

Brussels IIa - Rome III

Article-by-Article-Commentary

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1. Auflage 2019. Buch. XVII, 411 S. Hardcover (In Leinen)

ISBN 978 3 406 72643 9

Format (B x L): 16,0 x 24,0 cm

Gewicht: 1021 g

irrelevant which persons are formally involved or who initiated the proceedings.⁷⁷ That kind of identity is given, albeit not required, in cases where the parents are fighting for custody of the same child.⁷⁸

b) Identity of the legal claim. Unlike Article 19 (1), Article 19 (2) requires for the **competing proceedings relating to parental responsibility for a child to pertain to the same legal claim.**⁷⁹ Similar to Article 29 (1) of the Brussels Ibis Regulation, the European Court of Justice's broad European definition of the term 'cause of action' is applied here.⁸⁰ While it is not necessary for competing proceedings involving the same cause to be congruent in the strictest sense,⁸¹ it is sufficient for the core of the proceedings to be identical.⁸² The only requirement is for the motions to be based on the same legal grounds (i. e., the same facts of the case or the same relevant legislation) and the same subject matter (the same goal of the proceedings).⁸³ What matters, in the opinion of European Court of Justice, is the purpose of the respective prayers for relief.⁸⁴ The required sameness, or identity, of the motions is met not only in case of perfect formal identity, i. e., in case of both parties praying for award of custody for the child. The required identity will also be presumed for the **relationship of parental custody and visitation rights** in cases concerning the same child. This applies regardless of whether the proceedings were initiated of the court's own motion or at the parties' request.⁸⁵ The required identity of the proceedings shall also be presumed for a motion for award of custody for a child and the opposing motion for surrender of that same child.⁸⁶ The earlier initiation of **isolated custody proceedings** will also have the effect of blocking later custody proceedings in conjunction with a divorce matter.⁸⁷ No identity of the proceedings shall be presumed between a parent's claim for visitation rights and a motion for placement of that child in a foster family.⁸⁸ No identity of the proceedings shall likewise be presumed if the competing motions pertain to **different children.**⁸⁹ The same applies in cases where a motion for award of custody is competing with a motion for return under the Hague Convention on Child Abduction of 25 October 1980 (cf. notably Article 19 of the Hague Convention on Child Abduction).⁹⁰ **Subsequent** amendments to the prayers for relief will not be taken into account for determining the identity of the proceedings.⁹¹ All that matters is the original document instituting

⁷⁷ Geimer/Schütze/Geimer Art. 19 note 8; Zöller/Geimer Art. 19 note 8; Rauscher/Rauscher Art. 19 note 38.

⁷⁸ NK-BGB/Gruber Art. 19 note 13.

⁷⁹ Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 18; Thomas/Putzo/Hüßtege Art. 19 note 4.

⁸⁰ ECJ – Case C-489/14 – A v. B, ECLI:EU:C:2015:654, para. 26; ECJ – Case C-296/10 – Purucker II, ECR I-2010, 11163 paras. 67 et seq.; Thomas/Putzo/Hüßtege Art. 19 note 4; Gruber FamRZ 2000, 1129, 1131; Hausmann EuLF 2000/2001, 346.

⁸¹ Thomas/Putzo/Hüßtege Art. 19 note 4.

⁸² Court of Appeal (Oberlandesgericht) of Karlsruhe FamRZ 2011, 1528.

⁸³ ECJ – Case C-144/86 – Gubisch/Palumbo, ECR I-1987, 4861 para. 14; ECJ – Case C-406/92 – Tatry/Maciej Rataj, ECR I-1995, 5439 para. 38; ECJ – Case C-296/10 – Purucker II, ECR I-2010, 11163, para. 68.

⁸⁴ ECJ – Case C-296/10 – Purucker II, ECR I-2010, 11163 para. 68; see also Rauscher/Rauscher Art. 19 note 39; Geimer/Schütze/Geimer Art. 19 note 8; Zöller/Geimer Art. 19 note 8.

