C-581/20, TOTO: A MISSED OPPORTUNITY TO CAST LIGHT ON ARTICLE 35 OF THE BRUSSELS I BIS REGULATION?

C-581/20, TOTO: ¿UNA OPORTUNIDAD PERDIDA PARA ARROJAR LUZ SOBRE EL ARTÍCULO 35 DEL REGLAMENTO DE BRUSELAS I BIS?

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Abstract: In C-581/20, *TOTO*, the CJEU was asked about two key aspects of the Brussels I bis Regulation jurisdictional regime for interim proceedings. One is whether it is possible to apply for the same provisional measure before the courts of two Member States. The other is whether access to interim measures throughout Article 35 is subject to a European autonomous regime of prerequisites. To the first point, and against the Advocate General Opinion, the CJEU replies that such practice is allowed. Concerning the second point, the CJEU does not even clarify whether there is an autonomous regime of prerequisites exists or not. The CJEU's answers are less ambitious than the expectations generated by the preliminary reference. This paper offers a comprehensive analysis of the judgment *TOTO*, evaluating its impact on the interpretation of the Brussels I bis Regulation.
Keywords: Brussels I bis Regulation, civil and commercial matters, enforcement, provisional measures; interim measures, choice of court agreements, lis pendens, irreconciliable judgments.

Resumen: En el asunto C-581/20, *TOTO*, el Tribunal de Justicia de la Unión Europea ("TJEU") fue preguntado acerca de dos aspectos clave sobre el régimen jurisdiccional que el Reglamento Bruselas I bis establece para los procedimientos cautelares. Uno es si Reglamento de Bruselas I bis permite solicitar la misma medida cautelar ante los tribunales de dos Estados miembros. El otro es si la obtención de medidas cautelares a través del artículo 35 está sujeta a un régimen autónomo europeo de requisitos materiales. A la primera pregunta, el TJUE responde que tal práctica está permitida, en contra de la opinión del Abogado General. Sobre el segundo punto, el TJUE no llega a aclarar si tal régimen autónomo de requisitos existe o no. Ambas respuestas están lejos de las expectativas generadas por las preguntas de la cuestión prejudicial. Este artículo ofrece un análisis general y exhaustivo de la sentencia *TOTO*, evaluando el impacto que esta haya podido tener en la interpretación del Reglamento Bruselas I bis.
Palabras clave: Reglamento de Bruselas I bis, materia civil y mercantil, ejecución, medidas cautelares, medidas provisionales, acuerdo de elección de foro, litispendencia, resoluciones inconciliables.

I. Introduction

1. Under the Brussels I bis Regulation,[1] claimants can apply for provisional measures before the court with jurisdiction on the merits, but also before other courts that do not have it.[2] This is the so-called double-track jurisdictional system for provisional measures,[3] and its backbone is contained in Article 35. In C-581/20, TOTO,[4] the Court of Justice of the European Union ("CJEU") faced two fundamental inquiries surrounding the jurisdictional regime for provisional measures. One is whether the Brussels I bis Regulation permits the request for the same provisional measure before the courts of two Member States. The second is if there is a European autonomous set of prerequisites to obtain provisional measures under Article 35. Besides those questions, the CJEU was also asked whether the dispute falls within the material scope of the Brussels I bis Regulation. This case note aims to provide a critical analysis of the CJEU's answers in *TOTO*, assessing the relevance that this judgment has on the interpretation of the Brussels I bis Regulation.

II. Background of the case

2. The preliminary reference in TOTO originated in a contractual dispute between a consortium of two Italian companies, TOTO SpA - Costruzioni Generali and Vianini Lavori SpA ("Italian Undertakings"); and the Polish General Director for Highways. Italian Undertakings and the Polish General Director for Highways had signed a contract for the construction of an expressway in Poland.[5] The performance of the contract was secured by a guarantee provided by a Bulgarian insurance company, Euroins AD.[6] Upon some disagreements on the performance of the contract,[7] Italian Undertakings requested provisional measures before the Regional Court of Warsaw (*Sąd Okręgowy w Warszawie*).[8] They sought, among other things, an injunction restraining the Polish General Director for Highways from using the Bulgarian guarantee of the contract. However, the Polish court refused to grant this interim measure because it considered that the *fumus boni iuris* requisite had not been satisfied.[9] Parallel to those proceedings in Poland, Italian Undertakings applied for a similar provisional measure in Bulgaria. The first Bulgarian court that received this request, the District Court of Sofia (*Sofiyski gradski sad*), rejected it.[10] However, Italian Undertakings were able to obtain the provisional measure on appeal.[11] The Polish General Director for Highways brought an appeal in cassation against the decision authorizing the provisional measure before the Bulgarian Supreme Court (*Varhoven kasatsionen sad*),[12] which decided to submit the following questions to the CJEU:

1. *Is Article 1 of [Regulation No 1215/12] to be interpreted as meaning that a case such as that described in this order for reference must be regarded in whole or in part as a civil or commercial matter within the meaning of Article 1(1) of that regulation?*
2. After the right to make an application for provisional/protective measures has been exercised and the court having jurisdiction as to the substance of the matter has already ruled on that

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

[2] Opinion AG Rantos in C 581/20, *TOTO*, ECLI:EU:C:2021:726, para. 31.

[3] On the expression double-track jurisdictional system: On the expression "double track system": C. Honorati, "Provisional Measures and the Recast of Brussels I Regulation: A Missed Opportunity for a Better Ruling", Rivista di diritto internazionale privato e processuale, 2011, p. 526

[4] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808.

[5] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 13.

[6] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 14.

[7] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 16.

[8] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 16.

[9] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 18.

[10] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, paras. 19.

[11] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 20.

