CHAPTER 11: Relations with Other Instruments, Transitional and Final provisions

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Contents

1. Relations with other instruments – Articles 59-61

The relevant provisions of Articles 59-61 define the relationship between the Regulation and other legal instruments concluded by the Member States before the Regulation entered into force. They mainly provide that the Regulation shall have prevalence over these Conventions, with some notable exceptions. Thus, it prevails over (1) conventions regulating the same private international aspects and concerning the same matters as those within the scope of the Regulation, with the exception of the 1931 Convention[1] (Article 59), (2) conventions listed in Article 60 that regulate certain issues falling under the scope of the Regulation, and (3) the 1996 Hague Convention (Article 61).

The Nordic Family Law Convention is the only legal instrument which prevails over the Regulation in Finland and Sweden since both states have made use of the opportunity given in Article 59(2) and 59(3). Thus, they declared that the Convention, together with the Final Protocol thereto, would apply in whole or in part in their mutual relations, instead of the rules of the Regulation. The declaration is provided in the Annex VI of the Regulation and was published in the Official Journal of the EU. However, any future agreements between Finland and Sweden concerning rules on jurisdiction in divorce matters and guardianship must be in line with the Regulation's rules.[2] Judgments rendered by the courts in Finland and Sweden are enforceable in all EU Member States under the rules of the Regulation, provided that the courts have established their jurisdiction on the basis of rules which are compatible with those under the Regulation.[3] Finland and Sweden are under an obligation to inform the Commission of the declaration and any future agreement, as well as of uniform laws implementing them. These declarations, which both Sweden and Finland have signed, are provided in Annex VI of the Regulation.

Article 60 governs the relationship with specific multilateral conventions[4] which only partly deal with matters governed by the Regulation. The latter prevail over the conventions insofar as these matters are concerned. Indeed, the relevant provisions of these conventions dealing with other matters remain applicable. The reference to the 1980 Hague Child Abduction Convention in paragraph (e) must always be read in the context of Article 11(1) of the Regulation. Where the Regulation provides for specific rules, those rules will prevail over the applicable 1980 Hague Convention provisions. In matters not governed by the Regulation, the 1980 Hague Convention continues to apply, as provided by Article 62. The provisions laid down in Article 11 can only be applied when the child has been removed from an EU Member State in which he or she was habitually resident before the wrongful removal or retention to

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[1] Convention of 6 February 1931 between Norway, Denmark, Finland, Iceland and Sweden containing international private law provisions on marriage, adoption and guardianship with final protocol (hereinafter – the Nordic Family Law Convention).
[2] Brussels IIbis Regulation, Article 59(2)(c).
[3] Brussels IIbis Regulation, Article 59(2)(d).
[4] Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants; Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages; Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children; 1980 Hague Convention.

another Member State. In all other situations, only the 1980 Hague Child Abduction Convention will govern, providing of course that both States are parties to the Convention.[5] The relationship and the scope of application under the two legal sources has already been extensively discussed *supra* in Chapter 4, under 3 '*Jurisdiction under Article 11(1)-(5)*' and 4 '*Jurisdiction under Article 11(6)-(8)*'.

Article 61 deals specifically with the relationship between the Regulation and the 1996 Hague Convention. It provides that the Regulation takes precedence over the 1996 Convention regarding the rules on jurisdiction when the child has his or her habitual residence in an EU Member State. A judgment rendered by the court of an EU Member State will be enforceable under the Regulation, regardless of the habitual residence of the child, thus also even if the child has his or her habitual residence in a non-EU state which is a party to the 1996 Hague Convention. Thus, we can conclude that the courts in the EU Member States shall always apply the rules of jurisdiction under the Regulation as soon as the child has his or her habitual residence in an EU Member State. As for recognition and enforcement, judgments rendered by the courts of EU Member States will be recognised and enforced according to the rules of the Regulation, regardless of the habitual residence of the child.

The 1996 Hague Convention is only mentioned in Article 12(4) of the Regulation. When this is considered together with Article 61 we can conclude that the Convention shall have precedence over the Regulation only in the context of the-so called prorogation of jurisdiction as provided in Article 12(4). Thus, this is the only aspect where the 1996 Hague Convention would be given prevalence. Article 12(4) introduces a limited prorogation option for a party to choose to seise a court of a Member State in which a child is not habitually resident, but with which the child nevertheless has a substantial connection. This option also applies when the child has his or her habitual residence in a third state that is not a contracting party to the 1996 Hague Convention. Jurisdiction shall then be deemed to be in the child's best interests, in particular, but not only, if it is found impossible to hold proceedings in the third state in question.[6] The presumption provided for in that Article will not apply if the third state where the child has his or her habitual residence is a party to the 1996 Hague Convention. Article 12(4) deems jurisdiction to be in the best interests of the child when, in case the child has his or her habitual residence in the territory of a third State which is *not* a contracting party to the 1996 Hague Convention, 'in particular if it is found impossible' to hold proceedings in the third State in question. Thus, this presumption under Article 12(4) will not apply for the purposes of the prorogation of jurisdiction if the child has his/her habitual residence in a non-EU state which is a contracting party to the 1996 Hague Convention. In other words, if the child is habitually resident in the territory of a third state which is a contracting party to the Convention, the rules of the Convention will prevail.[7]

