

RECOMMENDATIONS AND GUIDELINES

Effective adoption, transposition, implementation and application of European Union legislation in the area of civil justice

(Latvia, Hungary, Germany, Sweden
and the United Kingdom)

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PREFACE

Every area of law is characterized not only by a set of certain material norms, but also by the application of those norms in practice. Nowadays, when globalization processes are making the world smaller and more interconnected, this statement holds true not only in relation to the national legal order, but to different international legal formations and especially to the EU and EU law. From various branches of EU law the area of civil justice is one of the most rapidly developing areas, thus challenging judges, civil servants and legal practitioners alike to keep up with this pace and to be capable of correct application of EU law in the area of civil justice.

So far, rapid development of EU-area civil justice has already been reflected in many various academic studies and textbooks. However, the adoption, transposition and especially the application of EU law in this area remains a hidden part of an iceberg. Therefore, the main purpose of the present Recommendations and Guidelines is to uncover this largely overlooked level by analyzing the adoption, transposition and practical application of EU law in the area of civil justice in five Member States: Latvia, Germany, Hungary, Sweden and the United Kingdom. Even more, the authors aimed not only to identify issues of concern, but also pointed out directions for improvement of the quality of the adoption, transposition and application of EU law in the area of civil justice. Additionally, it is our hope that the materials of the present Recommendations and Guidelines will serve as a helping tool in the application of EU law in the area of civil justice for everyday practitioners, both in the public and private sectors.

The responsibility for the content is shared jointly by the five authors of these Recommendations and Guidelines. Nevertheless, our work could not be accomplished without substantial support and assistance from various sources. First of all, the authors would like to thank the Ministry of Justice of the Republic of Latvia for the development of the idea of such Recommendations and Guidelines and for making the whole research possible. Furthermore, the authors thank all state institutions in the other four Member States of the project for their assistance with the research materials and for sharing the information on good practices with the authors.

Additionally, our sincere gratitude goes to all individuals from various countries that supported this project by filling out questionnaires, giving interviews, and providing information and their opinions.

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INTRODUCTION

- [1] The **purpose** of these Recommendations and Guidelines is to give an overview of the general problems revealed in five particular Member States (**Latvia, Germany, Hungary, Sweden and the United Kingdom**) of the European Union (*further: EU*) regarding implementation, application and transformation of EU law in the field of civil justice. The Recommendations and Guidelines provide practical recommendations how to make more effective application of EU law in the civil law area.
- [2] The **authors** of these Recommendations and Guidelines are
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 - ✓ **Dr.iur. Baiba Rudevska**, Independent Researcher in the field of private international law (conflict-of-laws), international civil procedure, Latvian private law, comparative private law and inter-temporal law;
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 - ✓ **LL.M Aleksandrs Fillers**, PhD student, Independent Researcher in the field of international arbitration, private international law (conflict-of-laws) and Latvian private law.
- [3] The **scope** of these Recommendations and Guidelines is limited by the following EU legal acts and future EU proposals in the field of international judicial cooperation in civil matters:
- ✓ Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (*further: **European Enforcement Order Regulation***);¹
 - ✓ Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (*further: **European Orders for Payment Regulation***);²
 - ✓ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (*further: **European Small Claims Regulation***);³

1 Regulation (EC) No. 805/2004 of the European Parliament and of the Council (21 April 2004) creating a European Enforcement Order for uncontested claims. L 143, Official Journal of the European Union, 30.04.2004, p. 15-62.

2 Regulation (EC) No. 1896/2006 of the European Parliament and of the Council (12 December 2006) creating a European order for payment procedure. L 399, Official Journal of the European Union, 30.12.2006, p. 1-32.

3 Regulation (EC) No. 861/2007 of the European Parliament and of the Council (11 July 2007) establishing a European Small Claims Procedure. L 199, Official Journal of the European Union, 31.07.2007, p. 1-22.

- ✓ Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (*further: **Insolvency Regulation***);⁴
- ✓ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (*further: **Brussels IIbis Regulation***);⁵
- ✓ Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (*further: **Maintenance Regulation***);⁶
- ✓ Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000 (*further: **Service of Documents Regulation***);⁷
- ✓ Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (*further: **Taking of Evidence Regulation***);⁸
- ✓ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (*further: **Rome I Regulation***);⁹
- ✓ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (*further: **Rome II Regulation***);¹⁰
- ✓ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*further: **Brussels Ibis Regulation***);¹¹
- ✓ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*further: **Brussels I Regulation***);¹²
- ✓ Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance

4 Council Regulation (EC) No. 1346/2000 (29 May 2000) on insolvency proceedings. L 160, Official Journal of the European Union, 30.06.2000, p. 1-18.

5 Council Regulation (EC) No. 2201/2003 (27 November 2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000. L 338, Official Journal of the European Union, 23.12.2003, p. 1-29.

6 Council Regulation (EC) No. 4/2009 (18 December 2008) on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. L 7, Official Journal of the European Union, 10.01.2009, p. 1-79.

7 Regulation (EC) No. 1393/2007 of the European Parliament and of the Council (13 November 2007) on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000. L 324, Official Journal of the European Union, 10.12.2007, p. 79-86.

8 Council Regulation (EC) No. 1206/2001 (28 May 2001) on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. L 174, Official Journal of the European Union, 27.06.2001, p. 1-24.

9 Council Regulation (EC) No. 4/2009 (18 December 2008) on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. L 7, Official Journal of the European Union, 10.01.2009, p. 1-79.

10 European Parliament and Council Regulation (EC) No. 864/2007 (11 July 2007) on the law applicable to non-contractual obligations (Rome II). OJ L 199, 04/07./2008, p. 40-49.

11 Regulation (EU) No 1215/2012 of the European Parliament and of the Council (12 December 2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. L 351 Official Journal, 20.12.2012, p.1-32.

12 Council Regulation (EC) No. 44/2001 (22 December 2000) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. L 12, Official Journal of the European Union, 16.01.2001, p. 1-23.

and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (*further: **Succession Regulation***);¹³

- ✓ Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (*further: **Rome III Regulation***);¹⁴
- ✓ Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (*further: **Protection Measures Regulation***);¹⁵
- ✓ Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (*further: **Legal Aid Directive***);¹⁶
- ✓ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (*further: **Mediation Directive***).¹⁷
- ✓ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (COM (2013) 794) (*further: **Proposal for Small Claims Regulation and European Enforcement Order Regulation***);¹⁸
- ✓ Proposal for a European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM (2012) 744) (*further: **Proposal for Insolvency Regulation***);
- ✓ Proposal for a European Parliament and of the Council amending Regulation Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (COM (2012) 445) (*further: **Proposal for European Account Preservation Order***);¹⁹
- ✓ Proposal for a European Parliament and of the Council amending Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM (2013) 228) (*further: **Proposal for Certain Public Documents***);

13 Regulation (EU) No. 650/2012 of the European Parliament and of the Council (4 July 2012) on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. L 201, Official Journal of the European Union, 27.07.2012, p. 107-134.

14 Council Regulation (EU) No. 1259/2010 (20 December 2010) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. L 343, Official Journal of the European Union, 29.12.2010, p. 10-16 (in English)

15 Regulation (EU) No. 606/2013 of the European Parliament and of the Council (12 June 2013) on mutual recognition of protection measures in civil matters. L 181, Official Journal of the European Union, 29.06.2013, p. 4-12.

16 Council Directive 2003/8/EC (27 January 2003) to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. L 26, Official Journal of the European Union, 31.01.2003, p. 41-47 (in English).

17 Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. L 26, Official Journal of the European Union, 31.01.2003, p. 4-12.

18 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (COM (2013) 794), C 226, Official Journal of the European Union, 16.07.2014, p. 43-47.

19 Now: Regulation (EU) No. 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, Official Journal of the European Union, 27.06.2014, p. 59-92 (*further: **European Account Preservation Order Regulation***).

- ✓ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM (2011) 126) (*further: **Proposal for Matrimonial Property Regulation***);
- ✓ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM (2011) 127) (*further: **Proposal for Property Consequences of Registered Partnerships***);
- ✓ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM (2013) 554) (*further: **Proposal for Brussels Ibis Regulation***).²⁰

- [4]** The **temporal scope** of the Recommendations and Guidelines is to examine application of the respective EU legal acts within the **past five years**.
- [5]** It should be noted that some of the legal instruments mentioned above are recent, for example, the Succession Regulation, thus there is no practice or case law yet.
- [6]** As the Recommendations and Guidelines were carried out in a very constrained timeframe, the scope of the Recommendations and Guidelines is limited to the most common and relevant issues of application of EU acts in the area of civil justice. Similarly, the selection of national practices is based on considerations of relevance, being widespread, accessibility and the limited length of these Recommendations and Guidelines.
- [7]** To achieve the aim of the Recommendations and Guidelines, the Researchers have used the following **methodology**. The Recommendations and Guidelines are mainly based on personal interviews with judges, private practice lawyers, notaries, court bailiffs and state officials conducted during study visits to **Germany, Hungary, Latvia, Sweden, and the United Kingdom** (*further: the U.K.*). The respective study visits included discussions with lawyers on practical application of the EU law in the area of civil justice. The Researchers have taken minutes and submitted reports regarding the discussed topics and problems in every study visit. Some of the stakeholders were contacted personally after the study visits. In this document the Researchers refer to the interviews, discussions and other communication in general (without identification of the particular source) in order to protect the privacy of persons and the personal opinion of the person, and to maintain ethical standards and the integrity of this work.
- [8]** The Researchers also distributed questionnaires addressing empirical and legal questions regarding the adoption and application of EU acts in area of the civil law among the members of the judiciary, legal professions and state officials, not only from Member States of the main focus.²¹ A brief summary of the questionnaires can be found in Annex 1. Researchers have used available databases of national²² and CJEU²³ case law. In addition, legal literature was also used in this Research. A detailed description of the methodology and methods was submitted at the first stage of the project.

20 This Proposal is not additionally discussed, as the Brussels Ibis Regulation has already entered into force.

21 The questionnaires were available: <http://webanketa.com/forms/70vk4d9g5xgkcdv471h6csg/> (in Latvian), <http://webanketa.com/forms/70vk2csg5ww38rsp61h3jdg/> (in English) and <http://webanketa.com/forms/70wkce9g5xgkcd36c-gw64s0/> (in Hungarian). The questionnaires were also published via Conflict of Law Net <http://conflictolaws.net/2014/research-projects-on-eu-law-and-ecj-case-law-in-civil-matters/>.

22 The Researchers have used the Court Information System (TIS) database in **Latvia**, Westlaw International, Westlaw UK, Cambridge Journals Online, and the Heinonline subscription databases, and the British and Irish Legal Information Institute's free database to access judicial decisions and literature about the **U.K.**. For **German** case law the Researchers have used the paid database www.juris.de and free database www.unalex.eu. In **Hungary** some judgments in the Hungarian language can be found in the database of Hungarian courts portal – <http://www.birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>. In **Sweden** the Researchers used the public database of the Swedish Courts Administration, which contains most of the reported guiding decisions of the Swedish courts: <http://www.rattsinfosok.dom.se/lagrummet/index.jsp>.

23 EU case law <http://europa.eu/eu-law/case-law>; Curia http://curia.europa.eu/jcms/jcms/Jo1_6308/; SEMDOC <http://www.state-watch.org/semDOC/728/>.

- [9]** Study visits were conducted and the Recommendations and Guidelines were drafted as from 14 August 2014 to 1 March 2015. In parallel, the Researchers conducted the Research on Application by the Court of Justice of EU case law.
- [10]** The **structure** of these Recommendations and Guidelines is formed in the following manner – the Researchers propose recommendations for each particular issue, taking into consideration the case law and experience of the particular Member State. The first part of the Recommendations and Guidelines deals with application of EU law in the area of civil justice. This part is divided into sub-sections of the specific areas of law, for example, jurisdiction, insolvency, family law, etc. The second part includes a study regarding adoption, transposition and control over transposition of EU law in the area of civil justice.
- [11]** Finally, the Researchers have made a comparative table on the temporal scope of each regulation dealt with within this project (Annex 2) and schema of the step-by-step procedure foreseen by legal practitioners in applying the Brussels Ibis Regulation and Rome I and II Regulations (Annex 3).

PART I: APPLICATION OF EU LAW IN THE AREA OF CIVIL JUSTICE

1. General Issues of Application of EU Law in the Area of Civil Justice

1.1. Awareness and Quality of Application in General



The national judiciary is under an obligation to apply EU law and set aside conflicting provisions of national law.

- [12]** At the very outset of the recommendations, one should be reminded that, in accordance with the principles of direct effect and supremacy, the national judiciary is under an obligation to apply EU law provisions and to recognize that they have higher legal force than provisions of national law.²⁴



Raising the level of awareness amongst judges and legal practitioners is of utmost importance in order to increase the frequency and quality of application of EU law in the area of civil justice.

- [13]** Generally, national judges and legal practitioners are familiar with the above-mentioned basic principle of supremacy of EU law. Yet, the same cannot be said regarding the specifics of EU law in the area of civil justice.
- [14]** In different contexts, experts from the visited Member States (**Germany, Hungary, Latvia, Sweden, and the U.K.**) expressed their concerns that legal practitioners (judges and representatives of the parties alike) are unaware of some minor or sometimes even major nuances of EU law in the area of civil justice. They pointed out that raising of the awareness and knowledge in regard to the legal instruments of EU law in the area of civil justice should be done not only at the level of Member States, but also on the EU level.
- [15]** As a practical example, in the context of family law, the experts from the Ministry of Justice of **Hungary** were of the opinion that in many cases, the parties might be unaware of possible options to choose the applicable law regarding divorce.
- [16]** Additionally, Hungarian judges specifically referred to the lack of knowledge on the part of Hungarian lawyers, who do not understand the background of these cases, as they do not know the procedural laws of the other country – they are trying to solve problems only from the point of view of their own procedural law. For example, there was a case where Hungarian lawyers complained about the unfairness of Italian court proceedings, because they did not receive any documents

²⁴ This well-known issue has been covered by every EU law study book, see, e.g., Craig P, de Burca G. EU Law. Text, Cases and Materials. 5th ed. Oxford University press, 2011, p. 256.

from the court. However, the Italian Law of Civil Procedures states that these are the lawyers themselves who should have sent the letters, not the Italian courts.

- [17] During the study visit to **Sweden**, the lack of awareness of the EU legal dimension was noted as well – not all practicing lawyers and judges are very well informed about some of the EU acts or amendments of the national laws implementing EU acts.
- [18] Also in **Germany and Latvia** sometimes judges have difficulties combining both the national civil procedure law and the relevant EU Regulation. In such situations judges prefer the Civil Procedure Law (this is also the case in **Latvia**), which is a legal act well known to them. Both practicing lawyers and judges are not always well informed about some of the EU acts or amendments to the domestic laws implementing EU acts. However, in general, German judges and lawyers are well prepared in the field of civil justice.
- [19] However, in the **U.K. and Germany** some experts were of the opinion that the judges and practitioners are well aware of EU private international law instruments. As specifically to the U.K., on a number of occasions respondents noted that U.K. courts have created a large body of case law, applying different EU private international law instruments. Respondents also emphasized that London is one of the centers of international litigation, and, consequently, EU private international law instruments have wide applicability in some parts of the U.K.



More extensive trainings of judges and other lawyers should be organized on EU law in the area of civil justice

- [20] The correct applicability of EU law in the area of civil justice highly depends upon the training of legal professions (not only judges, but also court judicial staff, lawyers and others) and on the availability of educational materials and scholarly writings.²⁵ The questionnaires show that approximately half of the respondents from all EU Member States think that judges and lawyers are trained to work with EU law in the area of civil justice. However, the situation regarding trainings and legal literature differs from one state to another. As well, the opinions of judges and lawyers do not match.
- [21] For example, more than 75% of Latvian lawyers replied that Latvian lawyers are not familiar with EU law in the area of civil justice. More than 80% of the same respondents thought that Latvian judges are not familiar enough with this field of law. According to the data provided by the **Latvian** Judicial Training Center, from 2011 to 2014 around 40 different seminars were organized, including seminars on European procedures, CJEU case law in the area of civil justice, EU family law etc.²⁶ However, most of these seminars were voluntary. Therefore, the accessibility of the seminars could be improved. Moreover, it would be advisable that judges and court staff be supplied with the necessary commentaries on the regulations.
- [22] In **Sweden** the training of judges on EU private international law is conducted on a regular basis at the Judges' Academy. However, it is mostly general training, not a training specifically devoted to issues in the area of civil justice.
- [23] In **Germany** there are two main institutions providing training of judges. The Judicial Training Centres are under the responsibility of Federal States (Länder). There is also the German Academy for Judges (Deutsche Richterakademie), where judges are trained. A specialisation of the courts is very widespread in Germany. Therefore, the training of judges is more effective.

25 European Judicial Training. European Commission. Available at: http://ec.europa.eu/justice/criminal/european-judicial-training/index_en.htm.

26 1 December 2014 Information provided by the Latvian Judicial Training Center on seminars covering issues of EU international civil procedure law.

[24] As for scholarly writings, the situation again differs among Member States. In the **U.K.**, respondents acknowledged that courts usually refer to scholarly writings in English when dealing with EU private international law. In cases where monographs or commentaries to EU private international law instruments are written in English, but authored by foreigners, works by local authors are preferred, as they are usually more accessible to judges. At the same time, respondents acknowledged that it would have been useful for courts to have wider access to works by foreign authors, contributing to more comprehensive treatment of particular legal issues.

[25] In **Germany**, the situation with legal literature is very good – there are numerous commentaries, scientific books, articles, and special reviews, so German judges and lawyers have sufficient legal materials in the area of EU civil justice. However, German practitioners also noted that the commentaries on regulations should also be written in English and not only in German, so as to create European-level discussions instead of more than twenty separate domestic discussions about the EU law. The Researchers agree – commentaries and scholarly writings in English could establish a real and uniform discussion platform within the EU about EU law.



Education of judges and legal practitioners should not be limited to EU-law instruments, but should also cover specific legal instruments of Common Law.

[26] Expansion of the EU area of civil justice increased necessity for lawyers to apply in practice legal instruments that substantially differ from familiar tools of their own legal system. The differences might be particularly extreme if lawyers from Civil Law countries have to apply in practice specific legal instruments originating from the Common Law system.²⁷

[27] The questionnaires and interviews confirm that in some Member States (e.g., **Hungary, Germany**) application of the Common Law instruments happens very rarely. Nevertheless, in other Member States additional skills on the usage of the Common Law instruments are of great importance (e.g., Latvia due to the fact that substantial Latvian diaspora resides in the U.K.). Hence in those countries at least minimal additional training, preferably conducted by trainers with native educational basis from Common Law countries, is desirable.

[28] In **Latvia** such plans are already put to motion by scheduled trainings of the Notaries Public in June 2015 on working with some Common Law instruments regarding succession issues. Additionally, there is an idea to train attorneys to apply the Brussels I bis Regulation and the Succession Regulation.



Although the EU Judicial Atlas in Civil Matters is a good tool for application of Regulations, however, it does not always reflect the most recent information from Member States. To solve the issue both Member States and the Commission should fulfil their respective duties in updating the information in due time.

[29] Even though questionnaires indicate that in general legal practitioners are slightly hesitant to use EU-law-related databases frequently, the EU Judicial Atlas in Civil Matters²⁸ is a good tool used by the practitioners. In interviews, for example, in **Latvia and Hungary**, judges acknowledged that they are very familiar with this tool. This is also evident from cases where courts have used the Atlas in order to transform a form-based document from the court's language to another.

²⁷ See part 8.1. of Guidelines and Recommendations

²⁸ European Judicial Atlas in Civil Matters Available at and http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jccm_information_en.htm. E-Justice portal: https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do

[30] However, many practitioners indicated that the Atlas does not always reflect current information on Member States and their institutions. Also, the E-Justice portal that has been intended to be a one-stop agency in the area of EU justice is not completed yet. This issue arises from the fact that Member States sometimes do not provide the Commission with information on relevant amendments to the law in due time. Also, as noted, for example, by the members of the Ministry of Justice of **Latvia**, sometimes the delays in updating information online are caused by the Commission itself.



Specialization of judges in EU law in the area of civil justice increases the quality of adjudication.

[31] The quality of EU law application is influenced by the frequency of application – the more courts have to apply EU law, the better the quality of the application.²⁹ Therefore, the Researchers are of the opinion that specialization of judges in EU law in the area of civil justice increases the quality of adjudication. As already noted before by the example of **Germany**, specialisation of the courts is a very useful tool to make the training of judges more effective. Additionally, specialisation helps to increase the awareness of judges of EU rules in the area of civil justice in general, as well as increases their understanding of specific issues in this area.

[32] However, not all Member States have judges specializing in the area of civil justice. The answer to the question of the questionnaire “Do judges in your Member state specialize in private international law and international cooperation in civil matters (e.g., are there judges dealing with cases involving international cooperation in civil matters)?” indicated that the situation varies greatly from one Member State to another.

[33] For example, in **Latvia** judges do not specialize. However, both interviews and questionnaires revealed that specialization would increase the quality of deciding cases, especially in cross-border cases. Then the judges would be more informed about the latest developments in EU law and would be trained more specifically.

[34] Also in **Sweden** judges do not specialize in particular fields of law, but from the interviews conducted with Swedish practitioners the Researchers conclude that such specialization could be beneficial, as it would increase the quality of deciding cases with a cross-border element.

[35] In turn, specialization of judges is quite developed in **Hungary**. For example, in the capital, the Central District Court of Buda specializes in application of the Brussels Ibis Regulation, but the District Court of Pesta specializes in application of the Brussels IIbis Regulation.

[36] Likewise, in Germany judges specialise in specific fields of law. The widespread specialization of courts in **Germany** helps to guarantee uniform domestic case law. However, judges in Germany are not specialized in any certain areas of private international law or international civil procedure. For example, if a judge is specialized in family matters, he or she must also apply international or EU family law.



Coordination of EU law issues within the national judiciary improves the quality of application of EU law and should be used more widely.

[37] As the example of **Hungary** shows, the frequency and quality of EU law usage is also stimulated by creation of an internal network of judges that specializes in EU law and serves as legal advisers in this field. These judges have received special training in EU-law matters and keep a regular

29 Varju M. The judicial reception of EU law. In: Varju M., Varnay E. (ed). The Law of European Union in Hungary: Institutions, Processes and the Law. HVG-ORAC Publishing Ltd., 2014, p. 221.

exchange of information on EU-law-related topics. The judges-coordinators of the network receive additional remuneration for the extra work they do. This network also serves as a base for coordination of requests for preliminary rulings from Hungarian courts with an aim to avoid simultaneous and repeated references on the same issues.

- [38]** In **Latvia** coordination of information related to the EU law are entrusted to particular court official – the Assistant to the Chief Justice of the Supreme Court of Latvia in EU law matters, whose primary work functions are to help judges of the Supreme Court to find necessary CJEU case law as well as to give general advises on the EU law matters.

1.2. Interpretation of the EU Law



No reference should be made to the domestic law of Member States in order to interpret EU concepts used in regulations or directives.

- [39]** This conclusion derives from the notion of “*autonomous interpretation*”, which means that no reference is made to the domestic law of Member States in order to interpret concepts used in regulations or directives. Instead, there is a reference to the EU law as a whole.³⁰ The main goal is to establish the same meaning of legal concepts in the EU, as well as uniform application of these concepts.
- [40]** Some regulations directly mention this concept of autonomous interpretation in the recitals, for example: “*the domicile of a legal person must be defined autonomously*”;³¹ “*a non-contractual obligation should be understood as an autonomous concept*”;³² “*culpa in contrahendo*” is an autonomous concept and should not necessarily be interpreted within the meaning of national law.³³
- [41]** Autonomous concepts can be established either by the EU legislator (e.g., Article 2 (a) of the Brussels Ibis Regulation regarding the concept of “*judgment*”; Article 7(1)(b) regarding the concept of “*the place of performance of the obligation in question*”; Article 63(1) regarding the concept of “*domicile of the company or other legal person or association of natural or legal persons*”; Article 63(2) regarding the “*statutory seat*” for the purposes of the **U.K.**, Ireland and Cyprus, etc.) or by the CJEU interpreting EU legal acts (CJEU case law³⁴). Nevertheless, the definition of some legal concepts is still left to the national legal systems of each particular Member State, for example, “*domicile of a natural person*” or “*domicile of a trust*” (see: Articles 62 and 63(3) of the Brussels Ibis Regulation).
- [42]** Thus, the only exception is the situation when a regulation itself provides that the national law of the Member State must be applied. For example, according to Article 19 of the Small Claims Regulation, subject to the provisions of this Regulation, the European Small Claims Procedure must be governed by the procedural law of the Member State in which the procedure is conducted.



EU law shall be interpreted according to the specific interpretation methods of EU law.

30 Magnus U., Mankowski P., Magnus I. (ed.). Brussels I Regulation. SELP, 2007, p. 33.

31 Recital 15 of the Brussels Ibis Regulation.

32 Recital 11 of the Rome II Regulation.

33 Recital 30 of the Rome II Regulation.

34 See: 22 November 1977 CJEU judgment in case No. 43/77 *Industrial Diamond Supplies v Luigi Riva*; 26 March 1992 CJEU judgment in case No. C-261/90 *Reichert v Dresdner Bank (Reichert II)*; 2 June 1994 CJEU judgment in case No. C-414/92 *Solo Kleinmotoren v Boch*.

- [43]** While interpreting legal acts, the CJEU applies methods of interpretation well known in the civil law legal system. Those methods are: 1) grammatical interpretation, 2) historical interpretation, 3) systematic interpretation, 4) teleological interpretation and 5) comparative interpretation. However, certain EU law particularities, of which national courts should be aware, influence application of these methods.
- [44]** **Grammatical interpretation** means that the textual meaning must be taken into consideration. Sometimes it can be found in the legal definitions given by the EU legislator. For example, Article 4 of Regulation 805/2004 gives legal definitions of the following notions: “*judgment*”, “*authentic instrument*”, and “*claim*”. Article 3(1) of the Succession Regulation explains the notions of “*succession*”,³⁵ “*joint will*”, “*disposition of property upon death*,” etc. These notions must be also interpreted in an autonomous way within the meaning and system of the particular regulation.
- [45]** Grammatical interpretation is largely influenced by the fact that EU acts are written in all the languages of EU Member States, and all the language versions are equally legally binding.³⁶ Therefore, when a provision of an EU act is being interpreted, the interpreter, whether it is a judge, a legal practitioner or an academic, must evaluate and take into account other language versions of the particular provision as well.³⁷ For example, Article 4(1) of the Regulation 805/2004 uses the word “*decision*” (in English); “*Entscheidung*” (in German); “*décision*” (in French), but “*spriedums*”³⁸ (in Latvian).
- [46]** Another specific of the grammatical interpretation arises from the previously mentioned autonomous interpretation of EU law. Therefore, on many occasions, even if the meaning of a particular term of EU law can be found also in the national legal system, the meaning of the EU law must be applied instead.³⁹
- [47]** **Historical interpretation** includes in itself research about adoption of the particular legal act, for example, examination of various proposals by the Commission, discussions of the Council and previous drafts of the act.⁴⁰ Those kinds of documents can shed light on why the particular act is shaped in that particular way. However, the interpreter must be cautious when using the historical interpretation of the EU law, as the documents produced in the adoption process might be incomplete or deal with very specific parts of the planned act. Additionally, the final version of the act on many occasions is a political compromise. Therefore, the CJEU has also recognized that if the final version of the act does not contain a particular issue mentioned, for example, in the Council meeting, this issue cannot be used for interpretation of the act.⁴¹
- [48]** Historical interpretation also means that the interpretation of the previous legal acts must be taken into consideration. For example, for the purpose of interpretation of the Brussels Ibis Regulation, the interpretation of the Brussels I Regulation and the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (*further: Brussels Convention*)⁴² must be

35 See also recital 9 of the Succession Regulation.

36 See: Regulation No. 1 determining the languages to be used by the European Economic Community. Official Journal of European Union, 6.10.1958, p. 385; Regulation No. 1 determining the languages to be used by the European Atomic Energy Community. Official Journal of European Union, 6.10.1958, p. 401-402.

37 24 October 1996 CJEU judgment in case No. C-72/95 Annemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland, para 28.

38 “*Spriedums*” in Latvian means “*judgment*”.

39 Beaumont P, Hess B, Walker L, Spancken S. The Recovery of Maintenance in the EU and Worldwide Bloomsbury Publishing, p. 462.

40 E.g., 22 May 2008 CJEU judgment in case No. C-462/06 Glaxosmithkline v Rouard, the CJEU interpreted the Brussels I Regulation using *travaux préparatoires* to resolve issues related to jurisdiction over individual contracts of employment.

41 17 April 2008 CJEU judgment in case No. C-404/06 Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände, para 32.

42 Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters (consolidated version). C 27, Official Journal of European Union, 26.01.1998, p. 1-27.

analyzed. For the Brussels Ibis Regulation, Official Reports of the Brussels Convention⁴³ can be used as well.

- [49]** **Systemic interpretation** of EU acts first of all requires interpretation according to EU primary law – TEU, TFEU and the Charter of fundamental rights.⁴⁴ Also, the recitals of the preamble must be evaluated. If there are international agreements to which the EU has acceded in the particular field, also these agreements might influence the meaning and understanding of the interpreted legal act.⁴⁵ As according to Article 6(3) TEU, fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (*further: ECHR*) constitute general principles of EU law, the Convention and findings of the European Court of Human Rights (*further: ECtHR*) should be used when interpreting legal acts that might be connected with or influenced by human rights.
- [50]** As regards systemic interpretation of regulations in the civil justice area, there can be two levels of this interpretation: the internal system and the external system.⁴⁶
- [51]** The internal system means that the inner structure of the regulation must be respected. For example, Article 20(1)(a)(i) must be read together with Article 14 of European Orders for Payment Regulation.
- [52]** The external system contains the legal provisions laid down by other regulations and EU legal acts. For example, Article 6(1)(d) of European Enforcement Order Regulation; Article 6 of European Orders for Payment Regulation; Article 3(2) and 18(1) (a) of European Small Claims Regulation.
- [53]** Sometimes the recitals of the regulations directly emphasize the necessity to interpret some legal concepts within the external system. According to Recital 17 of the Rome I Regulation the concepts of “*provision of services*” and “*sale of goods*” should be interpreted in the same way as when applying Article 7 of the Brussels Ibis Regulation (Article 5 of the Brussels I Regulation) insofar as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.
- [54]** The recitals of the preamble of a particular legal act are one of the main sources of information needed for **teleological interpretation**, as the aim and purpose of the act is usually stated there.⁴⁷ Very often the recitals mention the main principles of the EU civil justice area. For example: – mutual trust in the administration of justice in the Union;⁴⁸– jurisdiction is generally based on the defendant’s domicile;⁴⁹

43 The two most important Official Reports are: Jenard P. Rapport sur la convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale. Journal officiel n° C 59, 5.3.1979, p. 1-70; Schlosser P. Rapport sur la convention relative à l'adhésion du royaume de Danemark, de l'Irlande et du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord à la convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, ainsi qu'au protocole concernant son interprétation par la Cour de justice. Journal officiel, n° C 59, 5.3.1979, p. 71-150.

44 See the 13 December 1983 CJEU judgment in case No. 218/82 Commission of the European Communities v Council of the European Communities, para 15.

45 For example, in some cases The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction could be used as a source of systemic interpretation. The principle is enshrined, for example, in the 10 September 1996 CJEU judgment in case No. C-61/94, Commission v Federal Republic of Germany.