[12] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 26.

application, is the court seised of an application for interim relief on the same basis and under Article 35 of [Regulation No 1215/12] to be regarded as not having jurisdiction from the point at which evidence is produced that the court having jurisdiction as to the substance of the matter has given a ruling on that application?

3. If *it follows from the answers to the first two questions referred that the court seised of an application under Article 35 of [Regulation No 1215/12] has jurisdiction, must the conditions for the ordering of protective measures under Article 35 of [Regulation No 1215/12] be interpreted independently? Should a provision which does not allow a protective measure to be ordered against a public body in a case such as the present one be disapplied?*

III. A claim within the material scope of the Brussels I bis Regulation?

3. The Brussels I bis Regulation only applies to "civil and commercial matters".[13] Furthermore, the Regulation expressly excludes from its scope of application "the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)".[14] In *TOTO*, there were well-founded reasons to question whether the dispute fell within the material scope of the Brussels I bis Regulation. One of the parties, the Polish Public Treasury, is a State entity, and the subject matter of the contract was building a public expressway. Furthermore, Bulgarian law expressly prohibits issuing interim measures against the State or public entities.[15] Therefore, it was no wonder that the Bulgarian court asked the CJEU if the Brussels I bis Regulation was applicable or not.

4. To determine whether there was an act of *iure imperii* in TOTO, first the CJEU examined "the nature of the legal relationships between the parties to the action or the subject matter of the action".[16] The contract was assigned to the Italian Undertakings through a public procurement launched by the Polish General Director for Highways;[17] and the subject matter of the contract, building a expressway, was a public purpose.[18] In the CJEU's view, none of these elements "entail the exercise of any powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals".[19]

5. The second factor taken into consideration by the CJEU were "the detailed rules governing the bringing of the action".[20] The action for an interim measure was based on ordinary Bulgarian law, and for the CJEU, another sign of a non-exercise of public powers.[21] Even if Bulgarian law prohibits the adoption of interim measures against public entities, that did "not undermine the civil and commercial nature of an action such as that in the main proceedings, within the meaning of Article 1(1) of Regulation No 1215/2012".[22] In this regard, the CJEU stated that the privilege of immunity that Bulgarian law might give is not "an obstacle for the application of Regulation No 1215/2012".[23] Upon examining all these factors, the CJEU concluded that the dispute fell within the material scope of the Brussels I bis Regulation.[24]

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[13] Art. 1(1) Brussels I bis Regulation.

[14] This reference was introduced in the Brussels I bis Regulation upon the request of German delegation: Comments from the delegation of Germany (18101/10 JUSTCIV 239 CODEC 1587, 9474/11 ADD 7 REV 1, p. 3). It meant a codification of what the CJEU had stated in *Lechouritou*: CJEU, 15 February 2007, C-292/05, *Lechouritou,* ECLI:EU:C:2007:102.

[15] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 43.

[16] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 36.

[17] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 41.

[18] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 39.

[19] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 39.

[20] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 36.

[21] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 42.

[22] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 44.

[23] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 45.

[24] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 46.

6. In *TOTO*, the CJEU reproduces the criteria employed in previous judgments to determine if the acts of a public authority are of an *iure gestionis* or *iure imperii* nature.[25] The two first elements that the CJEU took into consideration correspond to the classic test that is used to determine if a dispute falls within the material scope of application of the Brussels I bis Regulation.[26] This is a test that might not be entirely clear, and, as AG Øe once stated, the CJUE has not always followed "a consistent distinction between 'the legal relationship between the parties', the 'basis of the action brought' and 'the subject matter of the dispute'".[27] However, *TOTO* does not contribute to making the test clearer. Concerning the State immunity that public bodies might enjoy under domestic or international law, the CJEU had already previously held that it "does not preclude the application of Regulation No 1215/2012".[28]

IV. A request for the same provisional measure in two different Member States

1. *Excursus*: The jurisdictional regime for provisional measures of the Brussels I bis Regulation

7. Before addressing the CJEU's answer to the second question, it is convenient to provide a comprehensive and concise overview of the jurisdictional regime for provisional measures of the Brussels I bis Regulation. As mentioned in the introduction, the Brussels I bis Regulation contains a double-track jurisdictional system for provisional measures.[29]

8. Claimants may apply for interim measures before the courts with jurisdiction as to the substance of the matter.[30] Provisional measures granted by these courts are the only ones that can be recognized and enforced in other Member States.[31] Nonetheless, if the measures were granted *inaudita altera parte* they would have to be served on the defendant before requesting their enforcement in other Member States.[32] Otherwise, the judgment containing the provisional measure would not qualify as a judgment for the purpose of the rules on recognition and enforcement of the Brussels I bis Regulation.[33]

9. Besides, Article 35 establishes that courts other than those having jurisdiction on the merits may also grant provisional measures.[34] This article does not establish an autonomous head of jurisdic-

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[25] In this sense: G. Van Calster, "Drawing somewhat blank. The CJEU in Toto", available at: https://gavclaw.com/2021/10/07/drawing-somewhat-blank-the-cjeu-in-toto/ (accessed on 15 November 2021).

[26] CJEU, 3 September 2020, C-186/19, *Supreme Site Services*, ECLI:EU:C:2020:638,

[27] Opinion AG Øe in C-186/19, *Supreme Site Services,* ECLI:EU:C:2020:252, para. 84.

[28] CJEU, 7 May 2020, C-641/18, *Rina*, EU:C:2020:349, para. 58; CJEU, 3 September 2020, C-186/19, *Supreme Site Services*, ECLI:EU:C:2020:638, para. 60.

[29] CJEU, 9 September 2021, Opinion AG Rantos in C 581/20, TOTO, ECLI:EU:C:2021:726, para. 31.

