

## Anonymised version

Translation

C-361/24 – 1

Case C-361/24 [Grečniaka]<sup>i</sup>

### Request for a preliminary ruling

**Date lodged:**

17 May 2024

**Referring court:**

Oberster Gerichtshof (Austria)

**Date of the order for reference:**

26 April 2024

**Appellant in the appeal on a point of law:**

RX

**Respondents in the appeal on a point of law:**

FZ

VT

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[...]

The Oberste Gerichtshof (Supreme Court, Austria), [...] adjudicating in the guardianship case concerning the first minor, FZ, and the second minor, VT, [...] both represented by the mother [...], on the matter of provisional maintenance claimed under Paragraph 382(8)(a) of the Exekutionsordnung (Enforcement Directive, ‘the EO’), in the appeal on a point of law (*Revisionsrekurs*) brought by the father, RX, [...] against the order of 14 June 2023 issued by the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria) – adjudicating as an appellate court – in case number GZ 42 R 11/23p-41, by which the order of the Bezirksgericht Innere Stadt Wien (Inner City of Vienna District

<sup>i</sup> The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

Court, Austria) of 19 September 2022 in case number GZ 83 Pu 137/21y-31 was confirmed, [...] issues the following

Order:

I. The following questions are referred to the Court of Justice of the European Union ('the Court') for a preliminary ruling pursuant Article 267 TFEU:

1. Is Article 12 of 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, OJ EU 2009 L 7/1 ('the EU Maintenance Regulation') to be interpreted as meaning that two sets of proceedings are pending '*between the same parties*' if, in one set of proceedings, minors assert their claim against the father for payment of current maintenance while, in the other set of proceedings, the father is also seeking, in addition to a divorce from the mother of the minors, a decision determining his maintenance obligation towards the minors, even though the minors are neither applicants nor respondents in the divorce proceedings?

2(a) Is Article 12 of the EU Maintenance Regulation to be interpreted as meaning that proceedings '*involving the same cause of action*' have been instituted if, in one set of proceedings, the minors are asserting their claim to current maintenance with immediate effect, whereas, in the other set of proceedings, the father is also seeking, in addition to a divorce from the mother, a decision determining his obligation to pay current maintenance for the minors as a consequence of the divorce, that is to say in respect of a future period for which the start date is not yet foreseeable?

2(b) For the purposes of the foregoing assessment, is it relevant whether the current maintenance sought by the minors is subject to a formal time limit expiring upon termination of the divorce proceedings?

2(c) Does the answer to questions 2.a) and 2.b) differ if the minors are seeking current maintenance in the form of an order for a provisional measure?

2.d) Does it make a difference, in that regard, whether the possibility of the periods overlapping is excluded by the wording of the application, or is merely practically unlikely because the provisional maintenance claim granted in Austria is subject to a time limit that expires upon termination of Austrian (main-) maintenance proceedings, that are suspended pending a decision on jurisdiction in the Polish divorce proceedings?

3. Is Article 14 of the EU Maintenance Regulation to be interpreted as meaning that, where main proceedings are pending, the applicant may initiate proceedings seeking provisional protective measures under Article 14 in all courts specified in Articles 3 et seq. of the EU Maintenance Regulation, notwithstanding the fact that the applicant is precluded from seising those courts of (further) main proceedings

because a set of main proceedings has already been initiated and *lis pendens* within the meaning of Article 12 is thus established?

4. If Question 3 is answered in the negative: Is Article 14 of the EU Maintenance Regulation to be interpreted as meaning that the applicant may also initiate proceedings seeking provisional protective measures under Article 14 before a court which has already been seised of main proceedings but has currently stayed its proceedings because main proceedings had already been initiated and *lis pendens* within the meaning of Article 12 is thus established?

5. If Question 3 is answered in the negative: Is Article 14 of the EU Maintenance Regulation to be interpreted as meaning that an application for provisional, including protective, measures can be made only to a court having jurisdiction on the basis of national rules if there is a real connecting link between the measure applied for and the territorial jurisdiction within the meaning of the case-law laid down in Case C-391/95, *van Uden*, and Case C-125/79, *Denilauler v S. N. C. Couchet Frères*?

If so, are there other criteria which should be taken into consideration for the purposes of determining whether there is a real connecting link besides the question of whether enforcement proceedings appear likely to be successful in that Member State (in particular, for the purposes of the present case, the domicile of the applicant minors; the staying of the main proceedings, which are suspended because of the minors' application; the domicile of the respondent at the time of initiation of the main proceedings, which are suspended because of the minors' application)?

6. If Question 3 is answered in the negative: Is Article 5 of the EU Maintenance Regulation to be interpreted as meaning that the father's appearance in proceedings for provisional spousal maintenance also amounts to an appearance in proceedings for provisional child maintenance if all maintenance claims are based on the fact that the father/husband has left the family and are the subject of the same divorce proceedings giving rise to *lis pendens*, but the protective measures *vis-à-vis* the maintenance must, under national law, be asserted in different types of proceedings?