⁸⁵ Gruber FamRZ 2000, 1129, 1134; Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 20.

⁸⁶ Hausmann, F note 299.

⁸⁷ Rauscher/Rauscher Art. 19 note 41.

⁸⁸ Rauscher/Rauscher Art. 19 note 40.

⁸⁹ Rauscher/Rauscher Art. 19 note 40.

⁹⁰ Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 22; see also ECJ – Case C-497/10 PPU – Mercredi, ECR I-2010, 14309 para. 65.

⁹¹ Court of Appeal (Oberlandesgericht) of Düsseldorf GRUR-RR 2009, 401; Hausmann, F note 298.

the proceedings. Objections on the respondent's part must be likewise disregarded and are irrelevant for determining the identity of the proceedings.⁹² No identity is presumed to exist between an action for divorce and proceedings in matters concerning parental responsibility.⁹³

- 18 It was initially unclear whether or not a motion for **interim relief** can even be opposed to main proceedings pertaining to parental custody. Since the arrangement reached by way of interim relief is only of a provisional nature, it might be conceivable to deny the identity of the proceedings. However, the European Court of Justice⁹⁴ made it clear in the *Purrucker* case that a differentiation is necessary:⁹⁵ If the court before which a motion for interim relief is filed bases its international jurisdiction on **Article 20 in conjunction with the national law** of a Member State, Article 19 (2) will not work like a procedural bar on the decision of the court judging the substance of the case.⁹⁶ That is because according to Section 20 (2), the former provisional measures as defined by Article 20 (1) will become automatically ineffective if the court having jurisdiction to hear the case on the merits had adopted a measure which it considers appropriate (cf. also Article 20 Marginal Note 18). Thus, in the words of the European Court of Justice (EuGH), the provision rules out any risk of irreconcilable judgments.⁹⁷ Incidentally, provisional measures as defined by Article 20 are not recognized under Article 21 et seqq. (cf. Article 21 Marginal Note 10), which means that there is no threat of a conflict of decisions.⁹⁸
- 19 If, in contrast, the court before which a motion is filed for interim relief bases its **international jurisdiction on Articles 8–14**, such motion may according to Article 19(2) block the main proceedings later initiated before another court in a Member State whose jurisdiction follows from Articles 8–14.⁹⁹ In that case, a provision preventing a decision conflict (like Article 20 (2)) will be lacking. The proceedings for interim relief may in such a case have effects equivalent to the proceedings in the main action.¹⁰⁰ This shall apply in particular to cases where the motion for interim relief serves as preparation of the proceedings in the main action.¹⁰¹ In that case, e.g. a motion for temporary award of custody or visitation rights in a Member State will work to block the proceedings in the main action later initiated in another Member State.¹⁰² This

⁹² ECJ – Case C-111/01 – *Gantner*, ECR I-2003, 4207 para. 30; Geimer/Schütze/Geimer Art. 19 note 32; Mankowski in: Magnus/Mankowski, Brussels IIbis Regulation, Art. 19 note 26.

⁹³ Rauscher/Rauscher Art. 19 note 41.

⁹⁴ ECJ – Case C-296/10 – *Purrucker II*, ECR I-2010, 11163 paras. 64, 69 et seq.; Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 24 f.; Thomas/Putzo/Hüfstege Art. 19 note 4; Hausmann, F note 303 et seq.; Dutta/Schulz ZEuP 2012, 542 ff.

⁹⁵ Sickerling, in: Gsell/Hau, Zivilgerichtsbarkeit und Europäisches Justizsystem (2012), p. 63 et seq.; Prütting, in: Festschrift f. Simotta (2012), p. 437 et seq.

⁹⁶ ECJ – Case C-296/10 – *Purrucker II*, ECR I-2010, 11163 paras. 69 et seq.; Hausmann, F note 304 et seq.; Dutta/Schulz ZEuP 2012, 542 et seq.; Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 24.