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[5] Magnus/Mankowski/Mantout, *op. cit.*, Article 11, note 15.
[6] Lowe, Everall, Nicholls, *op. cit*., pp.166.
[7] *Ibid.*

The 1996 Hague Convention remains relevant with respect to the applicable law in cases of parental responsibility, as this is not a private international law issue which is covered by the Regulation. As for the rules on jurisdiction, the Regulation applies whenever a child has his/her habitual residence in an EU Member State, thus it has prevalence over the 1996 Hague Convention as expressly provided for in Article 61(a). The same holds true when the recognition or enforcement of a judgment on parental responsibility has been issued by a court of an EU member State. The Regulation applies to enforcement and recognition regardless of the habitual residence of the child, i.e. even when a child has his/her habitual residence in a third state which is a contracting state to the 1996 Hague Convention as expressly provided in Article 61(b).

The Practice Guide 2014[8] suggests that when considering Article 61(a), two questions must be asked when assessing which of the two instruments prevails in deciding on jurisdiction in matters of parental responsibility:

(i) Does the case concern a matter covered by the Regulation?[9]
(ii) Does the child concerned have his or her habitual residence on the territory of an EU Member State?

If both questions can be answered affirmatively, the Regulation's rules on jurisdiction prevail over the rules of the 1996 Hague Convention.[10] This strict geographical interpretation without any examination of the issues could lead to what appear to be odd results. Namely, it does not seem to be in the best interests of the child for an important protective instrument to be excluded, thereby depriving certain children of the protection it provides.[11] A narrower interpretation of 'matters covered by the Regulation' would acknowledge that the relationship and/or interaction between Member States and Contracting States would not fall within that restrictive clause and would thus allow the courts of Member States to apply the 1996 Hague Convention when considering cases involving the relationship between a Member State and a Contracting State.[12]

Article 61(b) operates as an extension of the more general rule provided by Article 61(a). The recognition, enforcement and registration scheme of the Regulation will be applicable wherever the courts of the Member States are asked to enforce a judgment rendered by the courts of another member State, regardless of where the child has his or her habitual residence.[13]

A significant difference arises where a judgment has been issued by a court in the exercise of its urgent protective jurisdiction under either Article 20 of the Regulation or

[8] Practice Guide 2015.
[9] This question is derived from the application of Article 62 of the Regulation.
[10] Practice Guide 2015, paras 8.3.1. and 8.3.2, p. 89.
[11] Setright, H., Williams, D., Curry-Sumner, I., Gration, M., Wright, M., *International Issues in Family Law, The 1996 Hague Convention on the Protection of Children and Brussels IIa* (Jordan Publishing 2015), p. 13.
[12] *Ibid.* See also Chapters 5 and 8 of that book.
[13] *Ibid*., p. 122.

Article 11 of the 1996 Hague Convention. The CJEU has held that judgments rendered on the basis of Article 20 cannot be recognised and/or enforced pursuant to Chapter III of the Regulation,[14] whereas judgments made pursuant to the jurisdiction available under Article 11 of the 1996 Hague Convention can be enforced and recognised under that Convention.[15] This distinction has significant consequences, particularly in the context of a judgment requiring the return of a child in proceedings brought under the 1980 Hague Convention.[16]

As for the 1980 Hague Convention, it remains applicable when an application has been made for the return of a child who has been wrongfully retained in a country other than the country of his/her habitual residence or has been removed from the country of his/her habitual residence. However, the Regulation makes a number of adjustments in Article 11(2)-(8) and they prevail over the relevant provisions of the Convention. This follows from Article 11(1), as well as from Article 60. The latter provision lists treaties over which the Regulation prevails as far as they regulate matters governed by the Regulation. The Regulation supplements the international rules with specific provisions aiming at ensuring the prompt return of the child. In relations between Member States, the prevailing character of the Regulation over the 1980 Hague Convention, as laid down by Article 60 of the Regulation, results in a joint application of the two instruments.[17] The 1980 Hague Convention is amongst these treaties, together with the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors, the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages, the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separation and the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

2. Transitional provisions and entry into force

2.1 Explanation of the concept and the way it is currently regulated and Scope of application *ratione temporis*

The Regulation applies, as of the 1 March 2005, in all Member States of the European Union, with the exception of Denmark. The Regulation does not contain any general provision on the *territorial scope* of its rules on jurisdiction. In matters of jurisdiction over parental responsibility the Regulation is applicable when the child, regardless of his or her nationality, has his or her habitual residence in a Member State or resides in a Member State. Further, Article 12 provides for jurisdiction not based on habitual residence in a Member State, but based on prorogation. Hence, the jurisdiction rules apply where a child is not habitually resident in a Member State but parental responsibility proceedings are brought in conjunction with matrimonial proceedings for which Article 3 provides jurisdiction or in the case of other