III. [...] [Stay of proceedings]

Grounds:

### **Regarding I.: Reference for a preliminary ruling**

#### **A. The initial situation:**

- 1 The parents of the two minors are still married but live separately. All of the parties are Polish nationals and their last place of common residence was in

Vienna, where the minors were also born. The father's maintenance obligation in respect of the two minors has not yet been determined in court.

- 2 On 24 August 2021, the minors, who are represented by their mother, applied to the Bezirksgericht Innere Stadt Wien (Inner City of Vienna District Court, Austria) in non-contentious proceedings registered under case number 83 Pu 137/21y, seeking an order requiring their father to pay monthly maintenance as of 1 August 2021. According to their submissions, he had moved out of the family's shared flat in Vienna in mid-May 2021 and does not pay regular maintenance.
- 3 The father objected, arguing that although he had continued to reside in Vienna following his move, he had already filed an application for divorce on 4 August 2021 before the Sąd Okręgowy w Krakowie (Regional Court of Krakow) in Poland, registered under case number XI C 2299/21, the subject matter of which also included determination of the maintenance for the mother and the two minors. According to the father's submissions, the international jurisdiction of the Regional Court of Krakow to hear the divorce proceedings arises from the common nationality of the spouses pursuant to Article 3(1)(b) of Council Regulation (EC) No 2201/2003. He argues that the Inner City of Vienna District Court should, on the grounds of *lis pendens* pursuant to Article 12(2) of the EU Maintenance Regulation, decline jurisdiction in favour of the Regional Court of Krakow and reject the minors' application for maintenance; in the alternative, he further argues that, by virtue of Article 13(1) and (2) of the EU Maintenance Regulation, the proceedings should be stayed on the grounds of related actions until the Regional Court of Krakow has made a *res judicata* decision on jurisdiction.
- 4 On 14 September 2021, the mother also filed an action for divorce but that action was filed with the Inner City of Vienna District Court in contentious civil proceedings registered under case number 83 C 34/21w. The action was served on the defendant on 29 September 2021.
- 5 Acting pursuant to Article 12(1) of the EU Maintenance Regulation, the Inner City of Vienna District Court stayed the maintenance proceedings brought by the minors in case number 83 Pu 137/21y by order of 25 October 2021, and by order of 1 March 2022 it also stayed the divorce proceedings of the parents in case number 83 C 34/21w, until such time as the jurisdiction of the first-seised Regional Court of Krakow is established.
- 6 A decision on jurisdiction by the Regional Court of Krakow has not yet been reported but on 15 November 2023, an enquiry was received from the Regional Court of Krakow concerning the status of the divorce proceedings in Austria.

**B. The opinions of the parties and the prior proceedings of the minors for provisional maintenance:**

- 7 On 14 April 2022, the minors – once again represented by their mother – filed an application with the Inner City of Vienna District Court, in non-contentious maintenance proceedings registered under case number 83 Pu 137/21y, seeking an order pursuant to Paragraph 382(1)(8)(a) of the Exekutionsordnung (Enforcement Directive, ‘the EO’) requiring their father to make a **provisional** maintenance payment of EUR 650 per child as of 1 May 2022.
- 8 The father lodged an objection, arguing that the court of first instance lacked international jurisdiction also for the purposes of determining provisional maintenance. The father submits that, by virtue of Article 14 of the EU Maintenance Regulation, international jurisdiction to order provisional measures lies primarily with the venue where the decision on the substance of the main case is to be made, which, in case at issue, is Krakow. He further submits that jurisdiction is also lacking under Austrian law: Paragraph 387(1) of the EO refers only to domestic courts; Article 387(2) of the EO refers to the court of enforcement, namely – in the instant case – the court at the father’s place of domicile, which is (now) Warsaw. The father argues that the minors’ application constitutes an abuse of rights in view of the fact that the father returned from Vienna to Poland in January 2022 but the mother decided secretly and unilaterally to remain in Austria with the minors. It was further submitted that the maintenance sought exceeds the father’s financial means.
- 9 The Inner City of Vienna District Court, as the court of first instance, and the Landesgericht für Zivilrechtssachen Wien (Vienna Regional Court for Civil Matters, Austria), as the appellate court: (1) affirmed the Inner City of Vienna District Court’s international jurisdiction under Article 14 of the EU Maintenance Regulation to hear the proceedings for provisional maintenance brought by the minors; (2) ordered the father to effect provisional monthly maintenance payments of EUR 365 per child as of 1 May 2022 until, at the latest, the conclusion of the maintenance proceedings brought before the Inner City of Vienna District Court by application of 24 August 2021 in case number 83 Pu 137/21y; and dismissed the additional claim for a further EUR 265 per child. The stay of the main proceedings in case number 83 Pu 137/21y did not preclude the court of the place where the minors have their habitual place of residence from ordering a provisional measure (Article 14, read in conjunction with Article 3(b), of the EU Maintenance Regulation). There was simply no evidence of any abusive conduct on the part of the minors (nor on the part of their mother). Based on the father’s established income and other duties to provide care, the minors would be entitled to 11% of the chargeable income.
- 10 The Vienna Regional Court for Civil Matters granted leave to appeal on a point of law to the Supreme Court because there was a lack of case-law from the highest courts concerning orders for provisional measures in proceedings relating to child

maintenance following a stay of maintenance proceedings pursuant to Article 12(1) of the EU Maintenance Regulation.