46 Nehne T. Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts. Mohr Siebeck, 2012, S. 68, 69.

47 Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation 2013, p. 16. Available at: <http://eur-lex.europa.eu/content/pdf/techleg/joint-practical-guide-2013-en.pdf>.

48 Recital 26 of the Brussels Ibis Regulation; Recital 21 of the Brussels Ibis Regulation; Recital 18 of European Enforcement Order Regulation; Recital 27 of Regulation European Orders for Payment Regulation.

49 Recital 15 of the Brussels Ibis Regulation.

– respect for the rights of the defence;⁵⁰ – free circulation of judgments;⁵¹ – principle of mutual recognition of judicial and extra-judicial decisions in civil matters;⁵² – best interests of the child (in particular on the criterion of proximity);⁵³ – legal certainty;⁵⁴ – the foreseeability clause;⁵⁵ – the parties’ freedom to choose the applicable law;⁵⁶ and – the rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed.⁵⁷

- [55]** All these principles must be taken into consideration in the interpretation of regulations. They may also have a certain mutual hierarchy. For example, the principle of respect for the rights of the defence prevails over the principle of free movement of judgments.
- [56]** Treaties can also be of help in determining the main intention of the legislator in adopting an act. Additionally, it always must be taken into account that the particular act is part of EU law and that the aim of the act is in conformity with the legal order in the EU.⁵⁸ The teleological interpretation can be used to solve misunderstandings caused by different language versions of a legal act.
- [57]** Another type of teleological interpretation is *effet utile* interpretation, which is closely linked to the principle of effectiveness of the EU law. It means that amongst several possible interpretations, priority should be given to the one that best guarantees the practical effect of the existing EU law.⁵⁹
- [58]** The **comparative method** supports the interpretation of a provision by comparing it with solutions taken from the national legal systems of Member States.⁶⁰ The CJEU uses this interpretation method quite often in order to find the best compromise among the different legal systems represented in Member States from the one side, and EU law from the other side. Also, national courts, by applying regulations in case of doubt and where a decision of the CJEU is still lacking, must consult how the courts of other Member States have solved the relevant legal question.⁶¹ It means that domestic judges must be able to find and analyze decisions made by national judges of other Member States. The main problem is knowledge of foreign languages and the possibility of having access to the legal and judicial databases of other Member States. This question can be solved only at the EU level.



CJEU case law on interpretation of regulations is binding upon national courts.

- [59]** There is a substantial number of cases in the area of civil justice where national courts in their judgments delivered extensive argumentation regarding EU regulations, yet did not make any reference to CJEU case law. It was noticed that judges while applying regulations in the area of civil justice very rarely motivate their decision not to apply the relevant case law of the CJEU.

50 Recital 29 and 38 of the Brussels Ibis Regulation; recital 10 of European Enforcement Order Regulation; Recital 9 of European Small Claims Regulation.

51 Recital 27 of the Brussels Ibis Regulation.

52 Recital 3 of the Brussels Ibis Regulation.

53 Recital 12 and 13 of the Brussels Ibis Regulation.

54 Recital 14 of the Rome II Regulation; Recital 16 of the Rome I Regulation; Recital 37 of the Succession Regulation.

55 Recital 20 of the Rome II Regulation; Recital 16 of the Rome I Regulation.

56 Recital 11 of the Rome I Regulation.

57 Recital 7 of the Succession Regulation.

58 Maduro M. P. Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism. Available at: <http://www.ejls.eu/current.php?id=2>.

59 See, e.g., Mayr S. Putting a Leash on the Court of Justice? Preconceptions in National Methodology v *Effet Utile* as a Meta-Rule. In: European Journal of Legal Studies, 2012, Vol. 5(2), p 8-21.

60 Magnus U., Mankowski P., Magnus I. (ed.). Brussels I Regulation. SELP, 2007, p. 37; Lenaerts K. Le droit comparé dans le travail du juge communautaire. Revue trimestrielle du droit européen, 2001, n° 37, p. 487.

61 Magnus U., Mankowski P., Magnus I. (ed.). Brussels I Regulation. SELP, 2007, p. 38.

- [60]** Even more, in cases where national courts have made references to CJEU case law, in many occasions those references contained minor or even major flows.
- [61]** Sometimes national courts use so called “*template judgements*”, i.e., use previous judgments as a basis for the new judgment. Generally this helps to save time for the court. Yet, as can be seen from several cases in **Latvian** courts, when applied in the context of the EU law in the area of civil justice case law such template judgments might drastically reduce quality of judges’ rulings.

1.3. Language and Translation Issues

- [62]** Linguistic issues are very topical in **Latvia, Hungary, Sweden** and **Germany**. Those issues are raised in two particular contexts: wording and translation of EU legal acts and language used by parties and judges applying EU law, in particular regarding filling forms.



National judges and other practitioners should be encouraged to use different language versions of EU law provisions.

- [63]** Already thirty years ago the CJEU pointed out that EU law provisions are “*drafted in several languages and that the different language versions are all equally authentic. Interpretation of a provision of Community law thus involves a comparison of the different language versions.*”⁶² Therefore, national judges are under an obligation to compare different language versions of the same provision before this provision is applied.
- [64]** Most private practice lawyers of Member States acknowledged that they use EU acts not only in their own language, but also verify their conformity with other language versions, especially if the legal act is adopted before a particular Member State joined the EU, as there are many discrepancies and ambiguities in the translations of EU acts. Even though state officials encourage the unification of translations, still it is an issue that should be considered. Therefore, the situation in Member States varies.
- [65]** In the **U.K.** respondents had opposing opinions on the use of different language versions of EU private international law instruments by U.K. courts. These contradictory statements are explained by different techniques used at different levels of the U.K. judiciary. Hence, at the level of the Supreme Court, foreign language versions of EU legal instruments are consulted more often than in lower instances.
- [66]** At the same time, in the U.K. respondents acknowledged that there is no single view on the usefulness or importance of references to EU private international law instruments in different languages. Versions in other languages are sometimes referred to during court proceedings. However, often solicitors or barristers presenting cases before courts do not have sufficient knowledge of a foreign language to make a coherent argument based on comparison of their different versions.
- [67]** **Swedish** lawyers mostly use the two-language approach – reading the necessary legal act or judgment in a language other than Swedish, usually English. In **Germany** judges mostly use the German texts of Regulations, but practising lawyers – also the English ones.
- [68]** **Hungarian** judges also sometimes use versions of the legal acts in different languages, mostly in English, but also in German, Italian or some other language the particular judge has knowledge of.
- [69]** Thus the Researchers are of the opinion that practitioners who have sufficient knowledge of other EU official languages besides their own sometimes use various language versions of legal acts.

62 6 October 1982 CJEU judgment in case: No. 283/81 C.I.L.F.I.T., para.18.

However, they should be encouraged to do so more often, especially in cases where a text in one language is not clear or precise. Additionally, judges with no foreign language knowledge should use alternative means to be able to compare the legal acts in various languages, for example, using a translator.



The possibility to ask for corrigendum for correction of deficiencies in translation of a particular EU law provision should be used more frequently.

- [70] However, the quality of different language versions of the same EU law provision might differ even up to the point that the provision in one particular language has the exact opposite meaning than in all other languages.
- [71] In such cases there is a possibility that the Member State (mostly through the Ministry of Justice) can ask EU institutions for a possible corrigendum to correct translation mistakes.⁶³ Therefore, national judges in turn should inform the Ministry of Justice of the particular Member State if any such situation is encountered. Although this might take a substantial amount of time, this is almost the only way how to deal with the problem of low-quality translations of EU legal acts. However, the overly extensive usage of corrigenda also has been criticized by academics, as it can create a form of legal uncertainty.⁶⁴
- [72] Researchers did not hear any particular complaints on the quality of translations of legal acts and case law of the CJEU in **Sweden**. Also, the practitioners in **Germany** find the German versions of regulations satisfactory. Nevertheless, some judges emphasized that the German texts could be better.
- [73] Practitioners in **Hungary** and in **Latvia** mostly were of the opposite point of view, stating that the language versions relatively often contain imperfections, sometimes even changing the very substance of the provision. However, these practitioners were not fully aware of the practical possibility to use the corrigendum procedure.



The adjudicators shall consider requirements of obligatory translation very carefully in order to avoid unnecessary and costly translations.

- [74] Even though parties are mostly requested to translate documentation submitted to other parties and courts in the language of the particular state, judges should not require the parties to provide unnecessary translations. One of the issues connected with translation is the high cost. For example, in a particular recognition and enforcement case in **Latvia**, the judge ordered translation into Latvian of the full judgment of 223 pages rendered by a **U.K.** court, even though the U.K. court had issued a certificate for the Order of a shorter version of the judgment, in accordance with Article 54 and 58 of the Brussels I Regulation.⁶⁵ But according to Article 32 of the Brussels I Regulation (Article 2 of the Brussels Ibis Regulation), “judgment” means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, **order** [Researchers’ emphasis], decision or writ of execution [...]. According to the commentaries, “also judgments issued in shortened form, without a full description of the reasoning followed by the adjudicating court,

63 Robinson W. Accessibility of European Union legislation. Available at: https://www.opc.gov.au/calcd/docs/Loophole_papers/Robinson_Feb2011.pdf.

64 Bobek M. Corrigenda in the Official Journal of the European Union: Community Law as Quicksand. *European Law Review*, 2009, Vol. 34, p. 950.

65 The Researchers considered not revealing the data of the case.

should also be recognized and enforced.”⁶⁶ Thus the particular **U.K.** court’s order qualified as the judgment within the meaning of the Brussels I Regulation, and there was no need to translate the full judgment (only the Order and certificate) in these proceedings of first instance.⁶⁷ It shall be stressed that the new Brussels Ibis Regulation does not require translation of the court judgment (Article 37(2)), thus saving time and financial resources for each involved person.

1.4. Calculations and Extension of Procedural Terms



Periods, dates and time limits should be calculated in accordance with Regulation No. 1182/71.

- [75]** For the purposes of calculating time limits, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits⁶⁸ should apply. For example, according to Recital 28 of the European Order for Payment Regulation, the defendant should be advised of this and should be informed that account will be taken of the public holidays of the Member State in which the court issuing the European order for payment is located.
- [76]** Also Recital 24 of the European Small Claims Regulation, Recital 41 of the Maintenance Regulation and Recital 77 of the Succession Regulation provide that for the purposes of calculating time limits as provided for in these regulations, Regulation 1182/71 should apply.
- [77]** If the Regulations and Directives set the specific time periods, they should be calculated in accordance with Council Regulation 1182/71. It is an autonomous calculation of time periods directly provided for in Regulations and Directives. For example, Article 16(2) of the European Order of Payment Regulation provides that the statement of opposition shall be sent within 30 days of service of the order on the defendant. The time period of 30 days must be calculated according to Article 3 of Regulation 1182/71.
- [78]** Only if some time period issues are not established by Regulation 1182/71 can they be governed by the national legislation of the Member State in which the procedure is conducted. For example, according to Article 14 (2) of the European Small Claims Regulation, the court may extend the time limits provided for in Article 4(4), Article 5(3) and (6) and Article 7(1) of this Regulation, in exceptional circumstances, if necessary in order to safeguard the rights of the parties. Procedural issues of this extension of time limits are not governed by the Small Claims Regulation and Regulation 1182/71. Therefore, they must be governed by the national legislation of the Member States (*lex fori*).
- [79]** Some Regulations also deal with the question of the autonomous legal consequences of non-respect of the time limits. According to Article 7(3) of the European Small Claims Regulation, if the court has not received a reply from the relevant party within the time limits laid down in Article 5(3) or (6) of the Regulation, it shall give a judgment on the claim or the counterclaim. Article 17(1) of the European Order for Payment Regulation also provides that if a statement of opposition is entered within the time limit laid down in Article 16(2), the proceedings must continue before

⁶⁶ Magnus, U., Mankowski, P. (ed.). European Commentaries on Private International Law Brussels I. Regulation. 2nd edn, SELP, 2012, p. 622.

⁶⁷ Here it had to be taken into consideration that the first instance court was not entitled to review the judgment (Article 41 of the Brussels I Regulation) but had to declare it enforceable and if the appeal is lodged then the court may consider to request the full judgment if it is necessary.

⁶⁸ Council Regulation (EEC, Euratom) No. 1182/71 (3 June 1971) determining the rules applicable to periods, dates and time limits. OJ L 124, 08/06/1971, p. 1-2.

the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure, unless the claimant has explicitly requested that the proceedings be terminated in that event.

- [80] For example, in accordance with Article 50(5) of the Succession Regulation, if the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appeal must be 60 days and must run from the date of service, either on him in person or at his residence. It means that in this situation the Succession Regulation itself fixes also the start of the time period. Therefore, this provision of the Succession Regulation shall be applied. However, Regulation 1182/71 applies in order to establish the **end** of the time period.

1.5. Scope of Application of Regulations



Before applying any Regulation, the geographical, temporal and material scope shall be determined.

- [81] As to application of regulations, **Latvian** case law shows that both parties and their representatives rarely check the geographical, temporal and material scope of the regulations, thus very often there are cases where the applicable legal instrument is not applied or is incorrectly applied.⁶⁹
- [82] How important it is to check the temporal scope can be demonstrated by the following case. The court of **Latvia** followed the argumentation of the claimant in its decision and applied in parallel the Rome I Regulation and Rome Convention, as well as conflict-of-law provisions of the Civil Law,⁷⁰ but if the temporal scope of the each regulation was checked, then only one applicable instrument would be found.⁷¹
- [83] Therefore, the Researchers have prepared a comparative table on the temporal scope of application of all respective Regulations (Annex 2).

2. International Jurisdiction under the Brussels Ibis Regulation



If there is a civil and commercial case with a cross-border element, the jurisdiction should be determined first.

- [84] Initially, when the adjudicator receives the case with a cross-border element, it shall determine the jurisdiction. However, as the Brussels Ibis Regulation⁷² is not the only instrument dealing with jurisdiction, it is always very important to determine the (temporal, geographical and material)

69 Rudevska B. Ko iesākt ar Anglijas tiesas izdotu aktīvu iesaldēšanas rīkojumu. Jurista Vārds, 2011. 18.oktobris, Nr. 42, 12.lpp.; Rudevska B. Regulas Nr. 44/2001 piemērošanas prakse Latvijas tiesās. Jurista Vārds, 2008. 29.jūlijs, Nr. 28, 4.-14.lpp.

70 Civil Law: Law of the Republic of Latvia. Valdiības Vēstnesis [Government's Herald] No. 41, 20.02.1937.

71 1 August 2014 Jūrmala City Court decision in case No. C17119614, unpublished.

72 On 27 September 1968, the six original European Economic Community Member States (Belgium, France, Italy, **Germany**, the Netherlands and Luxembourg) concluded the Brussels Convention. See: Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters (consolidated version). OJ C 27, 26.01.1998, p. 1-27. This Convention came into force on 1 February 1973. After the Amsterdam Treaty was signed on 2 October 1997 and entered into force on 1 May 1999, the Brussels Convention was developed further, by adopting the Brussels I Regulation. It was possible because the Amsterdam Treaty integrated the so-called Third Pillar (the intergovernmental cooperation in matters of police and administration of justice) into the First Pillar – Community policy. New recast regulation – the Brussels Ibis Regulation was adopted in 12 December 2012.

scope of this Regulation. This part of the Recommendations and Guidelines intends to show the step-by-step application of the Brussels Ibis Regulation regarding international jurisdiction. The graphical illustration of this application can be found in Annex 3.



The Brussels Ibis Regulation is applicable to proceedings instituted as from 10 January 2015.

[85] In accordance with Article 81, the Brussels Ibis Regulation is applicable as from **10 January 2015**. However, according to Article 66 “[t]his Regulation shall apply only to **legal proceedings instituted**, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or **after 10 January 2015**.”

[86] Therefore, it is of great importance to consider temporal application of the new regulation. Namely, if the case was commenced before 10 January 2015, then the Brussels I Regulation is still applicable.⁷³



The Brussels Ibis Regulation is applicable in all Member States.

[87] As concerns **geographical application** of the Brussels Ibis Regulation, it should be noted that even though Recital 41 of the Regulation provides that Denmark is not taking part in the adoption of the regulation, however, Denmark has by a letter of 20 December 2012 notified the Commission of its decision to implement the content of the Regulation.⁷⁴ This means that the provisions of the Brussels Ibis Regulation shall be applied to relations between other Member States and Denmark.⁷⁵



The Brussels Ibis Regulation is applicable to civil and commercial cases, with a few exceptions.

[88] It is also important to determine the **material scope** of the application, i.e. whether the case at hand is a civil or commercial case in accordance with Article 1(1) of the Brussels Ibis Regulation. The concept “civil and commercial matters” is autonomous, and the extensive case law of the CJEU should be taken into account when interpreting it.

[89] Next one should check whether the case does not fall in the list of exclusions indicated in Article 1(2) of the Brussels Ibis Regulation. For example, Article 1(2)(e) provides that the regulation is not applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, as for this category of cases, the Maintenance Regulation is applicable.

[90] Even though Article 1(2)(d) of the Brussels Ibis Regulation excludes arbitration from its scope of application. Nonetheless, certain cases concerning arbitration will fall within the material scope

73 It is already evidenced from practice, for example, in **Latvia**, that this temporal scope is not foreseen, and the Brussels Ibis Regulation is applied to all proceedings after 10 January 2015. See, e.g., 19 February 2015 Riga Regional Court decision in case No. CA—1113-15/6, unpublished.

74 The Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. L 79, Official Journal of European Union, 21.03.2013, p. 4.

75 The predecessor of the Brussels Ibis Regulation – the Brussels I Regulation – provided that it is not applicable to Denmark (Article 1(3)), but this reference could be misleading, because the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was signed in Brussels on 19 October 2005 and came into force in all EU Member States as of 1 July 2007. See: Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. L 299, Official Journal of the European Union, 16.11.2005, p. 62; Information on the day the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters came into force. L 94, Official Journal of the European Union, 04.04.2007, p. 70. Thus the Brussels I Regulation was also applicable to Denmark.

of application of this regulation. For example, it will be applicable if the interim measures in connection with the dispute pending in arbitration are sought before a court.⁷⁶ There is also novelty in the Brussels Ibis Regulation regarding arbitration, i.e. it includes Recital 12, intended to clarify the arbitration exception.



When determining jurisdiction in accordance with the Brussels Ibis Regulation, numerous factors should be checked step-by-step: whether the proceedings concern exclusive jurisdiction then whether the proceedings involve a “weaker party” and whether the parties have concluded an explicit or implicit agreement of jurisdiction.

- [91] Chapter II of the Brussels Ibis Regulation deals with the general provisions on jurisdiction.⁷⁷ There are no major changes in this chapter comparing with the Brussels I Regulation, except that additional articles are adopted regarding *lis pendens* involving third states. In order to determine the applicable article dealing with jurisdiction, adjudicator should go through the checklist, as jurisdiction rules are set in a certain hierarchy in this regulation.
- [92] Firstly, one should check whether the case does not concern the proceedings included in Article 24 of the Brussels Ibis Regulation (for instance, immovable property, validity of legal persons, validity of entries in public registers, etc.). This Article covers exclusive jurisdiction, and it not only displaces the general rule of the defendant’s domicile and the special rules on legal jurisdiction, but, also, exclusive jurisdiction may not be overridden by an agreement on jurisdiction, nor by the defendant’s voluntary submissions to the forum.⁷⁸
- [93] When the case falls under this article, the Brussels Ibis Regulation applies only if the proceedings are in connection with the Member State. For example, where a connecting factor employed by the rule of exclusive legal jurisdiction points to a third state, and the defendant is not domiciled in the Member State, the jurisdiction is governed by domestic law.⁷⁹
- [94] Secondly, it shall be evaluated whether one of the parties is not enjoying special protection by the regulation as a weaker party. This concerns the insured, policy holders, beneficiaries of insurance contracts, injured parties (Section 3 of the Brussels Ibis Regulation), consumers (Section 4) and employees (Section 5).⁸⁰ Insurers and employees are protected regardless of whether they are passive or active, but **consumers are protected only when they are passive**, depriving the consumer of his or her protection if the contract is concluded with a foreign entrepreneur.



Only those consumers who have concluded the contracts specified in Article 17(1) of the Brussels Ibis Regulation enjoy special rules on jurisdiction.

- [95] Article 17(1) of the Brussels Ibis Regulation indicates the exhaustive list of consumer contracts where the special jurisdiction rules of Article 18 apply. Those contracts are 1) a contract for the sale of goods on instalment credit terms, 2) a contract for a loan repayable by instalments, or for any

76 See: 17 November 1998 CJEU judgment in case: No. C-391/95 Van Uden Maritime BV, Trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another.

77 As in the Brussels I Regulation, this Chapter contains 10 Sections, providing general provisions (Section 1), special jurisdiction (Section 2), autonomous jurisdiction (Section 3-5), exclusive jurisdiction (Section 6), choice of court agreements (Section 7) and examination as to jurisdiction and admissibility (Section 8), *lis pendens* – related actions (Section 9) and provisional measures (Section 10).

78 Magnus U., Mankowski P. (ed.). European Commentaries on Private International Law, Brussels I. Regulation, SELP, 2012, p. 415.

79 Ibid., p. 416.

80 Comparing the Brussels I and Ibis Regulations, there are almost no changes in the wording, except there is a new Article 21(2), providing a new rule that an employer not domiciled in a Member State may be sued in a court of a Member State in accordance with Article 21(1)(b).

other form of credit, made to finance the sale of goods or in all other cases, 3) a contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State and the contract falls within the scope of such activities. If the contract is not one of those mentioned in this Article, the general rules of jurisdiction shall be applied (Article 4 and 7).

- [96]** Interviews, questionnaires and case law revealed that the determination of the concept “*consumer contract*” under this regulation is the most topical in the Member States, especially in **Latvia** and **Hungary**. For example, in one case the Latvian court found that the defendant, a natural person, has its declared address in the **U.K.**, and the parties have not agreed on jurisdiction in their agreement, therefore, in the judge's opinion the agreement constituted a consumer contract according to the regulation, thus, the claim shall be brought in the **U.K.**⁸¹ When a similar case is received next time, the court shall describe whether the particular consumer contract is covered by the regulation. Moreover, Article 62 of the Brussels Ibis Regulation provides that in order to determine whether a party is domiciled in the Member State, the court shall apply its internal law. In this case the second part of the Article is also relevant. It provides that if the party is not domiciled in the territory of the court seized, then the court shall apply the law of that other Member State, thus the court should apply foreign law to determine the domicile of the natural person (in the case at hand – **U.K.** law).
- [97]** In **Latvia** the court shall apply Article 7 of the Civil Law to determine the domicile of a natural person domiciled in Latvia.⁸² Even though the Declaration of Place of Residence Law⁸³ defines the notion “place of residence”, this norm by its legal nature and purpose is more appropriate to solve internal situations in Latvia, thus shall not be applied in European international civil procedure.
- [98]** It is important that recognition of the judgment shall be refused if it conflicts with Section 6 of the Chapter II (exclusive jurisdiction) and Sections 3, 4 or 5 of Chapter II, where the policyholder, insured, beneficiary of an insurance contract, injured party, consumer or employee was the defendant (Article 35(1)(e)). This is an exception to the general rule of non-review of jurisdiction, as established in Article 35(3) of the Brussels Ibis Regulation. The judge makes this review *ex officio*.



The Brussels Ibis Regulation does not require that the parties shall have domicile in the Member State to agree on jurisdiction in the court of the Member State.

- [99]** Thirdly, as a next step, one shall check whether the parties have not agreed on the jurisdiction as provided in Article 25 of the Brussels Ibis Regulation. It is very important to note that Article 23 of the Brussels I Regulation required that the parties shall have domicile in the Member State, otherwise the national law had to be applied. However, the recast regulation explicitly states that the rule on prorogation of jurisdiction can be made regardless of the parties' domicile. Moreover, now it also provides that material validity of such agreement is determined by the law of the chosen Member State not covered by the Brussels I Regulation, for which the latter was criticized by interviewed lawyers in the **U.K.**
- [100]** At the same time, the Brussels Ibis Regulation does not protect jurisdictional agreements from courts outside the EU, imposing no obligation for the Member State courts to respect such agreements. This seems to be a problem that can be solved only at the legislative level by extending protection of jurisdictional agreements to those designating third-state courts. Whilst the widespread

81 5 December 2013 Valmiera District Court decision in case No. 3-10/0033-13/7, unpublished.

82 Civil Law: Law of the Republic of Latvia. Valdības Vēstnesis [Government's Herald] No. 41, 20.02.1937.

83 Declaration of Place of Residence Law: Law of the Republic of Latvia. Latvijas Vēstnesis [Latvian Herald], No. 104, 10.07.2002.

ratification of the Hague Choice of Court Convention⁸⁴ may assist in this regard, it will only provide a partial and long term solution, since currently only Mexico has ratified this convention. Furthermore, the convention covers exclusive jurisdiction clauses.

- [101]** The CJEU developed a full set of principles on when jurisdiction clauses are validly agreed upon and incorporated in the main contract.⁸⁵ However, still topical is the question regarding multi-choice and hybrid jurisdiction clauses. These clauses appear in thousands of finance contracts. They provide lenders with flexibility in terms of where they can initiate proceedings against a borrower, but limit the borrower to bringing proceedings against the lender to the chosen court: reflecting the commercial risks of the transaction. These agreements are not mentioned in either the Brussels I Regulation, or in the Brussels Ibis Regulation, although they were expressly provided for in the Brussels Convention.

✓ **Parties can implicitly agree on jurisdiction if the defendant appears before court and does not contest the jurisdiction.**

- [102]** Fourthly, Article 26(1) of the Brussels Ibis Regulation states that “*apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction.*” This then makes for implicit consent by the parties on jurisdiction, unless the defendant appears before the court to contest the jurisdiction. This provision of the Brussels Ibis Regulation suggests that the court shall not evaluate *prima facie* the jurisdiction upon commencement of the proceedings, but shall wait until the defendant’s appearance. However, there is one exception, as this article does not override rules on exclusive jurisdiction (Article 24).⁸⁶

- [103]** Moreover, it is very important that this article contains a new provision providing that in insurance, individual employment and consumer contracts the court shall inform the defendant – the weaker party – of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance (Article 26(2)). Thus this provision obliges the court, first, to determine the existence of a contract with a weaker party as covered by the Regulation and, secondly, to inform the defendant. Thus, for example, if a court in **Latvia** receives a statement of a claim against a natural person domiciled in **Hungary**, it shall evaluate whether the claim does not fall within the exclusive jurisdiction and then wait for the defendant to appear. →

- [104]** It also shall be noted that in accordance with Article 28 of the Brussels Ibis Regulation, the court shall verify its jurisdiction on its own motion if the defendant does not enter an appearance.

✓ **Only when the existence of exclusive jurisdiction, a contract with a weaker party and implicit agreement on jurisdiction are not found, can jurisdictional rules incorporated in Articles 4 and 7 of the Brussels Ibis Regulation be applied.**

- [105]** Only when the above stated steps are made jurisdiction can be established in accordance with Article 4 and 7 of the Brussels Ibis Regulation.

- [106]** Article 4 of the Brussels Ibis Regulation incorporates the well-known principle of *actor sequitur forum rei*, i.e. that defendant can be sued in the court of his domicile. The moment of having domicile in a Member State is the moment of commencing of proceedings against the defendant.

84 Hague Convention on Private International Law, Convention on Choice of Court Agreements. 44 International Law Materials, 30.06.2005, p. 1294.

85 Magnus U., Mankowski P. (ed.). European Commentaries on Private International Law Brussels I. Regulation. SELP, 2012, p. 445.

86 See: 27 February 2014 CJEU judgment in case No. C-/13 Cartier parfums – Lunettes SAS, Axa Corporate Solutions assurances SA v Ziegler France SA, Montgomery Transports SARL, Inko Trade s. r. o., Jaroslav Matějka, Groupama Transport.

- [107]** Domicile of legal persons is determined by Article 63 of the Brussels Ibis Regulation, and the Researchers did not find particular problems in applying this autonomous concept. In turn, the domicile of a natural person shall be determined in accordance with the national law as provided by Article 62 of the Brussels Ibis Regulation. During interviews, lawyers from **Latvia** and **Hungary** in particular expressed their concern regarding interpretation of this concept. Moreover, the common law (the **U.K.**) notion of “domicile” has another meaning than in civil law countries – a person’s roots “within a territory covered by a particular legal system.”⁸⁷ As indicated above, Article 62(2) provides that if a party is not domiciled in the Member State of the court seized, then the court shall determine domicile in accordance with the law of that other Member State. Thus it can be very challenging to determine the domicile of a natural person.
- [108]** In interviews and in questionnaires, **Latvian**, the **U.K.**, **Hungarian**, **Swedish** and **German** lawyers revealed that notwithstanding the regular case law from the CJEU, operation of special heads of jurisdiction under the regulation continues to raise questions (Article 7 – 9 of the Brussels Ibis Regulation). The more common problems concern Article 7(1). However, there are no major changes made comparing the Brussels I Regulation and the Brussels Ibis Regulation. Therefore, the following chain of tests can be used by the plaintiffs and judges to establish special jurisdiction under this Article.
- [109]** When applying Article 7(1) of the Brussels Ibis Regulation, firstly, it shall be determined whether the defendant is domiciled in the Member State, as this is a prerequisite of the said article. If the defendant is not domiciled in the Member State, then this article is not applicable, and one shall refer to Article 6(1) of the Brussels Ibis Regulation and apply domestic law.
- [110]** Then it shall be decided whether the claim arises from the contract. The concept “*contract*” shall be interpreted autonomously, without reference to domestic law. In this regard adjudicator can consult the Rome I Regulation, as Recital 7 of the Rome I Regulation provides that it has to be consistent with the Brussels Ibis Regulation.
- [111]** Regarding an agreement concerning transport, Article 71 of the Brussels Ibis Regulation should be kept in mind, as Article 7(1) will not be applicable if there is a special convention dealing with jurisdiction in transport agreements (for example, the CMR Convention⁸⁸). This was rightly acknowledged by the court of **Latvia** in the case where two parties have concluded the agreement that was within the scope of the CMR Convention, thus the Brussels I Regulation was not applicable.⁸⁹
- [112]** In matters related to sales of goods, the first part of Article 7(1)(b) of the Brussels Ibis Regulation, applies, but regarding provision of service, the second part of Article 7(1)(b) is applicable.
- [113]** Also, it is important to consider whether the place of performance of the obligation is in a Member State different from the domicile of the defendant. Namely, if the place of performance and domicile match, then Article 4 of the Brussels Ibis Regulation shall be applied. Determination of the place of performance was one of the concerns of interviewed lawyers in all five states (**Germany**, **Hungary**, **Latvia**, **Sweden**, and the **U.K.**).
- [114]** It is also evident from the case law. For example, in **Latvia** it is even a problem to determine the place of performance where parties have agreed on that. In one case the claimant submitted an application for a European order for payment, but the first instance court rejected the application, stating that it had no jurisdiction, as the goods were delivered in Croatia. However, the claimant appealed the decision, based on the argument that the parties have agreed on EXW [the place in

87 Magnus U., Mankowski P. (ed.). European Commentaries on Private International Law Brussels I. Regulation. SELP, 2012, p. 415.

88 United Nations Convention On the Contract for the International Carriage of Goods by Road (CMR). 399 UNTS 189, 1956.

89 12 December 2011 Rēzekne Court judgment in case No. 26114410, unpublished.

