

Effective Application of Provisional Measures under the Brussels Ibis Regulation

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Abstract

*The article is devoted to the study of the notion of provisional measures under Article 35 of the Brussels Ibis Regulation. The purpose of the study is to analyse the jurisdictional grounds for the application of provisional measures by courts of the Member States of the European Union. The authors argue that the Brussels Ibis Regulation establishes a dual-track jurisdictional system for the application of provisional measures in cases where the court is seised of the merits of the case and when the court is not seised of the merits of the case. The application of both bases for provisional measures is consistent with the principle of *lis pendens*, and therefore if the court that was the first to hear the first application for interim relief has priority to apply such measures.*

The analysis was based on the scientific literature on the peculiarities of the application of provisional measures and case law of the Court of Justice of the European Union. The following methods were used to write the article: analysis, systematic, and legal interpretation.

Keywords

cross-border civil dispute • European Union law • provisional measures • interim measures

Introduction

The application of provisional measures (thereinafter also – interim measures) in civil proceedings guarantees that the imminent judgment can be enforced successfully (Kazhashvili, 2018). Effective application of provisional measures is important not only in domestic but also in cross-border civil proceedings in which their application requires enforcement abroad. Provisions of the European Union (thereinafter – EU) should be interpreted and applied in the way their effectiveness is ensured by law (Case C-379/17). It is likely that in cross-border civil proceedings, a defendant may have assets outside the state of the forum hearing the case; there may be a need to take appropriate measures to preserve these assets during the pendency of the proceedings. If a successful judgment for a claimant is rendered, the judgment may be smoothly enforced abroad. The ELI/UNIDROIT Model European Rules of Civil Procedure (thereinafter – ELI/UNIDROIT Model Rules) establishes that one of the functions of provisional and protective measures is to ensure effective enforcement. Rule 185 of the abovementioned legislation provides that the grant of provisional and protective measures is subject to the principle of proportionality, whilst taking into account the interests of both the claimant and the defendant. Thus, the requirements of effectiveness and proportionality

stand out as the main criteria for the application of provisional relief in cross-border litigation.

The Brussels Ibis Regulation establishes a few provisions on the scope and application of provisional measures in cross-border civil and commercial matters (Regulation 1215/2012). The first major issues related to provisional measures were addressed under the 1968 Brussels Convention when the Court of Justice of the European Union (hereinafter – the CJEU) in 1980 clarified that provisional measures that were applied *ex parte* are not subject to the recognition and enforcement procedure provided for in the Brussels Convention if the defendant was not notified in advance before their enforcement (Case C-125/79). The recent case law of the CJEU reveals that the problems still arise when applying for provisional measures regarding their scope and proportionality when more than one provisional measure is sought to be applied in different Member States (Cases C-186/19, C-581/20, C-271/21). Moreover, the procedure for applying provisional measures must be compatible with the procedural guarantees of the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights which is also an important source for the consideration of the application of EU civil procedure law (Case No 17056/56).

The effectiveness of the application of provisional measures in cross-border civil proceedings relates to the notion, scope and conditions under which such measures may be applied. In this regard, the application of the national and EU law also

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intertwines. Since the Brussels Ibis Regulation does not define and establish *European* provisional measures, they are a matter of the national laws of the Member States. However, not all provisional measures under the national law of the Member States may fall under the scope of the Brussels Ibis Regulation since they have to comply with the certain requirements. Further, the existence of cross-border elements in civil proceedings raises the question of which courts of which Member States have jurisdiction to hear an application to provisional measures. Is it always the forum of the Member State which hears a dispute or, is it also possible to file such an application before the court of other Member States? What are the grounds (links) for such jurisdiction?

Furthermore, the question arises whether a few applications for provisional measures may be submitted simultaneously before the courts of different Member States? It may happen, for instance, that a defendant has assets which may be relevant in the case of the enforcement of a judgment in different Member States. Does it mean that such applications can be submitted to different courts? Can the courts from different Member States impose the same provisional measures against the same assets of a defendant, for example, issue a freezing order? Does the effectiveness of the application of the Brussels Ibis Regulation require the courts receiving such applications to coordinate their actions? Is the application of interim measures subject to the autonomy of the Member States' domestic law? For example, if one Member State provides for the immunity of certain entities from such measures, does this prohibition also apply to the application of interim measures under EU law? Should the court in one Member State declare that it lacks jurisdiction to hear an application for provisional measures if the court in another Member State had already decided upon the same application for provisional measures in civil proceedings?