⁹⁷ ECJ – Case C-296/10 – *Purrucker II*, ECR I-2010, 11163 para 71: ‘... that there is no possibility that the decisions made in a judgment granting provisional measures within the meaning of Article 20 of that regulation and a judgment handed down by the court which has jurisdiction as to the substance of the matter can contradict each other ...’.

⁹⁸ Hausmann, F note 304 et seq.; Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 VO (EG) 2201/2003 note 24.

⁹⁹ ECJ – Case C-296/10 – *Purrucker II*, ECR I-2010, 11163 paras. 72 et seq., 75 et seq.; ebenso Hausmann, B note 217; Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 25.

¹⁰⁰ ECJ – Case C-296/10 – *Purrucker II*, ECR I-2010, 11163 paras. 72 et seq., 78 et seq.; Hausmann, F note 303.

¹⁰¹ ECJ – Case C-296/10 – *Purrucker II*, ECR I-2010, 11163 paras. 73 et seq., 80; Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 25.

¹⁰² Hausmann, F note 303.

means that the court second seised must investigate, in reference to whether or not the procedural bar of Article 19 (2) will apply, whether the court first seised before which a motion for interim relief is filed bases its jurisdiction on Articles 8–12 or on Article 20 (1) (in conjunction with national law).¹⁰³ Where this cannot be clearly established, the European Court of Justice (EuGH) holds that the court deciding on the substance of the matter shall be allowed to continue the proceedings pending before it in case of doubt if justified by the best interests of the child and after a reasonable waiting period has expired.¹⁰⁴ When determining the reasonable period, the **best interests of the child, with due consideration of specific factors relevant to the circumstances of the individual case**, shall be taken into account.¹⁰⁵ Conversely, the *lis pendens* of the main proceedings does not, for reasons of effective legal protection, pose an obstacle to the award of interim measures for legal protection (closer to Article 20 Marginal Note 17).¹⁰⁶

3. Consequence in law

Even within the scope of Article 19 (2), the **priority rule** applies. As in the case of Article 19 (1), Article 19 (2) provides that the court will initially only **stay the proceedings later initiated of its own motion**.¹⁰⁷ The court will only dismiss the proceedings later initiated for lack of jurisdiction after the international jurisdiction of the court first seised was established as final and absolute. To find out whether the proceedings should be suspended according to Article 19 (2), it is not necessary to investigate whether or not a decision awarded in proceedings earlier initiated would be recognized in other European Member States as per Article 23 (no prediction of recognition in the European judicial area).¹⁰⁸ To determine the date and time when the competing proceedings involving the same cause of action have become pending shall be based on Article 16 (autonomous scale).¹⁰⁹

IV. Declaration of non-jurisdiction by the court second seised (subsection 3)

1. (Positive) establishment of jurisdiction of the court first seised (subsection (3), 1st sentence)

According to Article 19 (3), 1st sentence the court second seised will decline jurisdiction in favour of the court first seised as soon as the jurisdiction of the court first seised has been (positively) **established**.¹¹⁰ This **decision to be made of the court's own**

¹⁰³ ECJ – Case C-296/10 – *Purrucker II*, ECR I-2010, 11163 paras. 80 et seq.: ‘However, it falls to the court second seised to ascertain whether the judgment of the court first seised, in that it grants provisional measures, was only a preliminary step towards a subsequent judgment delivered by that court when better informed of the case and in circumstances where the need to make an urgent decision no longer arises. The court second seised should moreover ascertain whether the claim relating to provisional measures and the claim brought subsequently relating to matters of substance constitute a procedural unit’; *Hausmann*, F note 305; *Dilger* in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 26 f.; *Dutta/Schulz* ZEuP 2012, 543 f.

¹⁰⁴ ECJ – Case C-296/10 – *Purrucker II*, ECR I-2010, 11163 para. 82.

¹⁰⁵ ECJ – Case C-296/10 – *Purrucker II*, ECR I-2010, 11163 para. 83: ‘The duration of that reasonable waiting period must be determined by the court having regard above all to the interests of the child. The fact that a child is very young is one criterion to be taken into consideration in that regard’; *Hausmann*, F note 305.