Latvia] INCOTERMS®2010,⁹⁰ thus the place of performance and jurisdiction was in Latvia in accordance with Article 5(1) of the Brussels I Regulation (Article 7(1)(b) of the Brussels Ibis Regulation). The court of the second instance recognized that the first instance decision was not grounded, thus it revoked it. Finally, the same first instance court re-decided that it did have jurisdiction and the European order for payment was issued.⁹¹ This case evidences that there has to be more training on the supplementary instruments,⁹² such as INCOTERMS®2010 that influence the determination of jurisdiction.

- [115]** Still in practice it remains unclear how a court should locate the place of performance of a contractual obligation if the applicable law permits performance in multiple locations. Neither the text of the Brussels I Regulation, nor CJEU case law directly addresses this matter. Thus, there is a need for a future preliminary ruling that would settle the issue.
- [116]** In case of service, ideally, service is rendered where the service provider performs the necessary activities and where the customer receives the respective results.⁹³ However, according to the latest case law of the CJEU involving an air-carrier registered in **Latvia** and the preliminary ruling requested by the **German** court, both the place of arrival and the place of departure of the aircraft must be considered, in the same respect, as the place of provision of the services which are the subject of an air transport contract.⁹⁴ Thus there can be more than one place of provision of services in carriage contracts.
- [117]** If the parties have not agreed on the place of performance, the court shall establish such in accordance with the applicable material law of the seized court.⁹⁵
- [118]** In conclusion, it should be mentioned that the Brussels Ibis Regulation is a very powerful instrument in the hands of practitioners. According to the interviews during the Study Visits, it was expressed that the **U.K.** benefits from jurisdictional agreements in favour of its courts, but this is unlikely for the courts of **Latvia**. The explanation is because the latter courts are less certain about their confidence in European international civil procedure law.

3. Applicable Law under the Rome I, II and III Regulations



When jurisdiction is established, the applicable law shall be determined.

- [119]** Once jurisdiction is determined in the cross-border case, the next step is to decide on the applicable law on the merits of the case. During interviews, it was revealed that neither lawyers, nor judges have well-grounded knowledge on conflict of laws rules. For example, there exists the notion that the judge should not determine the applicable law *ex officio*. This issue is left to the parties, as the procedure is adversarial in court. Some of attorneys admitted that they do not raise the issue of applicable law in court in order not to complicate the case.



Application of the Rome I and Rome II Regulations is only possible after determination of their scope.

90 INCOTERMS 2010®. ICC Services, 2010.

91 18 September 2014 Rīga District Court decision in case No. CA-2700-14/17, unpublished.

92 See: 9 June 2011 CJEU judgment in case No. C-87/10 Electrosteel Europe SA v Edil Centro SpA.

93 Magnus U., Mankowski P. (ed.). European Commentaries on Private International Law Brussels I. Regulation. SELP, 2012, p.175.

94 Ibid., para 43.

95 See: 17 January 1980 CJEU judgment in case No. 56/79: Siegfried Zelger v Sebastiano Salintri.

- [120]** The Rome I Regulation applies to contractual obligations in cross-border cases. The concept of “*contractual obligation in civil and commercial matters*” is autonomous and covers obligations “*freely assumed by one party towards another*.”⁹⁶ An adjudicator must take into account that the Rome I Regulation already specifies certain types of contracts (e.g., Article 4). Contractual obligations that fall within the autonomous scope of these notions are certainly covered by the regulation.
- [121]** Article 28 of the Rome I Regulation provides that a contract must be concluded after 17 December 2009 in order to fall within its scope.
- [122]** Relations between the Rome I Regulation and Rome Convention are addressed in the Rome I Regulation. However, some Member State courts have attempted applying both instruments concurrently.⁹⁷ This approach is incorrect.
- [123]** Article 24(1) provides that the Rome I Regulation replaces the Rome Convention, except in regards to territories where the Rome I Regulation is inapplicable. Firstly, this means that Danish courts remain bound by the Rome Convention, since Denmark is not participating in the Rome I Regulation.⁹⁸ However, other Member State courts must apply the Rome I Regulation, even if the contract in question is related to Denmark.⁹⁹ Secondly, in accordance with Article 355 TFEU certain overseas territories of Member States are not bound by the Rome I Regulation, but remain bound by the Rome Convention.¹⁰⁰ And, of course, the Rome Convention applies to contracts concluded on or before 17 December 2009. However, simultaneous application of both the Rome I Regulation and Rome Convention is impossible.
- [124]** The Rome II Regulation applies to non-contractual obligations in civil and commercial matters (Article 1(1)). A non-contractual obligation is an autonomous concept, meaning “*any obligation that an obligor has not freely assumed*.”¹⁰¹ The territorial scope of the Rome II Regulation is identical to that of the Rome I Regulation.
- [125]** Due to unsatisfactory drafting, the temporal scope of the Rome II Regulation has created controversies. The text of the regulation was published in the Official Journal on 31 July 2007.¹⁰² According to Article 264(1) of the EC Treaty, the regulation came into force on the 20th day after its publication, namely, on 20 August 2007.¹⁰³ Article 31 established that the regulation shall apply to events giving rise to damages which occur after its entry into force. If read literally, the regulation would apply to events giving rise to damages occurring after 20 August 2007.¹⁰⁴ This reading is problematic, since Article 32 provides that the regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008. The conflict between the two provisions was resolved by the CJEU ruling that the regulation applies to events giving rise to damages occurring after 11 January 2009.¹⁰⁵

96 Ferrari F. (ed.). Rome I Regulation. Pocket Commentary. SELP, 2015, p. 33; Saleron F., Franzina P. (eds). Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali («Roma I»). I commentari. Le nuove leggi civili commentate, N. 3-4, Maggio-Agosto 2009, p. 556.

97 1 August 2014 Jürmala City Court judgment in case No. C17119614, unpublished.

98 Ferrari F. (ed.). Rome I Regulation. Pocket Commentary. SELP, 2015, p. 504.

99 Ibid.

100 Ibid., pp. 504-505.

101 Huber P. (ed.). Rome II Regulation: Pocket Commentary. SELP, 2011, p. 37; Calliess G.-P. (ed.). Rome Regulations: Commentary on the European Rules of the Conflict of Laws. Kluwer Law International, 2011, p. 380.

102 Huber P. (ed.). Rome II Regulation: Pocket Commentary. SELP, 2011, p. 458.

103 Ibid.

104 Ibid., p. 459.

105 17 November 2011 CJEU judgment in the case: No. C412/10, Deo Antoine Homawoo v GMF Assurances SA, para. 37.



The Rome III Regulation determines the law applicable to divorce and legal separation. The concepts of divorce and legal separation are interpreted autonomously.

- [126]** The Rome III Regulation provides conflict-of-laws rules for matters of divorce and legal separation. Both terms are interpreted autonomously, thus the regulation determines its own material scope. Recital 10(1) provides that, in principle, the scope of the Rome III Regulation must be construed consistently with that of the Brussels IIbis Regulation, however, Rome III Regulation does not apply to marriage annulment. Thus, a court may look at practice and scholarly materials under the Brussels IIbis Regulation to interpret the Rome III Regulation.
- [127]** The Rome III Regulation does not determine the law applicable to legal capacity and validity of marriage. However, Recital 10(3) specifies that preliminary questions such as legal capacity and the validity of the marriage, and matters such as the effects of divorce or legal separation on property, name, parental responsibility, maintenance obligations or any other ancillary measures should be determined by the conflict-of-laws rules applicable in the participating Member State concerned. Thus, a national court may use any national or international conflict-of-laws rules, including the rules on *renvoi*, rules on imperative provisions and the public policy exception dealing with these preliminary questions.¹⁰⁶
- [128]** The principle behind Recital 10(3) may be illustrated by the following example: if a **Latvian** court receives a claim for divorce of a marriage concluded in **Hungary**, it has to apply its own rules of conflict-of-laws to determine legal capacity of the parties and validity of the marriage. In Latvia, these rules will be set forth in the Latvian Civil Law.¹⁰⁷ Article 11(2) of the Latvian Civil Law provides that the rights of Latvian citizens to conclude a marriage are determined by Latvian law, while the form of marriage by *lex loci*. Thus, if two Latvian citizens have concluded a marriage in Hungary – Hungarian law will determine the form of the marriage, while Latvian law will determine parties' capacity to conclude a marriage.
- [129]** Likewise, Article 13 of the regulation provides that nothing in the regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of the regulation (see also Recital 26(3)). Read in light of Recital 10, this provision likewise understands “*the law of the Member State*” not as substantive law, but rather as conflict-of-laws rules.¹⁰⁸



The Rome III Regulation has limited geographical scope.

- [130]** The Rome III Regulation has a smaller number of Member States and thus has a narrower geographical scope in comparison to other EU instruments. Currently, the regulation applies in Belgium, Bulgaria, **Germany**, Spain, France, Italy, **Latvia**, Lithuania, Luxembourg, **Hungary**, Malta, Austria, Portugal, Romania and Slovenia.
- [131]** It follows that judges from **Sweden** or the **U.K.** are not bound to determine the applicable law to matters of divorce and legal separation based on the Rome III Regulation. Instead, they have to apply national or international sources of private international law.

106 Torga M. Party autonomy of the spouses under the Rome III Regulation in Estonia. *Netherlands Journal of Private International Law*, 2012, Vol. 4, p. 551.

107 Civil Law: Law of the Republic of Latvia. *Valdības Vēstnesis* [Government's Herald] No. 41, 20.02.1937.

108 Torga M. Party autonomy of the spouses under the Rome III Regulation in Estonia. *Netherlands Journal of Private International Law*, 2012, Vol. 4, p. 551.



Adjudicators must determine the temporal scope of the Rome III Regulation.

[132] Just like with other EU instruments, the Rome III Regulation applies only to matters falling within its temporal scope. Article 21(2) specifies the scope of its application. The regulation applies as of 21 June 2012. However, the transitional rules specify how the regulation must be applied in regards to its temporal scope. Article 18(1) specifies that the regulation applies to legal proceedings instituted and to agreements on choice of applicable law concluded as from 21 June 2012. Article 18(2) specifies that effect shall be given to agreement on choice of applicable law concluded earlier, if they are materially and formally valid under the regulation. Finally, Article 18(3) specifies that the regulation shall be without prejudice to agreements on the choice of applicable law concluded in accordance with the law of a participating Member State whose court is seized before 21 June 2012.



The Rome Regulations have no personal scope, thus the habitual residence of parties in a Member State is not, in principle, a precondition for application of these instruments.

[133] Article 4(1) of the Brussels Ibis Regulation establishes the central connecting factor for jurisdiction – domicile of the defendant. The Rome Regulations have a different structure. They must be applied to cases falling within their scope, irrespective of parties' habitual residence. This means that the Rome Regulations are equally applicable, if parties are not habitual residents of the EU. For example, parties from Australia and the United States agree to litigate disputes arising from their contract on provision of services in Hungary. Such agreement is valid under Article 25 of the Brussels Ibis Regulation.

[134] A Hungarian court will have to determine which instrument will supply conflict-of-laws rules. In this case, **Hungary** is an EU Member State bound by the Rome I Regulation. Thus, the Hungarian court is covered by the geographical scope of the regulation. Likewise, contracts on provision of services fall within the material scope of the Rome I Regulation. If the contract is concluded after 17 December 2009 (Article 28), it falls within the temporal scope of the Rome I Regulation. The presence of the cross-border element is evident, since both parties have habitual residences in different states.¹⁰⁹ Thus, the Rome I Regulation will apply, even though no party has habitual residence in the EU.

[135] Likewise, the Rome Regulations may apply if both parties share common habitual residence, but legal relations otherwise have a cross-border element. For example, Article 4(2) of the Rome II Regulation provides that *“where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.”*¹¹⁰ Thus, if two persons, having habitual residence in **Sweden** have started a fight in **Germany**, then the law applicable to the tort will be that of Sweden. However, this conclusion may be reached only through application of the Rome II Regulation.

[136] Nevertheless, determination of habitual residence is a crucial task for application of the Rome Regulations. The regulations use habitual residence as the main connecting factor to identify applicable law, thus determination of habitual residence is a necessary precondition for efficient application of the regulations.

¹⁰⁹ Habitual residence is not a unique form of cross-border element. A non-exhaustive list for contractual obligations: place of business or place of central administration of the party, place of performance or conclusion of the contract, place where immovable or movable property is situated. See Ferrari F.(ed.) Rome I Regulation. Pocket Commentary. SELP, 2015, pp.111-112.

¹¹⁰ It has been argued that Article 4(2) of the Rome II Regulation should not apply to cases where there is more than one victim or tortfeasor having different habitual residences. These disputes then must be decided in accordance with the law pointed out by the general rules of the Rome II Regulation. See, Huber P. (ed). Rome II Regulation: Pocket Commentary. SELP, 2011, p. 95.



The Rome Regulations contain the principle of universal application.

- [137]** Once the scope of the Rome Regulations is satisfied, an adjudicator must use connecting factors provided therein to identify the applicable law. The EU nature of these instruments may create a wrong impression that the regulations apply only to cases where the applicable law is that of a Member State.
- [138]** This is a misconception, clarified by the very text of the Rome Regulations. Article 2 of the Rome I Regulation, Article 3 of the Rome II Regulation and Article 4 of the Rome III Regulation provide that any law specified by these instruments applies, whether or not it is the law of a Member State. Thus, a national court is bound to apply a law designated by these instruments, even when the designated law is that of a third state. For example, if parties to the contract have chosen Chinese law, then in accordance with Article 3 of the Rome I Regulation, a Hungarian court hearing the case must apply the designated law, even though China is not a Member State.



Article 8 of Rome II Regulation covers infringements of property rights, but not infringements of trade secrets.

- [139]** The Researchers have identified a case where the content of Article 8 of the Rome II Regulation has been misunderstood. In a case before a Latvian court, a Lithuanian company brought a claim against a Latvian company.¹¹¹ The claimant argued that the defendant had stolen claimant's trade secrets, bringing a claim based on tort liability.
- [140]** The defendant argued that the claim is contractual and must be arbitrated. The parties had concluded a contract. Accordingly, with its terms the defendant provided programming services. The contract contained a confidentiality clause and an arbitration clause. The defendant considered that the claim was contractual in nature, since it concerned an infringement of the confidentiality clause. The claimant maintained that the case concerned an infringement of a trade secret, which was a non-contractual right.
- [141]** The first instance ruled that the claim concerned the confidentiality clause and thus was subject to the arbitration clause. The second instance annulled the decision, considering that an infringement of a trade secret qualifies as a tort claim. *En passant*, the second instance court noted that its conclusion is supported by Article 8 of the Rome II Regulation.
- [142]** Strictly speaking, the courts did not apply the Rome II Regulation. Moreover, it was inapplicable, since the dispute in question concerned the scope of the arbitration clause. Such dispute should have been resolved through application of the Latvian arbitration law. Nevertheless, the court made a reference to the Rome II Regulation, which will be analysed hereinafter.
- [143]** Firstly, "*intellectual property rights*" under Article 8 of the Rome II Regulation is an autonomous concept.¹¹² The concept is interpreted in light of international conventions binding upon the EU.¹¹³ Intellectual property rights cover copyright, a *sui generis* right for the protection of databases and industrial property rights.¹¹⁴ However, Article 8 does not apply to infringement of trade secrets.
- [144]** This follows from contextual (systemic) interpretation of the Rome II Regulation. Article 6 of the said regulation deals with unfair competition. Article 6(1) deals with unfair competition affecting

111 7 May 2014 Chamber of Civil Cases of the Supreme Court of Latvia decision in case No. PAC – 1180/2014, unpublished.

112 Huber P. (ed). Rome II Regulation: Pocket Commentary. SELP, 2011, p. 231.

113 *Ibid.*, pp. 231-232.

114 *Ibid.*, p. 231; Calliess G.-P. (ed.). Rome Regulations: Commentary on the European Rules of the Conflict of Laws. Kluwer Law International, 2011, pp. 482-483; Dickinson A. The Rome II Regulation: The Law Applicable to Non-contractual Obligations. Oxford University Press, 2010, pp. 452-453.

competitive relations or collective interests of consumers. On the other hand, Article 6(2) states that where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply. This means that such unfair competition is governed by the law of the place in which the event giving rise to damage occurred. Unfair competition affecting exclusively the interests of a specific competitor covers infringements of trade secrets.¹¹⁵

- [145]** This is confirmed by *travaux préparatoires* of the Rome II Regulation. The European Commission in an explanatory memorandum to the proposal of the Rome II Regulation noted that Article 6(2) "*deals with situations where an act of unfair competition targets a specific competitor, as in the case of enticing away a competitor's staff, corruption, industrial espionage, disclosure of business secrets or inducing breach of contract.*"¹¹⁶
- [146]** The example shows that it may be difficult to determine precise content of the Rome II Regulation provisions. *In casu*, it was Article 6(2) of the Rome II Regulation, covering infringement of trade secrets.
- [147]** However, it is much more important to point out that courts should not use EU conflict-of-laws instruments to analyze legal concepts under national law. The Rome II Regulation deals with conflict-of-laws rules. These rules do not determine whether particular obligations are characterized as contractual or non-contractual under national law. On the contrary, they provide autonomous interpretation of these concepts not related to characterization under national law. For example, Article 12 of the Rome II Regulation treats *culpa in contrahendo* claims as non-contractual. Nevertheless, it may well be true that the law designated by Article 12 considers such claims contractual.¹¹⁷ Courts must distinguish conflict-of-laws rules, determining applicable law and distinctions within national legal systems that may be affected by historical, policy consideration or any other factors.



Case law shows that certain cases involve extremely complicated legal problems, requiring a number of sequential steps: identification of a conflict-of-laws problem, identification of the EU instrument, supplying conflict-of-laws rules to solve the problem, and finally, separating preliminary questions from the main question.

- [148]** **Latvian** case law offers an illustration of a complex conflict-of-laws case, where asking the correct question and determination of a correct EU instrument become a complicated multi-step endeavour.¹¹⁸ The case dealt with the following fact-pattern. The Latvian court opened insolvency proceedings against a locally registered company and appointed an insolvency administrator. An estate of a recently passed person – X – with habitual residence in Saudi Arabia attempted to lodge a claim against the insolvent estate. The claim was rejected by the insolvency administrator, considering that the representative of the X's estate in Latvia did not have the power of attorney to lodge such a claim. X's estate, through a local representative, challenged the decision of the administrator. The crux of the case – which law governed the power of attorney of the said representative.

115 Huber P. (ed). Rome II Regulation: Pocket Commentary. SELP, 2011, p. 233.

Dickinson A. The Rome II Regulation: The Law Applicable to Non-contractual Obligations. Oxford University Press, 2010, p. 405; Wadlow C. Trade Secrets and The Rome II Regulation on the Law Applicable to Non-Contractual Obligations. European Intellectual Property Review, 2008, Vol. 30(8), p. 310.

116 See, Wadlow C. Trade Secrets and The Rome II Regulation on the Law Applicable to Non-Contractual Obligations. European Intellectual Property Review, 2008, Vol. 30(8), p. 311.

117 Huber P. (ed). Rome II Regulation: Pocket Commentary. SELP, 2011, p. 38.

118 1 August 2014 Jūrmala City Court judgment in case No. C17119614, unpublished. The judgment was annulled by the 22 September 2014 Riga Regional Court decision in case No. C17119614. However, the grounds for annulment were not related to the application of EU private international law. Thus, the original judgment remains a valid example of complexities related to application of EU private international law instruments.

- [149]** The reasoning of the court was mistaken from the very beginning. The court determined that the claim of X's estate was based on a loan agreement. The court applied Article 4(2) of the Rome I Regulation, subjecting contracts to the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. Here, the court concluded that under Latvian law, a loan agreement is a "real" contract, concluded only after possession over the object of the loan is transferred to the debtor. Thus, only the debtor had an obligation under the contract. The defendant was a debtor and had habitual residence in Latvia. Based on this consideration, the court concluded that the power of attorney to lodge a claim against the estate was governed by Latvian law.
- [150]** Here is the court's first error. In accordance with the principle of autonomous interpretation, for the purposes of the Rome I Regulation, a loan agreement is interpreted without regard to Latvian national law.
- [151]** However, the court's analysis of the loan agreement was completely useless, since the court incorrectly identified the crux of the case. The question of the applicable law was not related to the loan agreement. The question was – the competence of a representative of X's estate to lodge a claim in insolvency proceedings. Identification of the law applicable to the loan agreement would have had no effect whatsoever. The court had to decide which law applied to the rights of a creditor to lodge a claim in insolvency proceedings.
- [152]** In reality, the court had incorrectly determined the scope of the Rome I Regulation. One could say that the Rome I Regulation has two material scopes. In most cases, the scope of the regulation is determined by the very regulation. However, this changes once insolvency proceedings are initiated. From that moment on, the Insolvency Regulation supplies conflict-of-laws rules.
- [153]** Article 4 of the Insolvency Regulation provides conflict-of-laws rules.¹¹⁹ This provision "*determines the law applicable to the insolvency proceedings, the conduct thereof and their material effects [...]*".¹²⁰ This *lex fori concursus* includes only substantive law of the country where insolvency is opened, without regard to national conflict-of-laws rules.¹²¹ Moreover, Article 4 of the Insolvency Regulation "*determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.*"¹²² However, to facilitate its application, Article 4 enumerates specific issues covered by the provision, even though the list is not exhaustive.¹²³
- [154]** The substantive effects of Article 4 "*are those typical of insolvency law, i.e. effects which are necessary for the insolvency proceedings to fulfil its aims.*"¹²⁴ And "[t]o this extent, the law of the State of the opening may displace [...] the law normally applicable, under the common pre-insolvency rules on conflict of laws, to the act concerned."¹²⁵
- [155]** In the particular case, the question concerned the authority of the representative of X's estate. Article 4(2)(h) of the Insolvency Regulation subjects the rules governing the lodging, verification and admission of creditors' claims to *lex fori concursus*. This provision implies that requirements for the creditor to lodge a claim against an insolvent estate fall within the scope of the Insolvency Regulation, particularly, Article 4. The interpretation is confirmed by the Supreme Court of France, declaring that Article 4(2)(h) of the Insolvency Regulation determines the law applicable to the

119 Pannen K. (ed.). European Insolvency Regulation. De Gruyter, 2007, p. 204.

120 Virgos M., Schmit E. Report on the Convention on Insolvency Proceedings, para. 88.

121 Ibid., para. 87; Pannen K. (ed.). European Insolvency Regulation. De Gruyter, 2007, p. 204.

122 Virgos M., Schmit E. Report on the Convention on Insolvency Proceedings, para. 90.

123 Ibid., para. 91; Pannen K. (ed.). European Insolvency Regulation. De Gruyter, 2007, p. 206.

124 Virgos M., Schmit E. Report on the Convention on Insolvency Proceedings, para. 90.

125 Ibid.

power of attorney of a person to lodge a claim.¹²⁶ Thus, the Latvian court had to pay attention to Article (2)(h) of the Insolvency Regulation, instead of the Rome I Regulation.

- [156]** Nevertheless, it is most likely that in the case at hand, the Insolvency Regulation would have also failed to provide a conflict-of-laws rule necessary to decide the case. At the end of the day, the issue was whether the X's estate in Saudi Arabia and its part located in **Latvia** had the capacity to issue a power of attorney to its Latvian representative. Thus, it seems that in order to answer whether the representative was capable of lodging a claim, it was necessary to decide a preliminary question whether X's estate had the general capacity to act in Latvia. Since the EU instruments, in principle, do not provide conflict-of-laws rules for issues of capacity, the court had to apply national law determining capacity of X's estate in Latvia.
- [157]** Once this question would have been decided in accordance with Latvian national law, the court should have applied the Insolvency Regulation to decide whether the power of attorney was sufficient to authorize the representative to lodge a claim against the insolvent estate. This issue would have been subject to Latvian substantive law, due to Article 4 of the Insolvency Regulation.



Currently, there is no generally accepted position in regards to application of foreign law *ex officio*. Hence, in legal systems regarding application of foreign law as a matter of procedure, courts are not required to apply foreign law, unless pleaded by parties. In many legal systems that view application of foreign law as matter of substance it is mandatory to apply foreign law on court's own motion, even if parties do not invoke it.

- [158]** Article 1(3) of the Rome I Regulation and Article 1(3) of the Rome II Regulation provide that both regulations do not apply to procedural matters. The **U.K.** courts rely on this provision to establish that application of foreign law is a matter of procedure within their legal system and thus they are not required to apply foreign law, if parties do not request it. This escape clause is useful only for legal systems that consider application of foreign law simultaneously a procedural and discretionary matter (so called "*passive approach*").
- [159]** In states where courts are categorized as "*passive*" in their approach to the treatment of foreign law, parties must plead and prove the relevant content of the foreign law invoked. The court's role is generally limited to the drawing of conclusions from proof adduced by the parties. Judges play no role in the gathering of information on facts. Foreign law is treated as an adjudicative fact.¹²⁷
- [160]** On the contrary, legal systems that do not regard the matter as procedural, cannot escape application of the Rome I and Rome II Regulations. For example, in foreign legal literature **Latvia** is mentioned as a country where the application of conflict of law rules is mandatory and factual as well as foreign law is treated as "fact".¹²⁸ Researchers propose the "active approach" to the treatment of foreign law in Latvia. However, whichever is chosen, it is necessary that the judiciary establishes a reliable approach to application of foreign law *ex officio*, whereas any derogation is explained and motivated by the court.
- [161]** The active approach is shared by **Germany** and **Hungary**, treating foreign law and the application of the domestic conflict of law rules is mandatory. Foreign law is considered "law", rather than fact. While, **Sweden** follows the middle of the road approach, considering application of conflict of law rules is mandatory only for matters relating to personal status, legal capacity and other such

126 15 December 2009 Cour de cassation judgment in case No. 08-14949 Société Aenix -v- Société Access Graphics BV.

127 Lalani S. Establishing the Content of Foreign Law: a Comparative Study. Maastricht Journal, 2013, Vol. 20, p. 79.

128 *Ibid.*, p. 94.

inalienable rights. Thus the nature of conflict of law rules is discretionary. Foreign law can actually be said to be both, “law of a peculiar kind” and “fact of a peculiar kind.”¹²⁹

4. Interim Measures



The application for provisional measures can be made either in the Member State whose court is dealing with merits of the case or, alternatively, in other Member State.

- [162]** The party has two options where to request the provisional measures – either in the Member State court having the jurisdiction as to substance of the matter or in another court of the Member State where, for example, the respondent’s assets are located. The latter is covered by Article 35 of the Brussels Ibis Regulation, providing the rules for jurisdiction if applicant seeks provisional, including protective, measures in other Member State, even if another Member State has jurisdiction as to the substance of the matter. Article 35 of the Brussels Ibis Regulation confers additional jurisdiction limited to provisional measures. Article 35 applies in any situation where the court from which provisional relief is requested lacks jurisdiction to determine the merits of the dispute by reason of any provision of Chapter II (“*Jurisdiction*”).¹³⁰ For example, if a claimant from **Hungary** has sued a defendant domiciled in **Germany** before a German court in accordance with Article 4 of the Brussels Ibis Regulation, and if the claimant finds that defendant has assets in **Sweden**, then the provisional measures can be requested in a Swedish court.
- [163]** Article 35 of the Brussels Ibis Regulation also enables an **U.K.** court to grant a temporary injunction against an alleged breach of contract, in aid of a contemplated substantive action in another Member State, to operate until the hearing of an interim application by the court having substantive jurisdiction.¹³¹
- [164]** The courts of the Member State where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the granting or refusal of the measures sought or to the laying down of procedures and conditions which the claimant must observe in order to guarantee the provisional and protective character of the measures authorized. Therefore, the granting of provisional or protective measures on the basis of Article 35 is conditional – the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Member State of the court before which those measures are sought.¹³²
- [165]** It is not important whether the court having substantive jurisdiction is seized before or after the interim measures have been applied. Thus, Article 35 may confer jurisdiction on the court examining an application for interim measures, even where proceedings have already been, or may be, commenced on the substance of the case in other Member State.¹³³
- [166]** This article cannot be invoked where the defendant is not domiciled in the EU, except where the substance of the case falls within the scope of the rules on exclusive jurisdiction or submission.¹³⁴

129 Ibid., pp. 77, 78, 83, 98.

130 Stone P. EU Private International Law. 2nd ed. Elgar European Law, 2010, p. 210.

131 Ibid., p. 211; Nike v Rosicky [2007] EWHC 1967 (Ch).

132 17 November 1998 CJEU judgment in case No. C-391/95 Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another, paras. 39, 40; 21 May 1980 CJEU judgment in case No. 125/79 Denilauler v Couchet frères, para. 16.

133 17 November 1998 CJEU judgment in case No. C-391/95 Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another, para. 34.

134 Magnus U., Mankowski, P.(ed.). European Commentaries on Private International Law Brussels I. Regulation. SELP, 2012, p. 612.

- [167]** The article indicated that a request may be made for protective measures as may be available under the national laws of that particular Member State. This leads to the applicable national procedure law, however, the concept “*provisional, including protective, measures*” shall be understood as referring to measures that “*are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.*”¹³⁵ Therefore, the court ordering the provisional, including protective, measures shall take into account the CJEU’s interpretation of this autonomous concept.
- [168]** According to Recital 25 of the Brussels Ibis Regulation, the notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.¹³⁶ It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to application of the Taking of Evidence Regulation.
- [169]** For example, the power of the **English** courts to grant a freezing order in support of substantive proceedings in other Member States is limited by the rulings of the CJEU in the cases *Van Uden* and *Mietz*¹³⁷ to orders designed to be enforced against assets or persons in England. This limitation applies where the subject-matter of the dispute falls within the material scope of the Brussels Ibis Regulation, and Chapter II (“Jurisdiction”) deprives the English court of substantive jurisdiction in favour of a court of another Member State.¹³⁸
- [170]** Regarding the recognition and enforcement procedure, Article 2(a) of the Brussels Ibis Regulation provides that for the purposes of Chapter III (“*Recognition and Enforcement*”) of the regulation, “*judgment*” includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.



Article 35 of the Brussels Ibis Regulation applies also to the provisional measures requested in other Member States in relation to agreements containing arbitration clauses.

- [171]** This Article also applies if provisional measures are requested to secure a claim in an arbitration dispute. It is set by the CJEU in *Van Uden*:
- Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, [...] it is only under Article 24 that a court may be empowered under the [Brussels] Convention to order provisional or protective measures.*¹³⁹
- [172]** National courts deciding on interim measures shall apply their own procedural rules. Thus, for example, if such requests for interim measures are sought from a **Swedish** court prior to or during the

¹³⁵ 26 March 1992 CJEU judgment in case No. C-261/90 Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG.

¹³⁶ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. Official Journal L 157, 30.4.2004, p. 45.

¹³⁷ 27 April 1999 CJEU judgment in case No. C-99/96: *Mietz v Intership Yachting Sneek*.

¹³⁸ Stone P. EU Private International Law. 2nd ed. Elgar European Law, 2010, p. 214.

¹³⁹ 17 November 1998 CJEU judgment in case No. C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, paras. 24-25.

pendency of arbitral proceedings,¹⁴⁰ in accordance with the **Latvian** Civil Procedure Law, the claim can be secured only prior to commencement of arbitration, thus if the arbitration proceedings are already initiated in arbitration seated in another Member State, then the Latvian courts will not grant the provisional measures.¹⁴¹

[173] There are courts that are very reluctant to provide for provisional measures.¹⁴² One of the reasons could be that very little regard has been paid so far to the interaction of the court in which substantive proceedings are pending and the court that has issued a provisional measure.¹⁴³ If there would be mechanism that a court ordering provisional measures could communicate with the court hearing the case on substance, it would give more certainty in the procedure.

