on the public policy exception can only be successful where the recognition or enforcement of the judgment given in another Member State would differ to an unacceptable degree with the legal order of the Member State in which enforcement is sought in such a way that it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a foreign judgment of another Member State to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State in which recognition is sought or of a right recognised as being fundamental within that legal order.[51]

The public policy ground in Article 22 of the Brussels IIbis Regulation has the same wording as the public policy ground in the Brussels Ibis Regulation. Therefore, the jurisprudence of the CJEU concerning the Brussels Ibis Regulation can help to interpret Article 22(a) Brussels IIbis Regulation.

The non-recognition ground based on public policy principles is rarely accepted in cases relating to the recognition of judgments on divorce, legal separation and marriage annulment.

In Member States that are liberal in granting divorce, the recognition of a divorce judgment rarely violates the public policy of that Member State. In Member States which have a more limited view of divorce, the scope of the public policy ground is further limited by Articles 24, 25 and 26 of the Regulation.[52]

Article 24 prohibits any review of the jurisdiction of the court of origin, even when it is founded on the domestic law of the State of origin.[53] Moreover, Article 24 states that the test of public policy may not be applied to the rules relating to jurisdiction set out in Article 3 to 14. The exercise of jurisdiction based on the Regulation cannot be an infringement of the public policy of the court of recognition.[54]

Article 26 prevents a judgment from being reviewed as to its substance. Therefore, a court may not refuse recognition on the basis that the granting court was mistaken as to the facts, the evidence or the law.[55]

Article 25 specifies that 'the recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.' This provision was introduced at the

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[50] *Ibid*., para 58 and the case law cited.
[51] *Ibid*., para 59 and the case law cited. In particular, as regards the circumstances in which the fact that a judgment of a court of a Member State had been delivered in breach of procedural safeguards may constitute a ground for the refusal of recognition under Article 34(1) of Brussels I Regulation, the Court has held that the public policy clause in that article would apply only where such a breach means that the recognition of the judgment concerned in the Member State in which recognition is sought would result in a manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State (see CJEU Case C‑681/13 *Diageo Brands* [2015] EU:C:2015:471, para 50).
[52] Teixeira de Sousa, *op. cit.*, p. 388.
[53] Teixeira de Sousa, *op. cit.*, p. 389; Ní Shúilleabháin, *op. cit.*, p. 258.
[54] Ní Shúilleabháin, *op. cit.*, p. 258.
[55] Ní Shúilleabháin, *op. cit.*, p. 258.

request of the Nordic States that were concerned that other Member States would use the ground of public policy in order to refuse the recognition of their divorces granted on relatively liberal grounds.[56] For example, if in the State of origin a divorce can be granted after a separation of two years, the public policy ground cannot prohibit recognition by a State where the law requires five years of separation.

4.1.2 Application of Article 22(a) – CJEU case law

In the case of *P v. Q*[57], the Court applied its interpretation of the public policy exception in the Brussels I Regulation to the Brussels IIbis Regulation.[58]

According to the CJEU, the following principles apply. First, only the public policy principles of the Member State of recognition are relevant. Thus, the fundamental values of the Member State where recognition is sought should be violated. However, the CJEU has the authority to review the application of these national public policy rules when a court refuses the recognition of a judgment. In *Krombach v. Bamberski* (a case concerning the 1968 Brussels Convention (later converted into the Brussels I Regulation), the CJEU decided that while the Member States are in principle free to determine, according to their own conceptions, what public policy requires, the limits of that concept are to be interpreted according to the Convention. Consequently, the CJEU decided that the Court should review the limits within which the courts of a Member State may have recourse to the public policy concept for the purpose of refusing the recognition of a judgment from a court in another Member State.[59] This was confirmed by the CJEU in its *Renault* judgment.[60] The CJEU further indicated that in order to define these limits, it will draw inspiration from the constitutional traditions common to the Member States and from the guidelines provided by international treaties on the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention on Human Rights[61] has particular significance.[62]

Secondly, the public policy exception only applies where there is a manifest violation thereof. In relation to the term 'manifest', the CJEU has argued that recourse to the public policy ground is only possible if the judgment is

> 'at variance to an unacceptable degree with the legal order of the State in which enforcement is sought in as much as it infringes a fundamental principle […] the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order'.[63]

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[56] Ní Shúilleabháin, *op. cit.*, p. 258.
[57] CJEU Case C-455/15 PPU *P v Q* [2015] ECLI:EU:C:2015:763.
[58] The reasoning of the CJEU is discussed in greater detail *infra* in Chapter 7 under 1.4 '*Grounds for non-recognition – CJEU case law*'.
[59] CJEU Case C-7/98 *Krombach v. Bamberski* [2000] I-01935, para 22-23.
[60] CJEU Case C-38/98 *Renault v. Maxicar* [2000] I-02973, para 171.
[61] The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the European Convention on Human Rights).
[62] CJEU Case C-7/98 *Krombach v. Bamberski* [2000] I-01935, para 25.
[63] *Ibid.*, para 37.

