CHAPTER 8: Common Provisions on Enforcement

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Contents

1. Prohibition on reviewing the jurisdiction of the court of origin – Article 24

1.1 Explanation of the concept and the way it is currently regulated

Article 24 imposes an absolute prohibition on reviewing the jurisdiction exercised by the court of origin when reaching the judgment that is presented for enforcement. Further, it prohibits the court of enforcement from considering the jurisdiction relied upon as the basis for the judgment when applying the public policy exception in Article 23(a).

1.2 Difficulties in application – National Reports

In most of the National Reports, no specific problems are mentioned regarding Article 24. In the Romanian Report,[1] regarding recognition and Article 24, a concern has been expressed. Even though in the majority of cases the recognition of foreign decisions has been respected,[2] some courts still mention the fulfilment of the recognition and enforcement of decisions in cases of parental responsibility conditions laid down by the Romanian Civil Procedure Code,[3] and not the conditions laid down in the Regulation. Some judgments might be contrary to Article 24.

1.3 Difficulties in application – CJEU case law

The absolute prohibition in Article 24 follows from the CJEU ruling in *Purrucker I*,[4] which is detailed *supra* in Chapter 5, under 5.4 '*Difficulties in application – CJEU case law*'. The court held that Article 24 Brussels IIbis Regulation prohibits any review of the jurisdiction of the court of the Member State of origin.[5] In the legal literature, a number of comments have been made regarding problems in application following from relevant case law from the CJEU. In this context, Scott is of the opinion that, even though there are only a few cases where the public policy exception to recognition and enforcement was invoked, this does not mean that it will have no effect. Its mere existence may have a restraining influence.[6] The same author argues that the aim of achieving adherence to its jurisdictional requirements should preclude arguments over jurisdiction. Where obtaining *exequatur* is relevant, the Regulation expressly prohibits any review of the jurisdiction of the Member State of origin.[7] The public policy test will not permit a review of the jurisdiction of the Member Sate which has delivered the judgment. However, there is no definition of public policy in Brussels IIbis. In *Hoffman v Krieg*,[8] the CJEU held under Brussels I that a refusal to recognise a judgment based on public policy should operate only in 'exceptional circumstances'. Even if the court of origin has assumed jurisdiction on a basis that is contrary to the Regulation, this will not permit a court in the state where recognition and enforcement is sought to refuse the recognition of a judgment.

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[1] National Report Romania, question 29.
[2] *Ibid*.
[3] *Ibid*.
[4] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez I* [2010] ECR I-07353.
[5] *Ibid*., para 90.
[6] Scott, *op. cit*, p. 31.
[7] *Ibid*., p. 32.
[8] CJEU Case C-145/86 *Hoffman v Krieg* [1988] ECR 645.

Scott[9] holds that in practice maintaining this position is not quite so straightforward as it may seem, as 'mistakes happen'. There have indeed been instances of courts being seised of a case, only to discover that a second court purports to exercise jurisdiction in breach of the *lis pendens* provisions of Article 19 of Brussels IIbis. If this occurs, the court that had been first seised is permitted not only to question jurisdiction, but should also decline to enforce an order of the court second seised. See, in that connection, the case of *Mercredi*.[10]

Mellone sees a contradiction in the ruling in *Purrucker I* and *Purrucker II*.[11] In *Purrucker I*,[12] the Court held that provisional measures which fulfil the conditions under Article 20 of the Regulation, but which are nonetheless issued by non-competent courts under the rules of jurisdiction of Brussels IIbis, are not admitted to the simplified regime of the circulation of decisions.

Moreover, in the *Purrucker II*[13] case, the Court added that in the case of *lis pendens* between a provisional measure and ordinary proceedings, the latter shall continue, regardless of whether they commenced after the proceedings related to a provisional measure.

Both decisions were essentially based on the same concept: provisional measures issued by non-competent courts are an exception to the system of jurisdiction and the recognition of decisions determined by the Regulation. As such, they cannot ('really') be considered as 'decisions' in light of the simplified system of the recognition of decisions and of the *lis pendens* mechanism. This important ruling by the Court has provoked an initial and fundamental effect: in order to ascertain whether the court issuing the provisional measure is or is not competent on the merits, the court seised for the enforcement shall investigate the original competence of the issuing court (which is, *a priori*, prohibited under Article 24 of the Regulation). If the test is positive, then the enforcement can be granted: if not, it will not be granted (at least under the Brussels II system).

In the case of *Inga Rinau*[14] one of the issues placed before the CJEU in the context of a child's return concerned the meaning of Article 24 in scenarios where a national court is unable to review the jurisdiction of the foreign court which issued the original decision. For full details of this case, see *supra* in Chapter 4, under 4.2 '*Difficulties in application – CJEU case law*'. If the court cannot identify any other grounds for non-recognition under Article 23 Brussels IIbis, is it obliged to recognise the decision of the court of origin ordering the child's return if the court of the Member State of origin failed to observe the procedures laid down in the regulation when deciding on the issue of the child's return? With this rather complicated question, the referring court sought to ascertain whether Article 24 must be interpreted as meaning that the court of the Member State in which the child is wrongfully retained is obliged to recognise the decision requiring the child's return issued by the court of the Member State of origin if that

[9] Scott, *op. cit.*, p. 32.
[10] CJEU Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309.
[11] Mellone, *op. cit.*, p. 23-24.
[12] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez I* [2010] ECR I-07353.
[13] CJEU Case C-296/10 *Purrucker v Guillermo Vallés Pérez II* [2010] ECR I-11163.
[14] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271, para 42(6).

court failed to observe the procedures laid down in the Regulation.[15] The Advocate General stated: 'It may be noted that it is clear from Articles 21 and 31(2) of the Regulation, read together, that a judgment concerning parental responsibility must as a general rule be recognised and enforced in another Member State unless one of the grounds of non-recognition set out in Article 23 is present, and that Article 24 expressly prohibits review of the jurisdiction of the court of origin'.[16] The Court decided *inter alia* that once a decision has been taken and brought to the attention of the court of origin, it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child.