[14] CJEU Case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* [2010] ECR I-07353, paras 76-83 and 86-91.
[15] Setright, *et al*., *op. cit.*, p. 123.
[16] *Ibid*., see also Chapter 9 of that book.
[17] Viarengo, I., and Villata F.C., (eds) 'Planning the Future of Cross-Border Families: a path through coordination. First assessment Report on the case-law collected by the Research Consortium' (2014) Project JUST/2014/JCOO/AG/CIVI/7729, p. 113.

proceedings instituted in a Member State, under certain conditions, when the child has a substantial connection with that Member State.

In a separate Chapter VI, entitled 'Transitional provisions', Brussels IIbis deals with issues of its temporal scope in just one provision, namely Article 64. This provision is based on the transitional provisions of the Brussels II Regulation (Article 42). Brussels II came into force on 1 March 2001 and Brussels IIbis entered into force on 1 August 2004. The latter is applicable as from 1 March 2005 (Article 72). Non-retroactivity is the leading principle, but there is an exception for more favourable rules of recognition and enforcement in specified circumstances.[18] A distinction can be made between the temporal scope of application concerning the rules on jurisdiction and the rules on the recognition and enforcement of decisions. Thus, Article 64 of the Regulation contains some rules that constitute the main rule on the temporal scope of the Regulation, thereby making a distinction between rules on jurisdiction and rules on recognition and enforcement of judgments.

2.1.1 Scope of application *ratione temporis* regarding rules on jurisdiction

Regarding the question of whether a court has to determine its jurisdiction on the basis of Brussels IIbis Regulation, a situation which is governed by Article 64(1), the answer is generally clear.[19] The main principle is that the Brussels IIbis Regulation only applies to 'new' cases. Article 64(1) states that the provisions of the Regulation shall apply only to legal proceedings instituted after its date of application as defined in Article 72.[20] Decisive is the date of application of Brussels IIbis as defined in Article 72 and not its entry into force on 1 August 2004. Namely, the repealing of the Brussels II Regulation took effect as of the date of application of the Brussels IIbis Regulation and not as of the date of its entry into force. Accordingly, there is no intertemporal gap.[21]

From Article 64(1) it follows that in proceedings instituted after 1 March 2005, the Brussels IIbis jurisdictional grounds have to be applied in the first fourteen original Member States. When the ten new Member States joined the European Community on 1 May 2004, in these Member States Brussels IIbis became applicable from 1 March 2005 to proceedings instituted after that date. Regarding Romania and Bulgaria the relevant date is 1 January 2007 and for Croatia it is 1 July 2013.[22] If the proceedings at stake were commenced before the date of the effective application of the Regulation in that country, the jurisdictional provisions of Brussels IIbis do not apply and jurisdiction over such proceedings has to be determined in accordance with the rules previously in force in the respective Member State, including the

[18] Mostermans, P.M.M., 'The Impact and Application of Brussels IIbis in The Netherlands' in Boele-Woelki and Beilfuss, *Brussels IIbis: Its Impact and Application in the Member States* (2007), *op. cit.*, p. 225; Mankowski/Magnus/Mankowski, *op. cit.*, Article 64, note 1.
[19] Althammer, *Kommentar zu den Verordnungen (EG) 2201/2003 und (EU) 1259/2010*, *op. cit.*, Article 64, p. 245.
[20] For more particular on the temporal scope, see Boele-Woelki and Gonzales Beilfuss, *Brussels IIbis: its impact and application in the Member States* (2007), *op. cit.*, pp. 36.
[21] Mankowski/Magnus/Mankowksi, *op. cit.*, Article 72, note 1.
[22] Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*, *op. cit.*, p. 382, note 3; Act of Croatian Accession, Article 2; [2012] OJ L112.

Brussels II Regulation and international treaties.[23] When legal proceedings are considered to have been instituted has to be determined according to Article 16.[24] Thus, the Regulation applies from 1 March 2005 with the exception of a number of provisions, which apply from 1 August 2004. According to Article 64 paragraph 1, it only applies to legal proceedings instituted after its date of application, which is 1 March 2005. Besides, it applies only to documents formally drawn up or registered as authentic instruments and to agreements concluded on or after this date. Thus, Article 64 (1) applies to documents, authentic instruments and agreements. If they are drawn up after 1 March 2005, Brussels IIbis applies. It is not relevant when such a document might have become enforceable. If an authentic instrument was effected the relevant point of time is when its registration as an authentic instrument took place.[25] If the document predates 1 March 2005, the Brussels II Regulation might be relevant, even though Article 71(1) repeals this instrument with immediate effect.[26]