[174] Moreover, a few cases of the **Latvian** courts indicate that the decision of non-granting of provisional measures before the commencement of the procedure in foreign forum is not appealable.¹⁴⁴ Such reasoning is based on the old and domestic case law,¹⁴⁵ even though the commentaries of the Civil Procedure Law provide that all decisions on interim measures are appealable.¹⁴⁶ Thus in the future it is advisable that adjudicators do not follow this kind of longstanding argumentation and also take into account the cross-border character of the case. Additionally, careful consideration shall be given to all circumstances that may influence the procedure in the foreign jurisdiction, including time and costs as well as in case of international arbitration the provisional measures cannot be requested after commencement of arbitral proceedings, thus the party loses one of the main remedies.



As from 18 January 2017 creditors will be able to obtain a European Preservation Order.

[175] In 15 May 2014 the European Account Preservation Order Regulation was adopted. It will be applicable as from 18 January 2017 (Article 54).¹⁴⁷ The regulation provides for the procedure on how the creditor should be able to obtain a protective measure in the form of a European account preservation order preventing the transfer or withdrawal of funds held by his debtor in a bank account maintained in a Member State if there is a risk that, without such a measure, the subsequent enforcement of his claim against the debtor will be impeded or made substantially more difficult (Recital 7). This procedure will be an alternative to available national procedures (Article 1(2)). A preservation order issued in one Member State will be recognized in the other Member State without any special procedure and will be enforceable in the other member States without the need for a declaration of enforceability (Article 22). Hopefully, this regulation will facilitate the efficiency to obtain protective measures in cross-border cases.

140 Shaughnessy P. Chapter 5: Interim Measures in International Arbitration. In: (ed. Franke U., Magnusson A. (ed.). Sweden: A Practitioners Guide. Kluwer Law International, 2013, p. 96. See also: The Swedish Arbitration Act (Sw: Lag (1999:116) om skiljeförfarande), Article 4(3).

141 Article 139, Civil Procedure Law of the Republic of Latvia, adopted 14 October 1998, published in Latvijas Vēstnesis [Herald of Latvia] No. 326/330, 03 November 1998.

142 According to official court statistics, the first instances of the court of **Latvia** have received 323 applications to secure the claim before commencing proceedings; only 191 applications were satisfied in 2014. However, these statistics do not provide how many times the provisional measures were asked in cases with a cross-border element. See: Statistics of the Court Information System. Available at: https://tis.ta.gov.lv/tisreal?Form=TIS_STAT_O.

143 Hess B., Pfeiffer T., Schlosser P. The Brussels I-Regulation (EC) No. 44/2001. The Heidelberg Report on Application of the Regulation Brussels I in 25 Member States (Study JI.2/C4/2005/03), 2008, p. 305.

144 See: for example, 13 October 2014 Riga Regional Court decision in case No. 3-12/0112-14/9, unpublished.

145 20 July 2010 Chamber of Civil Cases of the Supreme Court of Latvia decision in case No. C01188510, unpublished.

146 Civilprocesa likuma komentāri. 1.daļa (1.-28.nodāļa). (Torgāns Kzin.red.), Tiesu Namu aģentūra, 2011, 344.lpp.

147 **The U.K.** and Denmark are not taking part in the adoption and application of the regulation. See: Recitals 50 and 51.

5. European Procedures



Once jurisdiction and applicable law are determined, the party can choose the available procedure, either national or European.

- [176]** Once the parties have considered jurisdiction, they may also consider the best procedure that may be appropriate for their litigation. They can choose available national procedures; however, they can also select alternative European procedures, i.e. European Small Claims Regulation, European Order for Payment Regulation or European Enforcement Order Regulation.
- [177]** With great support of the Ministry of Justice of the Republic of **Latvia** and the European Commission, research on application of European procedures was conducted,¹⁴⁸ thus these Recommendations and Guidelines only shortly deal with European procedures.



European procedures are an alternative to national procedures *inter alia*.

- [178]** It is very important to stress that European procedures are an alternative to all available national procedures and that parties are free to choose either one of the European procedures or available similar domestic procedures. Therefore, the judge on its own initiative cannot refer the claimant to use one of the European procedures, because there is a cross-border element in the case at hand.¹⁴⁹
- [179]** Moreover, the European procedures do not replace or harmonize existing similar mechanisms in domestic procedures,¹⁵⁰ thus the European procedures shall be interpreted autonomously from national procedures. For example, the Supreme Court of **Latvia** changed its previous judicature in order to maintain the distinction between the national and the European procedures. Namely, prior case law suggested that the national small claims procedure shall be interpreted in light of the European Small Claims Regulation, thus disputes concerning employment issues are not within the scope of the national procedure. However, the Supreme Court correctly stated that the scope of the European Small Claims Regulation does not affect the scope of the national procedure law, thus employment disputes can be settled by the national small claims procedure.¹⁵¹
- [180]** One of the concerns regarding the European procedures is that they have been intended to be alternative and separate procedures at EU level. However, some of the provisions suggest that if the European procedures cannot be continued, then the court transfers the procedure to the national procedure.¹⁵² However, neither particular regulations, nor all national laws of particular Member States provide for such order of transition.¹⁵³



Jurisdiction on European Small Claims and on the European Order for Payment Procedures shall be determined in accordance with the Brussels Ibis Regulation.

148 Regulation (EC) No. 805/2004 of the European Parliament and of the Council (21 April 2004) creating a European Enforcement Order for uncontested claims. L 143, Official Journal of the European Union, 30.04.2004, p. 15-62, Regulation (EC) No. 861/2007 of the European Parliament and of the Council (11 July 2007) establishing a European Small Claims Procedure. L 199, Official Journal of the European Union, 31.07.2007, p. 1-22, Regulation (EC) No. 861/2007 of the European Parliament and of the Council (11 July 2007) establishing a European Small Claims Procedure. L 199, Official Journal of the European Union, 31.07.2007, p. 1-22.

149 This was the case of a court of **Latvia** when the court on its own initiative asked parties to use the European small claims procedure, as the case had a cross-border element. See: 18 May 2012 Daugavpils Court decision in case No. 590/2012, unpublished.

150 See: Recital 8 of the European Small Claims Regulation, Recital 10 of the European Order for Payment Regulation.

151 29 April 2014 Supreme Court of Latvia decision in the case No. SKC-2113/2014.

152 See: Article 5(5) of the European Small Claims Regulation.

153 There is no such procedure in **Latvia**, but in Germany such procedure is provided in Section 1099 of the Code of Civil Procedure of **Germany**.

[181] The Brussels Ibis Regulation is interrelated with the European Small Claims Regulation (for example, form A, part 4 of this regulation) and the European Order for Payment Regulation (Article 6), as in these procedures jurisdiction shall be determined in accordance with the Brussels Ibis Regulation.



European procedures are form-based procedures. The parties and judges shall use these forms.

[182] One of the aims of those procedures is to simplify and quicken dispute resolution in cross-border cases. In order to achieve this aim, the EU legislator has based these procedures on forms. But for courts in **Latvia** it is difficult to adjust to a form-based procedure and realize that the use of the forms is time and cost saving. There are many cases where the courts have not used the form as required by the European procedures. For instance the courts do not use the form B “Request to the Claimant to complete and/or rectify an application for a European order for payment”, but draft the decision in accordance with the Latvian Civil Procedure Law.



European procedures are not always as simple, speedy and cost-effective as intended.

[183] The aim of European procedures is to simplify, speed up and reduce the costs of litigation in cross-border cases.¹⁵⁴ However, in practice those procedures are not always accomplishing this aim and are not used as often as intended. During the study visit in **Sweden**, the Researchers were informed that in less than 0,5% of cases are the European procedures used. According to the interviews in **Germany, Hungary and Latvia**, the European Small Claims Procedure is not so popular,¹⁵⁵ but the European Order of Payment is used very frequently, for example, in **Germany**.

[184] Interviews with lawyers in **Hungary** revealed that one of the reasons why the European procedures are not applied more often is the low level of awareness. Indeed, according to the questionnaires distributed within this project, 81,82% of the questioned **Hungarian** and 73,17% of **Latvian** lawyers have not applied the European Enforcement Order Regulation; 72,73% of **Hungarian** and 80,49% of the **Latvian** lawyers have not applied the European Order for Payment; and 90,91% of the respondents in **Hungary** and 73,17% in **Latvia** have not used the European Small Claims Procedure.

[185] Even if better awareness could be easily achieved, still in some cases the European procedures are not as effective as planned, because the procedures may be lengthy and costly.



Each Member State may have a different authority to issue a European order of payment.

[186] It is also notable that each country has differing authority to issue European orders of payments. For example, in the **U.K., Germany and Latvia** it is the courts. For example, in Germany only one court is competent to deal with the European payment order procedure – the Local Court in Berlin. Therefore, German judges are well trained to apply this European Order for Payment Regulation. In **Sweden** it is the Swedish Enforcement Administration (Kronofogdemyndigheten), but in **Hungary**

154 See: Recital 9 of the European Order of Payment Regulation, Recital 9 of the European Enforcement Order Regulation, and Recital 7 of the European Small Claims Procedure Regulation.

155 Discussions with **German** colleagues show that the Small-Claims Regulation is not very popular in Germany. Nevertheless, the German national small claims procedure is very popular. Germany is also against augmentation of the maximum sum of the European Small-Claims procedure up to 10 000 EUR. Attorneys at law who work with big companies do not have experience with this Small-Claims Regulation (because the amount is too small).

orders for payments are issued by notaries.¹⁵⁶ These differences can give rise to varying practices among the Member States.

[187] For example, in 2014 the Supreme Court of **Hungary** delivered its first decision on the European order for payment procedure.¹⁵⁷ The Hungarian Supreme Court found that it had no procedural right to appoint the court seized of the proceedings.¹⁵⁸ Interpreting Article 20(3) of the European Order for Payment Regulation in conjunction with the rules of national procedure, the Supreme Court established that only the same notary has exclusive competence to declare a European order for payment null and void. Therefore, the Supreme Court did not appoint a court, but returned the files to the notary for further proceedings.



The use of electronic means of communication would improve application of the European procedures

[188] A new proposal for the amendments to the Small Claims Regulation and the European Enforcement Order Regulation states that it will put postal service and electronic service on the same footing, in order to allow the Member States where electronic service is already in place to make

156 See: European Judicial Atlas in Civil Matters. Available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/epo_courtsjurisd_en.jsp?countrySession=4&#statePage0.

157 Harsági V. Hungarian Case Law Relating to European Private Law (2013-2014). In: *Zeitschrift für das Privatrecht der Europäischen Union*, 2014, Vol.11(4), p. 209. The case originated from a defendant filing an opposition against a European order for payment issued by a notary. When the notary, in accordance with the Hungarian Code of Civil Procedure, applied to the Supreme Court of Hungary and asked to appoint a court that would adjudicate this case, the Supreme Court of Hungary returned the case back to the notary. The notary was put under obligation to instruct the claimant to specify the facts required for determining which court should have jurisdiction in this case. The claimant announced that he could not specify the court having jurisdiction, because neither the claimant, nor the defendant had a registered seat in Hungary, and the place of occurrence of the damage was not Hungary either. In his opinion the courts of Hungary had jurisdiction over Article 33(1) of the Montreal Convention. The notary referred the matter once more to the Supreme Court of Hungary. As to application of the Montreal Convention, the Supreme Court noted that prior to having regard to the rules of jurisdiction in the Montreal Convention applicable to the merits of the legal dispute between the parties, it must be examined whether a European order for payment procedure may take place at all. For the issue of the European order for payment to fall within the jurisdiction of the Hungarian courts, the case laid before them must fall within the objective scope of the European Order for Payment Regulation. Pursuant to Article 2 of this Regulation its scope covers cross-border civil and commercial matters. The Supreme Court of Hungary found that according to the Brussels I Regulation, domicile of the parties has to be determined, and the claimant and the defendant are domiciled in the **U.K.** The delayed flight that had given rise to the claim concerned was an inner flight between two cities in the **U.K.** As there was no cross-border element, it was not possible to issue a European order for payment.

A quite similar issue was raised in another case before the **Hungarian** Supreme Court only a few months later. In this case the Hungarian Supreme Court stayed proceedings and made reference for a preliminary ruling to the CJEU. The central point of reference in this case concerned relations between the same legal instruments as in the previously mentioned case: the Montreal Convention and EU legal instruments – the Brussels I Regulation and the European Order for Payment Regulation (there has been no judgment from the CJEU in this case yet. See: 27 February 2014 application to the CJEU in case: No. C-94/14 Flight Refund).

158 Judgment of the Supreme Court of Republic of Hungary in case: No. Pkk. V. 24.842/2013, unpublished.

these electronic means available to parties using the European Small Claims Regulation.¹⁵⁹ In addition, it could be facilitated that all Member States use electronic means of service as provided in the European Payment Order Regulation¹⁶⁰ and in the European Enforcement Order Regulation.¹⁶¹

[189] However, as is evident from the studied Member States, only **Germany** and partially the **U.K.** allow electronic communication on the European procedures, but **Latvia, Hungary** and **Sweden** mostly provide for direct or postal service. Thus the introduction of common standards making the electronic service of documents autonomous of the national law and online commencement and procedure could be considered in EU. This can be achieved by creating a special e-procedure

159 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (COM (2013) 794), para. 3.1.3.

Article 4(1) of the European Small Regulation allows the standard claim Form A to be lodged directly, by post or by any other means of communication if it is acceptable in the particular Member State. However, Recital 18 and Article 13(1) provide that the primary method of service of documents is postal service with acknowledgment of receipt. If such service is not possible, the methods provided in Articles 13 and 14 of the European Enforcement Order Regulation shall be used. The postal service shall be used when the application shall be sent to the defendant, and the judgment shall be sent to the claimant and defendant.

In accordance with the Atlas, **Germany** states that in all cases, the following means of communication may be used: postal services, including private delivery services, fax but, for example, in the *Land* of Brandenburg, in Bremen and in the Land of Hessen it is also possible to access all local courts and the Higher Regional Court of Brandenburg electronically. See: http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_communicationshtml_de_en.htm.

The reference in Atlas regarding **Hungary** is quite confusing; it states: "*the completed standard claim form (Form A) may be submitted to the court; – the application may be submitted by post; or – it may be made orally to the court.*" Still, it can be concluded that electronic means are not acceptable, but what is meant by "oral" submission is not clear. See: http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_communicationshtml_hu_en.htm.

Latvia has communicated that the applicant may submit the application either directly or by post. Electronic statement of claim is not accepted. See: http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_communicationshtml_lv_en.htm#sc_communicationshtml1.

Also **Sweden** accepts direct or postal service. See: http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_communicationshtml_se_en.htm.

England and Wales accept the statement of claim by post, but subsequent documents can be allowed to be sent to the court by post, facsimile or by e-mail. Other rules apply for Scotland, Northern Ireland and Gibraltar. See: http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_communicationshtml_uk_en.htm.

160 Article 13 and Article 14 of the European Payment Order Regulation provide the methods of service of the European Payment Order. The Articles expressly provide that service of the documents shall be in accordance with the national law of the Member State, thus allowing the Member States to exclude service via electronic means.

Germany has communicated the following: the competent bodies in Germany are currently working on the development of an IT system, which should make it possible to submit European payment order applications and objections electronically. Until then, within Germany documents are served via post, including private delivery services. See: http://ec.europa.eu/justice_home/judicialatlascivil/html/epo_communicationshtml_de_en.htm.

In **Hungary** communication may be by post or in person, directly to the notaries. See: http://ec.europa.eu/justice_home/judicialatlascivil/html/epo_communicationshtml_hu_en.htm.

In **Latvia** an application may be submitted to the competent court in writing (in paper form), either personally or via an authorized intermediary, or it may be sent by post. See: http://ec.europa.eu/justice_home/judicialatlascivil/html/epo_communicationshtml_lv_en.htm#epo_communicationshtml2.

Sweden provides that applications for a European order for payment must in principle be lodged in paper form.

The means of communication acceptable by courts in **England and Wales** for the purposes of commencing the European order for payment is by post (due to the necessity to take a court fee to issue the process). However, subsequent documents including any statement of opposition will be allowed to be sent to the court by post, facsimile or e-mail. Other rules apply for Northern Ireland, Scotland, and Gibraltar. See: http://ec.europa.eu/justice_home/judicialatlascivil/html/epo_communicationshtml_uk_en.htm.

161 Articles 13 and 14 of the European Enforcement Order Regulation set the list of methods of service to be used when serving the documents instituting the proceedings or an equivalent document. Electronic service is allowed by the Regulation (Articles 13(1) (d) and 14(1)(f)); however, even though the minimal standards incorporated in this Regulation shall be treated as autonomous, not all Member States have corresponding national norms allowing identical service. For example, Article 6.1 of the Civil Procedure Law of **Latvia** provides that the court can serve the court's documents via electronic mail, but only if the participant of the procedure has agreed to such service.

platform for the European procedures in an E-Justice portal.¹⁶² Even though it is an ambiguous idea, however, it would facilitate autonomous application of the European procedures, allow avoidance of fragmentation and differences in application of those regulations as well as would save time and costs. It is suggested that the German electronic order for payment procedure could be a very good example for the European lawmaker in attempting to introduce an electronic European order for payment procedure.¹⁶³ In 2013 nearly 50 million EUR were collected in Germany thanks to this European payment order procedure. Maybe this experience could be discussed also in **Latvia**. The technical equipment for this electronic system is quite expensive. Therefore, the choice to make only one central court competent for these cases is very meaningful.¹⁶⁴

6. Service of Documents



Notion of “extrajudicial document” must be developed by the case law of the CJEU.

[190] Problems can be found in regard to very basic terms of the Service of Documents Regulation in **Hungary**. Article 1 of the regulation provides that “this Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there”. However, the meaning of the notion of “extrajudicial document” as interpreted by the CJEU is open to criticism. In the case C-14/08 Roda Golf¹⁶⁵ the CJEU came to the conclusion that documents issued by the notaries are regarded as “extrajudicial documents” in the meaning of the regulation irrespective of the nature of the proceeding. At the time of drafting these Recommendations and Guidelines there is a pending case C-223/14 Tecom Mican¹⁶⁶ before the CJEU on the same subject, and the Hungarian expert expressed hope that the CJEU will change its case law.



Problem of establishing the addresses of natural persons must be solved at the EU level.

[191] The second paragraph of Article 1 states that “*this Regulation shall not apply where the address of the person to be served with the document is not known*”. This provision also is quite problematic for **Hungary**, because under Hungarian law courts in certain cases are obliged to actively participate in the search for the address of the person.

[192] Since the Hungarian Ministry of Justice receives questions regarding locating persons from Hungarian courts from time to time, the possible suggestion that is given to courts is to apply the Taking the Evidence Regulation.

[193] However, the problem is even deeper if such issue arises in the context of Member States that do not have centralized domicile registers (for example, France, the **U.K.**). Also in **Germany** one of the main problems is establishing the address (domicile, habitual residence) of natural persons.

162 See: European Parliament resolution on the e-Justice Action Plan 2014-2018 (2013/2852(RSP)), paras. 3, 6 and the European Parliament resolution of 18 December 2008 with recommendations to the Commission on e-Justice (2008/2125(INI)), Annex, Recommendation 2(3).

163 Sujecki B. The German Electronic Order for Payment Procedure. Digital Evidence and Electronic Signature Law Review, Vol. 4, 2007. Available at: <http://sas-space.sas.ac.uk/5542/1/1799-2463-1-SM.pdf>.

164 Kormann J.M. Das neue Europäische Mahnverfahren im Vergleich zu den Mahnverfahren in Deutschland und Österreich. JWV, 2007, S. 193.

165 25 June 2009 CJEU judgment in case No. C-14/08 Roda Golf & Beach Resort SL.

166 Request for a preliminary ruling from the Juzgado de Primera Instancia No. 7 de Las Palmas de Gran Canaria (Spain) lodged on 7 May 2014 in case No. C-223/14. Tecom Mican, S.L. v Man Diesel & Turbo SE. Official Journal C 223, 14.7.2014, p. 8.

German judges are obliged to establish the address of a natural person. In Germany (as in **Latvia**) there is a special register of addresses.

- [194]** As a solution to a certain extent serve bilateral agreements with those Member States that are ready to admit that so-called fictive service of documents under certain conditions (i.e. if the court has searched for possibilities to deliver the document) might be an option. Yet the role of the courts as seekers for the party might not be acceptable in all Member States (e.g., in the U.K., France, and Netherlands, where courts usually do not undertake such a role).
- [195]** The Researchers and the German judges discussed possible ways to solve this problem. One of the possibilities would be to use e-mail addresses for the service of documents. Using the services of a private detective is a very expensive solution; therefore, it is not the best way to solve this problem. Also EU-unified post documents could be very helpful (for example, as a unified standard form attached to the Service of Documents Regulation).
- [196]** There is a wider issue related to a particularity of the **U.K.** legal system, concerning identification of the address of natural persons. There is no compulsory system of declaration for natural persons, making it often impossible to identify the location of a natural person. Existing registers are voluntary and incomplete.
- [197]** Theoretically, only EU legislative intervention may insure uniformity in regards to identification of the address of natural persons. However, in this respect, respondents expressed strong scepticism about development of a pan-European registry of natural persons, as being incompatible with the traditional system in the U.K. It follows that, realistically speaking, divergence among Member States will remain.
- [198]** In relation to natural persons, it is for the party seeking the service of documents to identify the addressee's location or even service documents personally if the laws of the Member State in which proceedings are taking place allow for doing so. The aforementioned problem does not apply to corporate legal persons. The latter are incorporated and thus have an office registered at the Companies Register that anyone is able to access. The registered office address is used for the purposes of communication.
- [199]** One of the possibilities could be creation of an EU address register – unified in all EU Member States and accessible in all EU Member States. However, this is a problem at the EU level.

6.1. Language issues



The criterion on understanding the language is too subjective, therefore, it must be developed by case law or in the Regulation itself.

- [200]** The language question is one of the most problematic issues within the EU. There are many official languages in the EU, and the addressee must understand the language in which the judicial document is written. Therefore, the language question is very often related to translation problems and costs.
- [201]** During the Study Visit in **Sweden**, the Researchers noted that the biggest issue regarding the Service of Documents Regulation is the language issue. In many cases requests for service of documents are misspelled or contain incorrectly transliterated names and addresses; the certificate of service is not used; or it is often not clear whether the service was completed or not. Therefore, these requests quite often are returned for corrections.

- [202]** Article 8 of the Service of Documents Regulation provides that the addressee may refuse to accept the document served at the time of service or return the document to the receiving agency within one week if it is not written in or accompanied by a translation into either of the following languages: – a language which the addressee understands; or – the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected.
- [203]** When the receiving agency is informed that the addressee refuses to accept the document, it must immediately inform the transmitting agency and return the request and the documents of which a translation is requested. Thus, the aim of the regulation to serve a document as soon as possible, and in any event within one month of receipt by the receiving agency (see recital 6 and 9), cannot be achieved.
- [204]** Article 8 of the Regulation can be regarded as the most problematic article in this regulation, because it stipulates the right to refuse to accept the document to be served because of the lack of understanding of its language. This provision brings too much subjectivity in the procedure: who and how can measure the level of understanding? What happens if assessments of the court are different from the assessment of the addressee? What level of understanding is required – everyday language skills or a higher level?¹⁶⁷ The reasoning behind the provision is clear (to speed the proceedings, to avoid unnecessary translations), but the current form of the provision is not satisfactory.
- [205]** There is a pending case before the CJEU that exactly reflects this problem – case *Alta Realitat*¹⁶⁸ (the document in Spanish procedure was served to Danish actor in English).¹⁶⁹
- [206]** Hopefully, the CJEU in this case will address the problem and will at least somewhat reduce the level of subjectivity. Perhaps the legal presumption of the service of documents in those situations will also be justified by the CJEU.
- [207]** The criterion of understanding the language must be developed by case law and should not be left only to the subjective attitude of the addressee towards a language. An addressee can use this argument in order to avoid court proceedings or to extend such. However, in the *Weiss* case¹⁷⁰ the Advocate General Trstenjak noted that the protection of defendants and their right to a fair hearing take precedence over procedural economy. Thus, the balance between those two interests must be found either in the case law or by amending the Regulation.
- [208]** One of the criteria for the presumption of understanding the language could be the nationality of the State in which this particular language is an official language. For example, if an addressee who has **Latvian** nationality and lives in **Germany** refuses to receive the judicial document in Latvian, then it could be considered as abuse of Article 8 in order to extend the procedure.
- [209]** It is very important to point out that Article 8 of the Service of Documents Regulation also influences the procedure for recognition and enforcement of judgments as well as other European

167 Stadler A. Practical Obstacles in Cross-Border Litigation and Communication Between (EU) Courts. *Erasmus Law Review*, Vol. 5, Issue 3, 2012, p. 157.

168 Request for a preliminary ruling from the Juzgado de Primera Instancia de Barcelona (Spain) lodged on 11 August 2014 in case No. C-384/14 *Alta Realitat S.L. v Erlock Films and Ulrich Thomsen*.

169 One of the preliminary questions referred by the Spanish court is the following: "Must Article 8(1) of the Service of Documents Regulation be interpreted to the effect that, if the addressee of a notice refuses a document drafted in a certain language, following a declaration from the court hearing the action that that person has a sufficient level of understanding of that language, the refusal of the document is not justified, and the court hearing the action may apply the consequences provided for in the legislation of the State of transmission to this type of unjustified refusal of a document and, if the procedural rules of the State of transmission so provide, treat the document as having been served on the addressee?": Request for a preliminary ruling from the Juzgado de Primera Instancia de Barcelona (Spain) lodged on 11 August 2014 in case No. C-384/14 *Alta Realitat S.L. v Erlock Films and Ulrich Thomsen*.

170 29 November 2007 Advocate General Trstenjak opinion in the case No. C-14/07 *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin*, para. 47.

enforcement procedures. The problem of recognition and enforcement of default judgments becomes more and more widespread.



A certificate of completion of formalities must be drawn up in the standard form set out in Annex I and addressed to the transmitting agency together with, where Article 4(5) applies, a copy of the document served (Article 10).

[210] Article 10(1) of the regulation provides that *“when the formalities concerning the service of the document have been completed, a certificate of completion of those formalities shall be drawn up in the standard form set out in Annex I and addressed to the transmitting agency, together with, where Article 4(5) applies, a copy of the document served.”* Hungary’s experience shows that there are a number of cases when the certificate has not been sent. However, this is not a major problem, as it is faced only in approximately in 5% of the cases of delivering documents in Hungary. It still might cause problems if the requested party has sent the documents in a foreign language, precluding the requesting party from understanding the very idea of the document. Usually this problem can be remedied within cooperation in the European Judicial Network.

6.2. Costs of Service



A discussion might be needed on whether both Member States concerned should cover the costs of service.

[211] Article 11 of the Service of Documents Regulation regards the costs of service. This article involves two problems. The minor one is a practical one – when the receiving side receives incomplete practical information. For example, there were cases when an invoice has been received without any banking details to whom the payment should be addressed or when the sum requested was much higher than the one mentioned in the declarations of the Member States.

[212] In **Hungary**, by outgoing requests for service of documents, the expenses of the service are covered in the court procedure (either by the parties or by the court itself – depending on the practice of the court). However, by incoming requests the costs of service in Hungary are borne by the State as well. It would be more equitable if all the Member States bore the costs of the internal service of foreign judicial documents.

[213] Also in **Latvia** judges expressed concern that there are some Member States that charge high fees for the service of documents (for example, the Netherlands), and initially this is not taken into account when the documents are sent.

6.3. Means of Service



A European notion of “receipt” could be introduced.

[214] Article 14 of the Service of Documents Regulation provides that *“Each Member State shall be free to effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent”*. The problem of this Article lies with sending back of the receipt, because in practice the functioning of the postal services

in different Member States is organized differently. Sometimes the receipt does not come back; sometimes it does, but it is very hard to determine who signed it, etc.

- [215]** A closely related problem here regards Article 9 of the regulation on the date of service. In **Hungary** the procedural laws set out that the service of the official document is carried out by post. There are situations when it is impossible to serve the letter. Then, if certain conditions laid down in the internal rules on the Hungarian postal service are fulfilled, the assumption that the letter was served might come into force. But in case the document has been sent from a different Member State, the Hungarian post cannot apply those rules, because the post does not know that it is an official document and that it should be treated accordingly.
- [216]** A possible solution (discussed also with **German** colleagues) for this problem would be to unify postal rules (European notion of "receipt" should be introduced or a unified standard form attached to the Service of Documents Regulation), but it might be hard to achieve consensus on that matter. The second possibility would be the use of an e-mail address for the service of judicial documents.
- [217]** Another minor practical problem regards Annex 2, which theoretically contains an obligation to use the form of the annex in all 23 languages. In practice the use of all languages is not necessary and often is omitted.
- [218]** The question is how long the service of documents might take. **Hungarian** experts noted that in the experience of the Ministry of Justice it all depends on the particular Member States: with some Member States service happens very fast, but with others it takes an entire 6 months and sometimes even more. The reasons for this are not technical, but mostly connected with the attitude of the receiving Member State..
- [219]** The huge variations in the time required for the service of document also triggers further problems, e.g., the timing of the service is interrelated with the scheduling of the time of adjudication of the case by the court.
- [220]** From the questionnaires the Researchers observe that the **Latvian** judges should have a real practical manual (in Latvian) on how to fill the forms of the particular regulation and how to serve documents abroad.
- [221]** In **Hungary** the courts are appointed as the transmitting and receiving agency according to the regulation. However, the Hungarian courts choose rather to send judicial or extrajudicial documents to other Member States by post, because it is faster and simpler (which is similar to **Latvia**). But there are some problems with the efficiency of the postal service.
- [222]** Sometimes the return receipts are not received back at all, and in other cases they are not filled correctly, making it unclear to whom exactly the document was served. The Hungarian courts can ask such information of the Hungarian postal service and clarify the exact address to which the document was sent. However, such reference to the Hungarian postal service is quite time-consuming (approximately 20 days).
- [223]** If the receipt is filled correctly, still other problems might arise. For example, if the document was received by a person other than the addressee, it is impossible to verify whether this person was entitled to receive the particular document or not. This information can be acquired from the Hungarian postal service, too, and the Hungarian postal service can forward this question to the postal service of the relevant Member State. But it is not the most authentic way to learn about the laws of other Member States.
- [224]** There are some problems in respect to fictitious service methods of documents. If the document is sent back together with the receipt and a postal sign that this document is unclaimed, it is impossible to apply the fictitious service methods provided by Hungarian law, as the law of the Member State to which the document was sent must be applied. But in their everyday work the judges cannot know whether there are any fictitious service methods in this state at all. It would be useful

if in the judicial atlas or somewhere else there was a collection of data regarding the laws and regulations of the Member States regulating the substitute delivery or fictitious service methods.