The problems of the application of provisional measures in cross-border civil proceedings in the Brussels Ibis Regulation have already been addressed in various scholars' works (Pretelli, 2016; Dickinson, 2010). Although important, the studies conducted do not examine recent case law. Some authors emphasise that the relevant case law of CJEU and the acts of the European Parliament and the Council miss the opportunity to improve the institute of provisional measures under EU law (Honorati, 2014; Goris, 2021). This research seeks to draw conclusions for a more efficient and effective delivery of justice under EU law. The recent case of the CJEU, such as the TOTO SpA case in which, the question arose what are the legal effects of a judgment of one Member State to apply provisional measures for the courts in the other Member States when the same application for provisional measures is submitted (Case C-581/20).

The article consists of three parts which aim to reveal the current problems of the effective application of provisional

measures in cross-border civil proceedings. First, it analyses the notion of provisional measures in EU civil procedure law. Second, it assesses jurisdiction to apply provisional measures under the Brussels Ibis Regulation. Third, it analyses some of the relevant questions related to the recognition and enforcement of provisional measures in EU civil procedure law.

Research Results and Discussion

The notion of provisional measures under the Brussels Ibis Regulation

To deal with the effectiveness of the application of provisional measures in cross-border civil proceedings, it is required to clarify what national measures fall under the concept of provisional measures under EU law. The the Brussels Ibis Regulation does not provide a precise definition of provisional measures. Recital 25 of the Brussels Ibis Regulation states that 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. It is important to note that these rules come from the case law of the CJEU and remain unchanged compared to the previous version of the Brussels Ibis Regulation (Case C-104/03). It should be noted that the Regulation cannot objectively provide a single strict definition of provisional measures due to the fact that the national law of the different Member States provides for different types of provisional, including protective measures. Instead, it is much better to define provisional measures by their functional purpose. For example, ELI/UNIDROIT Model Rules divide provisional measures into three broad types: i) conservatory or preservation measures to secure enforcement on the merits; ii) regulatory measures that cover a broad range of measures intended to maintain *status quo*; iii) anticipatory measures that, on the temporary basis, award either partially or in full what is or will be claimed in the proceedings. This distinction is in principle also valid for the application of the measures provided for in the Brussels Ibis Regulation.

The second paragraph of Article 2 (a) of the Brussels Ibis Regulation establishes that for the purposes of Chapter III, '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. The broad definition is borrowed almost word for word from Article 32 of the Brussels I Regulation. The second paragraph gives a specific definition, for the purposes of the Regulation, of judgments that contain provisional and protective measures. Legal doctrine emphasises that this definition, which was absent from the 2001 Regulation, is quite restrictive and introduces a narrowing of the category of provisional and protective measures, which can be recognised and enforced under the Brussels I regime. Authors argue that the introduction of this new restriction was unexpected. The Heidelberg Report had identified various issues deserving attention on the subject of provisional and protective measures. But they were concerned mainly with the conditions for granting such measures and, therefore, the application of what is now Art 35 of the Regulation. In relation to the matter of recognition and enforcement of judgments, the only “policy recommendation” made by the authors of the Heidelberg Report was to acknowledge that, in line with the CJEU’s case law, the enforcement of provisional measures should be subject to the right of the respondent to comment on the issue of the measures before or after they are issued. <...> Moreover, a second limitation, which had not been envisaged by the Commission Proposal, has been introduced during the legislative process, namely that *ex parte* measures are also excluded from the Regulation rules on the recognition and enforcement of judgements (Dickinson & Lein, 2015). It seems that the institute of provisional measures did not receive significant and thorough attention from the legislator when the new Regulation was adopted. As a result, at present, certain court orders on interim measures cannot be considered as judgments, which, consequently, creates certain obstacles to the free movement of judgments and to the effective enforcement of the right to a judicial remedy.

Thus, a provisional measure under the Brussels Ibis Regulation is not any kind of measure but also a measure which has a protective or preventive function. Moreover, according to Article 2 of the Brussels Ibis Regulation, not all provisional measures can be court decisions, such a measure must meet certain criteria, such as being issued by a court having jurisdiction over the substance of the dispute and the defendant must be heard before it is enforced. If these conditions are met, then an imposed provisional measure can only be considered a judgment for one purpose only – recognition and enforcement.

Jurisdiction to apply provisional measures under the Brussels Ibis Regulation

If the dispute between the parties has a foreign (international) element, it is likely that the enforcement of the judgment may take place in a foreign country. In such a case, when applying for an interim measure, a party to the dispute may choose either to apply to the court seised of the merits of the

dispute or to apply to the court of the foreign State where the defendant’s assets are located. In either case, it is necessary to assess the court’s rights to apply interim measures under the Brussels Ibis Regulation.