For those Member States which joined the EU after this date, the Regulation applies to legal proceedings instituted and documents drawn up or registered as authentic instruments and to agreements concluded from the date of their accession. Thus, such documents and agreements originating in 'new' Member States will only be recognised in other Member States in accordance with the Regulation if they have been drawn up or registered or concluded after these States have become EU Member States. In the same vein, new Member States will apply the Regulation only with respect to such documents and agreements drawn up, registered, or concluded in other Member States if they have been drawn up, registered or concluded on or after the date when they have become a Member State. The question of the existence of an agreement on the choice of forum is only present concerning Article 12 in relation to jurisdiction over parental responsibility for the judge deciding on the divorce. Article 64(1) only requires them to be 'agreements concluded between the parties after its date of application in accordance with Article 72'. If a choice of court is generally accepted, a more detailed rule will be necessary, in particular as to when the spouses stipulate that the agreement should become effective.[27]

As already explained, Article 64 deals with both the temporal scope of application of the Regulation's jurisdictional rules (Article 64(1)), as well as the recognition and enforcement of judgments (Article 64, paras (2)-(4)). Concerning both issues, the temporal scope of application is limited in the sense that the Regulation does not have retroactive effect, i.e., it does not apply to events that occurred before it became applicable.[28]

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[23] Mankowski/Magnus/Mankowksi, *op. cit.,* Article 64, note 3 and the case law mentioned there. See also Stone, *op. cit*., p. 451.
[24] Rauscher, *op cit*., p. 382, note 5; Mankowski/Magnus/Mankowksi, *op. cit*., Article 64, note 5.
[25] Mankowski/Magnus/Mankowksi, *op. cit.,* Article 64, notes 7-8.
[26] *Ibid*., Article 64, note 11.
[27] Borrás, A., 'Grounds of jurisdiction in matrimonial matters: recasting the Brussels IIa Regulation' (2015) 1 NIPR, p. 9. Also, the author expresses the view that a problem of transience that is not solved by the Brussels IIbis Regulation refers to *lis pendens.* In her view, the essential problem is what happens when one of the proceedings was instituted before the date of application of the new instrument and the other after this date. For these reasons the author suggest introducing a rule on this matter.
[28] De Boer, 'What we should *not* expect from a recast of the Brussels IIbis Regulation', *op. cit.,* p. 12.

2.1.2 Scope of application *ratione temporis* regarding rules on the recognition and enforcement of judgments

In contrast to a clear wording of paragraph (1), the provisions in paragraphs (2)-(4) of Article 64 are rather ambiguous. Consequently, the picture on the temporal scope of application concerning the recognition and enforcement of judgments is rather complicated. According to Article 64(2), a judgment rendered after the Regulation's date of application may be enforced under the Regulation even if the proceedings were instituted before that date provided that the court of a Member State has based its jurisdiction on the rules in the Brussels II Regulation or in a treaty entered into by the state where the judgment is rendered and the state where the enforcement is sought which was applicable at the moment when the proceedings were instituted. The same holds true for judgments rendered before the application of the Regulation in proceedings instituted after the entry into force of the Brussels II Regulation provided that they relate to divorce, legal separation or marriage annulment or parental responsibility for the child of both spouses within these matrimonial proceedings.[29] Judgments rendered before the date of the Regulation's application but after the date of application of the Brussels II Regulation in proceedings commenced before the entry into force of the Brussels II Regulation are enforceable under the Regulation if jurisdiction was based on rules which are in accordance with the rules in the Brussels IIbis Regulation or the Brussels II Regulation or in a treaty between the state of origin and the state where the enforcement is sought provided that it was in force at the moment of the commencement of the proceedings in which the judgment was rendered.

In practice, however, the relevance of these provisions is currently rather limited considering that the Regulation has now been applicable for over ten years. As for states that became a Member State after 1 March 2005 or 1 August 2004, these provisions are of no relevance as the application of these provisions is connected with the entry into force of the Brussels II Regulation. Thus, it bears no relevance for judgments rendered in Romania, Bulgaria and Croatia, as they became Members States after 1 March 2005 (in 2007 and 2013 respectively). Accordingly, the Brussels II Regulation has never been in force in those jurisdictions.

Yet it is not entirely clear whether the same line of reasoning is to be followed when the recognition and enforcement of a judgment is requested in Bulgaria, Romania and Croatia and that judgment was rendered by a court of an EU Member State *after* they became Member States, but when the proceedings had been instituted *before* their accession. The wording 'the entering into force of Regulation 1347/2000' may imply that the extension of the application of the Regulation is 'linked' to the applicability of the Brussels II Regulation in the 'country of origin', i.e., where the judgment was rendered. Therefore, it remains circumspect in our view whether the provisions of paragraphs (2)-(4) could be applied *analogously* so that the 'new

[29] Brussels IIbis Regulation, Article 64(2).