- 11 In his appeal on points of law (*Revisionsrekurs*) to the Supreme Court as the court of last instance, the father requests that the decision of the court of first instance be declared null and void and that the case be referred back to the court of first instance for a new hearing; in the alternative, he requests that the minors' application be dismissed on procedural grounds for lack of jurisdiction; in the further alternative, he requests that the order of the court of appeal be set aside and that the case be referred back to the court of first instance. He also advocates obtaining a preliminary ruling from the Court of Justice of the European Union ('the Court') on the issue of international jurisdiction.
- 12 The father's simultaneous application for a suspension or deferral of the enforceability of the provisional maintenance order was dismissed on substantive grounds by the Inner City of Vienna District Court, which was the competent court in that regard, with the result that its provisional order on maintenance for the minors is currently enforceable.
- 13 The minors have requested the Supreme Court to reject the father's appeal on a point of law on formal grounds or to dismiss it on substantive grounds.

### **C. Relevant legal provisions**

- 14 **1.** Article 3 of the EU Maintenance Regulation is worded as follows:

#### ***General provisions***

*In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:*

*(a) the court for the place where the defendant is habitually resident, or*

*(b) the court for the place where the creditor is habitually resident, or*

*(c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties,*

*or*

*(d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.*

- 15 **2.** Article 5 of the EU Maintenance Regulation is worded as follows:

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***Jurisdiction based on the appearance of the defendant***

*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 rule shall not apply where appearance was entered to contest the jurisdiction.*

- 16 **3.** Article 12 of the EU Maintenance Regulation is worded as follows:

***Lis pendens***

*(1) Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*

*(2) Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.*

- 17 **4.** Article 14 of the EU Maintenance Regulation is worded as follows:

***Provisional, including protective, measures***

*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 State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.*

- 18 **5.** Paragraph 382(8)(a) of the Exekutionsordnung (Austrian Enforcement Directive, 'the EO') is worded as follows:

***Protective measures***

*Paragraph 382 The protective measures that the court may order, upon application, depending on the nature of the objective to be achieved in the individual case, shall include:*

*[...]*

*8(a) determination of a provisional maintenance payment to be made by a spouse or divorced spouse to the other spouse or by one of the parents to the child, in each case in the context of maintenance proceedings; in the case of a maintenance obligation on the part of the father of a child born out of wedlock, that obligation shall apply only if paternity is established; in the case of maintenance for the spouse or a child born of marriage, a connection with proceedings for divorce or for an annulment or declaration of nullity of the marriage shall be sufficient.*

- 19 **6.** Paragraph 387 of the EO (Austrian Enforcement Directive) is worded as follows:

### **Jurisdiction**

(1) *Unless otherwise provided for in this Law, the court before which the main substantive proceedings or the enforcement proceedings in respect of which a measure is to be ordered are pending at the time of the first application shall have jurisdiction to grant provisional measures and issue the orders necessary for their implementation and to adjudicate on other applications and proceedings arising in connection with such measures.*

(2) *If such measures are applied for before the commencement of legal proceedings, or after their final conclusion but before the commencement of enforcement, the Bezirksgericht (district court) where the opponent of the party at risk has his general place of jurisdiction for disputes at the time of the first application shall have jurisdiction for the specified authorisations[,] orders, applications and hearings, but if, however, such a place of jurisdiction is not established for the said opponent in Austria, the competent court shall be the domestic district court within whose geographic jurisdiction the subject matter in respect of which a measure is to be ordered is located, or within whose geographic jurisdiction the third-party debtor has his or her or its domicile, registered office or place of residence, or within whose geographic jurisdiction the act facilitating enforcement of the provisional measure is otherwise to be carried out.*

(3) *By way of derogation from subparagraph (2), the court that would have jurisdiction for the main substantive proceedings shall also have jurisdiction in those cases if the proceedings relate to provisional measures under Paragraph 382(8) [comment by the referring court: that is to say for provisional maintenance] or those in connection with unfair competition, or pursuant to the Urheberrechtsgesetz (Copyright Law) or Paragraphs 28 to 30 of the Konsumentenschutzgesetz (Consumers Protection Law).*

(4) [...]

## **D. Reasons for the reference to the Court of Justice**

### **1. Applicability of the EU Maintenance Regulation**

- 20 **1.1.** 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 ('the EU Maintenance Regulation') entered into force as of 18 June 2011 (Article 76 of the EU Maintenance Regulation).
- 21 Austria and Poland are Member States to which the EU Maintenance Regulation applies, which means that the regulation takes precedence over bilateral and multilateral agreements by virtue of Article 69(2) thereof.