In accordance with Article 35 of the Brussels Ibis Regulation, the application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter. This means that there are two types of jurisdictions to apply interim measures: 1) when the court is seised of the merits of the case; 2) when the court is not seised of the merits of the case. This is the so-called double-track jurisdictional system for provisional measures (Honorati, 2014; Goris, 2022).

Although at first sight it would appear that both the court having jurisdiction on the substance of the dispute and the court not having jurisdiction on the substance of the dispute have the same right to grant provisional measures, however, this is not the case.

In the first case, when the court is seised of the merits of the case, the court has the power to grant provisional measures in accordance with its domestic law (*lex fori*). In principle, the main condition a court has to satisfy is that it has jurisdiction to hear the case on the merits. The condition is satisfied, provided that the jurisdiction of the court is established. If the defendant challenges the jurisdiction or does not appear before the court, it is required for the provisional measure to be recognised in the other Member States that such court has already ruled on that point, it is doubtful that the parties can obtain the certificate confirming that the court has jurisdiction as to the substance of the matter (Art 42(2)(b)(i)), without which the decision cannot circulate (Dickinson & Lein, 2015). When the condition is met, a court has the right to apply provisional measures in the light of its domestic regulation and case law. For example, prior to Brexit, the legal doctrine noted the peculiarity of one certain type of provisional measure applied by English courts - the freezing order. Unlike freezing devices in civil law countries, the English freezing order operates only *in personam* and amounts to neither any seizure nor any authorisation to request a seizure from enforcement authorities (Hess et al., 2008). As the order is addressed to a person and not to a property, it also has legal consequences for entities in foreign countries. Moreover, the English freezing order has a “draconian character” due to the fact that not only the respondent is exposed to contempt of court penalties but also all persons or commercial entities are affected who may assist the respondent, for example, banks that maintain bank accounts of the debtor (Hess et al., 2008). Another example of a particular country where domestic law provides for specific rules on the application of interim measures is found in Bulgarian law. Article 393 of

the Bulgarian Code of Civil Procedure provides that interim measures to secure a pecuniary claim against, inter alia, the State and public entities are not allowed (Case C-581/20). These examples show that it may be useful for litigants to take into account certain features of the application of interim measures provided for by the domestic law of the Member States. For example, it may be advantageous for a claimant to litigate in a State that can apply interim measures *in personam*. On the other hand, it may be in the defendant's interests to litigate in a State which provides for certain protective regulations against the defendant. This aspect of „forum shopping“ is also noted in the legal doctrine. Dickinson and Lein state that although the intention of the Brussels Ibis Regulation was to curb the so-called “provisional forum shopping”, paradoxically, however, it may have the opposite effect. The impact of forum shopping in respect of substantive claim – *bona fide* or *mala fide* – is still reinforced, as it becomes paramount to bring a substantive claim in a forum that allows for efficient cross-border provisional relief, either pre-judgment or post-judgment (Dickinson & Lein, 2015).

As regards the second possibility of applying provisional measures, i.e. when they are applied by a court which is not seised of the merits of the case, the question arises whether such application of provisional measures relates exclusively to the application of the provisions of EU law, or whether it is a matter of domestic law. Although Article 35 provides that an order for interim measures issued by a court which is not seised of the merits of the dispute shall have effect only in the Member State, which issued such an order, this rule essentially contains a reference to the domestic jurisdictional rules of the Member States. However, this reliance on the national jurisdictional systems is not unconditional (Goris, 2022). In the Supreme Site Services case, the CJEU determined that previous case law remains applicable to Article 35 (Case C-186/19). The first condition is that provisional measures have to fit within the autonomous notion of “provisional, including protective measures”, as elaborated by the CJEU. Secondly, there has to be a “real connecting link” between the provisional measures and the Member State where the measures are sought (Goris, 2022). Thus, the possibility of granting interim measures is not absolute. Two conditions must be met for the court to apply provisional measures, which is not seised of the merits of the case. These conditions are: i) provisional measures have to fit within the autonomous notion of “provisional, including protective measures”; ii) there has to be a “real connecting link” between the provisional measures and the Member State where the measures are sought. These two conditions partially protect the defendant, as claimants are not guaranteed that foreign courts will grant provisional measures in all cases. Thus, the Regulation provides for a certain minimum protection for the defendant. In the light of

the principle of adversary proceedings, the burden of proof as to the existence of those conditions should be placed on the claimant. Finally, it should be noted that Article 35 of the Brussels Ibis Regulation deals only with the application of interim measures and not with their validity in other States or their recognition and enforcement.