¹⁰⁶ ECJ – C-391/95 – *Van Uden*, ECR I-1998, 7091 para. 29, 34.

¹⁰⁷ NK-BGB/Gruber Art. 19 note 3.

¹⁰⁸ *Hau FamRZ* 2000, 1333/1339; *Thomas/Putzo/Hüßtege* Art. 19 note 1; *Hausmann*, F note 294.

¹⁰⁹ *Hausmann*, F note 291.

¹¹⁰ Court of Appeal (Oberlandesgericht) of Hamm NJW-Spezial 2005, 443.

motion will follow at a later date than the decision pertaining to the stay of the proceedings.¹¹¹ This procedure is a so-called tiered procedure. ‘Establishment’ as defined by Article 19 (3) would actually mean that the question of international jurisdiction has been **formally and with legally binding effect** been decided by the court first seised.¹¹² The correctness of the decision shall not be doubted by the court second seised.¹¹³ It is also completely irrelevant whether the international jurisdiction is based on Article 8 et seqq. or on the provisions of the relevant *lex fori*. After all, the court second seised cannot argue that the desired objective of legal protection is actually non-realizable before the court first seised.¹¹⁴

- 22 The ECJ has recently stated that the concept of ‘established jurisdiction’ in Art. 19 must be interpreted independently, by reference to the scheme and purpose of the act that contains it.¹¹⁵ As a result, this requirement is **interpreted generously**: ‘Thus, in order for the jurisdiction of the court first seised to be established within the meaning of Article 19 (1) of that regulation, it is sufficient **that the court first seised has not declined jurisdiction of its own motion** and that none of the parties has contested that jurisdiction before or up to the time at which a position is adopted which is regarded in national law as being the first defence on the substance submitted before that court [...]’.¹¹⁶

However it is necessary ‘that the proceedings brought between the same parties and relating to petitions for divorce, judicial separation or marriage annulment **be pending simultaneously before the courts of different Member States**. Where two sets of proceedings have been brought before the courts of different Member States, and one set of proceedings expires, the risk of irreconcilable decisions [...] disappears. It follows that, even if the jurisdiction of the court first seised was established during the first proceedings, the situation of *lis pendens* no longer exists and, therefore, that jurisdiction is not established. That is the case following the lapse of the proceedings before the court first seised. In that situation, the court second seised becomes the court first seised **on the date of that lapse**’.¹¹⁷

- 23 For its declaration of non-jurisdiction, the court second seised shall select a **form of decision-making** which conforms to the *lex fori* of the respective Member State. If, in connection with a matrimonial cause as defined by Article 19 (1) in conjunction with subsection (3) 1st sentence the court second seised establishes its lack of jurisdiction, the question arises in what way this will impact a (detachable) ancillary family-law matter. The relevant national legislation shall regularly be consulted in such cases to determine whether or not the divorce proceedings pending before the court first seised would in any way restrict the implementation of a related ancillary matter in another Member State.¹¹⁸ If the ancillary matter concerns **spousal support and child support**, Article 12 of the Maintenance Regulation (EC) shall apply. It is of critical importance here whether

¹¹¹ Court of Appeal (Oberlandesgericht) of Karlsruhe FamRZ 2011, 1528; Rauscher/Rauscher Art. 19 note 45.

¹¹² Heiter FamRZ 2014, 861; dissenting Thomas/Putzo/Hüfstege Art. 19 note 6; Hilbig-Lugani GPR 2016, 132, 134.

¹¹³ Rauscher/Rauscher Art. 19 note 46.

¹¹⁴ Rauscher/Rauscher Art. 19 note 47, 32 ff. (*separazione giudiziale*).

¹¹⁵ ECJ – Case C-489/14 – A v. B, ECLI:EU:C:2015:654, para. 28, 34.