4.1.3 Difficulties in the application of Article 22(a) – National Reports

The National Reports do not mention any relevant case law where the public policy exception has been applied. This was also the conclusion of Hess and Pfeiffer after their analysis in 2011.[64]

4.2 Respect for the rights of defence when the respondent is in default of appearance

Article 22(b) stipulates that a judgment regarding divorce, legal separation or marriage annulment shall not be recognized

> 'where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally'.

Article 22(b) is an addition to the protection of Article 18 of the Regulation, which also protects the respondent's rights of notification and defence (see *supra* in Chapter 5, under 3 '*Examination as to admissibility – Article 18*'). The principle protected in Article 22(b) can be part of the procedural public policy of a Member State. Article 22(b) embodies a violation of a fair trial, but is only applicable when the respondent has not appeared, was not notified in sufficient time[65] or was not able to arrange his/her defence. An irregularity in the citation is not sufficient. Thus the irregularity must prevent the possibility for the defendant to defend him/herself.[66] However, if the respondent has unequivocally accepted the judgment, the lateness or irregularity of the citation becomes irrelevant. Helms argues that failing to appeal against the judgment does not prove that there was an unequivocal acceptance of that judgment.[67] On the other hand, the contracting of a new marriage by the respondent or the demand for maintenance from the former spouse proves an unequivocal acceptance of the judgment.[68]

4.3 Irreconcilable judgments

With regard to irreconcilable judgments, the Regulation provides for two situations.

Firstly, Article 22(c) stipulates that a judgment relating to divorce, legal separation or marriage annulment shall not be recognized 'if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought'.

A judgment on matrimonial matters cannot be recognized when it is incompatible with another judgment in the Member State of recognition. Article 22(c) does not explicitly require

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[64] Hess, B. and Pfeiffer, T., 'Interpretation of the public policy exception as referred to in EU Instruments of Private International and Procedural Law' (Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, European Union, 2011) available at: www.europarl.europa.eu/studies.

[65] This is not subject to any deadline, but must be sufficient for the respondent to retain a lawyer and to be able to organize his/her defence. CJEU Case C-166/80 *Klomps v Michel* [1981] ECR 1593; Teixeira de Sousa, *op. cit.*, p. 390.

[66] Vandenbosch and Muylle, *op. cit.*, p. 318.

[67] Helms, *op. cit.*, p. 264.

[68] Borrás Report, no 70.

the actions to have the same object. Article 22(c) even disregards whether the judgment in the State of recognition predates or postdates the judgment given in the State of origin.[69] Thus, it is not necessary that the inconsistent judgment of the State of recognition falls within the scope of the Regulation.[70]

Secondly, Article 22(d) stipulates that a judgment relating to divorce, legal separation or marriage annulment shall not be recognized 'if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought'.

This provision relates to cases in which the judgment, delivered in another Member State or in a third country between the same parties, meets two conditions: (a) it was given earlier; (b) it fulfils the conditions that are necessary for its recognition in the Member State in which recognition is sought.[71]

4.4 Application of Article 22 – National Reports

The National Reports reveal that decisions refusing the recognition of judgments in matrimonial matters are rare.

The Reports of Greece, Germany and Romania address the refusal of recognition based on the procedural incompleteness of the files. In Germany, civil servants report that there are often difficulties in attaining authentic documentary evidence concerning foreign divorces.[72] In Greece, a lack of the necessary documents for recognition can lead to a delay in court hearings.[73] Moreover, in Romania, the Brăila County Court[74] denied the recognition of a divorce judgment delivered by a French court, as the claimant had not produced a certified copy of the foreign judgment nor the certificate mentioned in Article 39 of the Regulation. The Report of Romania also refers to a decision by the Suceava County Court[75] of 8 October 2015 in which the recognition of a divorce judgment originating from Spain was refused on the ground that the claimant had not proved that the judgment was final. The applicant also did not produce the certificate required by Articles 37 and 39 of the Regulation. In the appeal procedure, the applicant produced the requested certificate.[76] The National Report of Romania further makes reference to several examples of court decisions that have refused the recognition of divorces by default based on Article 22 of the Regulation.[77]