Member States' would be required to apply the Regulation to judgments rendered after they became Member States, but the proceedings were instituted before that moment.

Thus, Article 64 deals in its three paragraphs with different circumstances. In the Practice Guide for the Brussels II Regulation a flow chart illustrates how this provision is supposed to operate.[30] On the basis of the interpretation of Article 64(2) the recognition and enforcement of decisions which have been instituted after the date of application fall within the temporal scope of the Brussels IIbis Regulation.[31] In the situations covered by paragraphs (2)-(4) of Article 64 both the date of the judgement and the date when the proceedings were commenced are relevant. The general idea is that all judgements from the date of application of Brussels IIbis are subject to a regime of automatic recognition in the other Member States, if the jurisdiction of the court meets certain requirements. These require that the court has jurisdiction on a jurisdictional basis which was agreed upon by both Member States and an equivalent to one of the jurisdictional bases of Brussels II or Brussels IIbis.[32]

Some of the difficulties involved are demonstrated *infra* in this Chapter, under 2.2 '*Difficulties in application – relevant literature*'. The wording of Article 64 of the Brussels IIbis Regulation is unclear and rather confusing. Regrettably, it differs from the clear wording used in Article 66 of the Brussels I Regulation. Therefore, the 2016 Commission's Proposal suggests drafting the temporal scope of application along the lines of Article 66 of the Brussels Ibis Regulation. As such, this suggestion is to be met with approval, as explained in the Recommendations, under 8 '*General and Final Provisions*'. Considering that the provisions in both Brussels Ibis and Brussels IIbis Regulations regulate the same private international law aspects – jurisdiction and the enforcement of judgements – presumably they should express similar considerations. This is probably the reason why the Commission suggests to follow the same line of reasoning regarding the temporal scope of application. From the practical point of view, it could be desirable that the current complicated provision of Article 64(2)-(4) could be subject to an analogous interpretation of Article 66 of the Brussels I Regulation. Namely, there is no reason why a judgment based on criteria for jurisdiction under the Brussels IIbis Regulation which was rendered after a Member State of enforcement has acquired membership should not be enforced under the Regulation. However, it seems that the wording of paragraphs (2)-(4) of Article 64, in particular the reference to the Brussels II Regulation, implies that the provisions of paragraphs (3) and (4) do not apply to judgments with respect to Member States that have never applied the Brussels II Regulation,[33] so that Romania, Bulgaria and Croatia are not requested to apply the Regulation to judgments rendered after their succession in proceedings instituted before succession.

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[30] The European Commission's Practice Guide for the application of the new Brussels II Regulation (2005), p. 9, available at: http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf.
[31] Mankowski/Magnus/Mankowksi, *op. cit.*, Article 64, note 11.
[32] Stone, *op. cit*., p. 388.
[33] Magnus/Mankowski/Mankowski, *op. cit.*, Article 64, notes 19 and 25, which take the view that Bulgaria and Romania do not feature in this context since their accession was as of 1 January 2007 so that they have never been Members of the Brussels II Regulation.

Regarding recognition under Article 64(2) – (4) the date of the application of both the Brussels IIbis and Brussels II Regulations are relevant. In the literature it is pointed out that this concerns the date on which the respective Regulation became applicable for *both* the State of origin *and* the State addressed.[34]

With respect to the possible concurrence of the Regulation with other relevant instruments,[35] in relation to the 1996 Hague Convention, the Regulation applies when the child has his or her habitual residence in a Member State. In relation to the 1980 Hague Convention, in the field of jurisdiction there is no confluence since the Regulation does not provide for jurisdiction regarding the request for the return of the child. In matters that concern both instruments, however, the Regulation prevails.

2.2 Difficulties in application – relevant literature

As stated before, the transitional provision of Article 64 is not clear in every respect. In the literature a number of problems have been identified. In National Reports, no problems have been reported, but no specific questions on this topic have been posed in the questionnaire. It will no doubt have been difficult at times for national courts to apply the difficult transitional provision, in particular the situations which have not been explicitly covered by Article 64.

In the literature a number of issues have been raised. One of them is that of *lis pendens* and transitional law. Borrás suggests that the recast provides a good opportunity to introduce a rule for the situation where one of the proceedings was instituted before the date of application of the new instrument and the other after this date.[36] If both proceedings started either before or after 1 March 2005, Brussels IIbis is not applicable. The scenario where one of the proceedings is initiated before and the other after the entry into force is problematic. In *Von Horn v. Cinnamond*, the CJEU attempted to solve the issue along the lines of what was then Article 54(2) of the 1968 Brussels Convention.[37]

The complicated nature of the transitional provision is often pinpointed in the legal literature, and the drafting of Article 64 has been called disgraceful[38] and 'extremely complicated'.[39] A number of scenarios have been identified in which it is not clear what would be applicable.[40] In order to create some clarity tables with the various situations and outcomes have been developed in the doctrine, demonstrating that Article 64 contains no rule for a number of situations.[41] As suggested in the literature, it seems to be sufficient either that the original court had explicitly assumed jurisdiction on a ground which was similar or comparable to one