[30] CJEU, 17 November 1998, C-391/95, *Van Uden*, ECLI:EU:C:1998:543, para. 40. The Commission Proposal on the Brussels I bis Regulation contained a specific provision acknowledging that courts with jurisdiction on the substance of the matter could also grant provisional measures: Art. 35 COM/2010/0748 final. However, it was removed from the final text of the Brussels I bis Regulation because some Member States considered it unnecessary: Comments from the delegation of Germany, 18101/10 JUSTCIV 239 CODEC 1587, 9474/11 ADD 7 REV 1, p. 20; and Comments from the delegation of Slovakia, 18101/10 JUSTCIV 239 CODEC 1587, 9474/11 ADD 1, p. 6.

[31] Art. 2(a) Brussels I *bis* Regulation.

[32] Art. 2(a) Brussels I bis Regulation.

[33] However, following Recital 33 of the Preamble, claimants could rely on the national law of the Member State to obtain recognition and enforcement of provisional measures granted *inaudita altera parte*: J. F. van Drooghenbroeck and C. de Boe, "Les mesures provisoires et conservatoires dans le refonte du Règlement Bruxelles I bis" in E. Guinchard (ed.), *Le nouveau règlement Bruxelles I bis. Règlement n° 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, Emile Bruylant, 2014, pp. 201 - 202.

[34] The existence of this second jurisdictional forum is not an innovation of the Brussels system. Before the 1968 Brussels Convention, there were some bilateral treaties which included similar provisions. See, among others: Article 9 of the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899; Article 32 of the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930; or Article 15(2) of the Convention between Germany and Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 30 June 1958.

tion.[35] It rather contains a reference to the domestic jurisdictional rules of the Member States.[36] However, this reliance on the national jurisdictional systems is not unconditional. Under the 1968 Brussels Convention, the CJEU rendered several judgments establishing certain limits to provisional measures before the courts that do not have jurisdiction on the merits. In Supreme Site Services, the CJEU determined that this case law remains applicable to Article 35.[37] The first boundary is that provisional measures have to fit within the autonomous notion of "provisional, including protective measures" as elaborated by the CJEU. According to this definition, "provisional, including protective, measures" are those "measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter".[38] Secondly, there has to be a "real connecting link" between the provisional measures and the Member State where the measures are sought.[39] The "real connecting link" is established when the provisional measure is enforced in the same Member State where it was requested.[40] This is not a major issue. As already mentioned, only provisional measures granted by the courts with jurisdiction on the merits can freely circulate from one Member State to another.[41]

2. Conflicting parallel provisional measures proceedings

10. The existence of the double-track jurisdictional system permitted in *TOTO* the existence of parallel interim measures proceedings in Poland and Bulgaria. In general terms, what the Bulgarian Supreme Court wonders is whether it is possible to rely on both jurisdictions to apply for the same provisional measure.

11. Before *TOTO*, the CJEU had only dealt with one case involving a request for the same provisional measure in two Member States, namely C-80/00, *Italian Leather*.[42] On that occasion, a claimant had unsuccessfully applied for a provisional measure in Germany before the Regional Court of Koblenz (*Landgericht Koblenz*).[43] Upon the rejection in Germany, the claimant was able to obtain the same interim measure in Italy,[44] subsequently requesting its recognition and enforcement in Germany.[45] At that stage, the German Federal Supreme Court (*Bundesgerichtshof*) asked the CJUE whether recognition of the Italian judgment could be denied based on Article 27(3) of the 1968 Brussels Convention (now Article 45(1)(c)).[46] This provision indicated that "a judgment shall not be recognized if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recog-

[35] Differently: F. Gascón Inchausti, "Artículo 35" in P. Blanco-Morales Limones, F.F. Garau Sobrino, M.L. Lorenzo Guillén, F.J. Monteiro Muriel (eds.), *Comentario al Reglamento (UE) no. 1215-2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil: Reglamento Bruselas I refundido*, Aranzadi, 2016, pp. 717-718.

[36] A.L. Calvo Caravaca and J. Carrascosa González, "Medidas Cautelares y el Reglamento Bruselas I-Bis", Rivista di diritto internazionale privato e processuale, 2015, p. 65; P. Gottwald, Art. 35 Brüssel Ia-VO, in W. Krüger and T. Rauscher, *Münchener Kommentar zur Zivilprozessordnung: ZPO*, C.H.Beck, 2020, para. 9; C. Heinze, "Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in theReform of the Brussels I Regulation", Rabels Zeitschrift für ausländisches und internationales Privatrecht, 2011, p. 602; B. Hess, *Europäisches Zivilprozessrecht* (De Gruyter 2020), para. 6.285; M Nioche, *La décision provisoire en droit international privé européen: Qualification et régime en matière civile et commerciale*, Bruylant, 2012, p. 270.

[37] CJEU, 3 September 2020, C-186/19, *Supreme Site Services*, ECLI:EU:C:2020:638, para. 42.

[38] CJEU, 26 March 1992, C-261/90, *Reichert (II)*, ECLI:EU:C:1992:149, para. 34.

[39] CJEU, 17 November 1998, C-391/95, *Van Uden*, ECLI:EU:C:1998:543, para. 40; CJEU, 9 September 2021, Opinion AG Rantos in C 581/20, *TOTO*, ECLI:EU:C:2021:726, para. 69.

[40] Hess (n 36), para. 6.285. There are other interpretations the expression of "real connecting link": A. Nuyts, "Provisional Measures" in A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast*, Oxford University Press, 2015, p. 99.

[41] CJEU, 9 September 2021, Opinion AG Rantos in C581/20, *TOTO*, ECLI:EU:C:2021:726, para. 35.

[42] CJEU, 6 June 2002, C-80/00, *Italian Leather*, ECLI:EU:C:2002:342.

[43] CJEU, 6 June 2002, C-80/00, *Italian Leather*, ECLI:EU:C:2002:342, para. 19.