Article 24 specifically addresses the question of whether the public policy test referred to in Articles 22(a) and 23(a) may be applied in relation to the jurisdiction rules set out in Articles 3 to 14. The answer is unambiguous: the public policy exception cannot be invoked in respect of these jurisdictional rules nor can it be with regard to national rules of residual jurisdiction. This presumably implies that if a court in a Member State has assumed jurisdiction based on Brussels IIbis, this assertion of its jurisdiction cannot be condemned as offensive to public policy.[17] A court cannot therefore refuse the recognition of a decision on the basis of the granting court's failure to properly apply Articles 3 to 7 of Brussels IIbis. Even if a court is unable to review the jurisdiction of the court of the Member State of origin and cannot determine whether this court of origin had jurisdiction under Brussels IIbis, it cannot review the jurisdiction of the court of origin. The rationale of the provision is that the grounds for non-recognition should be 'kept to a minimum'.[18]

2. Non-review as to substance – Article 26

2.1 Explanation of the concept and the way it is currently regulated

Article 26 concerns an essential part of any effective arrangement for recognition and enforcement. In his report[19] on the 1968 Brussels Convention, Jenard observed that it was 'obviously an essential provision of enforcement convention that foreign judgments must not be reviewed. The court of a State in which recognition is sought was not to examine the correctness of that judgment. It could not substitute its own discretion for that of the foreign court, nor refuse recognition if it considered that a point of fact or of law has been wrongly decided'.[20] The Borrás Report on the Brussels II Convention traced the history of such a provision and observed that it was a necessary rule in order not to subvert the meaning of the

[15] *Ibid.*, para 56.
[16] *Ibid.*, Opinion of Advocate General Sharpston, para 98.
[17] Fawcett, J., 'Part III Jurisdiction, Foreign Judgments and Awards, Ch.16 Recognition and Enforcement of Judgments Under the Brussels/Lugano System' in: Cheshire and others *Private International Law* (14th edn., OUP 2008).
[18] Recital 21 of the Brussels IIbis Regulation and CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271, para 50.
[19] Jenard, P., 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters' [1968] Official Journal of the European Communities No. C 59/1.
[20] Jenard, P., *op. cit.* citing Graulich, P., *Principes de droit international privé* (1961), Conflits de lois. Conflits de juridictions. No 254 ; and Battifol, *Traité elementaire de droit international privé*, no 763.

exequatur procedure in recognition. That recognition must not allow the court in the State in which recognition is sought to rule again on the ruling made by the court in the State of origin.[21]

While there can be no review of the original judgment, that judgment may no longer be appropriate to the child's situation. That court cannot under any circumstances review the judgment as to its substance. The court does however have the opportunity to reject recognition, and therefore enforcement, where this would be manifestly contrary to public policy. The public policy exception applies both in relation to the recognition of judgments relating to divorce, legal separation and marriage annulment and the recognition and enforcement of judgments relating to parental responsibility. It represents a safeguard against the recognition, and in cases of parental responsibility against the enforcement, of a judgment that would be unacceptable in a national context, either because the law applied by the court of origin is unacceptable, or because the judgment itself is unacceptable. In practice the public policy exception is often invoked, but is seldom applied.[22]

2.2 Problems in application following from relevant literature

Article 26 Brussels IIbis establishes what appears to be a clear prohibition; however, there may still be questions as to how it should be applied. A question raised is whether Article 26 prohibits the court of enforcement from reviewing the effect of the implementation of the judgment upon the particular child concerned.[23]

2.2.1 The best interests of the child

Article 23(a) allows the court of enforcement to refuse to recognise or enforce a judgment if thus would be 'manifestly contrary to the public policy' of the Member State where the recognition is sought, taking into account the best interests of the child. Since this sentence is not repeated in Article 26, it can be questioned if Article 23(a) nevertheless allows the court to examine the substance of the judgment, albeit to a very limited extent, thereby evaluating whether the judgment would be contrary to the best interests of the child.[24] A judge is expressly forbidden by Article 26 from reviewing the decision by the court of origin as to its substance, but is at the same time obliged to take into account the best interests of the child. This may depend upon exactly how the term 'public policy' is to be interpreted.[25]

One question would be whether Article 26 forbids an examination of the judgment by the court of enforcement and whether this falls within the scope of the Regulation.[26]

A second question is whether Article 26 prohibits the court of enforcement from examining whether the judgment that has been presented for enforcement falls within the scope of Brussels IIbis, and so is capable of being enforced pursuant to that instrument. There does not appear to be anything prohibiting the court of enforcement from considering this issue and

[21] Borrás Report, p. 27, 64, para 77.
[22] Scott, *op. cit.*, p. 29.
[23] Setright, *et. al.*, *op. cit.*, p. 149-150.
[24] *Ibid.*
[25] *Ibid*., 6:101.
[26] *Ibid*., 6:100.

refusing to recognise a judgment on the ground that it falls outside of the scope of application of the Regulation. Thus, it becomes clear that the review of a judgment by the court of enforcement must be limited to determining whether it falls within the scope of Brussels IIbis, and the application of the Article 23 factors.[27]

It has been argued that a court invited to recognize or enforce a judgment under a European Regulation must be free to determine for itself whether the judgment falls within the scope of the Regulation. This seems to be the practice under the instruments dealing with judgments in civil and commercial matters and appears to follow from the logic of the system established by the Regulation.[28] This apparent reservation seems to soften the clear prohibition, although this exception is not laid down in the provision itself.