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[34] Stone, *op. cit*., p. 437.
[35] Brussels IIbis Regulation, Article 61.
[36] Borrás, 'Grounds of jurisdiction in matrimonial matters: recasting the Brussels IIa Regulation', *op. cit*., pp. 3-9.
[37] CJEU Case C-163/95 *Elsbeth Freifrau von Horn v Kevin Cinnamond* [1997] ECR I-5451, paras 14-25.
[38] Stone, *op cit*., p. 450; Mankowski/Magnus/Mankowksi, *op. cit*., Article 64, note 11.
[39] Stone, *op. cit*., p. 450.
[40] *Ibid.*, pp. 388-390. The same author at p. 426 states that: '[i]t seems that, where a decision at first instance granting a divorce decree (or making a custody order) is subsequently affirmed on appeal, the date of grant (or making) for the purposes of the transnational provisions is that of the decision at first instance and not that of the decision on appeal'; See also D v D [2007] EWCA Civ 1277 (CA). See also, Ni Shúilleabháin, *op. cit.*, p. 97.
[41] Stone, *op. cit.*, p. 388-390; Curry-Sumner, I., 'Rules on the recognition of parental responsibility decisions: A view from the Netherlands' (2014) 4 NIPR, pp. 545-558. See also Vlas, Ibili, *op. cit.*, p. 263, 271.

applicable under the Brussels IIbis Regulation or on the ground in a relevant convention which was in force when the proceedings were instituted, or that the court addressed finds that a ground of jurisdiction accepted in the Brussels IIbis Regulation or in a relevant convention had in fact existed.[42]

2.3 Difficulties in application – CJEU case law

The facts of *Hadadi* case[43], have already been presented *supra* in Chapter 2, under 3.7.1 '*Difficulties in the application of Article 3(1)(b) – CJEU case law*'. It involved the interpretation of the transitional provision of Article 64(4). The spouses, who had double French-Hungarian nationality, both instituted divorce proceedings, one in France and the other in Hungary. The Hungarian court issued the judgment granting a divorce on 4 May 2004, after Hungary became a Member State.[44] Thus, the judgment postdated the application of Brussels II in Hungary, but it was rendered before the date of application of Brussels IIbis. The proceedings were instituted before the date of the entry into force of Brussels II Regulation in Hungary Accordingly, these are the circumstance in which Article 64(4) applies. In order to determine whether to apply the Regulation on the recognition of the judgment, the French court had to decide whether the jurisdiction of the Hungarian court could be based on the common Hungarian nationality of the spouses. The common nationality is one of the rules on jurisdiction contained in Article 3(1)(b) of the Regulation Brussels IIbis. In accordance with Article 64(4), the Hungarian divorce judgment is to be recognised pursuant to Brussels IIbis if the jurisdiction of the Hungarian court was founded on rules which were in accordance with those provided for either in Chapter II of Brussels IIbis, Brussels II or in a convention concluded between Hungary and France, which was in force when the proceedings were instituted. In this context, the CJEU ruled that it is not necessary that the granting court actually relied on an equivalent ground at the time of accepting jurisdiction. It is enough that the jurisdiction of the court in question 'was able to be established by applying Article 3(1) of Brussels IIbis, whatever rules on jurisdiction were in fact applied by them'.[45] In those circumstances, the question of the recognition of that judgment must be assessed by applying Article 64(4), since proceedings were instituted and the judgment was delivered within the period set out in that provision.[46]

Where the spouses have the same dual nationality, the court seised cannot overlook the fact that the individuals concerned had the nationality of another Member State. On the contrary, in the context of Article 64(4), where the spouses hold both the nationality of the Member State of the court seised and that of the same other Member State, that court must take into account the fact that the courts of that other Member State could have been properly seised of the case under Article 3(1)(b) of the Brussels IIbis Regulation since the persons concerned had the nationality of the latter State.

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[42] *Ibid*., pp. 451. See also CJEU Case C-435/06 *C.* [2007] ECR I-10141 (dealing with a finding of 'residence' as being similar to habitual residence) and CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871 (especially at paras 29-30, in which it was considered sufficient that both spouses were nationals of the State of origin).
[43] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871.
[44] Hungary became a member on 1 May 2004.
[45] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871, paras 27-30.
[46] *Ibid*., paras 27-28.

The CJEU case of *C*,[47] addressed the question of the moment when the judgment is rendered. For the purposes of applying Article 64, it is important to determine the date when the judgment was rendered. In some jurisdiction there might be a difference in the date of the ruling and the date when the decision becomes enforceable. The relevant point of time is when the judgment becomes effective and not when it eventually becomes *res judicata* or gains enforceability.[48] When a judgment is deemed to be rendered is not a matter regulated by EU law. Instead it is governed by the rules of the respective *lex fori processus* of the court which has delivered its judgment.[49] For the purpose of recognition within the meaning of Article 64, the term 'judgment' relates to the original judgment brought at last instance in the country of origin. Any kind of subsequently entered order declaring the judgment enforceable is irrelevant in this context.