[44] CJEU, 6 June 2002, C-80/00, *Italian Leather*, ECLI:EU:C:2002:342, para. 21.

[45] CJEU, 6 June 2002, C-80/00, *Italian Leather*, ECLI:EU:C:2002:342, para. 23.

[46] CJEU, 6 June 2002, C-80/00, *Italian Leather*, ECLI:EU:C:2002:342, para. 26.

nition is sought". The CJEU replied affirmatively, determining that Article 27(3) could also apply in the case of two irreconcilable judgments on interim measures.[47] The coordination between the two requests for provisional measures was achieved at the enforcement stage.[48]

12. Nevertheless, *Italian Leather*'s solution cannot be transposed into *TOTO*. As AG Rantos remarked, "no measure having effects that are irreconcilable with those of the Polish judgment exists yet in Bulgaria".[49] Therefore, Article 45(1)(c) would be of no help. In *TOTO*, the request for a provisional measure in Bulgaria was submitted when the proceedings in Poland had been already initiated. It is not entirely clear whether the Polish proceedings were still pending or there was already a final decision.[50] Each of those scenarios would have different solutions to prevent a secondary proceeding on provisional measures. The CJEU provides a single answer without distinguishing between them.[51] Still, I will transpose the CJEU's analysis to both hypotheticals, and, on that basis, explore the available solutions for each of them.

A) Still an ongoing proceeding before Polish courts

i) Seeking coordination throughout a choice of court agreement?

13. The contract signed between Italian Undertakings and the Polish General Director for Highways contained a jurisdictional clause in favour of Polish courts.[52] Does this clause mean that Polish courts were also exclusively competent to grant provisional measures? In other words, to which extent does a choice of court agreement prevent claimants from requesting provisional measures via Article 35? If such were the case in *TOTO*, then, according to Article 31(2) of the Brussels I bis Regulation, Bulgarian courts should have declared their lack of jurisdiction, even if they were seised before Polish courts were. The CJEU appears to be inclined to accept the possibility of giving exclusive jurisdiction to the courts of a Member State to grant interim measures.[53] However, the CJEU also indicates that the fact that the courts of a Member State are selected to decide on the merits does not necessarily imply that this court has also exclusive jurisdiction to grant provisional measures.[54] It might still be possible to obtain provisional measures through Article 35.[55] The availability of Article 35 would depend on the terms in which the jurisdictional clause is drafted.[56] The CJEU left to the referring Bulgarian court the task of examining whether in *TOTO* the jurisdictional clause also encompassed provisional measures.[57]

14. The CJEU's reasoning seems to be guided by the principle of the parties' freedom of choice,[58] giving them the possibility to choose not only the courts that will decide on the merits, but also those that can grant provisional measures. Such approach also aligns with the interpretation that several domestic courts have made of Article 35 in the context of a choice of court agreement.[59]

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[47] CJEU, 6 June 2002, C-80/00, *Italian Leather*, ECLI:EU:C:2002:342.para. 52.

[48] M. Pertegás Sender and T. Garber, "Article 35" in U. Magnus and P. Mankowski (eds.), *Brussels I bis regulation: Commentary*, Otto Schmidt, 2016, para. 91.

[49] Opinion AG Rantos in C-581/20, *TOTO*, ECLI:EU:C:2021:726, para. 83.

[50] Opinion AG Rantos in C 581/20, *TOTO*, ECLI:EU:C:2021:726, para. 69.

[51] Conversely, AG Rantos distinguished between them: Opinion AG Rantos in C 581/20, *TOTO*, ECLI:EU:C:2021:726, paras. 76.

[52] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 50.

[53] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 51.

[54] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para.51.

[55] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 51.

[56] AG Rantos was even more explicit: "which disputes are covered by the choice of forum agreement and which are not is a question of interpretation of the agreement concluded between the parties" (Opinion AG Rantos in C-581/20, *TOTO*, ECLI:EU:C:2021:726, para. 59).

[57] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 11.

[58] CJEU, 28 June 2017, C-436/16, *Leventis and Vafias*, ECLI:EU:C:2017:497, para. 33.

[59] France: Cass 1re civ 30 January 2019 – n° 17-28.992; Luxembourg: CA Luxembourg 15 November 2017 – n° 164/17. It is also a widespread interpretation among scholars: M. Brosch and L. M. Kahl, 'Article 25: Jurisdiction agreements' in Marta Requejo Isidro (ed.), *Brussels I Bis. A Commentary on Regulation (EU) No 1215/2012*, Edward Elgar 2022, para. 25.49; H.

II. Lis pendens rule

15. Article 29 establishes the lis pendens regime of the Brussels I bis Regulation. According to this rule, if two proceedings with the same parties, the same subject matter and the same cause of action are pending before the courts of two different Member States,[60] then, the second court seised "shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established".[61] Does the lis pendens rule also apply between two parallel provisional measures proceedings? If the answer were yes, in the case decided in *TOTO*, the Bulgarian court seised with an application for the interim measure would have had to stay the proceedings. However, on the basis of the CJEU's answer to the second question, the lis pendens rule would not be applicable. In this answer, the CJEU gave two reasons to support the possibility of parallel proceedings. The first one is that provisional measures granted by the court with jurisdiction on the merits and provisional measures granted by other courts have different territorial effects.[62] Furthermore, the CJEU added that the Brussels I bis Regulation "does not establish a hierarchy between these jurisdictions".[63] Therefore, when one court is seised with a request for provisional measures it does not impede other courts from being seised too.[64]

16. Be it as it may, the CJEU's reasoning does not offer a convincing explanation as to why the lis pendens rule does not apply. On the one hand, the territorial limitation for provisional measures granted under Article 35 was introduced only by the Brussels I bis Regulation. There were no different territorial effects between interim measures under the 1968 Brussels Convention and under Brussels I Regulation.[65] Under the old Brussels regime, all provisional measures could be recognized and enforced in other Member States, even those granted by courts with no jurisdiction on the merits. Does this mean that the lis pendens rule would have applied under those instruments? On the other hand, the argument based on the lack of hierarchy between the jurisdictions is not convincing either. It is based on a very literal interpretation of the text of Article 35. Indeed, this provision does not say that once the court with jurisdiction as to the substance of the case is seised with an application for provisional measures, no other court could be seised with the same application; nor vice versa. Nonetheless, the lack of a hierarchy between jurisdictions has never been a criteria to determine the applicability of the lis pendens rule. What matters is determining which court is seised first.