- 22 **1.2.** The material scope of application of the EU Maintenance Regulation covers all maintenance obligations ‘arising from a family relationship, parentage, marriage or affinity’ (Article 1(1) of the EU Maintenance Regulation), which therefore also encompasses the father’s obligation to pay financial maintenance.
- 23 **1.3.** Article 75(1) of the EU Maintenance Regulation provides that the regulation is to apply to all proceedings instituted after 18 June 2011.

## 2. Question 1: Identity of the parties

- 24 **2.1.** The father, as the applicant, filed his application for divorce with the Regional Court of Krakow against the mother, as respondent. The dependent minors are not parties to their parents’ divorce proceedings in Poland but the father’s application for divorce also seeks a decision determining the maintenance for his children.
- 25 **2.2.** The term ‘*between the same parties*’ as used in Article 12(1) of the EU Maintenance Regulation must be defined in isolation from the regulation. According to the case-law of the Court concerning the identical content of Article 21 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, the identical nature of the parties is, exceptionally, also to be assumed where the parties to the dispute are not identical, but there is, as regards the subject matter of two disputes, such a degree of identity between the interests of the parties that a judgment delivered for or against one of the parties would have the force of *res judicata* as against the other (CJEU C-351/96, *Drouot v CMII*, paragraph 19).
- 26 **2.3.** It has therefore been argued in academic literature that identity of parties should be assumed also in maintenance proceedings if the child is a party in one set of proceedings and a parent is conducting the proceedings on behalf of the child in the other set of proceedings (that is to say in his or her own name but concerning the rights of the child), in so far as the decision is effective for and against the child (*Andrae in Rauscher*, EuZPR/EuIPR<sup>4</sup> IV [2010] Art. 12 EuUVO, paragraph 4; *Fuchs in Gitschthaler*, Internationales Familienrecht [2019] Art. 12 EuUVO, paragraph 10; *Weber in Mayr*, Europäisches Zivilverfahrensrecht<sup>2</sup> [2023] paragraph 6.239; *Reuß in Geimer/Schütze*, Internationaler Rechtsverkehr in Zivil- und Handelssachen [66<sup>th</sup> supplement of January 2023] Art. 12 EuUVO, paragraph 8; *Lipp in MKFamFG* [2019] EG-UntVO Art. 12, paragraph 8).
- 27 **2.4.** It was for that reason that the Supreme Court made a corresponding request for a preliminary ruling in case 6 Ob 240/12f = CJEU C-442/13, *Nagy*. The Sixth Chamber withdrew that request by order of 26 May 2014, after the Hungarian divorce proceedings, whose subject matter also encompassed child maintenance, had been declared terminated following an application by the father of 28 March 2014 (see 6 Ob 99/14y).
- 28 **2.5.** The question as to whether Article 12 of the EU Maintenance Regulation is applicable if the father is seeking a decision determining his maintenance

obligation towards a child in pending divorce proceedings while, in a separate set of proceedings, the child asserts his or her claim for maintenance payments against the father has therefore not yet been definitively settled by the case-law of the Court of Justice of the European Union.

### 3. Question 2: Identical cause of action

- 29 **3.1.** In the Polish proceedings, the father is seeking a divorce and a decision determining the children's place of residence and the amount of his maintenance obligation. It therefore appears that the subject matter of the proceedings in Poland concerns (only) the minors' claim for maintenance following the parents' divorce, which is yet to take place.
- 30 In the Austrian proceedings, the minors initially requested that the father be ordered to make monthly maintenance payments as of 1 August 2021. Following the stay of those proceedings pursuant to Article 12(1) of the EU Maintenance Regulation, they are now seeking a provisional order requiring the father to pay provisional maintenance as of 1 May 2022. According to the issued provisional order, that obligation is to apply until, at the latest, termination of the Austrian maintenance proceedings.
- 31 **3.2.** The Court applies an independent interpretation to determine, in the light of the objectives of the regulation, whether the causes of action are the same (see case C-144/86, *Gubisch Maschinenfabrik v Palumbo*, paragraph 11; C-406/92, *The Tatry v The Maciej Rataj*, paragraph 30). It affirms identity if the subject matter and basis of the actions or applications initiating the proceedings are identical (see RS0118405). The term 'subject matter' refers to the purpose of the action or the application initiating the proceedings; it also encompasses preliminary questions that will subsequently be reflected in the supporting grounds for the decision (case 144/86, *Gubisch Maschinenfabrik v Palumbo*, paragraph 16). The Court understands the term 'cause of action' to comprise the facts and the rules of law relied on as the basis of the action (C-406/92, *The Tatry v The Maciej Rataj*, paragraph 39). In that context, however, the 'rules of law' does not refer to the specific provision of the applicable substantive law, but rather to the legal question that must be answered (*Fuchs in Gitschthaler*, *Internationales Familienrecht* [2019], Article 14 of the EU Maintenance Regulation, paragraph 11 with further references).
- 32 Unlike the relationship between spouses, the parent-child relationship is not fundamentally changed by the parents' divorce. Determining the child maintenance payable by a parent who does not provide benefits-in-kind by caring for the child in his or her household thus serves the purpose of providing care for the child, irrespective of the continuance of the parents' marriage. It therefore follows that the 'cause of action' for the minors' maintenance claims in the proceedings before the Regional Court of Krakow and the Inner City of Vienna

District Court is the same factual life situation, that is to say the same maintenance relationship arising out of a specific family law relationship.