Lastly, it is important to mention the problem of concurring application of provisional measures. The problem is addressed in the TOTO case C581/20. One could ask, what happens when different courts of different EU Member States receive applications for provisional measures? Does Article 35 of the Brussels Ibis Regulation must be interpreted as meaning that the court of a Member State to which an application for interim measures is filed must declare that it has no jurisdiction when a court of another Member State having jurisdiction to hear the case in substance, has already ruled on an application in a case between the same parties on the same subject and on the same grounds? The CJEU takes the position that the Brussels Ibis Regulation does not establish a hierarchy of these courts (Case C581/20). In particular, it is not apparent from the wording of Article 35 of the said Regulation that it generally confers jurisdiction on the courts of a Member State with jurisdiction over the substance of the case to adopt interim measures, including protective measures, and as a result courts of other Member States no longer have jurisdiction to adopt such measures when the first courts were approached with a request to apply such measures or they made a decision on such a request (Case C581/20). Article 35 of the Brussels Ibis Regulation must be interpreted as meaning that the court of a Member State to which a request for provisional measures within the meaning of this provision has been made, is not required to declare that it lacks jurisdiction when a court of another Member State having jurisdiction to hear a case on the substance of the matter, has already ruled on a request in a case between the same parties on the same subject and on the same grounds. (Case C581/20).

In our opinion, the CJEU's reasoning and the result achieved in the TOTO case are not clear enough. It is worth mentioning AG Rantos's Opinion, according to which *lis pendens* rule in Article 29 of the Brussels Ibis Regulation applies to applications for provisional, including protective, measures (Opinion of Advocate General in case C-279/17). Two consequences flow from that rule: (a) the court seised of the first application for interim relief has priority once it has declared that it has jurisdiction; and (b) from that moment, the court seised of the second application for interim relief must decline jurisdiction in favour of the first court (para 50.). Such an interpretation undoubtedly ensures greater legal clarity. Especially bearing in mind that the institution of provisional measures is strongly dependent on the specific factual circumstances, which may be treated differently by the courts in the Member States due

to the high discretion of the court in these matters. Moreover, although the case did not raise the issue, it is also important to note that, in our view, the same principle should also apply not only for the application of provisional measures but also when the court decides on the annulment or modification of provisional measures, which also relates to the requirement of proportionality of the interim measures. In such cases, only one court at a time should decide on the application of these measures, i.e. we should apply the *lis pendens* rule. Otherwise, it would lead to situations where litigants would turn to foreign courts to obtain the most favourable court rulings on these issues.

To sum up, the Brussels Ibis Regulation provides for the so-called double-track jurisdictional system for provisional measures: 1) when the court is seised of the merits of the case; 2) when the court is not seised of the merits of the case. In the first case, the court applies provisional measures under domestic law, so the parties may have an interest in having the dispute resolved in a forum that is favourable to them. In the second case, provisional measures may be granted by another court, but two conditions must be met. The measures must comply with the notion of provisional measures under the Brussels Ibis Regulation and there must be a “real connecting link” between the measure sought and the jurisdiction of the court. Obviously, the effectiveness of provisional measures is different in both cases, which may lead the parties to so-called “provisional forum shopping”. In order to ensure legal clarity, only one court at a time should rule on provisional measures on the same issue. A contrary interpretation is incompatible, as in practice, it could lead to situations where, for example, a court in one jurisdiction decides on the modification of interim measures and another jurisdiction decides on their annulment.

Recognition and enforcement of provisional measures under the Brussels Ibis Regulation

Depending on the manner in which the interim measures have been applied, their effects on recognition and enforcement will differ. According to the Recital 33 of the Brussels Ibis Regulation, firstly, where provisional measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation will be ensured under the Brussels Ibis Regulation. Secondly, where provisional measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures will be confined to the territory of that Member State.

Provisional measures are regarded as “judgments” only for the reason of recognition and enforcement (Chapter III of the Brussels Ibis Regulation). This rule should also be understood in reverse, i.e. when there is no question of recognition or enforcement, then provisional measures should not be regarded as a judgment. In this regard, it should be noted that the Brussels Ibis Regulation, unlike the previous Brussels

Regulation No. 44/2001, abolished *exequatur*. Under Brussels Regulation No. 44/2001 all judgements had to be recognised by the court of other Member States. However, under the new Brussels Ibis Regulation, certain provisional measures, which meet certain prerequisites, may be automatically recognised in all Member States.