- [225] In the field of service of documents at least one judgment of the CJEU had great effect on Hungarian practice, namely, the judgment in case *Alder*¹⁷¹. In Hungary if the plaintiff or the defendant has no place of residence in Hungary, the court has to send a notice to that party in order to appoint a representative authorized to accept the service of documents and has a residency in Hungary. If the party fails to comply with this obligation, the court may not serve any other document in accordance with the Hungarian Code of Civil Procedure. The Hungarian court has to apply a fictitious service method – it has to deem that these documents have been served to the party without actual service. In the judgment of the case C-325/11 *Alder*, the CJEU stated that similar rules of the Polish Code of Civil procedure were contrary to the Service of Documents Regulation.
- [226] In **Germany** there are no problems with **Latvia, Hungary, Sweden**, Lithuania and Estonia in the field of application of the Service of Documents Regulation. However, there are problems with such EU Member States as Ireland, France, Italy, Spain or **the U.K.** For example, in Ireland a post office notices only the day when the document was put into the letter-box, but according to German national law the date of the real service of document is important. Thus, the differences among the national laws of Member States create huge problems in practice.
- [227] In **Sweden** most documents before courts can be submitted **electronically**, and most of cases are held in an electronic case file, making their accessibility easier also for purpose of the Service of Documents Regulation.
- [228] During the Study Visit in London, the **English** colleagues expressed an opinion that generally there were no major challenges for efficient application of the Service of Documents Regulation.
- [229] However, according to the respondents, there are some minor practical difficulties. In some cases requests for service of documents are filled in handwriting. As a result, the text may be difficult to understand or contain misspellings. Likewise, sometimes the requests are only partially filled. It was noted that these problems are not constant and are more typical to some Member State courts than others. Overall it shows that not all courts in Member States have a sufficient level of diligence when making requests for service of documents. The possible solution is improvement of awareness and diligence on the part of requesting courts.
- [230] Overall, respondents indicated that the Service of Documents Regulation is frequently used by English courts, and in a great majority of cases it is efficient and raises no challenges as to its application. On the contrary, certain respondents noted that notwithstanding the Regulation it can take a long time to serve English court documents in other Member States and the process can be expensive, especially where long contracts attached to a claim form must be translated into the relevant local language.
- [231] In **Latvia** one of the biggest problems regarding the use of the forms in accordance with the Service of Documents Regulation is that requests for service are misspelled, there are incorrectly transliterated names, addresses and the certificate of service are not used or it is often not clear whether the service was completed or not. Similar problems have also been identified in **Hungary**.

171 19 December 2012 CJEU judgment in case: No. C 325/11 *Alder v Orlowski*.

7. Taking of Evidence



The Taking of Evidence Regulation covers all types of evidence; there is no exhaustive list of evidence under the regulation.

[232] The concept “evidence” is not defined in the regulation, but it includes *inter alia* hearings of witnesses of fact, of the parties, of experts, the production of documents, verification, establishment of facts, and expertise on family and child welfare.¹⁷² In a recent case in **Latvia** the court noted that all information and documents, and witness testimonies are subject to the Taking of Evidence Regulation. However, the court noted that request for certain evidence might be contrary to the public policy considerations and such requests cannot be executed.¹⁷³ Thus, the courts should also consider the standard for taking of evidence established by the regulation even when the parties do not refer to the regulation itself and try to sidestep from the procedures and standards under the regulation.



The Taking of Evidence Regulation should be amended to include a definition of “court” that covers also other bodies that function similarly to courts for efficiency of the taking of evidence proceedings.

[233] During the study visit to **Hungary**, it was noted that the Taking of Evidence Regulation lacks a definition of the term “court.”¹⁷⁴ In many Member States the term “court” is treated literally by excluding other public bodies that perform the functions of the court. However, in Hungary there are several other bodies that in substance fulfil the function of the court, e.g., notaries and guardianship authorities. Also in **Sweden**, for example, the State Enforcement Authority (Kronofogden) and the National Board for Consumer Disputes (Allmänna reklamationsnämnden) have the task of trying disputes that arise between consumers from other EU countries and Swedish business operators.

[234] In practice as illustrated from the example of **Hungary**, this has led to the following chain of events. Firstly, a notary public sent the documents, but they were returned, due to the fact that a notary public is not considered a “court” under the Taking of Evidence Regulation. Then the documents were sent to the Hungarian Ministry of Justice, and the ministry sent the documents with an explanation of the situation to the central authority of the receiving Member State. Finally, the central authority of that Member State did provide the necessary evidence. Even though the result was reached, a considerable delay and unnecessary work were created, due to a lack of any clear definition of “court”. A broad definition of the term or an inclusive list should be included in the Taking of Evidence Regulation.

[235] Additionally, lack of a definition endangers effective application of Article 14(2)(b) of the Taking of Evidence Regulation. This allows to formally refuse a request, due to varying national procedures for targeting of evidence that endangers effective application of the Taking of Evidence Regulation.

172 Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 5 December 2007 on application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [COM(2007) 769 final - not published in the Official Journal], p. 6. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007DC0769&from=EN>, p.6.

173 27 December 2013 Riga Regional Court judgment in case: No C27242011, unpublished.

174 Article 1 of the Taking of Evidence Regulation: “This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests.”



Courts of Member States should interpret Article 14 of the Taking of Evidence Regulation as an exhaustive list of circumstances for refusing to execute a request.

- [236]** Article 14 of the Taking of Evidence Regulation deals with the reasons for refusal to execute a request. Pursuant to Article 14(3) of the Regulation, national laws should not be considered reasons for refusal to execute a request. Recital of 11 of the Regulation also aims to limit exceptional situations when the request may be refused.
- [237]** However, during the study visit to **Hungary** it was indicated that Member States tend to interpret Article 14 broadly, for example, recently Austrian authorities refused the request for collection of bank account details, stating that such request is against the national laws of Austria. This approach is contrary to the comprehensive nature of Article 14.
- [238]** The Researchers note that the wording of Article 14 seems clear, in contrast to Article 17(5)(c), which allows for broader interpretation of the reasons for refusal of a request for direct taking of evidence. Thus, the courts of Member States should apply Article 14 restrictively.



A court is not required to summon a witness or request evidence using the Taking of Evidence Regulation; on the contrary, a court may summon a witness or request evidence using the law of the forum. The Taking of Evidence Regulation provides an optional mechanism only.

- [239]** Another practical problem that was identified during the Study Visits concerns the mandatory use of the Taking of Evidence Regulation for summoning a witness or requesting evidence. In the **U.K.** practice, companies established under foreign laws have claimed that national courts cannot summon witnesses or request documentary evidence, without applying the Taking of Evidence Regulation. This problem has been solved by the CJEU in the *Lippens*¹⁷⁵ and *ProRail*¹⁷⁶ cases, where the CJEU ruled that national courts are not required to rely on the Taking of Evidence Regulation in order to summon witnesses or request documentary evidence.
- [240]** Also the Svea Court of Appeals in **Sweden** has applied the Taking of Evidence Regulation, noting that the Regulation grants the courts an opportunity to request assistance from the courts of other Member States, thus indicating its supplementary character.¹⁷⁷ The same notion was more clearly stated by the CJEU in the *Zaraga* case:
- the court of the Member State of origin must, in so far as possible and always taking into consideration the child's best interests, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Regulation No 1206/2001.*¹⁷⁸
- [241]** In another case from **Germany** the Higher District Court of Oldenburg (*Oberlandgericht* Oldenburg)¹⁷⁹ had to decide whether the double costs of the taking of cross-border evidence had to be reimbursed to the parties. In its reasoning the court made a reference to the Opinion of the Advocate General in the *ProRail* case:

175 6 September 2012 CJEU judgment in case No. C-170/11 Maurice Robert Josse Marie Ghislain Lippens, Gilbert Georges Henri Mittler, Jean Paul François Caroline Votron v Hendrikus Cornelis Kortekaas, Kortekaas Entertainment Marketing BV, Kortekaas Pensioen BV, Dirk Robbard De Kat, Johannes Hendrikus Visch, Euphemia Joanna Bökkerink, Laminco GLD N-A, Ageas NV, formerly Fortis NV.

176 21 February 2013 CJEU judgment in case: No. C-332/11 ProRail BV v Xpedys NV, FAG Kugelfischer GmbH, DB Schenker Rail Nederland NV, Nationale Maatschappij der Belgische Spoorwegen NV.

177 30 November 2012 Svea Court of Appeals judgment in case: No. T8355-12.

178 22 December 2010 CJEU judgment in case: No. C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz, para. 67.

179 29 November 2012 OLG Oldenburg, 8. Zivilsenat, 8W 102/12. Available at: www.juris.de.

[...] if a court does not intend to use that form of judicial cooperation, because it considers that the assistance of the local authorities is not necessary for the investigation it is conducting to be completed successfully, it is not required to comply with the formalities laid down by Regulation No 1206/2001.¹⁸⁰

[242] Thus the Taking of Evidence Regulation provides an optional mechanism to simplified obtaining of the evidence abroad. Therefore, the courts of Member States are not obliged to use the Taking of Evidence Regulation if the evidence can be gained under local procedural law on evidence.

8. Recognition and Enforcement of Judgments

8.1. Enforcement of Common Law Instruments



In Civil Law countries, there is a need to study the main concepts of the civil procedure law of Common Law countries in order to ensure application of Article 45(1) of the Brussels Ibis Regulation.

[243] The most problematic issues encountered both by judges and private practice lawyers are with *Common Law* instruments. For example, in **Latvia** one of the attorneys faced enforcement of a “*receivership order*”, and it was found very difficult to explain to the judge what kind of legal institute that is. Others had cases on enforcement of English “default judgments” or “freezing orders” (“*Mareva injunctions*”). **Latvian** courts are more and more often confronted with *Common Law* instruments, partly because of the sizeable Latvian community in **the U.K.** This is a new challenge for Latvian judges and legal practitioners.

[244] In the cases *Trade Agency* and *Avotiņš v Latvia* the Latvian courts were confronted with the recognition and enforcement of English and Cypriot default judgments. The reasoning of these judgments is not provided, and, therefore, the Latvian judges were not sure how to deal with them.

[245] In the *Avotiņš* case the Supreme Court of **Latvia** pointed out in a very simple way that defendant Avotiņš had the possibility to commence proceedings to challenge this default judgment in Cyprus. As he did not start such a proceeding, the Member State of enforcement (Latvia) must recognise and enforce this judgment according to Article 38, 45 and 34(2) of the Brussels I Regulation.¹⁸¹ However, the Supreme Court of Latvia had not verified whether Mr. Avotiņš had really had such a possibility.

[246] In the *Trade Agency* case the Supreme Court of Latvia submitted a request for a preliminary ruling to the CJEU.¹⁸² The CJEU answered that Article 34(1) of the Regulation must be interpreted as meaning that the courts of the Member State in which enforcement is sought *may* refuse to enforce such a judgment, only if it appears to the court, after an overall assessment of the proceedings and in the light of all the relevant circumstances, that that judgment is a manifest and disproportionate breach of the defendant’s right to a fair trial referred to in the second paragraph of Article 47 of the

180 6 September 2012 Advocate General Jääskinen Opinion in the case: No. C-332/11 ProRail NV, para. 50.

181 31 January 2007 Supreme Court of Latvia decision in the case: No. SKC-190/2007, unpublished.

182 One of the questions referred was the following: “whether Article 34(1) of the Brussels I Regulation, to which Article 45(1) refers, enables the court of the Member State in which enforcement is sought to refuse enforcement of a judgment given in default of appearance, which disposes of the substance of the case, but which does not contain any assessment of the subject-matter or the basis of the action and which is devoid of any argument on the merits thereof, on the basis of the clause relating to *public policy* on the ground that it infringes the right of the defendant to a fair trial referred to in Article 47 of the Charter of Fundamental Rights of the European Union”. 6 September 2012 CJEU judgment in case: No. C-619/10 Trade Agency Ltd.v. Seramico Investments Ltd, para. 47.

Charter, on account of the impossibility of bringing an appropriate and effective appeal against it. Thus, the CJEU accepted the possibility to enforce also *Common Law* default judgments within the Brussels I system.

- [247]** The next question was how to make this overall assessment of the proceedings in the light of all the relevant circumstances? The Supreme Court of Latvia exercised a possibility to obtain additional evidence from the parties (according to Article 642(2) of the Civil Procedure Law of Latvia) in order to examine these relevant circumstances and finally decided to recognize and to enforce in Latvia this **English** default judgment.¹⁸³
- [248]** The Latvian courts were also confronted with the recognition and enforcement of an English *freezing order* (*Mareva injunction*). In the case *Gramsci Shipping Corporation and others v A. Lembergs*, the court of the first instance was seized with the question to give an *exequatur* to the *freezing injunction* made by the High Court of Justice Queens Bench Division against A. Lembergs. This *in personam* freezing injunction had quite a complicated structure and also ordered not to remove from Latvia many different assets. This freezing injunction affected third persons domiciled in Latvia as well. According to the civil procedure of Latvia, third persons cannot be affected with interim measures. Therefore, the Latvian courts tried to adapt this English freezing order to the Latvian legal system.¹⁸⁴ It must be noted that in this case the Supreme Court of Latvia asked for a preliminary ruling¹⁸⁵, but the CJEU decided that there is no need to give a ruling on this request.¹⁸⁶ However, there is already the next case before the CJEU where the Supreme Court of Latvia has submitted a request for a preliminary ruling in order to receive a reply regarding the English freezing order.¹⁸⁷ This case is also related to the recognition and enforcement of an English freezing order in Latvia.¹⁸⁸
- [249]** In order to facilitate the adaptation of foreign legal procedural instruments unknown in Latvian legal system, the Ministry of Justice of Latvia has prepared draft amendments to the Civil Procedure Law. This project contains a new Chapter 78.1 "Adaptation of rights and duties set out in a foreign court judgment with the view of their application in Latvia" with seven sections.¹⁸⁹

183 13 February 2013 Supreme Court of Latvia decision in case: No.SK-1/2013 *Seramico Investments Ltd. v Trade Agency Ltd.* See: Rudevska B. Zur Frage der Anerkennung und Vollstreckung eines englischen Versäumnisurteils (default judgment) in Lettland. Praxis des Internationalen Privat- und Verfahrensrechts (IPRax), 1/2014, S. 85-87.

184 13 June 2011 City of Rīga Vidzeme Urban District Court decision in case: No. C30610811, unpublished; 22 June 2012 decision of Rīga Regional court in the case: No. C30610811, unpublished.

185 The main preliminary question was as follows:
must Article 34(1) of Brussels I Regulation be interpreted as meaning that, in the context of proceedings for the recognition of a judgment delivered by a court of another Member State, infringement of the rights of persons who are not parties to the main proceedings may constitute a ground for applying the public-policy clause contained in Article 34(1) of that regulation and for refusing to recognise that judgment in so far as it affects persons who are not parties to the main proceedings?
See: 5 June 2014 CJEU order in the case: No. C-350/13 *Antonio Gramsci Shipping Corp. And others v. Aivars Lembergs*, para 4.

186 The reason not to reply to this question was as follows:
In the present case, the referring court itself notes that the freezing injunction, the recognition and enforcement of which were applied for, has been annulled. Consequently, that court is no longer dealing with a case which is pending before it and the questions referred in the context of the present case have for that reason become hypothetical. The fact that similar cases are pending before the referring court is irrelevant in this regard.
See: *Ibid.*, para 11.

187 The main preliminary question referred: "Must Article 34(1) of the Brussels I Regulation be interpreted as meaning that [...] infringement of the rights of persons who are not parties to the main proceedings may constitute grounds for applying the public policy clause contained in Article 34(1) and for refusing to recognise the foreign judgment in so far as it affects persons who are not parties to the main proceedings?". Request for a preliminary ruling from the Augstākā tiesa (Latvia) lodged on 5 December 2014 in the case: No. C-559/14 *Rūdolfos Meroni v Recoletos Limited*. OJ C 89, 16.3.2015, p. 2.

188 15 October 2014 the Supreme Court of Latvia decision in the case: No. SKC-1791/14, unpublished.

189 Project of Law No. 129/Lp12, 12.02.2015, <http://titania.saeima.lv/>

8.2. Human Rights and Free Movement of Judgments



The interaction between human rights law and the principle of mutual trust, which lies at the very base of the free movement of judgments, is a complicated issue to which present case law of the CJEU does not provide any clear solution. Therefore, more detailed and precise guidelines from the CJEU are welcomed.

- [250]** Human rights was one of the central issues in discussing free movement of judgments in EU member states raised by judges and private practice lawyers. It was noted that the recognition and execution of judgments is too automatic in Members States. In this regard respondents mentioned both the *Trade Agency* case¹⁹⁰ in the CJEU and the *Avotiņš v Latvia* case in the ECHR.¹⁹¹
- [251]** One of the main points experts (e.g., in **Hungary**) focused on in their interviews was the dynamics of interaction between some EU law instruments and principles in the area of civil justice and human rights law. In this regard national judges might be put in a delicate situation, because of their EU-law duty to ensure the effectiveness of cross-border justice. In particular, the duty to ensure the effectiveness of cross-border justice might collide with the obligations of national constitutions in the human rights area as well as the ECHR. Although more vivid examples of such potential conflicts can be found in the area of criminal law, this issue plays a role in the area of civil justice as well.¹⁹²
- [252]** In the recent case of *Avotiņš v Latvia*, the ECHR held that the Brussels I Regulation is based on the principle of mutual trust.¹⁹³ Therefore, the applicant (defendant) has an obligation to commence proceedings to challenge a default judgment in the Member State of origin (Article 34(2) of the Brussels I Regulation). The ECHR applied its previous *Bosphorus v Ireland* case law¹⁹⁴ concerning the presumption of compliance of the ECHR with the EU law.
- [253]** However, this judgment of the ECHR is accompanied by the joint dissenting opinion of three judges: Ziemele, De Gaetano and Bianku. It shows that this case was not so easy to decide. This judgment is the first one which concerns application of the Brussels I Regulation in light of Article 6(1) of the ECHR.
- [254]** It has to be mentioned that this case concerned the enforcement in **Latvia** of a default judgment delivered in Cyprus. The applicant complained that the Cypriot court had ordered him to repay his debt under a contract without summoning him properly and without guaranteeing his defence rights. The ECHR noted that the applicant should have appealed against the Cypriot court's default judgment. It took the view that the Latvian authorities, which had correctly fulfilled the legal obligations arising from Latvia's status as a Member State of the EU, had sufficiently taken account of the applicant's rights. The ECHR held, by a majority, that there had been no violation of Article 6(1) of the ECHR. It must be noted that this judgment is not final. On 8 September 2014 the case was referred to the Grand Chamber of the ECHR at the request of the applicant. On 8 April 2015 the Grand Chamber hearing will take place in Strasbourg.

190 6 September 2012 CJEU judgment in the case: No. C-619/10 *Trade Agency Ltd. v. Seramico Investments Ltd.*

191 25 February 2014 ECHR judgment in case: No. 17502/02 *Avotiņš c. Lettonie*. 0

192 20 November 2014 interview with the representative of the Ministry of Justice of Hungary.

193 25 February 2014 ECHR judgment in case: No. 17502/02 *Avotiņš c. Lettonie*, paras. 49, 51.

194 30 June 2005 ECHR judgment in case: No. 45036/98 *Bosphorus v Ireland*, para. 165.



In cases concerning enforcement of judgments regarding return of a child, the principle of the best interest of the child must prevail over the principle of mutual trust. Therefore, the case law of the CJEU where the principle of mutual trust prevails is not satisfactory for the children.

- [255] For example, in family law disputes there might be cases when the duty of national judges to ensure the effectiveness of cross-border justice as set out in the Brussels IIbis Regulation would contravene the constitutional duty to protect family life. Although there is a lack of practical examples from the Hungarian courts in this area, such issues have been raised before the CJEU from the courts of other Member States.
- [256] As a good example of such conflict from CJEU practice, the expert mentioned the case from **Germany** *Zarraga v Pelz*.¹⁹⁵ The dispute in this case concerned the rights of the court of the Member State of enforcement to exceptionally oppose the enforcement of a judgment ordering the return of a child, which has been certified on the basis of Article 42 of the Brussels IIbis Regulation by the court of the Member State of origin (in Spain), on the ground that the latter court stated, in the certificate, that it had fulfilled its obligation to hear the child before handing down its judgment, although that hearing did not take place. The national court in reference to the CJEU suggested that such lack of hearing of the child might be considered a breach of human rights provisions, inter alia, enshrined in Article 24 of the Charter of the Fundamental Rights of the EU.¹⁹⁶
- [257] However, the CJEU in this case took a very cautious approach to creating possible additional grounds for the courts of the Member State for enforcement to refuse enforcement of the foreign judgment. The CJEU stated that assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin. The court of the Member State of enforcement can do no more than declare that a judgment is enforceable. Lawfulness of the judgment ordering return of the child as such (and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied) must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system. That Member State should examine the lawfulness of that judgment with reference to the requirements imposed, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of the Regulation.¹⁹⁷ Thus the CJEU expressly demonstrated its willingness to rely heavily on the national courts of the Member States, which did not help national judges at all on the assessment of a possible human rights breach.
- [258] In the case *Šneerson and Kampanella v Italy*¹⁹⁸ before the ECHR two **Latvian** nationals (mother and child) alleged that the Italian Government had violated their right to respect for their family guaranteed by Article 8 of the ECHR. They furthermore pointed out that the first applicant's absence from the hearing of the Rome Youth Court had rendered the decision-making process in the Italian courts unfair – Italy had violated their right to a fair trial under Article 6(1) of the ECHR. The ECHR has concluded that the interference with the applicants' right to respect for their family life was not "necessary in a democratic society" within the meaning of Article 8 § 2 of the ECHR. There has accordingly been a violation of Article 8 of the Convention on account of the Italian courts' order for the child's return from Latvia to Italy. The Italian courts did not refer to two psychologists' reports

195 22 December 2010 CJEU judgment in the case: No. C-491/10 PPU *Zarraga v Pelz*.

196 *Ibid.*

197 *Ibid.*, paras. 49, 51, 69. See also 1 July 2010 CJEU judgment in case: No. C-211/10 *Povse v Alpagó*, paras. 70, 74. "As is clear from Recital 24 and Articles 42(1) and 43(2) of the Regulation, the issue of a certificate is not subject to appeal, and a judgment thus certified is automatically enforceable, there being no possibility of opposing its recognition". See also: 11 July 2008 CJEU judgment in case: No. C-195/08 PPU *Inga Rinau*.

198 12 July 2011 ECHR judgment in case: No. 14737/09 *Šneerson and Kampanella v Italy*, paras. 95, 98.

that had been drawn up in Latvia pursuant to requests from the applicants' representative and then relied upon by the Latvian courts. Neither did the Italian courts refer to the potential dangers to the child's psychological health that had been identified in those reports. Had those courts considered the reports unreliable, they certainly had the opportunity to request a report from a psychologist of their own choosing. However, that was not done either.

- [259]** Already before the ECtHR delivered its judgment the Latvian authorities had decided to return the child to Italy, but at the moment where this return had been scheduled (on 26 January 2011) the child's father did not appear. Thus, the Latvian court interpreted this attitude as an unwillingness to enforce the decision of Italian court and as an acceptance of the fact that child now lived in Latvia. Also the Italian court had not replied to the request of the Latvian court to provide the information about the current situation in this case in Italy. Finally, on 28 August 2013 the Latvian court decided to grant a separate custody of the child to his mother.¹⁹⁹ It is obvious that the mechanism of the Brussels II bis Regulation was used by child's father in order to take revenge on the mother which, of course is not the main purpose of the Regulation.
- [260]** Additionally, in October 2008, Latvia brought an action against Italy before the European Commission in connection with the return proceedings. It claimed in particular that Italy had respected neither the Regulations nor the decisions of the Latvian courts concerning the child. The Commission issued a reasoned opinion, finding that Italy had not violated the Brussels II bis Regulation nor any general principles of community law.²⁰⁰

9. Insolvency



The courts of Member States where the COMI is located have primary jurisdiction under the Insolvency Regulation.

- [261]** The Insolvency Regulation operates on determination of the location of centre of debtor's main interests (COMI) as the basis for a court's jurisdiction to open insolvency proceedings. However, due to a lack of a clear definition, determination of COMI necessitates autonomous interpretation of COMI on a case-by-case basis. A broad interpretation of factors determining COMI creates certain dangers for a unified approach to this concept and the core functioning of the Insolvency Regulation. Researchers note that COMI can be located only in one state at a time.²⁰¹
- [262]** Article 3(1) of the Insolvency Regulation contains a presumption that the place of a registered office shall be recognized as COMI of a legal person in absence of proof to the contrary. The concept of COMI is easily applied when all business assets of the company at issue are located in one Member State, all of its business activities are related to establishment in a particular Member State and that is clearly ascertainable by third parties (see also Recital 13 of the Insolvency Regulation).



The Insolvency Regulation is applicable when the insolvency proceedings are listed in Annex A to the Insolvency Regulation, and all four criteria under Article 1(1) of the Insolvency Regulation are met (two-step test).

¹⁹⁹ 28 August 2013 judgment of the Riga city Vidzemes district court in the case: No C30221807, unpublished.

²⁰⁰ ECtHR. Press Release of 12.7.2011. Available at: <http://hudoc.echr.coe.int>.

²⁰¹ Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Kommentar. Rauscher T. (Hrsg.). EG-InsVO, Mäsch P., Art. 1. Sellier, 2010, S. 891.

- [263]** Article 1(1) of the Insolvency Regulation provides that the Regulation applies “to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator”. As noted by the CJEU in its *EuroFood* judgment, the wording of Article 1(1) of the Regulation means that all four criteria have to be met for application of the Insolvency Regulation: 1) proceedings must be collective, 2) they are based on debtor’s insolvency, 3) they entail partial divestment of debtor’s property and 4) are supervised by a liquidator.²⁰² However, Article 2(a) of the Insolvency Regulation is merely confusing, because it refers to Annex A as a conclusive list of insolvency proceedings. This list is exhaustive and cannot be extended.²⁰³ But in practice the interrelation between Article 1(1), Article 2(a) and Annex A of the Insolvency Regulation is unclear. This can be seen from the CJEU’s judgment in the *Ulf Kazimierz Radziejewski* case²⁰⁴ regarding debt relief proceedings in **Sweden**.²⁰⁵
- [264]** In the case the Swedish government noted that the Insolvency Regulation is not applicable to debt relief proceedings for two reasons. Firstly, the debt relief procedure does not entail divestment of the debtor. Secondly, the debt relief proceedings were not enlisted in Annex A of the Insolvency Regulation.
- [265]** Even though the preliminary ruling in the *Ulf Kazimierz Radziejewski* case primarily concerned the balance between the fundamental freedom of movement and conflict with the Swedish Law on Debt Relief, Advocate General Sharpston made her observations regarding argumentation on application of the Insolvency Regulation to debt relief proceedings made by the Swedish government. She noted that the Insolvency Regulation is not applicable, because Annex A to the Insolvency Regulation indeed does not list debt relief, and additionally, divestment of the debtor is not part of debt relief under the Swedish law.²⁰⁶
- [266]** This suggests a two-step test for application of the Insolvency Regulation. Firstly, the law-applier must make sure that certain proceedings are listed in Annex A of the Insolvency Proceedings, but, secondly, that all four criteria under Article 1(1) of the Insolvency Regulation are met.
- [267]** The Researchers note that the Insolvency Proposal²⁰⁷ gives an updated list of national procedures in Member States that provide for restructuring of companies at the pre-insolvency stage. Even though it is not part of the Insolvency Regulation, the law-applier should make sure whether an insolvency proceeding in question is not enlisted in the Insolvency Proposal.



The Insolvency Regulation is applicable to insolvency proceedings launched before the accession of the Member State, but after entering into force of the Insolvency Regulation, if it remained pending also after the accession of the new Member State (*ratione temporis*).

202 2 May 2006 CJEU judgment in case: No. C-341/04 Eurofood IFSC Ltd., para. 46.

203 Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Kommentar. Rauscher T. (Hrsg.). EG-InsVO, Mäsch P, Art. 1. Sellier, 2010, S. 874.

204 8 November 2012 CJEU judgment in case: No. C-461/11 *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm*.

205 The Swedish Law on Debt Relief provides for debt relief proceedings (*skuldsaneringslagen*) under which natural persons are eligible for complete or partial debt relief (*skuldsanering*). Debt relief is granted only to persons residing in **Sweden** that are insolvent and presumed to be unable to pay the debts within a foreseeable period, and it is reasonable to grant debt relief. To invoke the proceedings the debtor has to apply to the Swedish Enforcement Agency (*Kronofogden*) and declare all income and expenditures. Then the *Kronofogden* determines whether the debtor generally fulfills the requirements under the Swedish Law on Debt Relief.

206 13 September 2012 Advocate General Sharpston opinion in case: No. C-461/11 *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm*, para. 42.

207 Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM (2012) 744).

[268] The CJEU judgment in *ERSTE Bank Hungary*²⁰⁸ clarified the *ratione temporis* application of the Insolvency Regulation. The Supreme Court of **Hungary** reviewed a case arising from insolvency proceedings in Austria that were initiated before Hungary's accession to the EU.²⁰⁹ The Supreme Court of Hungary referred a preliminary question to the CJEU regarding the scope of Article 5(1) of the Insolvency Regulation.²¹⁰ The CJEU in the *ERSTE Bank Hungary*²¹¹ case noted that Article 5(1) of the Insolvency Regulation shall be applied and accordingly "*the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated in another Member State at the time of the opening of the proceedings.*"²¹² Thus the CJEU also confirmed that the Insolvency Regulation is applicable to insolvency proceedings that were initiated after coming into force of the Insolvency Regulation, but before accession of the (new) Member State.

[269] Such interpretation of the Insolvency Regulation, however, shifts the jurisdiction of the national courts of the (new) Member States, due to immediate application of the Insolvency Regulation.²¹³ In the case before the Supreme Court of Hungary²¹⁴ it should be the jurisdiction of the Hungarian courts to review the matter if the registered seat of the company in question is in Hungary²¹⁵. After the CJEU judgment in *ERSTE Bank Hungary* the jurisdiction of Austrian courts was recognised, due to the assumption that COMI in the current case was in the territory of Austria.²¹⁶ Similarly, **Latvian** courts had exclusive jurisdiction over the insolvency proceedings of the company in question if its registered address was in the territory of Latvia.²¹⁷

[270] Therefore, notwithstanding the clear wording of Article 43 of the Insolvency Regulation, it is not sufficient for determination of application of *ratione temporis*, and the conclusions drawn from *ERSTE Bank Hungary* must be applied in favour of existing insolvency proceedings.



COMI of a company is subject to autonomous interpretation and is presumed to be located in the place of registration, and it may be rebutted only if objective factors exist and they are clearly ascertainable by third parties (three-step test).

[271] Some authors have emphasised that COMI must be determined in accordance with the domestic law of the state of registration²¹⁸, but this approach would be contrary to Recital 4 of the Insolvency

208 5 July 2012 CJEU judgment in case: No. C-527/10 *ERSTE Bank Hungary Nyrt* Republic of Hungary, BCL Trading GmbH, ERSTE Befektetési Zrt.

209 13 November 2012 Supreme Court of Republic of Hungary judgment in case: No. Gfv.VII.30.236/2012/5, unpublished.

210 The Supreme Court of Hungary wanted to know whether the fact that the debtor's asset (in the present case, that held by an Austrian company and the monetary sums which replaced them) over which the third parties have a right *in rem* (namely, the financial security provided in favour of bank) is situated within the territory of a Member State (here, **Hungary**), other than that in which the insolvency proceedings were opened (here, Austria), in a case where the State in which the asset concerned is located became a Member State of the EU only after the insolvency proceedings had been opened against the debtor.