In the case of *C*,[50] a Swedish Social Welfare Board had ordered two children to be taken into care. This decision was subsequently confirmed by a Swedish administrative court.[51] The CJEU assumed that the date of the latter and not the former was decisive for the purposes of recognition pursuant to Article 64.[52] The Advocate General had also supported this viewpoint holding that 'a judgment has only been given for the purposes of Article 64 where it is enforceable and has external consequences under the law of the granting state.'[53]

2.4 Conclusion

The provision of Article 64 is unclear, incomprehensive and inconclusive. In some instances, becoming rarer as time goes by, there are still gaps.[54] The most important one relates to judgments given after 1 March 2005 stemming from proceedings instituted before 1 March 2001. The Commission in its Proposal suggests appropriate changes in Article 78 which would remedy the deficiencies under the current provision of Article 64. The suggested amendments are detailed in the Recommendations, under 8 '*General and Final Provisions*'.

3. Final provisions in Chapter VII

The final chapter of Brussels IIbis contains a number of different issues, ranging from reporting by the Commission on the application of the Regulation to the date of repealing the Brussels II Regulation.[55] From the perspective of this Guide for Application, many of these provisions do not require specific attention as they either speak for themselves, and/or have been dealt with in the past or are not relevant for the everyday application issues of the Regulation.[56] In this section we will focus on Articles 65 and 66, which are the most interesting from a practical

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[47] CJEU Case C-435/06 *C.* [2007] ECR I-10141.
[48] Dilger, J. in: Geimer/Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen (C.H. Beck 2017), Article 64, note 9; Kaller-Pröll in: Fasching/Konecny, Article 64, note 8.
[49] Mankowski/Magnus/Mankowksi, *op. cit.*, Article 64, note 6.
[50] CJEU Case C-435/06 *C.* [2007] ECR I-10141.
[51] *Ibid*., para 16.
[52] *Ibid*., para 71.
[53] *Ibid*., Opinion of Advocate General Kokott, paras 64-66.
[54] Mankowski/Magnus/Mankowksi, *op. cit.*, Article 64, note 26.
[55] Brussels IIbis Regulation, Article 65.
[56] It concerns Articles 67-72 which do not appear to raise any problems. Some of the provisions are to some extent rephrased in the proposal for the recast.

perspective. In National Reports no issues have been identified concerning any of these provisions.

Article 65 requires an 'inspection' by the European Commission with regard to the application of the Regulation during a five-year period.

In the 2016 Commission's Proposal a number of changes are foreseen. First, the currently recurring five-year period is to be replaced by a once-only evaluation after ten years. In the literature the introduction of an ongoing duty for the Commission to monitor, evaluate and adapt the application of the Regulation in 2005 was perceived to be an improvement, since it requires the Commission to keep track of developments.[57] It is not clear why a different choice has been made. This decision could be called into question, taking into account the fact that the proposed recast is already in its second revision thereby demonstrating that things might need to change quite regularly.

What is new is the duty for the Member States to collect data and provide this information to the European Commission. It concerns: the number of decisions in both matrimonial matters and parental responsibility in which jurisdiction was based on the Recast; the number of Article 32 cases on the enforcement of parental responsibility decisions, where enforcement has not occurred within the prescribed time limit of six weeks; the number of applications to refuse the recognition of an Article 39 decision and, if possible, how many of these applications have been granted; the number of applications to refuse the enforcement of an Article 41decision and, if possible, how many of these applications have been granted; and the number of appeals lodged against the refusal of an enforcement decision pursuant to Articles 44 and 45.

One may wonder whether the Member States are in the position to provide these data, in particular regarding the number of decisions in which the jurisdictional grounds of the recast have been used.

Thirdly, a minor change concerns the terminology in the heading that changes to 'monitoring and evaluation' which is definitely a better heading than the current 'review.'

Article 66 provides, just like Brussels II did, a specific rule for Member States in which two or more systems of law or sets of rules exist concerning matters governed by the Regulation. It only applies to Member States with more than one set of rules or systems of law from the point of view of judicial procedure, such as the UK or Spain.[58] Article 66 makes clear which habitual residence, domicile and authority in a member State have to be read as in a particular territorial unit of that Member State. This provision is relevant since it means that it is the Regulation which determines jurisdiction within a particular Member State. Thus, national law of that Member State do not apply for this purpose.[59]

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[57] Magnus/Mankowski/Mankowski, *op.cit.*, Article 65, note 5.
[58] Borrás, 'Grounds of jurisdiction in matrimonial matters: recasting the Brussels IIa Regulation', *op. cit.*, p. 126.
[59] Rauscher, *op. cit.*, Article 67, note 3.