- 33 **3.3.** However, in cases involving disputes as to maintenance, the period of the claimed maintenance is regarded as an essential criterion for the purposes of determining whether the subject matter of the dispute is identical. In maintenance disputes, the core question is thus whether, in what amount and for what period one of the parties is required to pay maintenance to the other party (see RS0118405 [T2] as regards the ‘core issue theory or hypotheses’ (*‘Kernpunkttheorie bzw -these’*)).
- 34 In academic literature it has therefore been argued that *lis pendens* can be present only if there are congruent periods at issue in both sets of proceedings (*Fuchs in Gitschthaler*, Internationales Familienrecht [2019] Art. 12 EuUVO, paragraph 14; *Fucik in Fasching/Konecny*<sup>3</sup> [2010] Art. 12 EuUVO, paragraph 2; *Lipp in MKFamFG* [2019] EG-UntVO Art. 12, paragraph 9; *Andrae in Rauscher*, EuZPR/EuIPR<sup>4</sup> IV [2010] Art. 12 EuUVO, paragraph 7). According to *Lipp*, separation maintenance can thus, for example, also be distinguished from post-marital maintenance of spouses, without there being any need for problematic legal recourse to its substantive legal basis (*Lipp in MKFamFG* [2019] EG-UntVO Art. 12, paragraph 9).
- 35 *Weber*, on the other hand, assumes that there will also be identical causes of action if, in one set of proceedings, a child asserts his or her claim for maintenance against the father in respect of past and current maintenance, while the father, in divorce proceedings, seeks a decision determining his maintenance obligation towards the child as well as the payments to be made to the mother in respect of the period following the divorce (*Weber in Mayr*, Europäisches Zivilverfahrensrecht<sup>2</sup> [2023] paragraph 6.243).
- 36 **3.4.** Question 2.a), which seeks to ascertain whether and to what extent *lis pendens* is to be affirmed under Article 12 of the EU Maintenance Regulation if the father, in pending divorce proceedings, seeks a decision determining his maintenance obligation towards a child as a consequence of the divorce, while, in a separate set of proceedings, the child is seeking payment of current maintenance from the father, has not yet been definitively settled by the case-law of the Court of Justice of the European Union.
- 37 **3.5.** Furthermore, question 2.b) seeks to ascertain the relevance to be attributed to the wording of the child’s maintenance claim in that context – for example, if the claim is not expressly formulated in such a way that it requests payment of current maintenance only until the parents’ divorce proceedings have been concluded.
- 38 **3.6.** In German academic literature, it has been argued that the rules on the coordination of proceedings (Article 12 and 13 of the EU Maintenance Regulation) concern only the relationship between the main sets of substantive proceedings. By contrast, the relationship between main proceedings and

provisional protective legal measures is not covered (*Weber in Mayr*, *Europäisches Zivilverfahrensrecht*<sup>2</sup> [2023], paragraph 6.235; *Andrae in Rauscher*, *EuZPR/EuIPR*<sup>4</sup> IV [2010] Art. 12 EuUVO, paragraph 8; *Hausmann in Hausmann*, *Internationales und Europäisches Familienrecht*<sup>3</sup> [2024] C. Unterhaltssachen, paragraph 281).

- 39 That view is also consistent with the case-law and academic literature on [...] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 ('the Brussels 1a Regulation') and the previous Council Regulation (EC) No 44/2001 of 22 December 2000 ('the Brussels I Regulation') (*Geimer in Geimer/Schütze*, *Europäisches Zivilverfahrensrecht*<sup>4</sup> [2020]) Art. 29 EuGVVO, paragraphs 76 et seq. with further references; *Gottwald in MüKommZPO*<sup>6</sup> Art. 29 Brüssel 1a-VO, paragraph 17; *Wallner-Friedl in Czernich/Kodek/Mayr*<sup>4</sup> Art. 29 EuGVVO 2012, paragraphs 19 and 28; 4 Ob 118/06s [Point 4.1]; 4 Ob 273/01b) as well as on similar provisions in other regulations (for example, Article 17 of Council Regulation (EU) 2016/1103 (*EuEhegüterVO/EuGüVO*): *Gottwald in MüKommBGB*<sup>9</sup> Art. 17 EuGüVO, paragraph 6; *Weber in Gitschthaler*, IFR Art. 17 *EuEhegüterVO* paragraph 8).
- 40 According to that point of view, proceedings for provisional relief, even if they relate to an application for a performance order, do not bar commencement of the main proceedings in another Member State and vice versa (*Hausmann in Hausmann*, *Internationales und Europäisches Familienrecht*<sup>3</sup> [2024] C. Unterhaltssachen, paragraph 281).
- 41 That view would also ensure that the minors could, in any event, secure their livelihood by making an application in their country of residence if no decision on jurisdiction by the court first seised of the main proceedings had yet been reported (which, in the present case, has been true for a number of years).
- 42 Question 2.c) – which seeks to ascertain whether the case-law on the non-applicability of the rules on procedural coordination to the relationship between main substantive proceedings and proceedings for provisional relief, which has been established in respect of other regulations, applies also to the EU Maintenance Regulation – has not yet been definitively settled by the case-law of the Court of Justice of the European Union.
- 43 **3.7.** In the present case, there is the additional special feature that the provisional maintenance determined by Austrian courts, although subject to a time limit that expires upon conclusion of the Austrian maintenance proceedings, is not linked to the decision determining maintenance in the Polish divorce proceedings. If the Regional Court of Krakow does not make a decision on jurisdiction before it issues a decision having the force of *res judicata* on the maintenance for the minors, or if the Inner City Vienna District Court is not made aware of a decision on jurisdiction that was already been made some time ago, then the proceedings relating to maintenance for the minors in case 83 Pu 137/21y will remain pending in Austria and the obligation to pay provisional maintenance will remain in force.