2.2.2 Substance

Where Article 26 of the Brussels IIbis establishes a clear prohibition on reviewing the ruling of the court of origin as to substance, Article 23 provides the grounds for non-recognition. As these grounds all relate to procedural grounds, no contradiction can be found between Article 26 and Article 23. As to the term 'substance', some clarification would be useful. Especially the distinction between 'substance' and 'procedure' is not always clear to practitioners, as can be seen from the following cases. A number of courts have held that an examination of issues of a procedural nature would nonetheless amount to a review of the substance of the foreign judgment.[29] A different approach was taken by Advocate General Jacobs in *Hendrikman v. Magenta Duck & Verlag GmbH*[30] where the issue concerned the equivalent Article 29 of the 1968 Brussels Convention, prohibiting a court before which recognition is sought from making any inquiry into whether the defendant had been validly represented in the proceedings leading to the foreign judgment.[31] In his opinion,[32] the Court expressed the view that it would be stretching normal usage to construe the concept of the 'substance' of a judgment as encompassing such unequivocally procedural elements as service and presentation. However, he still argued that the court before which enforcement was sought could not investigate this type of procedural irregularity. The grounds for refusing enforcement were set out exhaustively in other Articles, and procedural irregularities could not be investigated except to the extent that they fell within one of the grounds so set out. In other words, even if a restrictive meaning is given to the term 'substance' in Article 26, the structure of the Regulation as a whole extends and reinforces the prohibition on reviewing the substance of the foreign judgment.[33] A different point of view was given by an English court which held that a prohibition on reviewing the substance of a foreign judgment prevails over the grounds for which recognition may be

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[27] *Ibid*., 6:104 and 6:107.
[28] Dicey and Morris, *The Conflict of Laws (*13th ed., Sweet & Maxwell 1999), paras 14-202.
[29] *Les Assurances Internationales v. Elfring*, Jur. Port. Anvers 197901980, [184] (the notification addressed the wrong person); Bundesgerichtshof (VIII ZB 9/79, 16 May 1979, (1979) E.C.C. 321 (judgment with the defendant having been heard).
[30] CJEU Case C-78/95 *Hendrickman and Feyen v. Magenta Druck & Verlag* [1996] ECR I-4943.
[31] Magnus/Mankowski/McClean, *op. cit.*, Article 26, note 6.
[32] *Ibid.*; CJEU Case C-78/95 *Hendrickman and Feyen v. Magenta Druck & Verlag* [1996] ECR I-4943, para 46 ff and para 22.
[33] Magnus/Mankowski/McClean, *op. cit.*, Article 26, note 7.

refused. This was the case of *Interdesco SA v Nullifire Ltd*[34] where it was alleged that the foreign judgment had been obtained by fraud; the Commercial Court held that where the foreign Court, in its judgment, has ruled on precisely the matters that a defendant seeks to raise when challenging the judgment, the Article prohibiting a review of the substance precluded the requested court from reviewing the conclusion of the foreign court.

3. Stay of proceedings – Article 27

3.1 Explanation of the concept and the way it is currently regulated

The Regulation seeks to ensure the ready recognition of judgments given in other Member States. However, there are circumstances in which the recognition of a foreign judgment can be fairly problematic, for instance in the case of a judgment that has not become *res judicata,* and the judgment is subsequently overturned on appeal. Article 27 aims to prevent the compulsory recognition of judgments which may be annulled or amended in the State of origin. Article 27(1) applies when an ordinary appeal against the judgment given in another Member State has been lodged in that Member State. The authority to stay proceedings depends on whether the appeal has actually been lodged.[35]

The power to stay proceedings is a matter of discretion; the Article imposes no mandatory duty for the recognizing court to stay proceeding. This opportunity to have discretion amounts to a measure to prevent possible abuse by a party seeking to delay the recognition and enforcement of a judgment by lodging a hopeless appeal. The question arises, however, as to the basis on which the discretion is to be exercised. There are cases, especially in the family context, where a delay in recognizing or enforcing a judgment could have harmful effects on the child or the adult parties concerned, and this will no doubt predispose a court to decline to stay proceedings.[36]

3.2 Difficulties in application – CJEU case law

3.2.1 Proceedings finalised

There has been some relevant case law regarding Article 27 Brussels IIbis. As to whether divorce proceedings in one jurisdiction have become finalised so that the divorce and any related jurisdiction has come to an end, the Court of Appeal in *Moore*[37] held that Article 27 applied so that proceedings in the country first seised had been completely determined when any appeal had been concluded. In *C v S*,[38] the court stated that for a court to remain seised of the matter there had to be existing proceedings before it. Despite these two decisions, there is still much uncertainty, and a potential for litigation, about when proceedings in the first seised jurisdiction have become completely finalized so that any proceedings in the second in time court can go ahead.[39] Hodson says that whilst there is some degree of precision about when a

[34] *Interdesco S.A. v Nullifire Ltd* [1992] 1 Lloyd's Rep. 180.
[35] Magnus/Mankowski/McClean, *op. cit.*, Article 27, note 1-3.
[36] *Ibid*., Article 27, note 8.
[37] *Moore v Moore* [2007] 2 FLR 339, EWCA 3612 (Civ).
[38] *C v S* [2010] 2 FLR 19 EWHC 2676 (Fam).
[39] Hodson, D., *The International Family Law Practice 2013-2014* (3rd edn., Family Law 2013).

court is first seised under Brussels IIbis, there remains a great deal of uncertainty for practitioners and (second seised) courts across Europe about when the first seised court is no longer seised.