17. The *periculum in mora* would have offered the CJEU a more persuasive argument. One of the prerequisites to obtain provisional measures is the existence of an urgency or *periculum in mora* that without such measure the outcome of the proceedings could be frustrated.[66] Such urgency could be argued to justify a derogative effect on the lis pendens rule, permitting claimants to reach several courts for provisional measures.[67] In this manner, claimants could increase their chances of obtaining the interim protection. In previous judgments, the CJEU affirmed that special jurisdiction constitutes a derogation of the general jurisdictional regime of the Brussels system.[68] The CJEU could have also

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Dörner "Art. 25 EuGVVO" in I. Saenger (ed.), Zivilprozessordnung: ZPO, Nomos 2021, para. 22; U. Magnus ,"Article 25' in U. Magnus and P. Mankowski, *Brussels Ibis Regulation. Commentary*, Ottoschmidt 2017, para. 152; P. Schlosser, "Art. 25 EuGVVO" in B. Hess and P. Schlosser (eds.), *EU-Zivilprozessrecht*, C.H.Beck. 2015, para. 42.

[60] CJEU, 14 October 2004, *Mærsk Olie*, ECLI:EU:C:2004:615, para. 34.

[61] Art. 29(1) Brussels I bis Regulation.

[62] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 11

[63] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 59.

[64] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 59.

[65] T. Kruger, "Provisional and Protective Measures" in A. Nuyts and N. Watté (eds.), *International civil litigation in Europe and relations with third States*, Bruylant, 2005, pp. 332-333.

[66] Even the CJEU acknowledged that the purpose of having a special jurisdictional rule for provisional measures is "intended to avoid causing loss to the parties as a result of the long delays inherent in any international proceedings" (CJEU, 28 April 2005, C-104/03, *St. Paul Dairy*, ECLI:EU:C:2005:255, para. 12).

[67] G. Wagner, "Art. 27 VO 44/2001" in F. Stein and M. Jonas (eds.), *Kommentar zur Zivilprozessordnung. Band 10: Europäisches Zivilprozessrecht*, Mohr Siebeck 2011, margin no. 41.

[68] CJEU, 17 November 1998, C-391/95, *Van Uden*, ECLI:EU:C:1998:543, para. 42; CJEU, 28 April 2005, C-104/03, *St. Paul Dairy*, ECLI:EU:C:2005:255, para. 12.

argued that such derogation encompasses the lis pendens rule. A simpler solution coherent with what the CJEU had already stated.

18. Conversely, AG Rantos defended the applicability of the lis pendens rule.[69] In his view, in *TOTO* "it is confirmed that the Polish court was seised of the proceedings first and that the threefold identity of subject matter, parties and cause of action exists, the Bulgarian court will have to decline jurisdiction in accordance with Article 29(1) of Regulation No 1215/2012".[70]

19. AG Rantos offers, if not a better, at least a more logical line of reasoning. In his analysis, he appears to trace symmetry between Article 45(1)(c) and Article 29.[71] In *Italian Leather*, the CJEU found that the ground can also apply to judgments containing provisional measures.[72] Article 29 also aims to avoid clashes between two irreconcilable judgments, though at an earlier stage than Article 45.[73] AG Rantos' solution would extend *Italian Leather*'s solution to the lis pendens rule. All the more, the solution proposed by AG Rantos also fits well with the interpretation that the CJEU has made of the lis pendens rule of the Brussels system. The CJEU has constructed an autonomous notion of the lis pendens rule in a broad sense.[74] It follows a functional approach, focusing on preventing irreconcilable judgments resulting from separate proceedings.[75] Therefore, putting provisional measure proceedings under the umbrella of Article 29 does not seem unreasonable.[76]

B) A Polish final decision

20. What would it happen if, by the time the Bulgarian court was seised, there was already a Polish final and unappealable decision on the request for the provisional measure? Would the Bulgarian court have to terminate the proceedings when it got to know about the Polish final decision? Not for the CJEU. Claimants could still ask Bulgarian courts for interim protection under Article 35. The reasons would be the same as those mentioned for the non-application of the lis pendens rule.[77] Conversely, for AG Rantos "if it is confirmed that the interim decision is final in Poland, it will also be able to take effect in Bulgaria and preclude (as long as the factual circumstances are the same) the adoption of another measure having the same subject matter, parties and cause of action".[78] Under the Brussels I bis Regulation the recognition of judgments is automatic.[79] Nevertheless, this does not mean that when the Bulgarian court knows about the Polish final decision, it would have to terminate the proceedings. The formalities required by Article 37 would have to be satisfied.[80] This means that the Bulgarian court would have to be provided "an authenticated copy of the judgment and the certificate referred to in Article 53".[81]

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[69] Before the judgment in *TOTO* was rendered, some scholars considered that the lis pendens rule could be applicable to provisional measure proceedings:

[70] Opinion AG Rantos in C 581/20, *TOTO*, ECLI:EU:C:2021:726, para. 69.

[71] Opinion AG Rantos in C 581/20, *TOTO*, ECLI:EU:C:2021:726, paras. 77-87.

[72] See, para. 11.