In UK case law and literature there is a debate as to how Article 66 is to be determined. The first approach is that if a case has internal connections only, jurisdiction is to be determined by national law only and the Regulation is irrelevant. If, however, the case has multiple connections, thus also with another Member State (for example, to England and Wales, Scotland, and France), then Brussels IIbis applies, and if it allocates jurisdiction to the UK, Article 66 on internal allocation (to England and Wales or Scotland) must be observed. Adherents to the second approach would consider Brussels IIbis to be applicable in both scenarios. The essential difference is that 'first approach' considers Article 66 to be inapplicable in purely internal cases whereas 'second approach' suggests it to be applicable in internal cases as well as in cases with an international dimension. It seems that the first approach enjoys considerable support, but there is room for interpretation.[60]

No suggestions for changes have been made in the literature and in the proposal for the Recast no changes are foreseen.

The final part of the Regulation relates to the role of the Commission in receiving the necessary information from the Member States, pursuant to Articles 67 and 68 of the Regulation, and the way the Commission is assisted by the committee as provided for in Article 70. This Article also declares that Articles 3 and 7 of Decision 1999/468/EC[61] apply in this context, meaning the rules of procedure of the committee and its advisory procedure.

Article 67 deals with where the courts and practitioners should turn to in order to gather information about the central authorities in other Member States.[62] Pursuant to Article 72 of the Regulation, the Regulation entered into force on 1 August 2004 and has been applicable from 1 March 2005, with the exception of Articles 67, 68, 69 and 70 which have been applicable from 1 August 2004.[63]

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[60] Ni Shúilleabháin, *op. cit*., p. 86; Beevers, K., and McClean, D., 'Intra-UK Jurisdiction in Parental Responsibility Cases: Has Europe Intervened?' [2005] International Family Law, p. 129; Fawcett, J., and Carruthers, J., Cheshire, *North & Fawcett: Private International Law* (14th edn., OUP 2008) p. 1085; Lowe, N., 'Negotiating the Revised Brussels II Regulation' [2004] International Family Law, 205, pp. 208–209.

[61] COUNCIL DECISION of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC) OJ L 184/23, p. 23.

[62] Mankowski/Magnus/Mankowksi, *op. cit*., Article 67, note 1; the current list of information can be found at https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-en.do?clang=en.

[63] Mankowski/Magnus/Mankowksi, *op.cit*., Article, 72 note 1.

GUIDELINES – Summary

Brussels IIbis and the 1996 Hague Convention

When Article 12(4) is considered together with Article 61 we can conclude that the Convention shall only have precedence over the Regulation in the context of the so-called prorogation of jurisdiction as provided for in Article 12(4). The presumption provided therein will not apply if the third state where the child has his or her habitual residence is a party to the 1996 Convention.

The 1996 Hague Convention remains relevant with respect to the applicable law in cases of parental responsibility, as this is not a private international law aspect which is covered by the Regulation.

Brussels IIbis and the 1980 Hague Convention

It follows from Article 11(1), as well as from Article 60, that the 1980 Hague Convention remains applicable when an application has been made for the return of a child who has been wrongfully retained in or removed from a country other than the country of his/her habitual residence. However, when a party applies to obtain the return of a child who has been wrongfully removed or retained in a EU Member State other than the Member State where the child habitually resided immediately before his/her wrongful removal or retention, the Regulation makes a number of adjustments in Article 11(2)-(8) and they prevail over the relevant provisions of the Convention.

A very important alteration from the 1980 Hague Convention is that judgments rendered by the courts of the EU Member State where the child habitually resided immediately before his/her wrongful removal or retention (thus, the judgments rendered in the so-called 'second chance' procedure under Article 11(8) of the Regulation) are directly enforceable in all EU Member States. Thereby the reason under Article 47(2) is the only reason that may be invoked to oppose their enforcement.

<u>Article 64</u>

The transitional provision of Article 64 is not clear in every respect, but the underlying principle is to favour recognition and enforcement, even if the date of instituting proceedings predates the date of application of the relevant Regulation.

The judgment postdates the entry into force of Brussels II, but predates its date of application

For the purposes of application of Article 64(4), a judgment is to be recognised pursuant to Brussels IIbis if the jurisdiction of the court was founded on rules which are in accordance with those provided for in the Regulation. In this context, it is sufficient that the jurisdiction of the court in question 'was able to be established by applying Article 3(1) of Brussels IIbis, whatever rules on jurisdiction were in fact applied by them'. In those circumstances, the question of the recognition of that judgment must be assessed by applying Article 64(4), since proceedings were instituted and the judgment was delivered within the period set out in that provision (see the *Hadadi* case[64]).

[64] CJEU Case C-168/08 *Hadadi v Hadadi* [2009] ECR I-6871.