3.2.2 The importance of speed

Another issue relating to Article 27 is the importance of speed. The fundamental importance of speed in a case where divorce petitions were issued within an hour or so of each other is shown in *LK v K*.[40] The stay of proceedings did not contribute to this issue. In *C v S*,[41] the issuing of divorce orders back and forth from England to Italy led to unintentionally unfortunate outcomes.

3.2.3 Ordinary appeal

One element of Article 27 has been clarified by the CJEU. The power to order a stay only applies when the appeal is an ordinary appeal. The distinction between an ordinary appeal and an extraordinary appeal can be found in many Member States but it is not the same in all States. In some States, there are clear legal definitions, in others a distinction is drawn on the basis of doctrinal opinions. The Court has stated in its decision in *Industrial Diamond Supplies v Riva*[42] that the distinction between ordinary and extraordinary appeals had to have an autonomous meaning; the nature of the distinction drawn in the national law of the State of origin or in that of the State asked to recognize the judgment was not determinative. For the purposes of the 1968 Brussels Convention and now of the present Regulation, an ordinary appeal is any appeal which forms part of the normal course of an action and which, as such, constitutes a procedural development which any party must reasonably expect. The Court held that any appeal bound by the law to a specific period of time which starts to run by virtue of the actual decision whose recognition is sought constitutes an ordinary appeal. Any appeal which might be dependent on events which were unforeseeable at the date of the original judgment or upon action taken by persons who were extraneous to the judgment, would not be an 'ordinary appeal'.[43] A definition, in line with the case law of the Court, of what an 'ordinary appeal' is could therefore be a convenient addition to Article 27. This would be to harmonize the procedural laws of the Member States.

When should proceedings be stayed? In *Industrial Diamonds Supplies v. Riva,*[44] the Court spoke of the power to stay proceedings 'whenever reasonable doubt arises with regard to the fate of the decision in the State in which it was given'. This ruling seems to be contradictory when one reads the ruling with Article 26 in mind; an argument that the appeal in the State of origin is very likely to succeed, because the foreign court's decision was plainly wrong, cannot be entertained, for that would have the effect of reviewing the substance of the foreign judgment, expressly prohibited in Article 26.[45] However, courts do explore the likelihood that

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[40] *LK v K (Brussels II Revised: maintenance pending suit)* [2006] 2 FLR 1113, EWHC 153 (Fam)
[41] *C v S* [2010] EWHC 2676 (Fam).
[42] CJEU Case C-43/77 *Industrial Diamonds Supplies v. Riva* [1977] ECR 2175.
[43] Magnus/Mankowski/McClean, *op. cit.,* Article 27, note 6.
[44] CJEU Case C-43/77 *Industrial Diamonds Supplies v. Riva* [1977] ECR 2175, para 33.
[45] Magnus/Mankowski/McClean, *op. cit.,* Article 27, note 9.

the pending appeal will affect the outcome, or the particular aspects relevant to recognition or enforcement.[46]

3.3 Suggested improvements

As stated by Magnus/Mankowski, referred to in the above section, a definition, in line with the case law of the Court, of what an 'ordinary appeal' is could be a convenient addition to Article 27. This is to harmonize the procedural laws between the Member States.

3.4 Commission's proposal

Firstly, the 2016 Commission's Proposal shows an adaptation of the above-mentioned suggestion. In the first paragraph (a), the sentence 'if an ordinary appeal against the judgment has been lodged' has been replaced by 'the decision'. Furthermore, the Commission's proposal shows a few changes to Article 27. The proposal has added two paragraph (b)-(c) stating that a court can stay proceedings if:

> (b) an application has been submitted for a decision that there are no grounds for the refusal of recognition referred to in Articles 37 and 38 or for a decision that the recognition is to be refused on the basis of one of those grounds; or
> (c) a decision on parental responsibility, proceedings to modify the decision or for a new decision on the same subject matter are pending in the Member State having jurisdiction over the substance of the matter under this Regulation.

4. Enforceable judgments and declarations of enforceability (*exequatur*) (Articles 28-36)

Articles 28 to 36 are essentially concerned with the enforcement of decisions relating to parental responsibility.[47] The enforceability of a decision regarding parental responsibility should follow from the decision itself. [48]

An *exequatur* is not required for 'rights of access' and for the return order subsequent to the second chance procedure under the current Regulation.[49] What is to be considered 'enforceable' requires an autonomous interpretation and also requires the objective of Article 28 and subsequent provisions to be taken into consideration. It means that the decision should be enforceable in the Member State where the decision was made.

Furthermore, the judgment should have been served, something which will usually be established by means of the certificate issued by the competent court or authority of the Member State of origin under Article 39 and in the form specified in Annex II.

As for the service of certificates between the Member States, Recital 15 of the Regulation indicates that the Service Regulation should apply to the service of documents in proceedings instituted pursuant to the Regulation. An application for a declaration of enforceability may be made by any 'interested party'.