[73] S. Francq, "Article 45" in in U. Magnus and P. Mankowski (eds.), *Brussels I bis regulation: Commentary*, Otto Schmidt, 2016, para. 61.

[74] CJEU, 22 October 2015, C-523/14, *Aannemingsbedrijf Aertssen*, ECLI:EU:C:2015:722, para. 39.

[75] F. Gascón and G. Schumann, "Lis Pendens and Res Judicata under the ELI/UNIDROIT Model European Rules of Civil Procedure", available at: https://eprints.ucm.es/id/eprint/68210/1/Fernando%20Gasc%C3%B3n.%20Guillermo%20Schumann.%20The%20rules%20on%20lis%20pendens%20and%20on%20res%20judicata%20in%20the%20ERCP_E-prints%20UCM..pdf (accessed on 15 November 2021), p. 5.

[76] This approach is shared by several scholars: F. Eichel, "Art. 29 Brüssel Ia-VO" in V. Vorwerk and C. Wolf (eds.), *BeckOK ZPO*, C.H. Beck, 2021, para. 68; P. Gottwald, "Art. 29 Brüssel Ia-VO" in W. Kruger and T. Rauscher, *Münchener Kommentar zur ZPO 5. Auflage* C.H. Beck, 2016, para. 16; T. Hartley, "Jurisdiction in conflict of laws - disclosure, third-party debt and freezing orders", Law Quarterly Review, 2010, p. 213.

[77] See, para. 16.

[78] Opinion AG Rantos in C 581/20, TOTO, ECLI:EU:C:2021:726, para. 79.

[79] Art. 36(1) Brussels I bis Regulation.

[80] Opinion AG Rantos in C 581/20, TOTO, ECLI:EU:C:2021:726, para. 81.

[81] Opinion AG Rantos in C 581/20, TOTO, ECLI:EU:C:2021:726, para. 81.

3. A need to reform the Brussels I bis Regulation?

21. Had the CJEU followed the solution proposed by AG Rantos, then a more coordinated jurisdictional regime for provisional measures would have emerged out of *TOTO*. However, this solution would still leave a problem unsolved, namely the risk of an over-security of the same debt via similar provisional measures granted in different Member States. In this regard, creditors would still be able to apply, under Article 35, for the provisional attachment of the debtors' assets in all Member States where the debtor has those assets. Since every application would refer to different assets, there would not be an identity between the parallel proceedings and the lis pendens rule would not apply.[82] If all the proceedings are conducted *inaudita altera parte*, the debtor would not be able to argue the existence of a risk of over-security. And, if the provisional measures are finally granted, the total value of the attached assets could even bypass the amount of the claim, leaving debtors in a difficult situation.[83]

22. *TOTO*'s value lies more in the preliminary reference that brought the case to the CJEU than on the CJEU's answer. The question posed by the Bulgarian court reveals the need to improve the coordination of the jurisdictional regime for provisional measures in the Brussels I bis Regulation.[84] The question arises as to which mechanism could bring such improvement.

23. The European legislator could reconsider the solution of the Commission Proposal on the Brussels I bis Regulation. Its Article 31 established a "communication channel" between the court seised on the merits and other courts seised for provisional measures. More precisely, the court seised for provisional measures was compelled to request information from the court seised on the merits about "all relevant circumstances of the case, such as the urgency of the measure sought or any refusal of a similar measure by the court seised as to the substance". This mechanism would not have prevented the existence of parallel proceedings on provisional measures.[85] Nonetheless, courts would have been better informed to decide whether or not grant to grant a provisional measure. For instance, if a court knows that the claimant has already obtained an interim measure in another Member State, it might consider that there is no need for an additional one because the claim is already secured. The terms in which Article 31 was drafted were rather vague without specifying more technical aspects, such as how the communication between courts would operate.[86] Eventually, the European legislator decided to remove it from the final text of the Brussels I bis Regulation. [87]

24. An alternative to the Commission's solution would be the one of Heidelberg Report, which suggested that the court with jurisdiction on the merits should have the power "to discharge, to modify or to adapt to its own legal system any provisional measure granted by a court of another Member State".[88]

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[82] F. Gascón Inchausti, *Medidas cautelares de proceso civil extranjero: Artículo 24 del Convenio de Bruselas*, Comares, 1998, p. 406.

[83] Nioche (n 36), pp. 291 – 292.

[84] B. Hess, "Reforming the Brussels Ibis Regulation: Perspectives and Prospects" available in https://www.mpi.lu/fileadmin/user_upload/MPILux_WP_2021_4__Reforming_Brussels_1bis_BH.pdf (accessed on 15 November 2021), p. 13.

[85] Nioche (n 36), p. 299.

[86] L. Sandrini, "Coordination of substantive and interim proceedings" in F. Pocar, I. Viarengo and F. C. Villata (eds.), *Recasting Brussels I: Proceedings of the conference held at the University of Milan on November 25-26,* 2011, CEDAM, 2012, p. 278. The Slovakian delegation remarked on the need to improve the drafting of Article 31 in this regard: Comments from the delegation of Slovakia, 18101/10 JUSTCIV 239 CODEC 1587, 9474/11 ADD 1, p. 6.

[87] The German delegation was particularly critical of this provision. It stated that the cooperation mechanism appeared "problematic, and not only in terms of the independence of the courts. It also entails a risk of delaying proceedings, which is inconsistent with the aim of swift provisional legal protection. The new rule also creates uncertainty as to, for example, the language of communication, liability for any costs (e.g. if translations are required) and data protection. Moreover, there seems no need for a rule, as the Court's information requirements can be met by asking the parties, for application of Article 31 necessarily means that the court requested to take provisional measures be apprised of the main proceedings. In that case, it can simply ask the parties for information on the situation regarding the main proceedings" (Comments from the delegation of Germany (18101/10 JUSTCIV 239 CODEC 1587, 9474/11 ADD 7 REV 1, p. 20)).