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[69] Borrás Report, no 71.
[70] Teixeira de Sousa, *op. cit.*, p. 391; Rauscher, *Europäisches Zivilprozessrecht und Kollisionsrecht*, *op. cit.*, Articles 22, 21.
[71] Borrás Report, no 71.
[72] National Report Germany, question 14.
[73] National Report Greece, question 16.
[74] County Court of Brăila, 1st Civil Division, case 426, 21 May 2015; National Report Romania, question 17.
[75] County Court of Suceava, case 1502, 8 October 2015; National Report Romania, question 17.
[76] Court of Appeal of Suceava, 1st civil Division, case 77, 26 January 2016; National Report Romania, question 17.
[77] National Report Romania, question 17, with reference to: Court of Appeal of Iaşi, case 152, 3 November 2008; County Court of Mehedinti, 1st Civil division, case 181, 30 September 2014; County Court of Galati, 1st Civil Division, case 1784, 24 November 2014; County Court of Bucharest, 4th Civil Division, case 423, 3 April 2014;

Furthermore, in Italy, the Court of Appeal of Perugia incidentally decided upon the recognition of a Spanish judgement in order to determine its own jurisdiction. The Court found that a Spanish judgment that had granted a divorce without a previous period of personal separation did not breach public policy within the meaning of Article 22. However, the Spanish divorce judgment could not be recognized since it contradicted procedural public policy. The judgment was rendered in proceedings where the statement of claim was served on the defendant according to the rules on untraceable persons even though the plaintiff was aware of the defendant's residence in Italy.[78]

Moreover, the Court of Second Instance in Poland rejected the recognition of a Dutch divorce judgment by default. The court argued that the applicant had not produced any evidence of the specific dates of the acts informing the defendant of the divorce proceedings. Therefore, it was impossible to determine whether the defendant had sufficient time to arrange his defence.[79]

5. Member States' national recognition rules

Decisions emanating from third countries can only be recognized in a Member State by the national recognition rules of that State. The National Reports show that there is a trend for Member States to implement the grounds of Article 22 Brussels IIbis Regulation in their national recognition rules for judgments on matrimonial matters. However, most Member States have added extra grounds for non-recognition. Some Member States use a completely different mechanism or focus on completely different grounds. These grounds are often linked to the nationality of the spouses concerned and/or imply a control of the jurisdiction of the court of origin. Many Member States have separate recognition rules for specific forms of marriage dissolution, such as repudiation.

County Court of Dambovita, 1st civil Division, case 1160, 1 October 2014; Court of Appeal of Bacău, 1st Civil Division, case 334, 20 February 2013.

[78] Court of Appeal of Perugia, case 20110310, 9 March 2011, https://w3.abdn.ac.uk/clsm/eupillar/public/case/2419.

[79] Court of Second Instance of Krakowie, case I ACz 1669/14, 5 October 2014, https://w3.abdn.ac.uk/clsm/eupillar/public/case/1463.

GUIDELINES – Summary

The recognition of judgments in *matrimonial matters* is regulated by **Chapter III** of the Brussels IIbis Regulation (*Articles 21-22*).

Only judgments of Member States can be recognized under Chapter III of the Regulation and the rules are limited to judgments that affect the dissolution of matrimonial ties. The dissolution of matrimonial ties by authentic instruments or by agreement between the parties that are concluded and enforceable in one Member State, fall within the scope of the recognition rules of the Regulation.

There is no consensus as to whether the dissolution of same-sex marriage divorces can be recognized under the Brussels IIbis Regulation. The National Reports of the Member States tend to include same-sex marriages within the scope of the Brussels IIbis Regulation when the law of the court of recognition allows same-sex marriages. They tend to exclude it when same-sex marriages do not exist in the Member State in question. With regard to registered partnerships, it is generally accepted that they fall outside the scope of Brussels IIbis. Therefore, the recognition of their dissolution also falls outside the scope of the recognition rules of the Regulation.

Judicial and non-judicial decisions can be recognized under Chapter III of the Brussels IIbis Regulation. The National Reports confirm that official administrative procedures fall within the scope of Brussels IIbis; religious proceedings are excluded, except for mufti judgements rendered enforceable by a decision of the Greek civil courts and marriage annulment decisions based on international treaties with the Holy See.

Different authors, the Borrás Report and the Lithuanian Reporter argue that judgments that refuse the dissolution of matrimonial ties (negative judgments) cannot be the object of recognition under the Brussel IIbis Regulation.

Since a recent decision of 13 October 2016 by the CJEU, the recognition of the annulment of a marriage requested by a third party following the death of one of the spouses falls within the scope of Brussels IIbis (posthumous and third party nullity procedures).