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[46] Liege, 8 March 1984, Jurisprudence de Liege (1984) 289; *Societe Protis v. Societe Cidue,* Versailles CA, 21.
[47] Althammer, *et. al., op. cit.,* Article 28, no. 10.
[48] *Ibid.*
[49] Articles 41 and 42 of the Brussels IIbis Regulation. For a comment on these exceptions and the proposal see, for example: Kruger and Samyn, *op. cit.*, p. 159-160.

The current procedure with regard to enforcement should be considered to be a matter of national law pursuant to Article 47(1) of the Regulation. In that connection, it is worth recalling that the legal systems of Ireland and those of the United Kingdom do not have an *exequatur* system unlike the other Member States. Rather, a judgment from another Member State should be registered in Ireland and the United Kingdom.

Pursuant to the first subparagraph of Article 29 (Jurisdiction of local courts) an application for a declaration of enforceability shall be submitted to the court appearing in the list notified by each Member State to the Commission pursuant to Article 68. The local jurisdiction shall be determined by reference to the place of the habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates. Where neither of the places referred to in the first subparagraph can be found in the Member State of enforcement, the local jurisdiction shall be determined by reference to the place of enforcement (second subparagraph of Article 29). The provision aims to provide greater clarity for citizens with regard to the question of which court has jurisdiction to hear the case. The court to which the application is made must have the authority to check that it does indeed have jurisdiction. Moreover, in some cases a child may be present but not habitually resident in a state; in such a case the second sub-paragraph confers jurisdiction in such cases to the local court for the place of enforcement.[50]

The procedure for making the application is governed by the law of the Member State of enforcement (Article 30(1)). Procedural matters are accordingly in principle governed by the *lex fori*. Even so, this provision contains mandatory requirements as regards an address for service and regarding the documents that must be supplied with the application. The Regulation does not specify any sanction for a failure to provide an address for service as this is left to the national law of the Member State in which enforcement is sought.

If the law of the Member State of enforcement does not provide for the furnishing of an address, the applicant should appoint a representative *ad litem* (Article 30(2)). The documents referred to in Articles 37 and 39 are attached to the application (pursuant to Article 30(3)). Strictly speaking, that requires affixing the documents by stapling or other means, but it is thought that the supply of the documents at the same time as the application itself will suffice.[51]

Article 31 aims to ensure that a decision on an application for a declaration of enforceability is given promptly in an *ex parte* procedure. The court applied to should give its decision 'without delay' but there is no specific time-limit within which the decision should be given. Paragraph 2 of Article 31 specifies that an application may only be refused for one of the reasons mentioned in Articles 22 (grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment), 23 (grounds of non-recognition for judgments relating to parental responsibility) and 24. Article 24 is not an additional ground for refusal but prohibits any review of the jurisdiction of the court of the Member State of origin and ensures that the test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the

[50] Althammer, *et. al.*, *op. cit.*, Article 30, no. 2.
[51] Magnus/Mankowski/McClean, *op. cit.*, Article 30, note 6; see further also Althammer, *et. al.*, *op. cit.*, Article 37, no 1 *et seq*.

rules as to jurisdiction set out in Articles 3 to 14. Pursuant to 31(3), under no circumstances may a judgment be reviewed as to its substance.[52]

Article 32 incorporates an obligation for the appropriate officer of the court to bring to the notice of the applicant, without delay, the decision given on the application in accordance with the procedure laid down by the law of the Member State of enforcement. The identity of this officer and the form in which and the method by which the decision is to be notified are matters for the national law of the Member State in which enforcement is sought. It should further be noted in respect of this provision that there appears to be no duty under the current Regulation to inform any other party.[53]

4.1 Appeal against a positive decision of enforceability (Articles 33-34) and a stay of the proceedings (Article 35)

Article 33 regulates the option to appeal against a positive decision of enforceability which is necessary and vital in order to avoid violations with Article 6 of the European Convention on Human Rights.[54] The right to appeal is only available to the formal parties at first instance and not to genuine third parties or an interested state body. It is modelled after Article 43 of the Brussels I Regulation.[55] The object of the appeal is the final decision of the court of first instance.[56]

Paragraph 2 of Article 33 vests exclusive jurisdiction in the appellate courts designated by the Member States. If an appeal has been lodged with a court not so designated, then this court has to transfer the case to the competent court in the same State, using the rules on the procedural transfer of the respective *lex fori*.[57] The Regulation does not establish a detailed regime. It is left to national legislatures to impose time-limits for a written reply by the respondent in the appeal proceedings and to prescribe whether such proceedings are predominantly to be oral or written in nature as long as the requirements of a fair trial are observed.[58] Either party should have the opportunity to participate and to be heard by the appellate court. Some degree of judicial involvement would not only be consistent with national law in many member states, but also appropriate given the nature of the judgments to be enforced.[59]

The respondent may be drawn into the contradictory proceedings at second instance even if he/she in substance has won at first instance by virtue of Article 33(4). This has to do with the unilateral nature of the *exequatur* proceedings at first instance. If he/she does not abide by the court's call and does not appear, he/she will only enjoy the minimum protection offered by Article 18.

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[52] Althammer, *et. al.*, *op. cit.*, Article 24, no 2.
[53] *Ibid.*, no. 1.
[54] Magnus/Mankowski/McClean, *op. cit.*, Article 33, note 1.
[55] See also Althammer, *et. al.*, *op. cit.*, Article 33, no 1.
[56] A list of courts is available under http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/manual_cv_en.pdf.
[57] Magnus/Mankowski/McClean, *op. cit.*, Article 33, note 17.
[58] *Ibid.*, Art. 33, note 17.
[59] Scott, *op. cit.*, p. 33.