211 5 July 2012 CJEU judgment in case: No. C-527/10 *ERSTE Bank Hungary Nyrt* Republic of Hungary, BCL Trading GmbH, ERSTE Befektetési Zrt.

212 *Ibid.*, para. 40.

213 See, e.g., Nagy C.I. The application *ratione temporis* of the insolvency regulation in new Member States. *International and Comparative Law Quarterly*, 2013, Vol. 62(4), pp. 941 – 954.

214 13 November 2012 Supreme Court of the Republic of Hungary judgment in case: No. Gfv.VII.30.236/2012/5, unpublished.

215 Section 62/A(g) of the Hungarian Act on Private International Law.

216 26 January 2012 Advocate General Mazák opinion in case: No. C-527/10 *ERSTE Bank Hungary Nyrt* Republic of Hungary, BCL Trading GmbH, ERSTE Befektetési Zrt., para. 42.

217 Article 342 of the Civil Procedure Code of the Republic of Latvia (as of 07.11.2003.).

218 Khairallah G. The 'Centre of Debtor's Main Interests': Comments on the Eurofood Judgment of the ECJ. In: Ringe W.-G., Gullifer L., Théry P. (eds). *Current Issues in European Financial and Insolvency Law*. Bloomsbury Publishing, 2009, p. 113-114.

Regulation, therefore, COMI should be interpreted autonomously. *EuroFood* judgment²¹⁹ is one of the milestone judgments where the main principles for determination of COMI were established²²⁰.

- [272]** This leads to the three-step test for determination of COMI. Firstly, COMI is presumed to exist in the Member State of registration of the company. Secondly, such presumption may be rebutted only if objective circumstances exist and allow the conclusion that COMI is located in a different Member State. Thirdly, third parties (creditors) must be aware of such objective circumstances. The protection of creditors therefore, was made essential by the CJEU in the *EuroFood* judgment. This approach is based on the “*real seat*” theory, developed in Continental company law²²¹ and focuses on the impression generated in the eyes of creditors as to the place of the debtor’s decision management. English courts prefer to emphasize the place where decisions are made as the main connecting factor between the debtor and COMI.²²²
- [273]** The so-called *EuroFood* test has been applied and thus clarified by courts of Member States on numerous occasions. There are different criteria that scholars have offered as crucial for determination of COMI.²²³
- [274]** A judgment of the Chancery Division²²⁴ (the **U.K.**) proves the importance of the *EuroFood* judgment for national courts. In the case the Chancery Division applied the *EuroFood* test and concluded that COMI is located where all management decisions were taken (London), not in the place of registration (Luxembourg), and agents as third persons who primarily dealt with the company in question were fully aware of this. ²²⁵ The approach of the English court, therefore, allows for easy identification of the COMI of legal persons.
- [275]** The practice of the CJEU does not give clear guidelines for determination of COMI. Therefore, the courts of Member States must assess all factual circumstances that might indicate the location of COMI, whether it is place of management, place of providing services, information on the company’s webpage, etc. However, the interests of creditors have to be considered at all cases.



Courts of Member States have jurisdiction in recovery actions where the defendant is resident in a third country.

- [276]** It was ruled by the CJEU in the *Schmid* case,²²⁶ where a reference for a preliminary ruling was made by the Federal Court of Justice of **Germany** that the Insolvency Regulation grants jurisdiction also in recovery cases where the defendant is a resident in a third country (Switzerland). Thus the court found that the Insolvency Regulation unlike other regulations does not require the presence of

219 2 May 2006 CJEU judgment in case: No. C-341/04 Eurofood IFSC Ltd.

220 *Ibid.*, para. 37:

[w]here a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

221 Paschalidis P. *Freedom of Establishment and Private International Law for Corporations*. Oxford University Press, 2012, para. 89.

222 Pannen K. (ed.). *European Insolvency Regulation*. De Gruyter, 2007, p. 96.

223 *Ibid.*, pp. 96-102.

224 09 October 2013 England and Wales High Court (Chancery Division Companies Court) judgment in case: ARM Asset Backed Securities SA, Re [2013] EWHC 3351 (Ch).

225 *Ibid.*, paras. 19-22.

226 16 January 2014 CJEU judgment in case: No. C-328/12 Ralph Schmid v Lilly Hertel.

connecting factors with the territory or legal system of at least two Member States.²²⁷ The only condition is a presence of COMI of the defendant with the territory of the EU.²²⁸

- [277] The judgment in **Schmid** indicates that the wording of the Insolvency Regulation is not sufficiently clear regarding the extension of jurisdiction over insolvency proceedings that the Insolvency Regulation grants in comparison with other regulations in the area of civil justice.
- [278] However, even though this approach binds the courts of the Member States, it obviously does not bind third countries,²²⁹ therefore, effectiveness of recovery actions is not granted. Using the aforementioned examples from the **Hungarian** Act on Private International Law and the Civil Procedure Code of the Republic of **Latvia**, should the laws of the third country grant exclusive jurisdiction of the courts of the third country, the applicants should choose the most beneficial forum considering the enforcement of the recovery action.
- [279] The Researchers note that the **Swedish** courts have applied the Insolvency Regulation in accordance with the CJEU conclusions in **Schmid** in recovery actions against debtors in Norway²³⁰ and Denmark,²³¹ even before the **Schmid** judgment was delivered. However, the court made the additional evaluation whether such approach is consistent with existing multilateral treaties²³² between the Member State (Sweden) and third countries (Norway and Denmark).

9.1. Determination of COMI of natural persons



COMI of natural persons should be subject to autonomous interpretation by the CJEU. Presumption of COMI of natural persons does not exist under EU law, and COMI must be determined on a case-by-case basis.

- [280] Article 3 of the Insolvency Regulation does not expressly mention COMI of a natural person, nevertheless, the Regulation applies to insolvency proceedings of legal and natural persons alike.²³³
- [281] English practice shows that **EuroFood**²³⁴ and later CJEU judgments, elaborating the test applicable for determination of COMI of legal persons, are useful for determination of COMI of a natural person. In a recent case two Irish citizens who through various corporate vehicles owned properties in the **U.K., Sweden** and America, presented petitions for bankruptcy in the U.K.²³⁵
- [282] The court adjudged the case by setting up circumstances that determined COMI through references to CJEU case law and earlier English case law, applying the principles developed in the **EuroFood** and **Interedil**²³⁶ cases. The court focused on circumstances that were ascertainable by third persons. The court, therefore, considered where the petitioners had pursued economic activity that was

227 Ibid., paras. 24, 25, 26 and 29.

228 Idot L. Procédures d'insolvabilité. Champ d'application territorial du règlement. Europe Jurisclasseur. Mars 2014, p. 36.

229 10 September 2013 Opinion of Advocate General Sharpstone in case: No. C-328/12 Ralph Schmid v Lilly Hertel, para. 36.

230 31 January 2013 Högsta domstolen judgment in case: Ö743-11 (alt NJA 2013:22).

231 30 December 2010 Högsta domstolen judgment in case: Ö2782-10, (alt NJA 2010:734).

232 The Nordic Bankruptcy Convention, see in: Berglund M. Cross-border Enforcement of Claims in the EU: History, Present Time and Future. Kluwer Law International, 2009, p.80.

233 Pannen K. (ed.). European Insolvency Regulation. De Gruyter, 2007, p. 41.

234 2 May 2006 CJEU judgment in case: No. C-341/04 Eurofood IFSC Ltd.

235 21 December 2012 England and Wales High Court (Chancery Division in Bankruptcy) judgment in case: O'Donnell & Anor v The Bank of Ireland [2012] EWHC 3749 (Ch).

236 20 October 2011 CJEU judgment in case: No. C-396/09 Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA.

ascertainable to third parties and, doing so, the court used a number of circumstances, for example, time spent in England and usage of the address in England. However, the court also considered facts that pointed towards COMI in Ireland, for instance, a website where the petitioner was described as a “*Dublin lawyer*”, “*Dublin solicitor*”, “*Dublin-based solicitor*” and “*Irish solicitor*”; the fact that decisions were taken mostly in Ireland; a Dublin address being mentioned in various transaction documents; and witnesses’ statements. These facts indicated that third parties assumed that the petitioners’ COMI is in Dublin.

[283] Taking into account all the circumstances, the court concluded that the COMI remained in Ireland. Thus, even though not explicitly mentioned, the test developed in the **Euro Food** judgment is useful also for determination of COMI of natural persons.



Declaration (place of registered address) is only one of the circumstances to be taken into account for determination of COMI, but it does not lead to any presumption of the location of COMI.

[284] The foregoing approach should be contrasted with that of the **Latvian** courts. In one case the court applied **Interedil** and other CJEU judgments (presumably the **EuroFood** judgment) by analogy where a Lithuanian citizen motioned for opening of insolvency proceedings in Latvia²³⁷ pursuant to his declaration.²³⁸ The Latvian court focused mostly on publicly available information, including the place of declaration for the natural person as primary source for jurisdiction under the Civil Law, rather than the impression of COMI of third persons.

[285] The court considered the place of declaration (registered address) as presumption of COMI under Article 3(1) of the Insolvency Regulation, similar to the CJEU’s conclusions in **EuroFood**. The court supported its opinion with a commentary of legal scholars of the national law. Thus the court applied the **EuroFood** test to a natural person, but also relied on national interpretation of the Insolvency Regulation. Even though the court did not find its jurisdiction due to circumstances that showed the debtor’s intention to seek a more favourable legal position through change of registered address, the court assumed that Article 3(1) creates a presumption of COMI regarding natural persons.

[286] Such approach of the Latvian court is dangerous for two reasons. Firstly, the court based its conclusion of COMI on domestic understanding of declaration (registration of address) as an indication of COMI, notwithstanding that a declaration does not create a permanent link with a particular place. Foreign creditors that are unfamiliar with the declaration system might not be aware of the importance of declaration, therefore, declaration itself does not allow to presume the location of COMI.

[287] Secondly, the court used a commentary of legal scholars of the national law to for application of the Insolvency Regulation. Insolvency Regulation should not be interpreted in accordance with the national understanding of insolvency proceedings, as it encumbers harmonization of cross-border insolvency proceedings. Therefore, reliance on national law and national legal commentaries in other circumstances could lead to incorrect interpretation of the Insolvency Regulation and notions of CJEU case law regarding the autonomous definition of COMI.²³⁹

[288] A similar approach considering the declaration principle as a presumption for the location of COMI can be seen in Swedish practice. In a case the Supreme Court of **Sweden** applied the findings of

²³⁷ In accordance with Article 366.22 (1) of the Civil Procedure Law of the Republic of Latvia.

²³⁸ 10 December 2013 Vidzemes Regional Court decision in case: No. CA-0239-13/9, unpublished.

²³⁹ 2 May 2006 CJEU judgment in case: No. C-341/04 Eurofood IFSC Ltd., para. 31.

the CJEU in its **EuroFood** judgment and **Staubitz-Schreiber**²⁴⁰ and found that under Article 3(1) of the Insolvency Regulation and its autonomous interpretation in **EuroFood** judgment there is a rebuttable presumption that a national registration in Sweden corresponds to a person's COMI, unless otherwise proved.

[289] The court found that at the moment of opening of insolvency proceedings the debtor owned property in Sweden, paid maintenance for children in Sweden and also had tax liabilities and parking fines imposed in Sweden; hence, COMI at the moment of opening of insolvency proceedings undoubtedly was located in Sweden. Thus the Swedish court both relied on the national registration fact, but also intended to verify the facts that prove where COMI was located at the moment of opening of insolvency proceedings. Thus it shows that even if national registration is used as a presumption, the burden of proof lies with the party to prove that the presumed location of COMI is objectively ascertainable by any third person.

[290] It must be noted from the reviewed cases and previous research²⁴¹ that Lithuanian citizens have often used declaration as an attempt to claim relocation of COMI to open insolvency proceedings in **Latvia** or the **U.K.** For instance, in **Germany** this problem can be seen with formal change of registered address to departments of *Elsass-Lothringen* in France (*Haut-Rhin, Bas-Rhin, Moselle*) where the Insolvency Act of 1985/1994 is beneficial for natural persons.²⁴² Therefore, courts should specifically avoid presuming the location of COMI in the Member State of declaration. As location of COMI is of paramount importance for effective application of the Insolvency Regulation,²⁴³ the courts should in all cases refer to the existing case law of the CJEU to correctly apply the concept of COMI in cases regarding natural persons in order to avoid *forum-shopping* situations.



Heidelberg-Luxembourg-Vienna Report is recommended as a source for interpretation of the Insolvency Regulation.

[291] These guidelines focus on the practical problems for application of the Insolvency Regulation that were discovered during the study visits. The Researchers note that recently a thorough evaluation of the Insolvency Regulation has been made in the Heidelberg-Luxembourg-Vienna Report,²⁴⁴ which should be used as an authoritative source for interpretation of the Insolvency Regulation.

10. Other Matters

10.1. Family Matters



Application of the Brussels IIbis Regulation requires determination of its scope.

240 17 January 2006 CJEU judgment in case: No. C-1/04 Susanne Staubitz-Schreiber.

241 Hess B., Oberhammer P., Pfeiffer T. European Insolvency Law. The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No. 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), p. 139. Available at: <http://www.mpi.lu/news-and-events/latest-news/detail/detail/the-external-evaluation-of-reg-no-13462000ec-on-insolvency-proceedings/>.

242 Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Kommentar. Rauscher T. (Hrsg.). EG-InsVO, Mäsch P, Art. 1. Sellier, 2010, S. 899.

243 Hess B., Oberhammer P., Pfeiffer T. European Insolvency Law. The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No. 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), p. 103. Available at: <http://www.mpi.lu/news-and-events/latest-news/detail/detail/the-external-evaluation-of-reg-no-13462000ec-on-insolvency-proceedings/>.

244 Hess B., Oberhammer P., Pfeiffer T. European Insolvency Law. The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No. 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4). Available at: <http://www.mpi.lu/news-and-events/latest-news/detail/detail/the-external-evaluation-of-reg-no-13462000ec-on-insolvency-proceedings/>.

[292] Like other EU instruments, the Brussels IIbis Regulation cannot be applied beyond its scope. Thus, the first step for its application is determination of its scope. The scope consists of a cross-border element and temporal, geographical and material aspects of the scope.



The Brussels IIbis Regulation applies to disputes having cross-border element.

[293] Presence of a cross-border element is a precondition for application of the Brussels IIbis Regulation.²⁴⁵ Thus, for example, divorce proceedings between two persons having common habitual residence in **Hungary** and all other elements pointing towards that state would not put into question application of the regulation. However, once a cross-border element is present, the regulation must be applied, provided other elements of its scope are satisfied. In cases of recognition and enforcement of foreign judgments, no additional cross-border element is necessary. The very fact that a foreign judgment is recognized or enforced abroad is sufficient to trigger application of the regulation, provided the dispute in question falls within its scope.



The adjudicator must verify the temporal scope of the Brussels IIbis Regulation.

[294] The temporal scope of the Brussels IIbis Regulation is of theoretical relevance, since the regulation is already applicable for ten years. Nevertheless, Article 72(2) provides that “[t]he Regulation shall apply from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004.”



Adjudicator must verify the territorial scope of the Brussels IIbis Regulation

[295] The Brussels IIbis Regulation applies in all Member States, except Denmark. In accordance with Article 2(3), Denmark is not treated as a Member State for the purposes of the regulation. *Inter alia*, this means that judgments rendered in Denmark are not recognized and enforced in accordance with the regulation. Courts in other Member States are bound by the regulation.



Adjudicator must verify the material scope of the Brussels IIbis Regulation.

[296] The material scope of the Brussels IIbis Regulation is determined by Article 1 of the regulation. Firstly, regulation applies only to civil matters. Secondly, Article 1(1) separates two different types of legal matters covered by the regulation. First – divorce, legal separation or marriage annulment. Second – the attribution, exercise, delegation, restriction or termination of parental responsibility. Article 1(3) expressly excludes certain matters from the material scope of the regulation.

[297] All these concepts are autonomous, and thus a Member State court may not interpret them in accordance with its national law.²⁴⁶ Thus, distinction between civil matters and public matters is treated autonomously.²⁴⁷ For example, in regards to parental responsibility, the regulation applies to *“the placement of a child in a foster family or in institutional care [and] [t]he placement of a child under the supervision of a youth protection service [.]”*²⁴⁸ The regulation applies to these measures even if under national law they are considered public law measures.²⁴⁹ Likewise, *“[t]he restriction or termination of parental responsibility is always a civil matter, even when pronounced by an administrative*

245 Magnus U., Mankowski P., Magnus I. (ed.). Brussels IIbis Regulation. SELP, 2012, p. 41.

246 Ibid, p. 31.

247 Ibid., p. 56.

248 Ibid.

249 Ibid.

body or as a side effect of a penal conviction.”²⁵⁰ An adjudicator must take into account that Article 1(3) expressly excludes certain matters from the scope of the regulation. Exclusions are likewise interpreted autonomously.



Provided all aspects of the scope are satisfied, an adjudicator must determine jurisdiction and recognize and enforce foreign judgments based on the rules of the Brussels Ibis Regulation.

- [298]** Once the scope of the Brussels Ibis Regulation is satisfied, a court must apply it. This means that the Brussels Ibis Regulation will supply rules on jurisdiction. In addition, the regulation provides rules on *lis pendens* and dependent actions (Article 19), recognition and enforcement of judgments (Article 21 *et seq.*), authentic instruments (Article 46) and certain other legal rules.
- [299]** Unlike the Brussels Ibis Regulation, the Brussels IIbis Regulation does not have a default jurisdiction rule like that of domicile. Thus, an adjudicator must determine whether the court in question has jurisdiction under the general rules of jurisdiction. For cases of divorce, legal separation and marriage annulment, such rules are provided by Articles 3-6 of the Brussels IIbis Regulation. For matters related to parental responsibility – by Articles 8-13 of the Brussels IIbis Regulation. Articles 7 and 14 of the Brussels IIbis Regulation make references to residual jurisdiction, i.e. allowing courts to establish jurisdiction based on national laws, when otherwise there is no jurisdiction under the regulation.
- [300]** It is possible that neither application of the Brussels IIbis Regulation, nor that of national rules within the limits of Articles 7 and 14 will secure jurisdiction of a Member State court. Thus, a **Latvian** court will not have jurisdiction over a divorce by spouses having their habitual residence in a third state, when one of them is a Latvian national. The court will have no jurisdiction, even though the Brussels IIbis Regulation is applicable.



Residual jurisdiction of the Brussels IIbis Regulation can be relied upon only when no other Member State court would have jurisdiction based on the regulation.

- [301]** The problem with correct understanding of the hierarchy between Brussels IIbis Regulation rules is demonstrated by at least one case. A **Latvian** court rendered the following decision:²⁵¹ a mother brought a claim before a Latvian court with a view to depriving the father of parental responsibility rights. The court found that both the mother and her child lived in Spain. The court rejected the claim. But it is more important how it reached such result.
- [302]** The court referred to Article 14 of Brussels IIbis Regulation, stating that “*where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.*” The court then referred to the Civil Procedure Law, only to conclude that the law in question supplied no jurisdiction.
- [303]** This reasoning is not entirely correct. The Brussels IIbis Regulation has its own hierarchy of jurisdictional rules. Articles 8-13 of the Brussels IIbis Regulation provide a rather complex scheme of jurisdictional rules. Article 14 provides residual jurisdiction. Under the principle of residual jurisdiction, a court may establish jurisdiction under its own national rules, even if they are based on nationality of parties. However, this rule applies only in one scenario: once the Member State court is assured that in accordance with the rules of the Brussels IIbis Regulation no other Member State court will

250 Ibid.

251 30 September 2013 Rigas District Court decision in case: No. CA-3499-13, unpublished.

have jurisdiction under general rules. This will happen “when the connecting factor of the relevant jurisdictional rule is located outside the European Union.”²⁵²

[304] Article 8 of the Brussels IIbis Regulation provides that “the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.” In the aforementioned case, a child had a habitual residence in Spain. Thus, a Spanish court had jurisdiction. A Latvian court, therefore, could not have even considered application of residual jurisdiction under Article 14, since “if the child’s habitual residence is located in a Member State, jurisdiction of the court of that State for parental responsibility matters will always be found in article 8.”²⁵³

[305] The same principle applies with regard to divorce, separation and marriage annulment. Here, general rules on jurisdiction are determined by Articles 3-6 of the Brussels IIbis Regulation. If the court in question identifies that any other Member State will have jurisdiction under any of the headings, it must reject the jurisdiction. Only if no other Member State court will have jurisdiction under general rules, a Member State court can turn to use of residual jurisdiction, based on its national law.²⁵⁴



The Brussels IIbis Regulation does not provide for prorogation of jurisdiction in matters related to divorce, legal separation or marriage annulment. Thus, an adjudicator must verify whether jurisdiction is based upon the grounds provided in the regulation.

[306] In one **Latvian** judgment, a court evaded determining jurisdiction in a divorce matter based upon the rules of the Brussels IIbis Regulation.²⁵⁵ In the case at hand, a person brought a divorce claim before a Latvian court. The court found that the claimant, contrary to the requirements of Article 1(a), had not proved being a habitual resident in Latvia for at least a year immediately before the application was made. Instead, the court relied on procedural economy under Latvian law, claiming that none of the parties argued against jurisdiction. Such approach does not take into account that jurisdiction rules under the Brussels IIbis Regulation coordinate allocation of cases among Member State courts. A court cannot just consider that a case falls within its jurisdiction, when the regulation does not allow doing so; this would deprive another, more convenient, forum of jurisdiction.

[307] The Brussels IIbis Regulation does not provide rules akin to those of the Brussels Ibis Regulation, allowing to prorogate jurisdiction by an agreement or appearance before a court. No derogation from jurisdictional rules “is admissible in matters of divorce or dissolution of marriage, but for Art. 3 (1) (a) 4th lemma.”²⁵⁶ Parties may neither deprive a Member State court of its jurisdiction, nor vest a Member State court with jurisdiction by explicit or implicit agreements.²⁵⁷ Thus, an adjudicator must follow the existing rules of the Brussels IIbis Regulation.

[308] Moreover, it is important to emphasize that in accordance with Article 17 of the Brussels IIbis Regulation: “[w]here a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.” This provision “establishes an independent responsibility of the court to investigate and determine, of its own motion, in compliance with the Regulation, whether jurisdiction lies with the court or not.”²⁵⁸ The duty of a court to examine the rules on

252 Magnus U., Mankowski P., Magnus I. (ed.). Brussels IIbis Regulation. SELP, 2012, p. 162.

253 Ibid., p. 162.

254 Ibid.

255 22 April 2014 Rigas District decision in case: No. C24113111, unpublished.

256 Magnus U., Mankowski P., Magnus I. (ed.). Brussels IIbis Regulation. SELP, 2012, p. 47.

257 Ibid.

258 Ibid.

jurisdiction on its own motion neither depends, nor may be limited by the procedural law of the forum.²⁵⁹ Moreover, all instances, even the highest instance, must verify their own jurisdiction, notwithstanding any procedural rules that may limit the competence of the highest instance court.²⁶⁰

- [309]** The position is different under the Brussels Ibis Regulation, where in accordance with the case law of the CJEU, a defendant that argues on substance, without invoking the lack of jurisdiction, submits itself to the court, except in cases of exclusive jurisdiction.²⁶¹ The same principle applies under Article 5 of the Maintenance Regulation.



Both jurisdictional and conflict-of-laws rules in matters relating to maintenance obligations are supplied by the Maintenance Regulation, thus creating a separate regime for maintenance claims. Likewise, rules on *lis pendens*, provisional measures, rights to legal aid and recognition and enforcement of decisions are provided by the said regulation. The regulation also governs recognition and enforcement of court settlements and authentic instruments.

- [310]** As with other instruments, the Maintenance Regulation applies within the limits of its scope. The Maintenance Regulation is binding on all EU Member States, including Denmark. The regulation applies “*in full*” from 11 June 2011 (Article 76(3)). However, its temporal scope in regards to specific events – court proceedings, court settlements and authentic instruments – is specified in Article 75.

- [311]** Finally, it is necessary to determine the material scope of the regulation before its application. Article 1(1) provides that the regulation applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity. The regulation does not define the “*maintenance*”²⁶² The concept of maintenance is autonomous, and CJEU case law on the Brussels regime remains pertinent for its interpretation in the context of the Maintenance Regulation.²⁶³

- [312]** For the purposes of the Brussels Regime, the CJEU has rules that a decision ordering a payment of a lump sum and transfer of property by a party to a former spouse qualifies as maintenance. The CJEU set comparatively vague criteria. In its own words:

*[I]t should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not, therefore, be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond. [...] It makes no difference in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a predetermined level of income.*²⁶⁴

- [313]** Taking into account the aforementioned judgment of the CJEU, it is advised that any court be as clear and precise as possible in identifying whether the decision concerns a maintenance obligation, whether a provision awarded is designed to enable the creditor to provide for himself

259 *Ibid.*, p.206.

260 *Ibid.*, p. 207.

261 See also: 7 March 1985 CJEU judgment in case: No. C-48/84: Hannelore Spitzley v Sommer Exploitation SA.

262 Briggs A. *Private International Law in English Courts*. Oxford University Press, 2014, para. 12.129.

263 *Ibid.*, para. 12.130.

264 27 February 1997 CJEU judgment in the case: No. C-220/95 Antonius van den Boogaard v Paula Laumen, paras. 22-23.

or herself and if his or her needs are taken into consideration when the amount is awarded. If the decision deals both with maintenance and some other legal relation, the court must specify which part concerns the maintenance obligation, identifying all the points described above in regards to the said part of the decision.

- [314]** It is necessary to keep in mind that criteria set out by the CJEU were made in relation to recognition and enforcement of a foreign decision. The subtle distinction developed by the CJEU is not always workable in practice, since different Member States may interpret criteria set out by the judgment of the CJEU differently, or be cryptic about the true nature of the sum awarded. It is perhaps unsatisfactory that application of the Maintenance Regulation depends on second guessing another court's thinking.
- [315]** The criteria developed by the CJEU are more workable at the stage of evaluating jurisdiction. In light of CJEU case law, a court shall apply the regulation if the obligation in question arises from a family relationship, parentage, marriage or affinity, and the award, whether in lump sum, period payments or transfer of property, is designed to enable the creditor to provide for himself or herself and takes into account his or her needs.
- [316]** Once a national court has determined the scope of the regulation, it has to apply its rules on jurisdiction. In respect of these and other rules, the Maintenance Regulation has precedence over the Brussels Ibis Regulation.
- [317]** Articles 3-7 of the Maintenance Regulation provide rules on jurisdiction. Notably, Article 3 contains a number of alternative jurisdictional choices for matters relating to maintenance obligations. These are non-hierarchical and are determined on a first-come, first-served basis. It is important to note that in comparison with the Brussels Ibis Regulation, the Maintenance Regulation limits the choice of court agreements to a few specific jurisdictions. Moreover, whereas the Brussels Ibis Regulation does not require mandatory written form for choice of court agreements, Article 4(2) of the Maintenance Regulation requires written form.
- [318]** Unlike the Brussels Ibis Regulation, the Maintenance Regulation provides a strict *lis pendens* rule (Article 12). Thus even if parties had made a choice of court agreement, a commencement of litigation before any Member State court prevents any other court from hearing the case, before the former has ruled upon its jurisdiction.
- [319]** The Maintenance Regulation also deals with conflict-of-laws rules. Article 15 provides that the law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations in the Member States bound by that instrument. In Member States not bound by the said protocol, like the **U.K.**, the law of forum remains applicable to maintenance obligations.²⁶⁵
- [320]** Likewise, the Maintenance Regulation governs recognition and enforcement of judgments made in a Member State, provided they fall within its scope. Like other EU instruments, the Maintenance Regulation does not deal with recognition and enforcement of maintenance decisions from courts outside the EU.²⁶⁶

10.2. Cross Border Legal Aid



A person shall have the right to receive legal aid in cross-border litigation cases.

²⁶⁵ Ibid., paras. 12.144-12.145.

²⁶⁶ Ibid., para. 12.126.

- [321]** Legal aid issues are covered not only by the Legal Aid Directive, but also, for example, by chapter V of the Maintenance Regulation, providing rules for access to justice. It was the goal of the EU legislator to provide for a very favourable legal aid scheme, thus special rules were added in addition to those provided in the Legal Aid Directive (Recital 36 the Maintenance Regulation).²⁶⁷
- [322]** The Legal Aid Directive shall be implemented in the national legislation. For example, **Latvia** has included the provisions on legal aid cross-border cases in the State Ensured Legal Aid Law.²⁶⁸ In **Hungary** the directive is implemented in Act No. 80 of 2003, denoting also the competent authority – the Legal Aid Agency. The Study Visits revealed that also in other countries, like **Sweden**, the Directive has been successfully implemented; however, there is no widespread awareness of this EU act among lawyers.
- [323]** When granting legal aid to a legal person, one shall follow the **DEB** case, where a preliminary ruling was motioned for by a court in **Germany**.²⁶⁹

10.3. Mediation



The Mediation Directive is an EU legal instrument, thus an adjudicator must interpret an act implementing the directive in accordance with the Mediation Directive. For this reason, an adjudicator must determine the scope of the Mediation Directive.

- [324]** The Mediation Directive is an EU legal instrument. However, as a directive it is not directly applicable in a Member State; the Member State court must instead apply its national acts, implementing the said directive. Nevertheless, this national act must be interpreted in light of the Mediation Directive. This duty of harmonized interpretation will apply only regarding matters falling within the scope of the Mediation Directive. Thus, for these reasons, an adjudicator may be required to determine the scope of the Mediation Directive.
- [325]** The Mediation Directive does not apply to all types of mediation. In fact, its scope is rather limited. Firstly, in accordance with Article 1(2) it applies only to civil or commercial matters. Secondly, it applies only to cross-border disputes. Thus, parties to the dispute must have domiciles or habitual residences in different Member States. This excludes disputes with both parties sharing domiciles or habitual residences and disputes where one or both parties have domiciles or habitual residences in a non-Member State.
- [326]** The use of alternative criteria – domicile and habitual residence – is unsatisfactory. Taking into account the recent adoption of the Brussels Ibis Regulation, Article 2(3) of the Mediation Directive must be read as referring to the Brussels Ibis Regulation, rather than the Brussels I Regulation. However, this does not solve the problem of the criteria set out in Article 2(3), since there is no guidance as to understanding of habitual residence. It is suggested to interpret the notion of habitual residence in light of the Rome I and Rome II Regulations.
- [327]** Finally, Article 3(a) specifies that the directive applies only to voluntary mediation. However, the same provision specifies that mediation may be suggested or ordered by a judge or even prescribed by law. Read in the light of Recital 13, it means that even if prescribed by law, the parties

²⁶⁷ There is no CJEU case law in applying this Regulation; however, the court refers to it regarding jurisdiction in matters relating to maintenance obligations in the L.V. M case. See: 12 November 2014 CJEU judgment in case: No. C-656/13 L.V. M, interveners R, K, para. 35.

²⁶⁸ State Ensured Legal Aid Law. Latvijas Vēstnesis [Latvia's Herald] No. 52, 01.04.2005.

²⁶⁹ 22 December 2010 CJEU judgment in case: No. C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland.

themselves must remain in charge of the mediation process, organize it as they wish and terminate it at any time. However, Article 3(a) provides another exception from the scope of the directive: it does not apply to attempts of the court to settle the dispute it is hearing at the moment.