That could result in a temporal overlap of the provisional maintenance payments ordered by the Austrian courts and maintenance set in the Polish proceedings as a consequence of the divorce.

- 44 Question 2.d) therefore arises, which seeks to ascertain whether there is identity of the causes of action based on a potential temporal overlap of an Austrian provisional order for maintenance in respect of the minors and a maintenance order for the minors issued in Poland as a consequence of the divorce, which has also not yet been definitively settled by the case-law of the Court of Justice of the European Union.

**4. Question 3: Is there international jurisdiction in respect of provisional measures by virtue of Article 14, read in conjunction with the fictitious jurisdiction provided for under Article 3, of the EU Maintenance Regulation?**

- 45 **4.1.** According to his submissions, the father returned to Poland in January 2022. Accordingly, at the time of the application for provisional maintenance on 14 April 2022, the minors, but not the father, were domiciled within the geographic jurisdiction of the Inner City of Vienna District Court.
- 46 **4.2.** Article 14 of the EU Maintenance Regulation establishes an exception to the (final) European system of jurisdiction in matters relating to maintenance obligations. Notwithstanding divergent jurisdiction under Article 3 et seq. of the EU Maintenance Regulation, the courts of other Member States are also authorised, alongside the court hearing the main case, to grant provisional relief as a court-of-measures in accordance with their national procedural law (two-track system of jurisdiction). The party at risk is therefore entitled to choose whether to invoke the ancillary jurisdiction of the court hearing the main case on the basis of the EU Maintenance Regulation or seise a court that is competent to order provisional measures (see *Weber in Mayr, Europäisches Zivilverfahrensrecht*<sup>2</sup> [2023], paragraph 6,262).
- 47 **4.3.** However, different views can be found in academic literature concerning the question of whether, in cases concerning provisional measures, all of the venues referred to in Article 3 et seq. of the EU Maintenance Regulation are available or only those provided for by national law.
- 48 Some writers take the view that international jurisdiction for provisional measures could no longer be based on Article 3 et seq. of the EU Maintenance Regulation if, at the time of filing the application for those measures, main substantive proceedings are already pending under the EU Maintenance Regulation before a court of a Member State. In that case, proceedings in another Member State would be precluded by the *lis pendens* rule laid down in Article 12 of the EU Maintenance Regulation, to the effect that the jurisdiction of other courts to grant provisional measures could then be established only on the basis of the *lex fori*, that is to say, under national law (*Fuchs in Gitschthaler, Internationales Familienrecht* [2019] Art. 14 EuUVO, paragraph 2 with reference to *Andrae* in

*Rauscher*, EuZPR/EuIPR<sup>4</sup> IV [2010] Art. 14 EuUVO, paragraph 11; *Reuß* in *Geimer/Schütze*, Internationaler Rechtsverkehr in Zivil- und Handelssachen [66<sup>th</sup> supplement of January 2023] Art. 12 EuUVO, paragraph 8; *Sieghörtner* in *Hahne/Schlögel/Schlünder*, BeckOKFamG<sup>49</sup> [2024] Art. 14 EuUVO, paragraph 5).