Pursuant to Article 33(5), the appeal against a declaration of enforceability must be lodged within one month of the service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and this runs from the date of service, either on him/her personally or at his/her residence. No extension to this time may be granted on account of distance.

Extensions for other reasons may be granted, however, according to the national law of the state of the *exequatur* proceedings. It should be noted that if a party against whom enforcement is sought is resident in a third state, then only Article 33(5)(1) is applicable so the shorter time applies in spite of longer distances and greater risks in communication. The judgment given on appeal may only be contested by means of the proceedings referred to in the list notified by each Member State to the Commission pursuant to Article 68 (Article 34). The purpose of this provision is to reduce further means of appeal against an appellate decision, on limited grounds and on grounds of law only. Of particular importance is the exclusion of any further means of appeal which would be based on factual grounds.[60] The provision does not restrict the scope of the remedies that may be made available but leaves this to the *lex fori* of the Member State.[61]

Article 35 regulates a stay of proceedings in the case of enforcing still appealable judgments. The appeal court in the enforcement state may stay its proceedings and await the decision of the judgment state's court or set a time limit for lodging such an appeal. The provision applies only where in the enforcement state an appeal is lodged either against the decision of a court of that state declaring a foreign judgment enforceable (Article 33) or against an appeal judgment concerning such a decision (Article 34). The court of appeal or even the court of third instance may then stay the proceedings; even though the third instance's entitlement can be seen as contentious because that instance will often limit itself to reviewing questions of law whereas the decision to stay may involve questions of fact, this choice has been justified in order to avoid the irreversible consequences of the enforcement of a still appealable judgment and, more generally, to avoid conflicting judgments.[62] The appeal court in the enforcement state cannot order a stay of proceedings on its own motion, but rather the party against whom enforcement is sought must apply for a stay of the proceedings.

It has been contended that, by way of analogy, a child should have an ('independent') right to apply for a stay, at least where the appeal against the original judgment was lodged in that child's interest and where that child objects to the appeal in the enforcement state but enforcement is not sought against the child.[63]

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[60] Magnus/Mankowski/McClean, *op. cit.*, Article 34, note 1; Althammer, *et. al.*, *op. cit.*, Article 34, no 1.
[60] Althammer, *et. al.*, *op. cit.*, Article 34, no 3.
[61] *Ibid.*
[62] Magnus/Mankowski/McClean, *op. cit.*, Article 35, note 5.
[63] Rauscher, *Europeisches Kollisions- und Zivilprozessrecht*, *op. cit.*, Article 35, note 2; Bülow/Böckstiegel/Geimer/Schütze, *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (Verlag C.H. Beck 2016), Article 35, note 4; Magnus/Mankowski/McClean, *op. cit.*, Article 35, note 12.

4.2 Difficulties in application – National Reports

From Belgium, one case has been reported which lays bare some difficulties. In this case the Court of Appeal of Ghent had set up a preliminary agreement between the divorced parents on parental responsibility over their children. The mother wanted to take the children to Scotland for the summer holidays. The court was concerned about the execution of its decision in Scotland. The Belgian court referred to Article 28(2) and confirmed that the judgment would only be enforceable after its registration in Scotland. The Belgian court also confirmed its competence to issue a certificate under Article 39 at the request of one of the parties, something which would be needed to obtain the enforcement of the judgment in Scotland.[64]

From Estonia some problems have been reported as regards the specification of exactly what sort of enforcement measures should be taken. However, the National Reports attest to the claim that in most other Member States, courts have not encountered particular problems in relation to the recognition and enforcement of decisions in cases of parental responsibility. Nonetheless, in some instances, as the Greek National Report exemplifies, foreign judgments have not been recognised or enforced due to the following grounds: a) that there was no written agreement on the custody rights and rights of access ratified by the foreign court[65] (b) or because there was no certificate that the foreign decision was final. In the absence of the certificate the Greek court stayed the proceedings and ordered a repetition of the hearing,[66] (c) no certificate proving that the foreign decision is not irreconcilable with a latter Greek judgement was produced. Nonetheless, in that case the Greek court stayed the proceedings and ordered a repetition of the hearing.[67] As for Italy, it has simply been affirmed that decisions about parental responsibility should undergo a procedure of *exequatur*,[68] with the exception of decisions on right of visitation and decisions on the return of a child who had been illicitly transferred abroad.[69] From Luxembourg only one case is reported wherein a Luxembourg court dealt with the question of the execution of a judgment on parental responsibility issued by a court of another Member State. The Luxembourg court applied Article 21(1) to automatically recognise the decision (issued by a French court).[70] But at the same time the court pointed out that a declaration of enforceability was lacking and therefore requested the interested party to still apply for it, following the procedure for making such an application. Nothing was said about the fast-track procedure of *exequatur* with regard to the certificate issued by the court of origin, according to Articles 40 and 41.[71]

4.3 Partial enforcement – Article 36

Pursuant to Article 36 only a part of a judgment may be declared enforceable where either enforcement of all parts of the judgment cannot be authorised or where the applicant has so

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[64] National Report Belgium, question 29.
[65] National Report Greece, question 30.
[66] *Ibid.*
[67] *Ibid.*
[68] National Report Italy, question 29. Reference to Cass. 27188/2006.
[69] National Report Italy, question 29.
[70] National Report Luxembourg, question 29.
[71] National Report Luxembourg, question 29. Cour d'appel de la jeunesse', no. 31882, 26 March 2007.

requested. This can be the case, for example, where the judgment concerns more than one child or the right of access as well as the return of the child or where only part of the judgment falls under the Regulation. In respect of Article 36, Magnus contends that decisions on costs and detailed orders on access with several dates should not be considered to be severable.[72] A court is not allowed to reject the enforcement of the whole judgment because parts of it are not enforceable and the court has no discretion but must decide *ex officio*. In contrast to (1) it is not necessary, however, that the remainder of the judgment, for which no enforcement is sought, is unenforceable.[73]

Individuals are entitled to request that the records reflect their new status on the production of a copy of a judgment pursuant to Article 37 and of a certificate (Article 39) in the standard form set out in Annex I of the Regulation.