[328] Provided the scope of the directive is satisfied, the Mediation Directive must be taken into account by a national judge interpreting and applying the national act implementing the directive.

✓ **An agreement resulting from mediation is not directly enforceable. Such agreement does not carry the force of a judgment or authentic instrument. Such agreement may become directly enforceable if confirmed by a decision, judgment, or authentic instrument in a Member State. Such decision, judgment or instrument is then enforceable under the Brussels Ibis Regulation, Brussels IIbis Regulation or Maintenance Regulation.**

✓ **An agreement resulting from mediation from may also include pecuniary claims. If such agreement is enforced in a court of a Member State without objection from the other party, it may be recognized and enforced in another Member State under the European Enforcement Order Regulation. Likewise, such agreement will be enforceable in another Member State by means of European Enforcement Order Regulation, if made through an authentic instrument.**

[329] A particular ambiguity was identified during the Study Visits – is an agreement resulting from mediation directly enforceable? Article 6(1) of the Mediation Directive does not establish any procedural effect for such agreements. Thus, they may be enforced through means available in national law for enforcement of other types of extrajudicial settlements. A court must pay particular attention to whether such agreements qualify as settlements, since the mere fact that the agreement has resulted from mediation proceedings should not deprive it of its legal effect under national law.

[330] The situation is different if a party brings a claim based on the agreement resulting from mediation. In such cases, if the claim is satisfied, it will be made into a judgment enforceable in other Member States under the Brussels Ibis Regulation. Likewise, if such agreement is made through an authentic instrument, the rules of the Brussels Ibis Regulation will allow enforcement of such authentic instrument in another Member State.

[331] Moreover, mediation is a relevant tool for resolution of disputes relating to parental responsibility and matrimonial matters. If an agreement resulting from mediation falls within the scope of the Brussels IIbis Regulation, then its provisions may be useful for recognition and enforcement of such agreement in other Member States. For example, if a Member State court has rendered a judgment confirming the agreement, it may be recognized and enforced abroad via the Brussels IIbis Regulation.

[332] Furthermore, Article 46 of the Brussels IIbis Regulation specifies that documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognized and declared enforceable under the same conditions as judgments. Here two situations must be distinguished.

[333] Firstly, an agreement resulting from mediation may be enforced as an authentic instrument, provided it is enforceable in accordance with the law of the Member State where it was drawn up or registered.²⁷⁰ For example, an agreement resulting from mediation drawn up by a **Hungarian** notary as an authentic instrument document must be recognized and enforced in **Sweden** based on the provisions of the Brussels IIbis Regulation, provided it is enforceable in Hungary.

270 Magnus U., Mankowski P. Magnus I. (ed.), Brussels IIbis Regulation. SELP, 2012, p. 383.

- [334]** Secondly, even private agreements resulting from mediation may be enforced under Article 46 of the Brussels Ibis Regulation. However, here the Brussels Ibis Regulation hides its Achilles heel. It remains unclear under which law a private agreement must be enforceable in order to benefit from Article 46 of the regulation. The law of the state where the mediation took place or where the agreement was concluded does not govern enforceability of such agreements.²⁷¹ Some authors argue that the law of the state with which the agreement is most closely connected must determine its enforceability.²⁷²
- [335]** The Brussels Ibis Regulation has another relevant omission. Article 46 subjects authentic documents and agreements, in respect of their recognition and enforcement, to the conditions applicable to judgments. Thus, presumably, a certificate provided by Article 39 of the regulation must be issued in respect of authentic instruments and agreements. However, Annexes to the regulation do not provide forms for authentic instruments and agreements. Thus, the forms have to be modified in order to make them appropriate for authentic instruments and agreements. Such certificate must be then issued by a competent court or authority under Article 39 for authentic instruments in the state of their registration or drawing and in respect of private agreements, most probably, the state that has the closest connection to the agreement.
- [336]** Overall, enforcement of agreements resulting from mediation via Article 46 of the Brussels Ibis Regulation seems extremely complicated, due to unsatisfactory drafting of the said provision and extreme uncertainty of the rules governing the enforcement procedure.
- [337]** If the agreement resulting from the mediation concerns a maintenance obligation, the agreement may be enforced in a form of an authentic instrument or judgment based on the provision of the Maintenance Regulation.
- [338]** Finally, if an agreement resulting from mediation proceedings concerns a pecuniary claim and is made in an authentic instrument or is approved by a court as a settlement, then it will fall within the scope of the European Enforcement Order Regulation. Likewise, if such uncontested pecuniary claim has been brought before a court, leading to a decision or judgment, it will be enforceable under the said regulation.



Currently, the interrelation of EU private international instruments does not favor mediation as the primary method of dispute resolution. Notably, the use of mediation collides with rigorous *lis pendens* rules under the Brussels Ibis Regulation, the Brussels Ibis Regulation and the Maintenance Regulation

- [339]** During the study visit to the **U.K.**, relations between the Brussels Ibis Regulation and the Brussels Ibis Regulation and mediation were particularly emphasized. This issue is becoming more pertinent since implementation of the Mediation Directive in Member States. Recital 6 of the Mediation Directive claims that “[m]ediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties.” In accordance with Recital 7, “[i]n order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.” The Mediation Directive is intended as an element of this legal framework.
- [340]** Unfortunately, this positive aspiration of the EU legislator, is hard to combine with the harsh realities of cross-border litigation in the EU. The Brussels Ibis, Brussels Ibis Regulations and Maintenance Regulation contain rigorous *lis pendens* rules. The Brussels Ibis Regulation has, however, more

271 Ibid., p. 384.

272 Ibid.

lenient rules on *lis pendens* than its predecessor. According to Article 29(1) of the Brussels Ibis Regulation, once a Member State court is seized with an action, every other court in the EU must stay proceedings. The first court then has to determine its own jurisdiction. An exception is provided in Article 31(2) – in case of prorogation of jurisdiction, the court allegedly chosen by parties remains competent to decide its own jurisdiction, even if being seized later. The Brussels Ibis Regulation contains no such exemption from *lis pendens* rules. Article 19(1) of the Brussels Ibis Regulation provides that starting an action in a Member State court prevents all other courts from deciding the matter. Article 12 of the Maintenance Regulation is substantially identical to Article 19 of the Brussels Ibis Regulation.

- [341] The possible conflict between these litigation regimes and mediation can be described by the following example. Jurisdiction in matters of divorce, legal separation or marriage annulment is established by Article 3 of the Brussels Ibis Regulation. The provision contains a non-hierarchical list of alternative jurisdictions. Thus, parties to a divorce dispute have a stimulus to seize a court as soon as possible in order to secure jurisdiction of the court that is most convenient to the particular party.
- [342] The described problem is not due to inappropriate application of EU instruments, but rather to hardly compatible policy objectives behind them. The *lis pendens* principle at the EU level is largely based on the principle of mutual trust and thus favors a neutral criterion of the time the claim is lodged to establish priorities among EU courts. Mediation, on the other hand, would most likely benefit from a legal regime that creates no stimuli to seize the court as soon as possible.

10.4. Cross Border Succession



The Succession Regulation will be applicable in Member States (except the U.K., Ireland and Denmark) as from 17 August 2015.

- [343] This Regulation will be a great challenge for Member States due to its material scope. For example, in **Germany** this Regulation will be implemented by a special law which will contain 40-60 articles. In **Latvia**, there will be some amendments to the Civil Procedure Act and to the Notaries Act.
- [344] According to the Transitional Provisions of the Regulation, it shall apply to the succession of persons who die on or after 17 August 2015. Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III of the Regulation or if it is valid in application of the rules of private international law which were in force at the time the choice was made in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed.



The concept of habitual residence of the deceased at the time of death must be understood autonomously.

- [345] According to Recital 23 and 24 of the Regulation, in order to determine habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned, taking into account the specific aims of this Regulation.

[346] In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons went to live abroad to work, sometimes for a long time, but maintained a close and stable connection with his State of origin. In this situation the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life were located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

10.5. Protection Measures



The Protection Measures Regulation applies only when recognition and enforcement of a protection measure ordered in one Member State is requested in another Member State. A protection measure must be an order by an appropriate issuing authority of the Member State and fall within the material scope of the Protection Measures Regulation. The protection measure must be ordered on or after 11 January 2015.

[347] The regulation applies only to cross-border cases, i.e. to cases where recognition and enforcement of a measure ordered in one Member State is sought in another Member State. For example, if a **Swedish** court receives an application for recognition and enforcement of an order issued by a **Hungarian** court, it must verify whether the order falls within the scope of the Protection Measures Regulation.

[348] The Protection Measures Regulation has its own distinctive scope. Firstly, it applies only to measures ordered by Member State authorities. Moreover, the regulation is not limited to measures ordered by courts. Article 3(4) defines the notion of an *'issuing authority'* as *"any judicial authority, or any other authority designated by a Member State as having competence in the matters falling within the scope of this Regulation, provided that such other authority offers guarantees to the parties with regard to impartiality, and that its decisions in relation to the protection measure may, under the law of the Member State in which it operates, be made subject to review by a judicial authority and have similar force and effects to those of a decision of a judicial authority on the same matter."* Recital 13 provides additional clarification, stating that *"this Regulation should apply to decisions of both judicial authorities and administrative authorities, provided that the latter offer guarantees with regard, in particular, to their impartiality and to the right of the parties to judicial review."* However, the same recital specifies that *"[i]n no event should police authorities be considered as issuing authorities within the meaning of this Regulation."* Any measures ordered by police or other authorities falling outside the definitions of the regulation do not benefit from the recognition and enforcement regime provided therein.

[349] Furthermore, Recital 10 specifies that the regulation applies only to protection measures ordered in civil matters. However, the notion has autonomous meaning and cannot depend solely on the nature of the issuing authority in the legal system of a Member State.

[350] A protection measure must impose an obligation on a person causing the risk. A person causing the risk is always a natural person. A protection measure must be ordered with *"a view to protecting another person, when the latter person's physical or psychological integrity may be at risk"*. Recital 6, however, specifies that the scope of the regulation goes beyond the narrow reading of the terms *"physical and psychological integrity"*. The regulation covers likewise cases *"where there exist serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence"*

in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion.” Thus, “physical and psychological integrity” encompasses personal liberty, security and sexual integrity.



In accordance with Article 4(1), a protection measure ordered in a Member State is to be recognized in another Member State without any special procedure or declaration of enforceability being required. A competent institution of a Member State addressed must not refuse to recognize a protection measure for the reason that its national legislation does not allow issuing such measure based on the existing facts.

- [351]** The Protection Measures Regulation prohibits a Member State to refuse recognition of a protection measure issued in another Member State, due to differences in their legal regimes. For example, recently the **Latvian** legislator amended the Civil Procedure Law.²⁷³ The amendments were made in order to provide Latvian courts with a right to order protection measures in civil matters. The amendment was, in fact, inspired by the Protection Measures Regulation.
- [352]** Notwithstanding that, the Latvian legislator turned out to be more cautious than its EU counterpart. For this reason, Article 25043 of the Civil Procedure Law provides that protection measures may be ordered only in specific disputes enumerated therein. In other types of civil disputes no such right is conferred on courts. This provision cannot interfere with the functioning of the regulation. Article 13(3) of the regulation provides that “*the recognition of the protection measure may not be refused on the ground that the law of the Member State addressed does not allow for such a measure based on the same facts.*” Thus, a Latvian court must recognize a protection measure ordered in a dispute that would not allow ordering a protection measure under the Latvian Civil Procedure Law.
- [353]** Article 13(1) of the Protection Measures Regulation provides that recognition and enforcement of a protection measure may be refused if manifestly contrary to public policy in the Member State addressed or irreconcilable with a judgment given or recognized in the Member State addressed. The regulation provides no other grounds for refusing recognition of the said measures.
- [354]** However, the practicalities of enforcement of particular measures are far from clear. Firstly, Recital 12 provides that the regulation “*does not oblige the Member States to modify their national systems so as to enable protection measures to be ordered in civil matters, or to introduce protection measures in civil matters for the application of this Regulation.*” Recital 18 specifies that the Protection Measures Regulation does not deal with enforcement of protection measures issued in another Member State. This is confirmed by Article 4(5), stating that the procedure for the enforcement of protection measures shall be governed by the law of the Member State addressed.
- [355]** This may cause problems with or even freeze enforcement of a measure totally unknown within the particular order. However, this is more of a theoretical problem, taking into account a comparatively narrow concept of protection measures under Article 3(1). In the case described above, where the Latvian legal system does not provide for issuing protection measures outside certain types of disputes, enforcement will not be affected. If the Latvian legal system has similar protection measures, but permits its use only in certain types of disputes, then it has to use these enforcement mechanisms to enforce a foreign protection measure.²⁷⁴
- [356]** It is more problematic that in accordance with Recital 18 sanctions for non-compliance with a particular measure are governed by the law of the Member State addressed. It may well be that

273 Section 305, Amendments to the Civil Procedure Law of the Republic of Latvia, adopted 13 February 2014, published in Latvijas Vēstnesis [Herald of Latvia] No. 41/5101, 26 February 2014.

274 Explanatory Memorandum in the Proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters (COM(2011) 276), p. 7.

in the issuing Member State non-compliance with the measure in question is a crime, while in another Member State non-compliance with a similar measure is sanctioned by a fine. Conversely, a sanction after recognition may turn out to be much more severe than that under the law of the issuing state.



The Protection Measures Regulation prevails over the Brussels Ibis Regulation. However, the Protection Measures Regulation has no priority over the Brussels IIbis Regulation. The relations between the Protection Measures Regulation and the Brussels IIbis Regulation are currently ambiguous.

- [357]** The Protection Measures Regulation governs cross-border recognition and enforcement of protection measures in the EU. Thus, if the same protection measure falls within the scope of the Brussels Ibis Regulation, its recognition and enforcement in other Member States is effectuated through application of the Protection Measures Regulation and not the Brussels Ibis Regulation.²⁷⁵ An exception applies to protection measures issued or recognized and enforced in Denmark. Denmark is bound by the Brussels Ibis Regulation, but not by the Protection Measures Regulation (see Recital 41 of the Protection Measures Regulation).
- [358]** The situation is different in relation to the Brussels IIbis Regulation. Article 2(3) of the Protection Measures Regulation specifies that the regulation shall not apply to protection measures falling within the scope of the Brussels IIbis Regulation. When adopting such provision, the EU legislator has probably thought that, for example, a Member State court could issue an order in the course of ongoing divorce proceedings prohibiting a husband from approaching a wife closer than some prescribed distance.
- [359]** However, it is possible that the EU legislator has made an error interpreting its own legal instruments. Article 2(4) of the Brussels IIbis Regulation defines a judgment as *“a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision.”* The Brussels IIbis Regulation then establishes the regime for recognition and enforcement of judgments (Article 21 *et seq.*). Thus, it is not clear whether the Brussels IIbis Regulation established a regime for recognition and enforcement of protective measures, since such decisions may fall short of the definition of the judgment.
- [360]** Moreover, the same argument may be reiterated in respect of divorce, legal separation or marriage annulment proceedings based on different grounds. Recital 8 of the Brussels IIbis Regulation specifies that *“as regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.”* This poses a legitimate question whether protection measures even fall within the material scope of the Brussels IIbis Regulation to begin with, or whether they would fall within the scope of the ancillary measures mentioned in Recital 8.
- [361]** Thus, it remains unclear whether at all, and if yes, to what degree, there is a competition between the Brussels IIbis Regulation and the Protection Measures Regulation. However, if such competition exists, then its result is not satisfactory. The recognition and enforcement procedure under the Brussels IIbis Regulation is more complicated than that under the Protection Measures Regulation. Hence, non-married couples, same-sex couples or neighbours have a faster and cheaper recognition and enforcement procedure of protection measures at their disposal than married couples participating in ongoing divorce, legal separation or marriage annulment proceedings.

²⁷⁵ *Ibid.*, p. 6.

PART 2: ADOPTION, TRANSPOSITION AND CONTROL OVER TRANSPOSITION OF EU LAW IN THE AREA OF CIVIL JUSTICE

1. Adoption of EU law in the area of civil justice



The current legal framework in the area of civil justice in the EU is excessively fragmented and hard to grasp for non-experts. Therefore, the EU legislative policy in the area of civil justice should be oriented to remedy these shortcomings. The overall reduction of legal fragmentation should be kept as an aim during the adoption of every particular legal act.

[362] Justly one of the most striking features of the modern international private law is its fragmentation, since next to age-old national legislation, sources of international law and EU law emerge.²⁷⁶ Not surprisingly, the issue of fragmentation was mentioned as a core problem by experts in various Member States in interviews as well as in responses to questionnaires.

[363] In **Hungary** the issue of fragmentation of the legal regulation was elaborated in more depth in the context of the discussion with experts on family law, where different legal issues have to be decided on the basis of different legal instruments. For example, in the case of a marriage dispute, there are many related issues, like child support, custody matters and others. The issue of dissolution of marriage is addressed under the Brussels II regulation, but that legal instrument does not provide rules for applicable law. The applicable law is determined by the Rome II Regulation. In respect of placement of the child, jurisdiction is determined by the rules of the Brussels II Regulation, but for other issues the Hague Convention²⁷⁷ to which almost all Member States are parties still applies. In child support matters the Maintenance Regulation and the Hague Protocol (Protocol on the Law Applicable to Maintenance Obligations)²⁷⁸ must be used. Needless to say, it is not easy for the courts and parties to keep the entire system of applicable law in check with so many different relevant documents.

[364] Even though already in 1994 the Council, the Commission and the Parliament by an inter-institutional agreement noted the necessity of codification in making EU law more transparent,²⁷⁹ the topic still is an issue, especially in the area of civil justice. Therefore, as the experts from **Germany**

276 Problems of fragmentation in this area even have been subject to separate studies – see, e.g., Letto-Vanamo P, Smits J. Coherence and Fragmentation in European Private Law. SELP, 2012.

277 Hague Convention on the Civil Aspects of International Child Abduction. 25.10.1980. Available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=24

278 Protocol on the Law Applicable to Maintenance Obligations, 23.11.2007. Available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=133

279 Interinstitutional Agreement of 20 December 1994 Accelerated working method for official codification of legislative texts. C 102, Official Journal of the European Union, 04.04.1996, p. 2-3.

mentioned during the interviews, the legislative process always should aim to combine two or even more regulations into single regulation. Additionally, if there are some problems with the functioning of regulations, improvement of the existing ones usually is a better way instead of adoption of new regulations.



Shortcomings in the drafting technique of EU legal acts should be reduced.

- [365]** There are many soft-law instruments that are aimed to increase the quality of the EU law legislation drafting technique, both at the initial level of drafting in the Commission as well as during the legislative process in the Council and the Parliament. Amongst others, perhaps the most noticeable is the “Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation”, which has been drawn up by the Legal Services of all three major EU institutions.²⁸⁰ Therefore, one cannot deny that the EU institutions started to take this issue seriously in the past two decades, and some improvements can be seen.
- [366]** Nevertheless, complaints regarding lack of some basic legislation drafting techniques remain quite common amongst scholars.²⁸¹ This was also one of the issues mentioned in the interviews with experts from various Member States as well as in the responses to the questionnaires: more than two-thirds of respondents agreed that the wording of the relevant EU acts and CJEU case law in the area of civil justice is not sufficiently clear and easy to understand.
- [367]** Regarding particular complaints, for example, legislation drafting experts from **Sweden** have pointed out as the main shortcoming length of sentences and complexity of sentence structure, and the ambiguity as a result of this complexity. Quite often, an entire paragraph will consist of one sentence. Really long sentences also tend to have a complicated structure with several sub-clauses. Another area of different approach to legislative technique concerns legal definitions. Definitions in EU law tend to be lengthy and contain examples of what is being defined in a way which may look strange in Swedish legislation.²⁸²
- [368]** Thus, despite the fact that considerable efforts have been made towards better legislative technique at the EU level, the adoption process of legal acts still should focus more on possible improvements in that regard. Due to the complexity of the substance and the above-mentioned problem of fragmentation of legal regulation in the area of civil justice, clear, simple and precise acts in this area are of even greater importance than in other areas of EU law.



Shortcomings in the quality of EU legal acts to a large extent are caused by the huge influence of political compromises. This is particularly true in relation to areas like civil justice, where there are major diversities between member states and reaching of compromises is especially hard.

- [369]** The above-mentioned problem of poorly drafted pieces of legislation is closely related to the way the Council of the EU and in particular its working groups function. The Council is famously known for its “*culture of consensus*”. However, since compromise agreements are difficult to achieve in

280 Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation. Available at: <http://eur-lex.europa.eu/content/pdf/techleg/joint-practical-guide-2013-en.pdf>.

281 See, Kaeding M. In Search of Better Quality of EU Regulations for Prompt Transposition: The Brussels perspective. *European Law Journal*, 2008, Vol. 14(6), p. 583-603.

282 See on this: EU legislation and Swedish national legislation – what are the differences in drafting style? Available at: http://ec.europa.eu/dgs/legal_service/seminars/20140703_hasselrot_speech.pdf.

formalized rounds, more and more pre-negotiation talks take place and have further moved the agenda to the informal settings of luncheon tables and Council corridors.²⁸³

[370] German lawyers admit that the language of EU acts is quite heavy and sometimes difficult to understand. In their view this also might be caused by the fact that the legal technique used in drafting EU acts is not the priority; the emphasis is on political compromise. Similar points were also raised by Latvian lawyers.

[371] A good example on how the provisions of a regulation can change during the drafting process is the Proposal for Small Claims Regulation and European Enforcement Order Regulation. The first legislative proposal of this Regulation was published in November 2013. Recital 5 of this proposal stated: *"Increasing the threshold up to EUR 10,000 would be particularly beneficial for small and medium enterprises, which are currently discouraged from considering court action because under national ordinary or simplified procedures the costs of litigation are disproportionate to the value of the claim and/or the judicial proceedings are too lengthy."* In July 2014 the European Economic and Social Committee issued an opinion regarding this proposal in which it also supports the proposal to extend the procedure's scope by raising the ceiling to EUR 10 000.²⁸⁴ Subsequently, in December 2014 the Committee on legal affairs of the European Parliament issued a draft report on the same proposal containing amendments tabled in committee.²⁸⁵ Several Members of the Committee suggested several versions of how high the ceiling for submitting a small claim should be. The most popular suggestion was that the threshold should be increased up to 4 000 EUR, due to the different levels of income in Europe and different national civil procedures. Afterwards, in December, the debate in the Council took place; the results are not available to the public.²⁸⁶ The indicative plenary meeting date in the Parliament has been set for July 2015,²⁸⁷ and one can only guess whether political factors or legal considerations will more greatly influence the text of the proposal submitted to the Parliament.

[372] Political compromises are not made only within the Council, but also between other institutions involved in the adoption of a legal act. For example, the text of the Proposal for European Account Preservation Order adopted in the first reading of the Parliament is a result of a compromise between Parliament and Council.²⁸⁸ To illustrate the differences between the first proposal in July

283 Hagemann S., Clerck-Sachsse J. Decision-Making in the Enlarged Council of Ministers: Evaluating the Facts. CEPS Policy Brief, 2007, No.119, p. 1.

284 Opinion of the European Economic and Social Committee (16 July 2014) on the 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure'. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014AE0025&from=LV>.

285 Draft report of the Committee on Legal Affairs of the European Parliament on Amendments 13-86 on Proposal for a Regulation on the European Small Claims Procedure and European order for payment procedure. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARGML+PE-544.192+01+DOC+PDF+V0//EN&language=EN>.

286 European small claims procedure and European order for payment procedure: improving access to justice and the efficiency of justice. Procedure file, European Parliament, Legislative Observatory. Available at: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0403\(OLP\)#tab-0](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0403(OLP)#tab-0).

287 European small claims procedure and European order for payment procedure: improving access to justice and the efficiency of justice. Procedure file, European Parliament, Legislative Observatory. Available at: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0403\(OLP\)#tab-0](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0403(OLP)#tab-0).

288 Summary of the European Parliament legislative resolution of 15 April 2014 on the proposal for a regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters. Available at: <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1346848&t=e&l=en> (full text of the Resolution available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0367#BKMMD-66>).

2011²⁸⁹ and the final act published in June 2014²⁹⁰ – the preamble of the first draft contained 24 recitals, but the preamble of the final act consists of 51 recitals. Also the provisions containing material and procedural norms have changed during that time. For example, the Proposal for European Account Preservation Order in Article 2(4) provided that: “This Regulation shall apply to matters of matrimonial property, the property consequences of registered partnerships or successions where Union legislation relating to jurisdiction, applicable law and the recognition and enforcement of decisions in these matters is applied.” Yet the final act in Article 2(2)(a) provides a completely different regulation – the Regulation does not apply to “rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage”.



The composition of working groups in the EU Council in the area of civil justice should involve more direct participation of national judges.

- [373]** As estimated by several authors, 70% of all legislative proposals are decided upon at the Council’s working group level.²⁹¹ For example, the Working Party on Civil Law Matters is the working group involved in the drafting of legal acts in the area of civil justice. As all other working groups, the working party meets in different configurations based on the topic discussed.²⁹² However, mostly the Working Party on Civil Law Matters consists of officials from the permanent representation of the Member States and from the ministries and departments of the national governments.²⁹³
- [374]** However, several practitioners and also experts questioned by the Researchers, especially from **Latvia** and **Hungary**, were of the opinion that also legal practitioners who will later apply the same act, such as judges and practicing attorneys at law, should be invited to participate in negotiations. Alternatively, at least legal practitioners should be invited to contribute to the formulation of national positions within respective ministries of the Member States. Such approach might reduce the number of issues relating to practical application of the legal act. The Researchers consider that more frequent participation of legal practitioners in the drafting process of legal acts would also increase the awareness of those acts among the practitioners themselves, thus also increasing the quality of application of the EU law acts.
- [375]** However, it should also be kept in mind that informal factors such as socialization, seniority and experience of actors; their negotiation skills; frequent informal meetings; ‘corridor bargaining’ and inter- and intra-group dynamics keep Council decision making functioning.²⁹⁴ Thus, of course, representatives in working groups should include both experienced negotiators, most likely from the Ministry of Justice, as well as judges and other practitioners, who will be the addressees of the respective piece of legislation.



Transparency of proceedings of the working groups in the EU Council should be increased.

289 Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011PC0445>.

290 Regulation (EU) No. 655/2014 of the European Parliament and of the Council (15 May 2014) establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters. L 189, Official Journal of the European Union, 27.06.2014.

291 See, e.g., Veen T. *The Political Economy of Collective Decision-Making*. Springer, 2011. p. 28.

292 Working Party on Civil Law Matters (JUSTCIV). European Council, Council of the European Union. Available at: <http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-civil-law-matters/>.

293 Working groups under the Council. Available at: <http://en.euabc.com/word/2011>.

294 Hayes-Renshaw F, Wallace H. *The Council of Ministers*. 2nd ed. Palgrave Macmillan, 2006. p. 28.

- [376]** Only a few of the legal practitioners interviewed by the Researchers were completely aware of how legal acts are drafted and adopted in the EU. This coincides with the lack of training of practitioners in EU law (this issue is discussed in the first part of the Guidelines). However, the fault might also be in the lack of transparency in the decision-making process in the EU, which is also emphasized as an issue by several academics.²⁹⁵ The issue of transparency of the EU legislative process in the area of civil justice was also addressed by experts from various Member States, especially from **Germany**, in their interviews.
- [377]** The TEU in Article 1 provides that decisions in the EU should be made as openly as possible. The EU General Court has stated that transparency *“is intended to secure a more significant role for citizens in the decision-making process and to ensure that the administration acts with greater propriety, efficiency and responsibility vis-à-vis the citizens in a democratic system.”*²⁹⁶ The transparency at the EU level includes not only public access to documents and information, but also openness of the decision-making system and institutional transparency and quality of drafting.²⁹⁷
- [378]** Specifically in the area of civil justice, transparency should include the already previously mentioned increased participation of legal practitioners in the adoption of legal acts, as well as making information about the adoption process available to and public and, especially, to legal practitioners.
- [379]** The Researchers are of the opinion that the adoption process of legal acts should be as transparent as possible. Transparency not only increases the level of awareness of practitioners, but also drafting materials, such as working group reports and papers, could be used as tools for further historical and teleological interpretation.
- [380]** The Legislative observatory of the Parliament²⁹⁸ is a very welcome tool in trying to ensure transparency in the EU decision-making process. The Legislative Observatory is Parliament’s database for monitoring the EU decision-making process.
- [381]** However, despite adding transparency at the surface, the lion’s share of decision making and brokering in the working groups of the Council as well as in the EU in general has remained opaque, as only a few of drafting documents are available to the public.²⁹⁹ For example, using the Legislative Observatory it can be found that a debate in the Council was held in December 4th 2014 regarding the Proposal for Small Claims Regulation and the European Enforcement Order Regulation³⁰⁰. However, the contents of this debate and even questions addressed in it are unknown to the general public. Also, no information about negotiations in the working groups is available.



The speed of proceedings of the working groups in the EU Council and of the legislative process in general should be increased.

- [382]** The Researchers find the length of the legislative process excessively long. Here, again, the Proposal for the European Account Preservation Order can be used as a vivid example. Already in October 2006, the Commission adopted a Green Paper which suggested creation of a European provisional

295 See, e.g., Dreissen B. Transparency in EU Institutional Law: A Practitioner’s Handbook. Cameron May, 2008. P. 5; Veen T. The Political Economy of Collective Decision-Making. Springer, 2011. p. 27; Van Aken W. Voting in the Council of the European Union: Contested Decision-Making in the EU Council of Ministers (1995-2010). Swedish Institute for European Policy Studies. 2012. p. 37

296 See, e.g., 7 February 2002 EU General court judgment in case: No. T-211/00 *Kuijjer v Council II*, 14 October 1999 EU General court judgment in case: No. T-309/97 *Bavarian Lager company v Commission*.

297 Dreissen B. Transparency in EU Institutional Law: A Practitioner’s Handbook. Cameron May, 2008. p. 5.

298 European Parliament’s Legislative Observatory. Available at: <http://www.europarl.europa.eu/oeil/home/home.do>.

299 Veen T. The Political Economy of Collective Decision-Making. Springer, 2011. p. 28.

300 European small claims procedure and European order for payment procedure: improving access to justice and the efficiency of justice. Procedure file, European Parliament, Legislative Observatory. Available at: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0403\(OLP\)#tab-0](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0403(OLP)#tab-0).

measure for the preservation of bank accounts.³⁰¹ The Commission Action Plan implementing the 2009 Stockholm Programme provides for a Regulation on improving the efficiency of enforcement of judgments in the European Union regarding the attachment of bank accounts.³⁰² In May 2011 the Parliament issued a resolution calling on the Commission to put forward a proposal on interim measures for the freezing and disclosure of debtor's assets in cross-border cases.³⁰³ At the end of July 2011 the first legislative proposal was published.³⁰⁴ The final act³⁰⁵ was signed almost 3 years later – in May 2014 – and will apply as from January 2017. Thus it took more than 7 years from the first initiative of the regulation till adoption of the final document.

[383] The excessively long time of drafting the legal act creates legal uncertainty, as Member States are hesitant to introduce their own regulations before the respective EU law is introduced, sometimes even leaving a gap in legislation among the Member States. Shortening the adoption proceedings would also add very necessary transparency to the EU decision-making procedure. Additionally, the longer the time of adoption, the more human and financial resources are used by the EU and Member States. Therefore, the Researchers suggest that possibilities to reduce the time spent on drafting EU law and to increase the effectiveness of the decision-making process in the EU should be discussed in the EU and at national level.