¹¹⁶ ECJ – Case C-489/14 – A v. B, ECLI:EU:C:2015:654, para. 34, 37; E v. E [2015] EWHC 3742 (Fam); Mankowski in: Magnus/Mankowski, Brussels IIbis Regulation, Art. 19 note 53; dissenting Thormeyer EuZW 2014, 340.

¹¹⁷ ECJ – Case C-489/14 – A v. B, ECLI:EU:C:2015:654, para. 37.

¹¹⁸ Court of Appeal (Oberlandesgericht) of Hamm NJW-Spezial 2005, 443; Rauscher/Rauscher Art. 19 note 47.

or not the claim to spousal and/or child support is already pending with the court first seised in the divorce matter.¹¹⁹

2. Excessive duration of the proceedings

An **excessive duration of the proceedings** before the court first seised may lead to an infringement of Article 6 (1) of the European Convention on Human Rights. In this case the question arises whether or not the court second seised should be allowed, by way of exception, to continue the proceedings in derogation from Article 19 (3).¹²⁰ Since the scope of Article 19 touches mostly on **matters of law on legal standing or status** which are of great significance for the individual party, this might justify a departure from the priority rule.¹²¹ As to whether or not it is alright to omit a declaration of non-jurisdiction as defined by Article 19 (3) 1st sentence in the individual case, it is very important to find out to what extent **effective legal protection** will be guaranteed in the individual case.

3. Motion before the court of origin (subsection (3) 2nd sentence)

In the case of a declaration of non-jurisdiction by the court second seised, the petitioner before that court may submit his/her **motion to the court first seised**.¹²² However, the Regulation does not provide for the automatic **transfer of the motion** by the court second seised.¹²³ There are various answers to the question of whether the court of origin may use its national procedural rules for dismissing the motion submitted, or whether this is ruled out by Article 19 (3) 2nd sentence.¹²⁴ It is therefore conceivable that Article 19 (3) 2nd sentence excludes precisely the national regulations on the periods for filing actions and on foreclosures,¹²⁵ even where this involves an interference with the *lex fori* of the respective Member States.¹²⁶ In any event, the court of origin's international jurisdiction for the motion does not yet follow from Article 19 (3) 2nd sentence.¹²⁷ In matrimonial causes, however, the prerequisites laid down in Article 4 (counterclaim) are likely to be met.¹²⁸ However, the international jurisdiction of the court of origin can become problematic in **matters concerning parental responsibility**.¹²⁹ In **matters of international private law qualification**, the court first seised is not bound by the viewpoints held by the court second seised.¹³⁰

¹¹⁹ Court of Appeal (Oberlandesgericht) of Hamm NJW-Spezial 2005, 443.

¹²⁰ *Sangmeister* NJW 1998, 2952; Thomas/Putzo/Hüfstege Art. 19 note 6. Rauscher/Rauscher Art. 19 note 49.

¹²¹ Rauscher/Rauscher Art. 19 note 49.

¹²² Borrás, Explanatory Report, OJ 1998 C 221/27, para. 55; Thomas/Putzo/Hüfstege Art. 19 note 7.

¹²³ Rauscher/Rauscher Art. 19 note 51.

¹²⁴ Rauscher/Rauscher Art. 19 note 52.

¹²⁵ Gruber FamRZ 2000, 1129, 1134; Hausmann EuLF 2000/01, 347; Rauscher/Rauscher Art. 19 note 54; Vogel MDR 2000, 1049; Thomas/Putzo/Hüfstege Art. 19 note 7.

¹²⁶ Rauscher/Rauscher Art. 19 note 54.

¹²⁷ Borrás, Explanatory Report, OJ 1998 C 221/27, para. 55; Hausmann EuLF 2000/01, 347; Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 40; dissenting Schack RabelsZ 65 (2001) 615, 626.

¹²⁸ Gruber FamRZ 2000, 1129; Hausmann EuLF 2000/2001, 347; Borrás, Explanatory Report, OJ 1998 C 221/27, para. 55.