[88] B. Hess, T. Pfeiffer and P. Schlosser, *Brussels I-regulation (EC) no 44/2001: the Heidelberg Report on the application*

This solution would have entailed a sort of centralization of the decision-making power on provisional measures on the court with jurisdiction on the merits. This solution would also be more advantageous for the party against which the provisional measures are sought. The defendant could ask for the any modification of any provisional measure granted in any Member State before the court seised on the merits.

25. Finally, it is also worth mentioning the system contained in Regulation No 655/2014, establishing a European Account Preservation Order Regulation.[89] This instrument introduced the first European provisional measure for civil and commercial matters. The measure consists of the attachment of the debtors' bank accounts. The creditor who applies for an EAPO "shall declare whether he has lodged with any other court or authority an application for an equivalent national order against the same debtor and aimed at securing the same claim or has already obtained such an order. He shall also indicate any applications for such an order which have been rejected as inadmissible or unfounded".[90] The obligation to inform the court about other provisional measures would lie on the debtor. I find this mechanism to be not the most suitable system for the Brussels I bis Regulation.[91] It would be preferable to settle a cooperation mechanism between courts, as the one in the one of the Heidelberg Report.

26. Until the European legislator takes any step in this regard, in cases like *TOTO*, claimants will continue to enjoy the possibility under the Brussels I bis Regulation to seise more than one court with a request for provisional measures.

V. European autonomous prerequisites to obtain provisional measures?

27. The last of the referred questions had two sub-questions. The CJEU was asked to determine if the request for provisional measures under Article 35 is subject to European autonomous prerequisites, and whether Bulgarian law prohibiting adopting provisional measures against public entities would collide with such autonomous regime. The CJEU stated that the purpose of the Brussels I bis Regulation "is not to unify the procedural rules of the Member States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments".[92] For that reason, the CJEU concluded that the Bulgarian prohibition to grant an interim measure against public authorities was compatible with Article 35.[93]

28. The CJEU's answer does not clarify whether there is an autonomous regime of access to provisional measures under Article 35. Nevertheless, there are other CJEU judgments that suggest so. First, interim measures have to fit into the autonomous concept of "provisional, including protective measures" already referred to.[94] Moreover, if provisional measures consist of an interim payment of a sum of money, the CJEU has determined that claimants would have to provide a guarantee.[95] Some scholars have even argued that access to provisional measures through Article 35 is subject to the existence of

of regulation Brussels I in 25 member states (Study JLS/C4/2005/03), C.H. Beck, 2008, para. 914. Originally, the Commission had also embraced this solution: Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0175 final, p. 8.

[89] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59–92 ("EAPO Regulation").

[90] Art. 16(2) EAPO Regulation. This system is similar to the one of the ILA Principles on Provisional and Protective Measures: F. K. Juenger, "The ILA Principles on Provisional and Protective Measures", The American Journal of Comparative Law, 1997, p. 943.

[91] A different view: Pertegás Sender and Garber (n 48), para. 92.

[92] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 68.

[93] CJEU, 6 October 2021, C-581/20, *TOTO*, ECLI:EU:C:2021:808, para. 69.

[94] CJEU, 26 March 1992, C-261/90, *Reichert (II)*, ECLI:EU:C:1992:149, para. 34.

[95] CJEU, 17 November 1998, C-391/95, *Van Uden*, ECLI:EU:C:1998:543, para. 47; CJEU, 27 April 1999, C-99/96, *Mietz*, ECLI:EU:C:1999:202, para. 42.

an autonomous prerequisite of urgency.[96] Even if Article 35 does not contain an explicit reference to the urgency;[97] they argue that the *periculum in mora* can be found implicitly in the autonomous definition of provisional measures elaborated by the CJEU.[98] Nevertheless, the CJEU has not confirmed this yet.[99] In any case, this European autonomous set of prerequisites do not replace the domestic prerequisites to obtain provisional measures. They are just complementary to the domestic ones.[100]

29. On a second point, even if the Brussels I bis Regulation does not seek the unification of the domestic civil procedural systems, this does not mean that the domestic prerequisites to access provisional measures are insulated from any interference from the regulation. The application of the Brussels I bis Regulation within the domestic civil procedural system is subject, among others, to the principle of effectiveness.[101] According to this principle, national rules and procedures must not make the exercise of rights acknowledged by EU law "practically impossible";[102] or "excessively difficult".[103] In the context of Article 35, if a domestic prerequisite hinders access to this jurisdiction to obtain provisional measures, such prerequisite would have to be put aside. Perhaps Bulgarian law that prohibits the rendering of provisional measures against public entities does not collide with the principle of effectiveness. Notwithstanding, it would have been helpful if the CJEU had elaborated more on its answer, at least with a reference to the principle of effectiveness.[104]

30. In this regard, the CJEU could have taken a similar approach to the one in *Capelloni*[105] In this case the CJEU was asked whether some Italian domestic laws to obtain protective measures were compatible with Article 39 of the 1968 Brussels Convention (now Article 40 of the Brussels I bis Re-

[96] J. F.van Drooghenbroeck, "Les contours de l'article 24 de la Convention de Bruxelles. Éléments de réflexion (1)" in R. Fentiman, A. Nuyts, H. Tagaras, and N. Watté (eds.), *L'espace judiciaire européen en matières civile et commerciale*, Bruylant 1999, p. 262; F. Garcimartín Alférez, "El régimen de las medidas cautelares en el comercio internacional", McGraw-Hill 1996, pp. 106-107; Gascón Inchausti (n 35), p. 704; M. E. Ancel and H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe. Règlements 44/2001 et 1215/2012 Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)*, L.G.D.J 2018, para. 335; Pertegás Sender and Garber (n 48), paras. 55-56; I. Pretelli, "Provisional and Protective Measures in the European Civil Procedure of the Brussels I System" in V. Lazić and S. Stuij (eds.), *Brussels Ibis regulation: Changes and challenges of the renewed procedural scheme*, T.M.C. Asser Press 2017, 105; D. Tsikrikas, "European Dimension of Provisional Measures" Revue Hellenique de Droit International, 2008, pp. 704-705. Differently: T. Kruger, "Provisional and Protective Measures" in A. Nuyts and N. Watté (eds.), *International civil litigation in Europe and relations with third States*, Bruylant 2005, p. 328.