- 49 By contrast, other writers consider that, even after the main substantive proceedings are pending, all of the courts referred to under Article 3 et seq. of the EU Maintenance Regulation have international jurisdiction to order provisional measures (*Weber* in *Mayr*, *Europäisches Zivilverfahrensrecht*<sup>2</sup> [2023], paragraph 6.267; *Henrich* in *Born*, *Unterhaltsrecht* [64<sup>th</sup> supplement, October 2023] Chapter 33, paragraph 2; *Hausmann* in *Hausmann*, *Internationales und Europäisches Familienrecht*<sup>3</sup> [2024] C. *Unterhaltssachen*, paragraph 3 12; *Lipp* in *MKFamFG* [2019] EG-UntVO Art. 14, paragraph 11). It would therefore also be permissible for the maintenance creditor to apply for the provisional measure before the court of his or her habitual residence and to commence the main proceedings before the court where the maintenance debtor has his or her habitual place of residence. That applies not only to orders for protective measures but also to performance orders, even if there is a risk that the maintenance debtor may be burdened by two judgments at the same time (*Weber* in *Mayr*, *Europäisches Zivilverfahrensrecht*<sup>2</sup> [2023], paragraph 6.267).
- 50 More specifically, *Henrich* has constructed the following example: If a German wife, who had been living with her Austrian husband in Austria, should return to Germany and the husband were to then file for divorce in Austria, the wife would be able to apply for a provisional maintenance order not only in the pending divorce proceedings in Austria (the jurisdiction of the Austrian courts to decide on the maintenance claim arises from Article 3(c) of the EU Maintenance Regulation, read in conjunction with Article 3(1)(a)(ii) of the Brussels II(b) Regulation), but also in Germany by virtue of Article 14 of the EU Maintenance Regulation. The German courts derive the necessary jurisdiction to order the provisional measure from Article 3(b) of the EU Maintenance Regulation; moreover, the German courts would also have international jurisdiction to rule on the main substantive case (*Henrich* in *Born*, *Unterhaltsrecht* [64<sup>th</sup>. supplement, as of October 2023] Chapter 33, paragraph 2).
- 51 If necessary, proceedings relating to a provisional measure can also be stayed pursuant to Article 13 of the EU Maintenance Regulation if (provisional) relief by the court adjudicating on the main substantive case appears more appropriate (*Hausmann* in *Hausmann*, *Internationales und Europäisches Familienrecht*<sup>3</sup> [2024] C. *Unterhaltssachen*, paragraph 3 12).
- 52 **4.4.** Taking everything into consideration, the question therefore remains unresolved as to whether all of the (so-called ‘fictitious’) venues provided for under Article 3(b) of the EU Maintenance Directive are optionally available for the purposes of proceedings relating to provisional protective measures under Article 14.

**5. Question 4: Jurisdiction as a court adjudicating on the main substantive proceedings as contemplated in Article 14 of the EU Maintenance Regulation notwithstanding a stay of the main proceedings pursuant to Article 12 of the EU Maintenance Regulation**

- 53 **5.1.** The Inner City of Vienna District Court, which was seised by the minors for the purposes of the provisional measure, was also previously seised by them for a decision on the substance of the main case. However, those substantive proceedings have been suspended for several years pending an affirmative or negative decision on jurisdiction by the Regional Court of Krakow.
- 54 **5.2.** Hence, it is precisely in a case such as this that the question arises as to whether – even if not every court having fictitious jurisdiction by virtue of Article 3 et seq. of the EU Maintenance Regulation can be a court of jurisdiction, then at least a court seised of the main case could still have jurisdiction in the sense of the wording of Article 14 of the EU Maintenance Regulation – ‘[even if], under this regulation, *the courts of another Member State have jurisdiction as to the substance of the matter*’ – even if it has stayed its proceedings because substantive proceedings had already been initiated before another court and no decision on jurisdiction has yet been issued by the court first seised.

**6. Question 5: international jurisdiction for provisional measures based on Article 14, read in conjunction with national law**

- 55 6.1. Under Austrian law, the court before which the main substantive proceedings are pending at the time of the first application has jurisdiction to determine the provisional maintenance that the parents are required to pay in respect of the minors (Paragraph 387(1) of the EO).
- 56 According to the Austrian case-law on domestic cases, it suffices for that purpose that the document instituting the proceedings was lodged with a domestic court and was not rejected *a limine* (RS0005066; on the requirement for domesticity: case 6 OB 142/19d (point 2), there is not even a requirement for a pending lawsuit (RS0005090). Those minimum requirements are met here in the proceedings in case number 83 Pu 137/21y before the Inner City of Vienna District Court, although they are currently stayed.
- 57 **6.2.** However, in German-speaking countries the prevailing doctrine – which makes reference to the Court’s case-law on the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as well as to Regulation No 2015/2012 (C-391/95, *van Uden*; C-125/79, *Denilauler v S. N. C. Couchet Frères*) – does not consider a national rule of jurisdiction to be sufficient in itself to affirm the jurisdiction of national courts in proceedings for provisional relief that fall within the scope of application of the EU Maintenance Regulation. It also requires a real connecting link between the requested measure and the territorial jurisdiction (*Andrae in Rauscher*, EuZPR/EuIPR<sup>4</sup> IV, Art. 14 EuUVO, paragraph 13; *Fuchs in Gitschthaler*, Internationales Familienrecht

Art. 14 EuUVO, paragraph 8; *Weber in Neumayr/Geroldinger*, Internationales Zivilverfahrensrecht Art. 14 EuUVO, paragraph 9; *Hausmann in Hausmann*, Internationales und Europäisches Familienrecht<sup>3</sup> [2024] C. Unterhaltssachen, paragraph 308; *Reuß in Geimer/Schütze*, Internationaler Rechtsverkehr in Zivil- und Handelssachen [66<sup>th</sup> supplement of January 2023] Art. 12 EuUVO, paragraph 9). The requirement for a real connecting link serves to guarantee the existence of a close connection between the forum and the provisional measure and ensures a minimum level of protection for the opponent of the party at risk, who will not be required to submit to the jurisdiction of the courts in all Member States on the (sole) basis of the rules of their autonomous legal systems, but only in those Member States that appear to be particularly relevant for the purposes of ordering provisional measures (*Simotta/Garber in Fasching/Konecny*<sup>3</sup>, Art. 35 EuGVVO, paragraph 126/1).