Regulations should continue to be the prevailing form of legal acts in the area of civil justice.

[384] Both the interviews during study visits and the responses to questionnaires showed support for regulations as the best suited form for EU acts in the area of civil justice.

[385] In **Hungary** it was quite the unanimous opinion of all experts who addressed the issue that the most appropriate form of legal act in the field of the EU area of civil justice is a regulation. However, at the same time the Hungarian experts admitted that practically all regulations in the EU area of civil justice to a larger or lesser degree require some additional national law provisions on the matter. Even more so, the lack of additional national provisions in Hungary was mentioned as a problem for the proper functioning of some articles of the regulations (e.g., Article 17 of the Regulation on taking evidences and the lack of a Hungarian law specifying the procedural execution of requested assistance).

[386] On a broader perspective, however, this is not only a problem of national law, but also and mainly a problem on the level of EU law. The area of civil justice serves as a very good illustration on how the distinction between regulations and directives becomes quite blurred, since most of the regulations in this area require additional national procedural law measures to be adopted before

301 Resolution (2007/2026(INI)) of the European Parliament (25 October 2007) on the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0486+0+DOC+XML+V0//EN>.

302 Communication (COM/2010/0171 final) from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (20 April 2010) Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52010DC0171>.

303 Resolution (2009/2169(INI)) of the European Parliament (10 May 2011) with recommendations to the Commission on proposed interim measures for the freezing and disclosure of debtors' assets in cross-border cases (2009/2169(INI)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-193>.

304 Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011PC0445>.

305 Regulation (EU) No. 655/2014 of the European Parliament and of the Council (15 May 2014) establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters. L 189, Official Journal of the European Union 27.06.2014, p. 59-92

the regulation becomes fully functional. This indicates the problem on the EU level. Therefore Researchers agree with the experts from **Hungary** that practical use of the regulations as a specific EU law tool should be made more consistent and coherent.

[387] Yet, asked of their opinion whether more frequent use of the directive in the area of civil justice in the EU law should be facilitated, the Hungarian experts generally answered negatively. Since usually the scope of the legal regulation in this area covers not only basic principles but also particular details (even more, sometimes the whole procedure is laid down by the EU law), regulations seem to be the best choice of instruments of EU secondary law. Nevertheless, as a potential field in the area of civil justice where directives might be preferable to regulations, the Hungarian experts mentioned alternative dispute resolution.

[388] In **Germany**, according to the representatives of the Federal Ministry of Justice, the most appropriate form of legal act in the field of civil justice is a regulation and not a directive. Private international law is very technical and, therefore, the “regulation” is the most appropriate form. There is also a much better chance to apply the regulation identically in all EU Member States. Therefore, in the opinion of German experts, Legal Aid Directive should be redrafted and reformulated as a regulation.

2. Transposition of EU law in the area of civil justice



Since EU law in the area of civil justice mostly consists of regulation, the transposition duties of Member States include first of all the duty to comply with the requirements of regulations.

[389] According to Article 289 of the TEU, “a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”. Even more, the CJEU in its case law expressly forbade the implementation of the regulations in the national law already half a century ago.³⁰⁶ Thus one of the main reasons why it might not be necessary to introduce new national law amendments in response to legislative activity on the EU level in the area of civil justice is the fact that the area of civil justice is regulated mainly by regulations which, because of their directly applicable nature, do not require implementation in national laws.



Usage of additional national legislative measures in the area of civil justice is widespread and should be facilitated.

[390] The responses to the questionnaires as well as interviews conducted by the Researchers indicated that national judges and practitioners alike support introduction of additional measures of national law that facilitates functioning of EU law in the area of civil justice.

[391] Even more, most Member States already have added certain provisions in their national laws in order to facilitate functioning of EU law. However, nuances on the degree of the necessary amendments in national law and the methodology used vary from case to case, as well as from one Member State to another.

[392] In the **U.K.** the Ministry of Justice is responsible for the adoption, transposition and implementation of EU legal instruments. In regards to regulations dealing with civil procedure, they are then incorporated into the Civil Procedure Rules, containing numerous references to EU private international

306 7 February 1977 CJEU judgment in case: No. 50/76 Amsterdam Bulb.

law instruments. At the same time, when a new EU private international law instrument comes into force, the Ministry makes the necessary amendments to the existing legal provisions in order to avoid incompatibility between the national and EU legal regime. Hence, the Ministry does not simply accept the direct application of EU regulations, but seeks to eliminate contradictions between them and the domestic legal order.

- [393]** In **Germany** Regulations are mostly implemented by making the relevant amendments to the Civil Procedure Law (Zivilprozessordnung). Nevertheless, there are some special laws by means of which the regulations are “implemented”, e.g., “An Act to Implement International Treaties and EU Legal Acts in the Field of Recognition and Enforcement in Civil and Commercial Matters” (“Gesetz zur Ausführung zwischenstaatlicher Verträge und zur Durchführung von Abkommen der Europäischen Union auf dem Gebiet der Anerkennung und Vollstreckung in Zivil- und Handelssachen”) as well as the “Act on proceedings in family matters of non-contentious jurisdiction” (“Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit”). Also the Succession Regulation will be implemented by a special law containing approximately 40 to 60 sections.
- [394]** In **Hungary** regarding particular additional national law provisions the most important legal act that incorporates the regulations in the EU area of civil justice in Hungarian law is the Code of Civil Procedure. Additionally, Hungarians are quite proud of their international private law traditions, especially of the fact that Hungary was one of the founding countries of the Hague conference. One of these private international law traditions is a separate code for private international law. As the Ministry of Justice at the moment is preparing massive amendments to the Code of Private International Law, there have been some discussions in Hungary on whether the provisions concerning jurisdiction should not be stated in the Code of Civil Procedure instead of the Code of Private International Law. However, the result of these discussions remains unchanged – it is essential to have one separate law dealing with situations when jurisdiction, applicable law, enforcement and recognition of a judgment made in another state have to be decided.
- [395]** Some similar discussions have arisen also in **Latvia**. Namely, the Code of Civil Procedure is the act that gets amended in most cases when it is necessary to integrate a particular instrument from the EU area of civil justice in Latvian legal system. However, certain instruments are not integrated into the Code of Civil Procedure. For example, the Protection Measures Regulation is not integrated into the Code of Civil Procedure. Thus, while ordering of protection measures in Latvia is governed by the Code of Civil Procedure, recognition and enforcement of such measures ordered abroad is not integrated in the said act.
- [396]** There are also serious discussions on the necessity of having a separate law on private international law.³⁰⁷ These discussions have no visible results yet. In this respect, it is noteworthy to mention that currently conflict-of-laws rules are supplied by the Latvian Civil Law. However, some of these rules are not applicable, since their content overlaps with that of the Rome Regulations. Under these circumstances, it would be useful to amend the existing national regulation, at least, indicating that currently the EU law supplies a number of conflict-of-laws rules. Otherwise, the stakeholder may erroneously misidentify the correct conflict-of-laws rules.
- [397]** In this context experience of **Sweden** somewhat stands out, since the experts from the Ministry of Justice pointed out that only rarely are EU regulations transposed into national acts or special laws adopted regarding a particular regulation; instead, the usual approach is to make only a few absolutely necessary amendments to existing laws.

307 The work on such legal act was initiated by the Latvian government. See, Ministru Kabineta 2006.gada 3.novembra rīkojums Nr. 859. Latvijas Vēstnesis [Latvian Herald], No. 177, 07.11.2006. Later the project was cancelled. See, Ministru Kabineta 2010.g. 14.apriļa rīkojums Nr. 209. Latvijas Vēstnesis [Latvian Herald], Nr. 61, 16.04.2010.

3. Control over transposition and application of EU law in the area of civil justice



The rights of the Commission to start an infringement procedure cannot be regarded as an efficient mechanism of control over application and transposition of EU law in the area of civil justice. However, a more active position on the part of the Commission could be welcomed as an additional stimulus for Member States to ensure proper functioning of EU law in the area of civil justice.

- [398] Traditionally, powers to control how Member States comply with EU law requirements are associated with the Commission and the infringement procedure enshrined in Article 258 of the TEU. However, mostly the Commission uses the infringement procedure in relation to the directives and their timely transposition within the legal systems of the Member States. So far, there are no CJEU judgments in the area of civil justice that have resulted from infringement actions, and Researchers are not even aware of any infringement procedures started by the Commission in this area.³⁰⁸ This can easily be explained by the fact that almost all legal acts in the area of civil justice are regulations and that those acts mainly regulate functioning of the national courts.
- [399] Yet at the same time breach of the obligations of the regulations can be a reason for starting an infringement procedure. Even more, the CJEU in several cases admitted that the breach of the EU law might arise not only from legislative actions, but also from actions of administrative or judicial character.³⁰⁹
- [400] Until now no infringement procedures against Member States in the area of civil justice have reached the CJEU. Yet occasional activity on the part of the Commission can be seen. For example, in 2013 Commission opened an investigation and followed up, with an additional letter of formal notice, because of an infringement launched earlier against Belgium due to the misapplication of the European Enforcement Order Regulation.³¹⁰ The application of the European Enforcement Order Regulation was also an issue in 2010 when a Romanian national submitted a petition to the Committee on Petitions of European Parliament about unreasonable delays by **Germany** in implementing a particular European Enforcement order. Only four years later, after requesting additional information from Germany and the petitioner, the Commission decided that it is not in a position to take an action in this case, as it could not detect an infringement of the EU law.³¹¹
- [401] These examples indicate that some future CJEU judgments against Member States for the breach of EU obligations in the area of civil justice are a possibility. Even a single precedent could serve as a stimulus for all Member States to ensure proper functioning of EU law in the area of civil justice. At the same time the Researchers hope that at least some attempts on the part of the Commission and other EU institutions will be made to make the proceedings within those institutions more efficient and less time consuming.

308 In that regard, see the answers of the Commission on request to provide similar information. Available at: http://www.asktheeu.org/en/request/infringement_proceedings_in_viol.

309 30 September 2003 CJEU judgment in case: No. C-224/01 Köbler; 7 June 2007 CJEU judgment in case: No. C-156/04 Commission v. Greece.

310 31st Annual Report from the Commission on Monitoring the Application of EU Law (2013). Available at: http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_31/com_2014_612_en.pdf

311 Notice to Members by the Committee on Petitions of European Parliament concerning Petition 0825/2010 by Alice Vasilescu (Romanian), on delays by the German authorities in implementing a European Enforcement Order issued under Regulation (EC) No. 805/2004 by a Romanian court. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-462.658&format=PDF&language=EN&secondRef=03>



In general, the regulations as the most widely used legal acts in the EU area of civil justice do not create formal transposition duties for Member States. Therefore, there is no need for extensive forms of internal control within the government over the transposition process. Yet, modern IT solutions within ministries should be envisaged for proper coordination of the information flow.

- [402]** Each Member State uses its own information coordination system, and the Ministry of Justice is usually the main administrative authority. However, in **Sweden**, generally the Prime Minister's office is in charge of overseeing the implementation of EU law.
- [403]** In **Hungary** the main actor in the coordination process is the Ministry of Justice, while the other ministries have general consultative functions as regards their own competences.³¹² The line ministries are also primarily responsible for the transposition of EU law within their respective portfolios. Practically it is ensured through single channelling of communications between the line ministry and the Ministry of Justice. It means that each ministry appoints a contact person who is usually responsible to the special coordinating unit or to special EU law department for transmitting the relevant information from the Ministry of Justice to the competent departments within the line ministry. This collaboration between ministries through the network of contact persons is only informal. Any official comments or proposals must be officially signed and presented by senior officials. Since 2010 this whole mechanism of legal approximation has been set by a legal act of general application – Government decree 302/2010 on the legislative tasks necessary for alignment of national law to EU law.
- [404]** Hungary uses individual programming of transposition, according to which a strict plan containing a timetable for implementation of each newly adopted EU measure which requires national transposition is prepared. The line ministry responsible for the subject matter prepares a legal approximation proposal within 30 days of publication of the EU measure in the Official Journal of the EU. If it was not the line ministry, but another public body, which was preparing the mandate for negotiations in the EU legislative procedure, the same body is responsible for the legal approximation proposal.
- [405]** As a part of internal control within the executive, adequate digital solutions play an essential role in the organization of Member States' ability to efficiently respond to changes in EU law rules and to prepare the necessary response within national laws.
- [406]** The information system on transposition and implementation of EU law in **Latvia** (ESTAPIKS) can be mentioned as a good example in this field, as this system not only ensures that the Ministry of Justice is automatically informed of any developments in EU law rules, but it also automatically distributes responsibilities that derive from those developments between different ministries. In the view of the Researchers this kind of system is a more efficient tool of communicating information than sending e-mails from ministry to ministry, as it reduces the possibility that some pieces of information are left unnoticed, at the same time working as a control mechanism over the implementation of EU law.

312 Varju M., Varnay E. (ed). The Law of European Union in Hungary: Institutions, Processes and the Law. HVG-ORAC Publishing Ltd., 2014. p. 117.

CONCLUSIVE REMARKS

- ✓ The study visits to **Germany, Hungary, Latvia, Sweden**, and the **U.K.** as well as numerous interviews and questionnaires confirmed current nature of the EU law in the area of civil justice among the adjudicators. Although, some of the instruments covered by these Recommendations and Guidelines already have extensive commentaries,³¹³ other instruments yet await a similar academic input on the matter. Even more, most of the adjudicators strongly argued that the lack of awareness of the EU dimension in the area of civil justice is a problem of utmost importance. Thus there are significant indications of demand for additional educational activities and informative materials of practical nature concerning the EU area of civil justice.
- ✓ The Researchers do hope that the present work will facilitate further research. For example, this work largely consists of practical recommendations and guidelines on adoption, transposition, implementation and application of European Union legislation in the area of civil justice. Each recommendation or guideline is supplemented by the commentary and selected case law of the particular state. However, the Researchers could not include all possible recommendations and guidelines due to limited scope of the work.
- ✓ Moreover, the Researchers developed a step-by-step schema of application for the Brussels Ibis Regulation, the Rome I and the Rome II Regulations that could help the adjudicators to understand and apply those instruments but there is a need for similar easy-to-understand materials for other EU instruments.
- ✓ There are several pressing issues that national adjudicators face at the **level of application** of the EU law in area of civil justice, addressed by present Recommendations and Guidelines. These include, first of all, difficulties caused by the multitude of EU official languages and proper use of the CJEU case law. Additionally, the notion of autonomous interpretation and the fragmentation of the material scope of regulations is challenging as well. It is worth considering, whether improvements on the existing regulations is not preferable to constant adoption of new instruments. There are some serious problems with establishing an address of a natural person within the EU. Also the human rights issues make the interpretation and application of the regulations quite complicated.
- ✓ At the same time difficulties with the application of the EU law at the national level are closely related and sometimes directly caused by the **problems at the EU level**. The most noticeable shortcomings of the EU law itself are identified by Recommendations and Guidelines and include overall fragmentation of the EU law in the area of civil justice and uneven drafting of the EU acts. The roots of those shortcomings to a large extent lay within overly politicized, slow and not sufficiently transparent adoption process of the EU instruments. Additionally, the Commission as the main controlling body over correct application of the EU law in Member States could have been more active in the area of civil justice.

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313 For example, Brussels I Regulation, Brussels Ibis Regulation, Insolvency Regulation and European procedures.

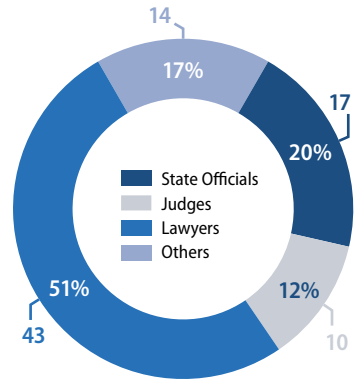
- ✓ At the national level, the Member States covered by the Recommendations and Guidelines have their own strong and weak points regarding the application of the EU law in the area of civil justice. These were largely revealed during the **Study Visits** and through analysis of national case law.
- ✓ **In Germany**, the regulations are mostly “*implemented*” by making relevant amendments to the Civil Procedure Law (*Zivilprozessordnung*). Nevertheless, there are some special laws by means of which the regulations are “*implemented*”. Overall, Germany has sophisticated case law on the EU law in the area of civil justice that relies on vast legal literature on the subject, comprised of numerous commentaries, treatises and articles. Unfortunately, those sources are rarely translated in English, whereas larger number of publications of commentaries and articles in English could establish a uniform discussion platform within EU about EU law. The interviews show that in general German adjudicators and practitioners are well prepared to work with legal instruments in the area of civil justice. Nevertheless there are also some problems, mostly regarding the application of regulations which are mentioned and analysed in these Recommendations and Guidelines.
- ✓ **In Hungary** adjudicators mostly face issues regarding application of the Brussels Ibis Regulation, service of documents and family law. Developed system of specialization of judges in the EU area of civil justice exists. Even more, advanced internal network of judges specializing in the EU law proved to be a great asset in struggle for better quality of the application of the EU law. This network also serves as a base for coordination of requests for the preliminary rulings from the Hungarian courts with an aim to avoid simultaneous and repeated references on the same issues. Nevertheless, the use of the CJEU judgements by Hungarian courts in the area of civil justice has not been very extensive. Additionally, academics express certain criticism regarding the use of difficult and curt language while introducing EU law into Hungarian judicial reasoning.
- ✓ **In Latvia**, the interviews conducted during the Study Visit indicated that adjudicators are knowledgeable in the application of EU law in area of civil justice. However, there are several cases showing that in future more careful consideration should be given to interpretation and proper application of the EU law and the CJEU case law. Moreover, Latvian adjudicators are more frequently confronting Common Law instruments at the stage of recognition and enforcement of foreign judgments. These instruments are not well known in Latvia, thus assistance from the EU and national authorities would be useful with a view to preparing adjudicators to deal with them. Similarly, the meaning of the notion of public policy remains problematic for Latvian courts.
- ✓ **In Sweden** the EU law in area of civil justice is well known to the judiciary and in most cases a thorough research of the existing CJEU case law grants the proper application of the EU law. However, annual training of judges does not always cover matters related to the EU law, therefore occasionally there is a lack of coherent and uniform guidelines for application of the EU law. It was noted by the legal practitioners that Sweden in general holds a very restrictive view on enforcement of foreign judgments and decisions, therefore proper application of the Brussels Ibis Regulation is of utmost importance. Even though Swedish institutions are quite flexible regarding language of documents, language remains one of fundamental problems regarding production of documents and taking of evidence due to poor translation of the requests.
- ✓ **In the U.K.**, the Study Visit shows that adjudicators and policy makers are generally well-aware of the EU instruments in the area of civil justice. The analysis of the case law shows that only complicate cases or cases of first impression pose challenges to the legal system. Just like in other Member States, jurisdictional rules are applied more often by the U.K. courts, while instruments dealing exclusively with conflict-of-laws rules play less prominent role in the case law. At the same time, the interviews showed that adjudicators and policy makers express certain concern about policy considerations behind jurisdictional rules. Notably, doubts were expressed about the practical efficiency of jurisdictional rules and their interpretation by the CJEU. On the contrary, conflict-of-laws instruments create less rejection on the part of local adjudicators, who, generally, find them satisfactory.

ANNEX 1. SUMMARY OF THE QUESTIONNAIRES

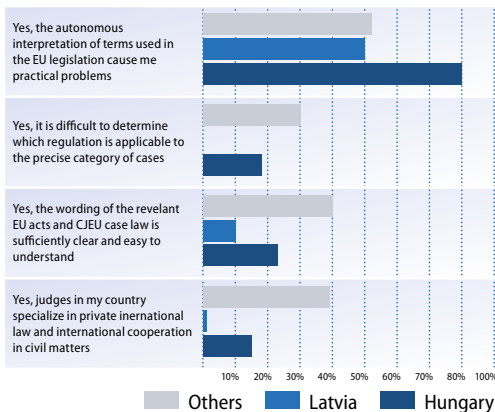
[407] Researchers developed survey forms for judges, state officials, practicing lawyers and attorneys in English, Latvian and Hungarian. The forms were published online.³¹⁴ The forms were completed anonymously. The surveys contained around 60 questions concerning the EU instruments covered by these Recommendations and Guidelines. 84 replies were received. The respondents were not only from the five respective Member States, but also from Estonia, France, Italy, Lithuania, Portugal, Romania, and Spain. We appreciate their responsiveness.

[408] Even though the activity of the respondents could be higher, the answers gave a general overview on the understanding and application of EU acts in cross-border cooperation in civil justice. Due to the limit of the length of this paper, only a few and most interesting answers are showed below.

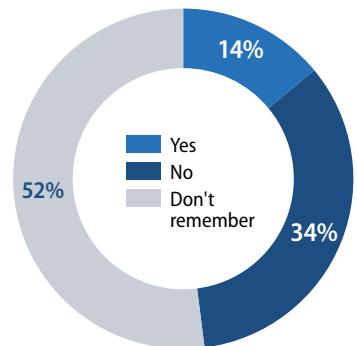
Respondents



General Issues

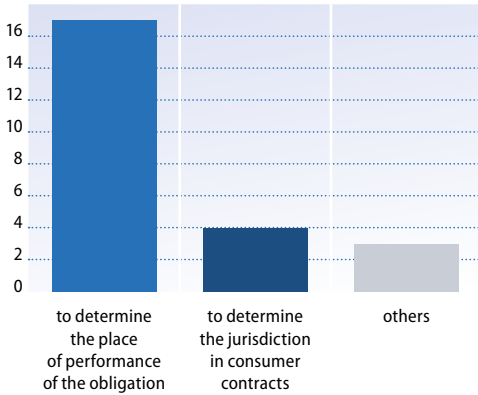


When you calculate the periods of time in the regulations do you consider the Regulation 1182/71?

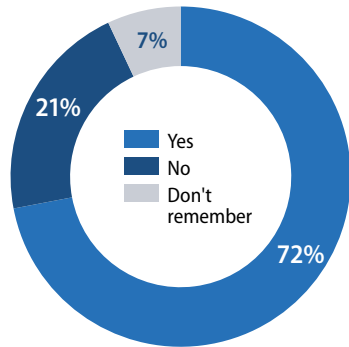


³¹⁴ The questionnaires were available: <http://webanketa.com/forms/70vk4d9g5xgkcdv471h6csg/> (in Latvian), <http://webanketa.com/forms/70vk2csg5ww38rsp61h3jdg/> (in English) and <http://webanketa.com/forms/70wkce9g5xgkcd36c-w64s0/> (in Hungarian). The questionnaires were also published via Conflict of Law Net <http://conflictoflaws.net/2014/research-projects-on-eu-law-and-ecj-case-law-in-civil-matters/>.

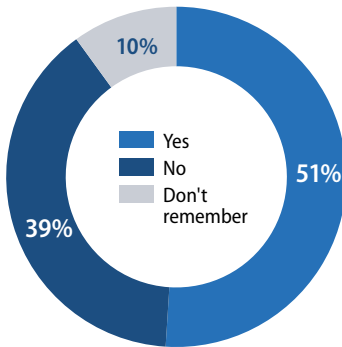
Do you have any problems determining jurisdiction in accordance with the Brussels I Regulations?



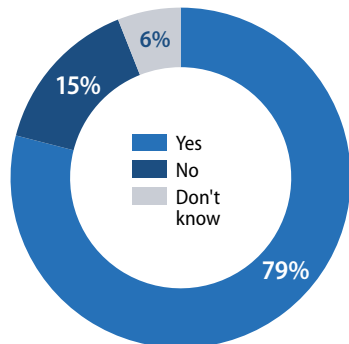
Have you ever encountered the problems when the documents have not been served because the domicile of the addressee is not known?

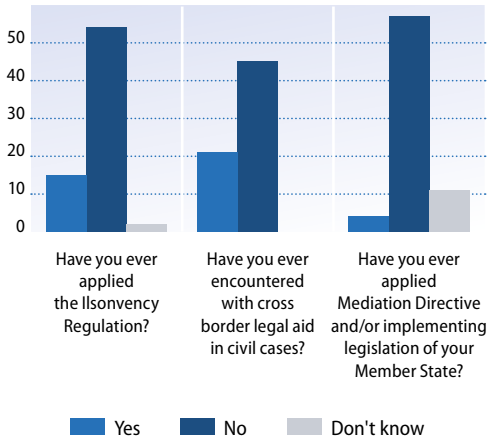


Have you encountered any problems determining applicable law?

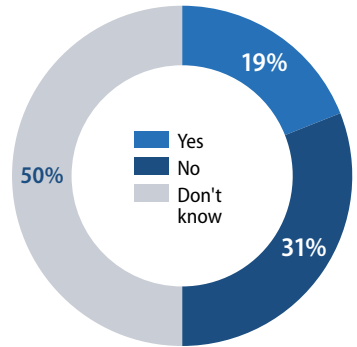


In your opinion, shall the judge check the applicable law ex officio?

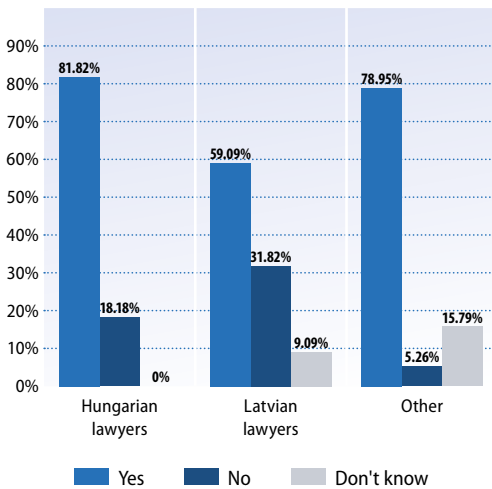




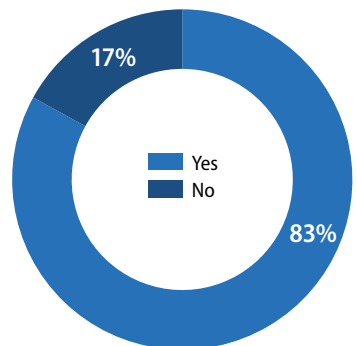
Do you consider that the duties for the central body under the Taking of Evidence Regulation provide for efficient gathering of evidence?



Are you generally satisfied with the mechanism of recognition and enforcement of foreign judgments in civil matters?



Do you apply the case law of the CJEU in your practice?



ANNEX 2. TEMPORAL APPLICATION OF RESPECTIVE REGULATIONS

No.	Regulation	Generally applicable from:
1.	<i>European Enforcement Order Regulation</i>	21 October 2005
2.	<i>European Orders for Payment Regulation</i>	12 December 2008
3.	<i>European Small Claims Regulation</i>	1 January 2009
4.	<i>Insolvency Regulation</i>	In force since 31 May 2002. For the twelve “new” Member States – applicable from 1 May 2004. For Rumania and Bulgaria – applicable from 1 January 2007. For Croatia – applicable from 1 July 2013.
5.	<i>Brussels I Regulation</i>	In force since 1 March 2002. For the twelve “new” Member States – applicable from 1 May 2004. For Rumania and Bulgaria – applicable from 1 January 2007. For Croatia – applicable from 1 July 2013.
6.	<i>Brussels II bis Regulation</i>	1 March 2005

Transitional provisions:

Regulation shall apply only to judgments given to court settlements approved or concluded and to documents formally drawn up or registered as authentic instruments after the entry into force of this Regulation (Art. 26).

Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done. (Art. 43).

1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.
2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,
 - (a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State of origin and in the Member State addressed;
 - (b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. (Art. 66).
1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.
2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

No.	Regulation	Generally applicable from:
7.	<i>Service of Documents Regulation</i>	13 November 2008
8.	<i>Taking of Evidence Regulation</i>	1 January 2004. For the twelve “new” Member States – applicable from 1 May 2004. For Rumania and Bulgaria – applicable from 1 January 2007. For Croatia – applicable from 1 July 2013.
9.	<i>Rome I Regulation</i>	17 December 2009
10.	<i>Rome II Regulation</i>	11 January 2009
11.	<i>Law Applicable to Divorce and Legal Separation Regulation (Rome III Regulation)</i>	21 June 2012

Transitional provisions:

3. Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation, provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.
4. Judgments given before the date of application of this Regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation, provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. (Art. 64).

This Regulation shall apply to contracts concluded as from 17 December 2009 (Art. 28).

This Regulation shall apply to events giving rise to damages which occur after its entry into force (Art. 31).

See also: 17.11.2011. judgment of CJEU in the case *Hamawoo* (C-412/10):

"Articles 31 and 32 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to noncontractual obligations ('Rome II'), read in conjunction with Article 297 TFEU, must be interpreted as requiring a national court to apply the Regulation only to events giving rise to damage occurring after 11 January 2009 and that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seized have no bearing on determining the scope ratione temporis of the Regulation."

1. This Regulation shall apply only to legal proceedings instituted and to agreements of the kind referred to in Article 5 concluded as from 21 June 2012.
However, effect shall also be given to an agreement on the choice of the applicable law concluded before 21 June 2012, provided that it complies with Articles 6 and 7.
2. This Regulation shall be without prejudice to agreements on the choice of applicable law concluded in accordance with the law of a participating Member State whose court is seized before 21 June 2012. (Art. 18).

No.	Regulation	Generally applicable from:
12.	<i>Maintenance Regulation</i>	<p>Articles 2(2), 47(3), 71, 72 and 73 shall apply from 18 September 2010.</p> <p>Except for the provisions referred to in the second paragraph, this Regulation shall apply from 18 June 2011, subject to the 2007 Hague Protocol being applicable in the Community by that date. Failing that, this Regulation shall apply from the date of application of that Protocol in the Community. (Art. 76).</p>
13.	<i>Brussels I bis Regulation</i>	10 January 2015
14.	<i>Protection Measures Regulation</i>	11 January 2015
15.	<i>Succession Regulation</i>	17 August 2015

Transitional provisions:

1. This Regulation shall apply only to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established as from its date of application, subject to paragraphs 2 and 3.
2. Sections 2 and 3 of Chapter IV shall apply to:
 - (a) to decisions given in the Member States before the date of application of this Regulation for which recognition and the declaration of enforceability are requested as from that date;
 - (b) to decisions given as from the date of application of this Regulation following proceedings begun before that date, insofar as those decisions fall within the scope of Regulation (EC) No 44/2001 for the purposes of recognition and enforcement.

Regulation (EC) No 44/2001 shall continue to apply to procedures for recognition and enforcement under way on the date of application of this Regulation.

The first and second subparagraphs shall apply mutatis mutandis to court settlements approved or concluded and to authentic instruments established in the Member States.

3. Chapter VII on cooperation between Central Authorities shall apply to requests and applications received by the Central Authority as from the date of application of this Regulation. (Art. 75).

1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.
2. Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation. (Art. 66).

Regulation shall apply to protection measures ordered on or after 11 January 2015, irrespective of when proceedings have been instituted. (Art. 22).

1. This Regulation shall apply to the succession of persons who die on or after 17 August 2015.
2. Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force at the time the choice was made in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed.
3. A disposition of property upon death made prior to 17 August 2015 shall be admissible and valid in substantive terms and as regards form if it meets the conditions laid down in Chapter III or if it is admissible and valid in substantive terms and as regards form in application of the rules of private international law which were in force at the time the disposition was made in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession.
4. If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession. (Art. 83).

ANNEX 3. APPLICATION SCHEMA OF THE BRUSSELS IBIS AND THE ROME I AND II REGULATIONS