4.4 Difficulties in application – CJEU case law

The case law of the CJEU is limited with regard to the requirements with regard to enforcement. In *Rinau*[74] it was affirmed, however, that a procedure must be interpreted in the light of the fact that, being of an enforceable and unilateral nature, it cannot take account of the submissions of that party without assuming a declaratory and adversarial nature, which would run counter to its very logic according to which the rights of the defence are ensured by means of the appeal provided for in Article 33 of the Regulation.[75] In *C v. M,*[76] it was held that the Regulation must be interpreted as meaning that, in circumstances where the removal of a child had taken place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment fixing the child's residence at the home of the parent living in the Member State of origin, the failure to return the child to that Member State following the latter judgment was wrongful; Article 11 of the Regulation is applicable if it is held that the child was still habitually resident in that Member State immediately before retention.[77]

5. Documents required for the recognition and enforcement of decisions (Section 3: provisions common to Sections 1 and 2 (Articles 37-39))

5.1 Introduction

Section 3 of Chapter III currently contains three provisions (Articles 37 to 39) defining the formal requirements for documents which are in principle (still) necessary for the recognition and enforcement of decisions from other EU Member States (with the exception of Denmark) concerning marriage and parental responsibility. This may change radically in view of the changes relating to the abolition of *exequatur* in the proposal.

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[72] Magnus/Mankowski/McClean, *op. cit.*, Article 36, note 5 and 7.
[73] *Ibid*., Article 36, note 8.
[74] CJEU Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271. See for full details *supra* in Chapter 4, under 4.2 '*Difficulties in application – CJEU case law*'.
[75] *Ibid*., para 101.
[76] CJEU Case C‑376/14 PPU *C v. M* [2014], ECLI:EU:C:2014:2268. See for full details *supra* in Chapter 1, under 3.11.2 '*Difficulties in application – CJEU case law*'.
[77] *Ibid*., para 54.

Generally, two documents are at present required: an authenticated copy of the respective judgment and a certificate using the standard form provided for by Annex I of the Regulation (on matrimonial matters) or II (on parental responsibility).

The documents must be produced by the person instituting the proceedings or relying incidentally on the judgment. The copy should satisfy the conditions necessary to establish its authenticity which means that the copy must meet the requirements of authentication prescribed by the particular Member State where the judgment has been rendered (*locus regit actum*). Legalisation or other formalities are not required, nor is a translation required although the latter can be requested by the court which is concerned with the recognition or enforcement of the judgment (Article 38(2)).[78]

Additional documents are required in the case of default judgments (Article 37(2)). It must then also be shown and evidenced by documents that the defaulting party had the opportunity to defend him/herself properly in the original proceedings or is content with the judgment.[79]

Proof of the service of proceedings (Article 37(2)(a)) can be effected by the original or a copy of the document which shows that the defaulting party was served with the document that instituted the proceedings or was served with a similar document that informed the defaulting party of the proceedings.[80] With respect to default judgments relating to parental responsibility it could be argued that a document proving that the defaulting party was properly

[78] Althammer, *op. cit.*, Article 37, no. 2. National Report the Netherlands, question 29. In the Netherlands, the Court of Appeal of 's-Hertogenbosch, 3 March 2015, ECLI:NL:GHSHE:2015:648 recognized without reservation a Spanish decision on the basis of Article 21 Brussels IIbis. The Court of Appeal did find that it had to make a ruling on the translation of the terms 'patria potestad' and 'guardia y custodia' used in the Spanish decision. In Court of Appeal of The Hague, 7 December 2005, NIPR 2006, 12 the wife had lodged divorce proceedings in Spain, the husband one month later in the Netherlands. As the documents instituting the proceedings in Spain had not been served properly on the husband (Article 8 of Brussels II Regulation, lack of translation), the Dutch courts had been seised first.

[79] National Report Spain, question 29. In Spain, for example, in case number 232/2012 of 2 May the Provincial Court of Zaragoza confirmed that '…it is not enough to plead the involuntary non-appearance in order to exclude the enforcement of a judgment…the Regulation demands that 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'. See also National Report Romania, question 29. Furthermore, in Romania the Brasov County Court discussed the incidence of Article 22(b) of the Regulation in relation to a judgement pronounced by default in Germany. The court granted the recognition since the claimant was the party in default of appearance in the divorce proceedings; his request was considered *per se* a non-equivocal acceptance of that default judgement. The significance of the documents mentioned in Articles 37(2)(a) and 37(2)(b) (proof of proper service and of a clear acceptance of the default judgement) was also discussed; since these documents are designed to safeguard the procedural rights of the defaulting party, when this is the one seeking recognition, the court decided to dispense with their production. See further National Report Greece, question 30. In Greece, although generally no problems have been observed in relation to the recognition of divorce decisions which are systematically granted when the necessary documents for the recognition are missing the hearing may be repeated.