- 58 The requirement for a real connecting link would in any event be satisfied if it appears that enforcement in the national territory would be likely to succeed (*Fuchs in Gitschthaler*, Internationales Familienrecht Art. 14 EuUVO, paragraph 8; *Weber in Neumayr/Geroldinger*, Internationales Zivilverfahrensrecht Art. 14 EuUVO, paragraph 9). If a provisional measure relates to a claim, there would be a real connecting link if international jurisdiction were based on the domicile, place of registered office or habitual residence of a third-party debtor (see also *Weber in Mayer*, Europäisches Zivilverfahrensrecht<sup>2</sup> [2023], paragraph 6.269; *Weber in Neumayr/Geroldinger*, Internationales Zivilverfahrensrecht [2022] Art. 14 EuUVO, paragraph 9; *Simotta/Garber in Fasching/Konecny*<sup>3</sup> [2022] Art. 35 EuGVVO, paragraph. 127 et seq. with further references).
- 59 **6.3.** However, the real connecting link criterion has been criticised by some writers as problematic because it is difficult to define (*Geimer/Schütze*, Internationaler Rechtsverkehr in Zivil- und Handelssachen [66<sup>th</sup> supplement of January 2023] Art. 12 EuUVO, paragraph 9, with reference to *Heinze*, Max Planck Private Law Research Paper No. 11/5 2011, 30 f)
- 60 It was for that reason that the European Commission also argued against maintaining the requirement for a real connecting link (European Commission COM (2009) 175, 9). Instead, it argues in favour of an analogous application of Article 20(2) of Council Regulation (EC) No 1347/2000, such that the measures ordered in the state other than the state seised of the main substantive proceedings would cease to have effect as soon as the court having jurisdiction for the main substantive proceedings has ordered the measures it considers appropriate (COM [2009] 175, 8; see also *Fucik in Fasching/Konecny*<sup>3</sup> [2010] Art. 14 EuUVO, paragraph 4; and *Andrae in Rauscher*, EuZPR [2010] Art. 14 EG-UntVO, paragraph 10, which affirms an analogous application in cases involving double protective measures).
- 61 **6.4.** The question of whether there is, in the present proceedings, a real connecting link between the requested provisional maintenance and the territorial jurisdiction



as described above cannot be reliably assessed on the basis of the facts established thus far. In particular, no findings have been made concerning the defendant's enforceable assets in Austria.

62 However, in order for the Supreme Court to set aside the decision and refer the case back to the court of first instance to make additional findings of fact, it is first necessary to clarify whether a real connecting link between the requested measure and the territorial jurisdiction is in fact a prerequisite for jurisdiction under Article 14 of the EU Maintenance Regulation, read in conjunction with national provisions. If that question is answered in the affirmative, it would be necessary to consider whether that real connecting link could also be affirmed, in the present case, on the basis of other factual elements (e.g. domicile of the applicant minors; pendency of suspended main proceedings; domicile of the respondent at the time when the suspended main proceedings in case number 83 Pu 137/21y were commenced).

### **7. Question 6: Relevance of the father's appearance in the Austrian proceedings for provisional spousal maintenance**

63 **7.1.** Lastly, the facts to be assessed in the present case also exhibit the following special feature: it was not only the two minors but also the mother who filed an application for provisional maintenance with the Inner City of Vienna District Court. The mother's claim is being adjudicated in separate proceedings registered under case number 83 C 5/22g; that is because spousal maintenance claims in Austria must be enforced in contentious proceedings, whereas maintenance claims in respect of minors have to be enforced in non-contentious proceedings.

64 The father entered an appearance in the proceedings relating to the mother's application, with the result that the Supreme Court, in case number 4 Ob 151/23v (iFamZ 2023/262 [*Fucik*]), ultimately affirmed the international jurisdiction of the Inner City of Vienna District Court to make a provisional order for the award of spousal maintenance pursuant to Article 5 of the EU Maintenance Regulation.

65 **7.2.** In view of the broad understanding given to 'identity of parties' and 'identity of cause of action' under EU law, the question arises as to whether that appearance, without contesting jurisdiction, also has a bearing on the question of international jurisdiction to make a provisional order awarding provisional maintenance in respect of the two minors, especially in the light of the fact that any possible *lis pendens vis-à-vis* the minors' maintenance claims is based on divorce proceedings pending only between the parents.

### **Regarding II. Suspension of proceedings:**

[...]