¹²⁹ Rauscher/Rauscher Art. 19 note 53.

¹³⁰ Dilger in: Geimer/Schütze, Internationaler Rechtsverkehr, Art. 19 note 42; NK-BGB/Gruber Art. 19 note 26; dissenting Gruber FamRZ 2000, 1129, 1134.

4. Lack of jurisdiction of the court of origin

- 26 Should the court first seised **decline jurisdiction** with legally binding effect, it will be the duty of the court second seised to continue the proceedings.¹³¹ This duty to continue shall survive even if the motion is dismissed as unfounded. After all, this decision dismissing the motion is not recognized under Article 21 et seq.¹³² As mentioned before (Marginal Note 12 above), the substantive relationship between *lis pendens* and *res iudicata* frequently discontinues after conclusion of the legal proceedings before the court first seised: This means that if the *res iudicata* effects, which are recognized across international borders, fall short of the scope of the procedural bar pursuant to Article 19, the later legal proceedings may be either continued or newly initiated.¹³³ But as long as the court first seised does not make a decision about its international jurisdiction, the second-round proceedings shall be suspended in order to prevent conflicting decisions.¹³⁴

Article 20 Provisional, including protective, measures

(1) In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

(2) The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

Recitals: 12, 16

Case Law:

ECJ – 120/79 *de Cavel./de Cavel*;
 ECJ – 25/81 *C.H.W./G.J.H.*;
 ECJ – C-365/88 *Hagen*;
 ECJ – C-351/89 *Overseas Union Insurance and Others*;
 ECJ – C-261/90 *Reichert*;
 ECJ – C-391/95 *van Uden*;
 ECJ – C-99/96 *Mietz*;
 ECJ – C-159/02, *Turner*;
 ECJ – C-116/02 *Gasser*;
 ECJ – C-104/03 *St. Paul Dairy NV./Unibel Exser BVBA*;
 ECJ – C-523/07 *A*;
 ECJ – C-256/09 *Purrucker*;
 ECJ – C-403/09 *PPU Detiček*.

¹³¹ Gruber FamRZ 2000, 1129, 1135; Thomas/Putzo/Hüßtege Art. 19 note 9; Rauscher/Rauscher Art. 19 note 56.

¹³² Gruber FamRZ 2000, 1129, 1135; Thomas/Putzo/Hüßtege Art. 19 note 9; Rauscher/Rauscher Art. 19 note 57.

¹³³ NK-BGB/Gruber Art. 19 notes 4, 27, 30; Thomas/Putzo/Hüßtege Art. 19 note 8; Gruber FamRZ 2000, 1129, 1134.

¹³⁴ Court of Appeal (Oberlandesgericht) of Karlsruhe FamRZ 2011, 1528; Gruber FamRZ 2000, 1129, 1133.

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I. Preliminary note

In principle, the rules of jurisdiction of the regulation are exhaustive. Here, Article 20 (1) has the function of an opening clause. According to Article 20, courts of the Member States may adopt provisional measures, including protective measures in matrimonial proceedings and in proceedings regarding parental responsibility, not only if they have jurisdiction in the proceedings in the main action under Articles 3 et seq., 8 et seq., but also if their jurisdiction is based solely on national law. This is the case even if the courts of another Member State have jurisdiction for the proceedings in the main action under the provisions of the regulation. For a general understanding of the jurisdiction provision in Article 20, in Case C-256/09¹ (*Bianca Purucker v. Guillermo Vallés Pérez*), the Court stated the following in proceedings regarding parental responsibility. The following remarks apply equally to matrimonial proceedings:

‘[61] It is evident from the position of Article 20 in the structure of Regulation No 2201/2003 that it cannot be regarded as a provision which determines substantive jurisdiction for the purposes of that regulation.