[80] Magnus/Mankowski/Magnus, *op. cit.*, Article 37, note 20; National Report Malta, question 29. The Maltese Report raises the issue of notifications (serving the other party with the official court documents) and suggests that a recast could introduce a new method of notification by email or some other form of technologically advanced way in order to gain time as usually a considerable amount of time is 'wasted' on several attempts to notify the other party.

served does not suffice since the child should have had the opportunity to be heard, even though this will often be documented in the judgment itself.[81]

As an alternative to the requirement of the service of proceedings, the claimant can also prove and has the burden of proof that the defaulting party has clearly accepted the default judgment. It has been suggested that Article 37(2)(b) applies only to judgments in matrimonial matters but not to those in matters of parental responsibility on the basis of a textual interpretation of the term 'defendant' (*Antragsgegner; défendeur*).[82]

There is no strict time-limit for the production of the required documents. A later production during the proceedings is permitted or the court may set a time-limit for the production of the respective document(s) (Article 38(1)). If the required documents are not presented the court or competent authority can set a time frame for their production, accept equivalent documents or completely dispense with their production or dismiss the motion at once. The choice is left to the discretion of the court. Since the aim is to facilitate the recognition and enforcement of judgments and to ensure procedural fairness towards the parties involved, a dismissal without giving the claiming party at least an opportunity to provide missing documents will only be a correct decision in rather rare cases where it is clear from the outset that no recognition or enforcement can be granted.[83]

The applicant can present all the required documents in the language in which they were originally issued, that being the language of the judgment. Nonetheless, Article 38(2) entitles the court to request a translation into the court's language.

Finally, Article 39 obliges the court or authority of the Member State whose courts have rendered the judgment to issue a certificate in the form prescribed by Annex I or II if an interested party so requests.[84]

The contents of the certificate are standardised by Annex I and II of the Regulation.[85] The Annex I certificate (on matrimonial matters) must state the name, address and date of birth of the spouses and particulars of their marriage, whether the judgment concerned a divorce, an annulment or a separation, whether it is subject to an appeal and when it takes effect. It does not state whether and when the judgment was served on the spouse against whom recognition

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[81] Magnus/Mankowski/Magnus, *op. cit.*, Article 37, note 24.
[82] *Ibid*., Article 37, note 26.
[83] *Ibid*., Article 37, note 2.
[84] National Report Belgium, question 29. An example is provided by a Belgian case, see the Court of Appeal of Ghent 27 May 2010, *Revue@dipr.be* 2010/3, 62. In this case the Court of Appeal of Ghent had set up a preliminary agreement between the divorced parents on parental responsibility over their children. The mother wanted to take the children to Scotland for the summer holidays. The court was concerned with the execution of its decision in Scotland. The court referred to Article 28(2) Brussels IIbis and confirmed that the judgment would be enforceable after registration in Scotland. The court also confirmed its competence to issue a certificate under Article 39 at the request of one of the parties, which would be needed to obtain the enforcement of the judgment in Scotland.
[85] National Report Romania, question 29. In the Romanian Report mention is made of a case decided by the Suceava County Court, civil decision no. 1502 from 8 October 2015, refusing the recognition of a divorce judgement originating from Spain on the ground that the claimant did not prove that the judgment was final and also did not produce the certificates required by Arts 37 and 39 of the Regulation. The applicant instigated an appeal, produced the requested certificates and the decision was quashed by the Suceava Court of Appeal, 1st civil Division, civil decision no. 77 from 26 January 2016.

or the enforcement of costs is sought.[86] Few problems have been reported in this regard by the Reporters of the Member States. Even so, the Belgian Report states that an ongoing issue concerning the Regulation is the lack of awareness of its application among the local authorities. Thus, dealing with the recognition of divorce acts or judgments within the EU, the Flemish Agency for Integration[87] has reported that many local authorities are not aware that European judgments or acts are governed by the recognition regime of Brussels IIbis. It may occur that a European divorce act already has an apostille, but not an Article 39 certificate. The question remains in such a case whether a certificate is still really necessary.

The Annex II form (on parental responsibility) requires the name, address and date of birth of the person(s) with rights of access and of the persons holding parental responsibility, the name and certificate of the children covered by the judgment, the attestation of the enforceability and service of the judgment and specific information as the case may be on access arrangements or return orders.[88]

Each interested party is entitled to request the issue of the respective certificate. With respect to judgments in matrimonial matters both spouses have that right. With respect to judgments on parental responsibility either parent or the child are entitled and, as the case may be, the respective authority is also entitled as an interested party under Article 28.[89]

5.2 Commission's proposal

The proposal envisages a series of standard certificates which aim at facilitating the recognition or enforcement of the foreign decision in the (proposed) absence of the *exequatur* procedure. These certificates are expected to facilitate the enforcement of the decision by the competent authorities and are also expected to reduce the need for a translation of the decision. [90]

[86] Magnus/Mankowski/Magnus, *op. cit.*, Article 39, note 8.
[87] The 'Agentschap Integratie en Inburgering', see http://www.integratie-inburgering.be.
[88] Magnus/Mankowski/Magnus, *op. cit.*, Article 39, note 9.
[89] *Ibid*., Article 39, note 4.
[90] 2016 Commission's Proposal, p.15.

GUIDELINES – Summary

Articles 28-36

A judgment must be enforceable in the Member State in which it was given but this does not mean that the judgment has to be *res judicata* in order to be recognised. The requirement that the decision authorising enforcement be served has a dual function, namely to protect the rights of the party against whom enforcement is sought and in order to calculate the strict and mandatory time-limit for appealing to be calculated precisely.

Article 37-39

The current Regulation does not autonomously state what requirements of authentication are required. The court seised should receive reliable information regarding the means of authentication in the judgment state.