[97] Conversely, in the equivalent provision of the Brussels II bis Regulation there is an explicit reference to the urgency: Art. 20(1) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1–29. The recast of the Brussels II bis Regulation has kept the reference to urgency: Art. 15(1) Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, ST/8214/2019/INIT, OJ L 178, 2.7.2019, p. 1–115. The CJEU has reiterated in several judgments that urgency is a prerequisites that courts have to examine when claimants apply for an provisional measure under Article 20 of the Brussels II bis Regulation: CJEU, 15 July 2010, C-256/09, *Purrucker (II)*, EU:C:2010:437, para. 77; CJEU, 23 December 2009, C-403/09 PPU, *Detiček*, ECLI:EU:C:2009:810, paras. 41-43; CJEU, 2 April 2009, C-523/07, *Korkein hallinto-oikeus* ECLI:EU:C:2009:225, para. 47 - 48; CJEU, 19 September 2018, Joined Cases C-325/18 PPU and C-375/18 PPU, *Hampshire County Council*, ECLI:EU:C:2018:739, para. 85.

[98] See, para. 9.

[99] In one occasion, the Dutch Supreme Court (*Hoge Rad*) asked the CJEU whether urgency was an autonomous prerequisite. Before the CJEU had the opportunity to address this question, the preliminary reference was withdrawn: CJEU, C-99/95, *Saueressig*, ECLI:EU:C:1996:167.

[100] In the decision rendered, this court examined first the prerequisites under the Spanish civil procedural system, and then, the autonomous prerequisites: Auto AP Cadiz (Seccion 7a) núm. 234/2002 de 22 de mayo JUR/2002/223002.

[101] CJEU, 4 October 2018, C-379/17, *Al Bosco*, ECLI:EU:C:2018:806, para. 17.

[102] CJEU, 16 December 1976, C-33/76, *Rewe*, ECLI:EU:C:1976:188, para. 5.

[103] CJEU, 9 November 1983, C-199/82, *San Giorgio*, ECLI:EU:C:1983:318, para. 14.

[104] In this sense: K. Pacula, "CJEU on provisional/protective measures requested against a public authority (potentially and/or allegedly enjoying some form of immunity) in the case TOTO, C-581/20", available at: https://conflictoflaws.net/2021/cjeu-on-provisional-protective-measures-requested-against-a-public-authority-potentially-and-or-allegedly-enjoying-some-form-of-immunity-in-the-case-toto-c-581-20/ (accessed on 15 November 2021).

[105] CJEU, 3 October 1985, C-119/84, *Capelloni*, ECLI:EU:C:1985:388, para. 21.

gulation). Article 39 authorised claimants who had already obtained an enforceable title to apply for protective measures before the courts of the Member State of enforcement while the decision authorising the enforcement of the title was being or could be appealed. The CJEU stated that whether "the national procedural law of the court hearing the proceedings is applicable to protective measures taken pursuant to Article 39 depends upon the scope of each provision of national law and upon the extent to which it is compatible with the principles laid down by Article 39".[106] Article 40 of the Brussels I bis Regulation is different from Article 35.[107] Nonetheless, by analogy, *Capelloni* is an illustrative example of how a domestic prerequisite might not apply because it hinders access to Article 35 of the Brussels I bis Regulation.

VI. What has changed after *TOTO*?

31. The jurisdictional regime for provisional measures of the Brussels system has been largely shaped by a number of pivotal judgments which have defined the boundaries and content of this provision. C-125/79, *Denilauler* limited the recognition and enforcement of provisional measures granted *inaudita altera parte*.[108] C-261/90, *Reichter (II)* introduced an autonomous definition of provisional measures.[109] C-391/95, *Van Uden* established additional prerequisites for those measures consisting of interim payments.[110] In which manner has *TOTO* contributed?[111] *TOTO's* results are unsatisfactory not only because of the answers given by the CJEU; but also because of the feeble reasoning behind those answers. A more ambitious outcome could have been reached, and AG Rantos's Opinion is good proof of it. Therefore, this judgment is not likely to become a landmark case, but it might perhaps serve to remind the European legislator that there is room for improvement concerning provisional measures in the Brussels I bis Regulation.

[106] CJEU, 3 October 1985, C-119/84, *Capelloni*, ECLI:EU:C:1985:388, para. 21.

[107] Since the wording of Article 40 Brussels I bis Regulation is different from the one of Article 39 of the 1968 Brussels Convention, *Capelloni* might be no longer applicable to interpret the Brussels I bis Regulation: M. Requejo Isidro, *La ejecución sin exequátur. Reflexiones sobre el Reglamento Bruselas I bis, Capítulo* (2015), REDI, p. 54.

[108] CJEU, 21 May 1980, C-125/79, *Denilauler*, ECLI:EU:C:1980:130, para 17.

[109] CJEU, 26 March 1992, C-261/90, *Reichert (II)*, ECLI:EU:C:1992:149, para. 34.

[110] CJEU, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543, para. 46.

[111] In this sense also: G. Cuniberti, "CJEU Rules on Parallel Interim Litigation", available at https://eapil.org/2021/10/07/cjeu-rules-on-parallel-interim-litigation/ (accessed on 15 November 2021); Van Calster (n 25).