[62] That finding is supported by the wording of Article 20, which merely states that, in urgent cases, the provisions laid down in Regulation No 2201/2003 ‘shall not prevent’ the courts of a Member State from taking such provisional, including protective, measures as may be available under the law of that Member State even if, under that regulation, a court of another Member State has jurisdiction as to the substance of the matter. Likewise, Recital 16 in the preamble states that the regulation ‘should not prevent’ the adoption of such measures.

[63] It follows that Article 20 of Regulation No 2201/2003 can cover only measures adopted by courts which do not base their jurisdiction, in relation to parental responsibility, on one of the articles in Section 2 of Chapter II [= Art. 8–15] of the regulation.

[64] It is therefore not only the nature of the measures which may be adopted by the court – provisional, including protective, measures as opposed to judgments on the substance – which determines whether those measures may fall within the scope of Article 20 of the regulation but rather, in particular, the fact that the measures were adopted by a court whose jurisdiction is not based on another provision of that regulation.’

¹ ECJ – C-256/09 *Purucker*, para. 61.

In Case C-403/09 PPU² (Detiček), as a general standard for the interpretation of the jurisdictional provision of Article 20, the ECJ stated the following:

‘[39] In that it is an exception to the system of jurisdiction laid down by the regulation, that provision must be interpreted strictly.’

Parallel provisions to Article 20 can be found in Article 35 of Regulation (EU) No 1215/2012, Article 14 of Council Regulation (EC) No 4/2009 and Article 19 of Regulation (EU) No 650/2012. However, contrary to the wording of specified provisions, Article 20 provides that jurisdiction under national law may be exercised only in urgent cases and only in respect of persons or assets in the state in question. However, a factual deviation from the aforementioned provisions need not necessarily have to result from this. On the other hand, Article 11 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children is not to be regarded as a parallel provision. Regarding this, in Case C-256/09³ (Bianca Purucker v. Guillermo Vallés Pérez), the Court stated as follows:

‘[89] [There are] two significant differences distinguish Article 11(1) of the 1996 Hague Convention from Article 20 of Regulation No 2201/2003. First, Article 11 of the convention is manifestly designed to be a rule of jurisdiction and structurally is to be found in the list of provisions of that type, which is not true of Article 20 of the regulation, as stated in paragraph 61 of this judgment.’

- 2 Through its reference to national law, Article 20 solely extends jurisdiction to provisional measures. The courts with jurisdiction for the proceedings in the main action pursuant to Article 3 et seq. (in particular Articles 6, 7), Article 8 et seq. (in particular Article 14) may, on the basis of such rules of jurisdiction, order provisional measures.⁴ Whether the measure is adopted prior to or after the initiation of proceedings in the main action is irrelevant. Accordingly, in no way does Article 20 restrict the jurisdiction of the courts with jurisdiction under the provisions of the regulation.⁵ For provisional measures based on the jurisdiction of the regulation, the restrictions of Article 20 are not to be observed,⁶ that is, the following conditions are not to be reviewed in such cases. The same applies to their recognition and enforcement.

II. Conditions of subsection (1)

- 3 What concepts of legal protection are covered by the term “provisional measures” under Article 20 (that is, the instruments of legal protection, in addition to general rules of jurisdiction, for which the opening clause of Article 20 are available) must be determined with a self-standing interpretation. Here, the case law of the ECJ regarding the parallel provisions of Article 20 (in particular Article 35 of Regulation (EU) No 1215/2012) must be taken into account.

In several decisions, the ECJ⁷ has emphasised that the authority of the courts covered by Article 20 (1) of that regulation to adopt provisional, including protective, measures is subject to three cumulative conditions, namely:

² ECJ – C-403/09 PPU *Detiček*, para. 39.

³ ECJ – C-256/09 *Purucker*, para. 61.

⁴ ECJ – C-256/09 *Purucker*, para. 62.

⁵ Austrian Supreme Court (OGH), Case 2Ob228/11 k.

⁶ ECJ – C-256/09 *Purucker*, para. 63.

⁷ ECJ – C-256/09 *Purucker*, para. 77; Case C-403/09 PPU *Detiček*, para. 39.