Even when the court applies provisional measures being seised of the merits of the case, the Brussels Ibis Regulation provides for another limitation related to recognition and enforcement. Under Article 2(a) of the Brussels Ibis Regulation, “judgment” 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. In practice, the question may arise, how to make sure whether all the necessary conditions (for example, the defendant was informed about the measure) have been met in the country of origin to recognise and allow the enforcement of temporary protection measures adopted by a foreign court? To ensure that the condition as to the jurisdiction of the court of origin is satisfied, Art 42(2)(b)(i) of the Recast Regulation requires, for the enforcement of a decision ordering a provisional measure, that the certificate issued by the court of origin confirms that “the court has jurisdiction as to the substance of the matter”. This certificate must be submitted by the party that seeks the direct execution of the decision from the competent enforcement authority in the Member State of enforcement (Dickinson & Lein, 2015).

Another practical problem that can be encountered is that the other Member State might not have a specific provisional measure, which the other court has issued, for example, an *anti-suit injunction*. Can you recognise and enforce that measure? According to Recital 28 of the Brussels Ibis Regulation, where a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. How and by whom the adaptation is to be carried out should be determined by each Member State.

As regards recognition and enforcement, the question may arise as to what to do if a court in one jurisdiction refuses to grant an interim measure, but an analogous measure is granted by a court in another country, and then the applicant seeks recognition of the measure in the first jurisdiction that first refused to grant the measure. Can such a measure be refused recognition because it is irreconcilable with a judgment given between the same parties in the Member State addressed (Article 45 (1) (c) of the Brussels Ibis Regulation)? This issue has been addressed in the case of Italian Leather, where CJEU agreed that recognition and

enforcement of such a decision should be refused (Case C-80/00). Although there is no doubt that the parties to a dispute should not use the Brussels Ibis Regulation as a tool to abuse procedural rights and to seek more favourable judgments in foreign jurisdictions, it should also be noted that an order of provisional measures cannot be treated in the same way as a judgment on the merits of the dispute. Unlike judgments on the merits, provisional measures do not have *res judicata* or prejudicial power, which means that a party to a dispute may re-apply to the court if there is *periculum in mora*. Court orders related to provisional measures are always interim (interlocutory), which means that they must be modified, amended or even revoked, having regard to the proportionality and appropriateness of the restrictions imposed by them. The European Court of Human Rights has also noted that certain circumstances may change in the course of the proceedings and in such a case, the court must decide on the lifting of the interim measures or the possibility of replacing them with less restrictive ones (Case 3330/12). Accordingly, the case law must take into account, on a case-by-case basis, whether the provisional measure sought to be recognised and enforced in other jurisdictions is, in fact, analogous to another provisional measure decided in the previous case.

In conclusion, the procedure for the recognition and enforcement of a court order on provisional, including protective measures, is much more complicated than it may seem at first glance. Whether such an order is automatically recognised in the Member States depends on certain circumstances, for example, whether the ruling was applied by the court that decides the case on its merits or whether the defendant was informed about the ruling prior to enforcement. In practice, various questions may arise when deciding on the recognition and authorisation of provisional measures, for example, whether the said measure does not conflict with a previous court decision on a similar matter. Since court rulings on provisional measures have neither *res judicata* nor prejudicial power, it can be assumed that it is possible to recognise court rulings on provisional measures, even if the recognising court previously refused to apply such measures.

Conclusions

Under the Brussels Ibis Regulation, not all provisional, including protective, measures can be understood as “judgements”. Provisional measures must meet certain criteria, such as being issued by a court having jurisdiction over the substance of the dispute, and the defendant must be heard before it is enforced. If these conditions are met, then

a provisional measure can only be considered a judgment for one purpose only – recognition and enforcement.

The Brussels Ibis Regulation provides for the so-called double-track jurisdictional system for provisional measures: 1) when the court is seised of the merits of the case; 2) when the court is not seised of the merits of the case. The effectiveness of provisional measures is different in both cases, which may lead to “provisional forum shopping”. In practice, there are problems related to parallel interim litigation, i. e. parties seek to take advantage of the different efficiency levels related to provisional measures. In our view, the *lis pendens* rule should be applied if an analogous question related to provisional measure is applied in different jurisdictions. The same principle should be applied to different court rulings related to provisional measures, for example, court rulings to modify or annul provisional measures.

Recognition and enforcement of provisional measures depend on several factors, including whether the court has jurisdiction as to the substance of the matter and whether the defendant was informed about the provisional measure prior to enforcement. Although CJEU case law states that if a court has refused to apply a provisional measure between the parties in dispute, the court must also refuse to recognise the same measure applied by another court, however, it should be taken into account that the provisional measures have neither *res judicata* nor prejudicial power, which means that in practice it is necessary to take into account whether the *periculum in mora* and other factual circumstances are really the same and/or unchanged.

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