

European Family Property Relations
Article-by-Article Commentary on EU Regulations
1103 and 1104/2016

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Editors



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Article 53
Provisional, including protective, measures

Manuela Giobbi

Regulation (EU) 2016/1103

Regulation (EU) 2016/1104

1. When a decision must be recognised in accordance with this Chapter, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 46 being required. (Same text)
2. The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.
3. During the time specified for an appeal pursuant to Article 49(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Summary: I. Provisional, including protective, measures. Premise. – II. Protective measures following the declaration of enforceability of the decision. – III. Limits.

I. Provisional, including protective, measures. Premise

Art 53, para 1 of Regulations 2016/110 and 2016/1104 provides that if a decision must be recognised in accordance with the provisions of

Chapter IV of the same Regulations, the applicant can avail himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Art 46 being required.

The formulation of Art 53 reproduces the provisions already contained in other previous regulations on civil judicial cooperation, and specifically Art 47 of Regulation 44/2001¹ and Art 54 of the Succession Regulation.² In any case, an analysis of Art 53 must be carried out with reference to Art 19 of Regulations 2016/1103 and 2016/1104, which provides that provisional, including protective, measures can be requested from the court of a Member State other than the one that issued the decision, even if the jurisdiction as to the substance of the matter lies with the court of another Member State. Based on Art 53, a non-competent judge has the right to grant the provisional, including protective, measure requested of him without waiting for the decision on which the request is based to be enforceable.³ In this case, the judge may use the instruments provided

¹ Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction, the recognition and enforcement of judgments in civil and commercial matters, 'Brussels I bis' [2001] OJ L12/1, no longer in force (Date of end of validity 9 January 2015), repealed by Regulation (EU) 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 [2012] OJ L351/1; Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

² Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107. The formulation of Art 53 of Regulations 2016/1103 and 2016/1104 is, however, referable to Art 39 of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1998] OJ C27/1.

³ On this topic, see P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019) 159-160. On this point, see also J. Kramberger Škerl, 'Provisional, Including Protective, Measures during the Exequatur Proceedings', in M.J. Cazorla González, M. Giobbi, J. Kramberger Škerl, L. Ruggeri and S. Winkler eds, *Property Relations of Cross Border Couples in the European Union* (Naples: Edizioni Scientifiche Italiane, 2020), 140, where it is shown that 'The

for in his own national system and may proceed with the adoption of protective measures provided there are conditions that allow for them. The anticipation of protective measures is therefore allowed, as is the protection of a given asset on the basis of the decision that was obtained in another Member State, even if, as specified in Art 53, para 1, the declaration of enforceability has not yet been made.⁴

Art 53 falls within the requirements of protection of the party who obtained the decision and who, however, is not yet in a position to be able to access the enforcement phase.⁵

By granting the protective or provisional measure, an attempt is made to protect the outcome of the future enforcement and, more specifically, to prevent it from becoming impossible or difficult to carry out. As indicated by the Court of Justice,⁶ provisional or protective measures represent tools aimed at protecting rights that must be ascertained by the judge called to decide on the substance of the matter.

regulations provide that provisional, including protective, measures (offered by the law of the State of enforcement) are available to the person applying for the declaration of enforceability before a final decision on that issue is adopted. The applicant can apply for protective measures even before lodging an application for the declaration of enforceability. The element of surprise, often aspired to by the applicant, will be censured if the protective measures are granted before the defendant is served with the court's decision on the declaration of enforceability; until that moment, the defendant is usually not aware of the pending *exequatur* proceedings.'

⁴ See Art 36, Regulations 2016/1103 and 2016/1104. On this point, see P. Bruno, n 3 above, 292.

⁵ On this subject, see L. Sandrini, 'Article 53. Provisional, including protective, measures', in P. Franzina and I. Viarengo eds, *The Regulation on the Property Regimes of International Couples: A Commentary* (Cheltenham: Edward Elgar, 2020), 414, where it is argued that in the event that 'anticipatory measures are taken (...), the reversibility of their effects must be assured, at least by way of security, so as to ensure compensation to the defendant at a later stage for any damage caused by the measure.'

⁶ As highlighted by the Court of Justice, in Case C-143/78 *Cavel v Cavel*, Judgment of 27 March 1979, available at www.curia.europa.eu (last visited 30 June 2021), provisional or protective measures must be 'understood as referring to measures which 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.'

It must also be borne in mind that the assets forming part of the matrimonial or registered partnerships' property regimes often have a close connection with the Member State in which the protective measure is granted and that, in general, the decisions concern family disputes that are characterised by remarkable complexity. The protective measure of the Member State of enforcement in this sense assumes a protective function of the interests of the party, but at the same time does not conflict with the ruling on the substance of the matter.⁷

The rationale of this legislative provision must be identified in the need to favour harmonisation, the circulation of decisions made regarding the property regime of spouses or registered partnerships,⁸ and to ensure the principle of mutual trust of justice between the Member States.

II. Protective measures subsequent to the declaration of enforceability of the decision

Art 53, para 2 provides that the declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.

In the event that the decision on which the protective measure is based is enforceable, the party has the right to act directly on the property of the party against whom enforcement was sought. This power must be considered inherent in the very enforceability of the decision, and therefore assigning further formalities or verifying the presence of additional requirements would only have the effect of delaying the action of the applicant.⁹

⁷ As points out P. Bruno, n 3 above, 160, European legislation allows the courts that do not have unlimited jurisdiction, so-called *exorbitant jurisdictions*, to adopt urgent measures without, however, conferring on them unlimited jurisdiction which, on the other hand, remains the prerogative of the authority identified as the exclusive and general jurisdiction.

⁸ On this point, see P. Bruno, *Le controversie familiari nell'Unione europea. Regole, fattispecie, risposte* (Milan: Giuffrè Francis Lefebvre, 2018), 297.

⁹ V. P. Bruno, n 3 above, 297. On this point, see also I. Pretelli, 'Article 53', in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (UE) 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021),

If, in fact, Art 53 para 1 grants the possibility of accessing a protective measure on the basis of a decision that has not yet been declared enforceable, it does not seem that there can be any impediment to the granting of a measure by the judge in the absence of activities aimed at ascertaining the preconditions. The same possibility must be considered extended to the party that has obtained the enforcement order. Asking the applicant to provide proof of the existence of conditions justifying the protective measure could prove to be an obstacle to the reasons of urgency that characterise the request for the protective measure. Furthermore, for the appellant, it would constitute a limitation of his own interest in preserving a right to the property without producing irreversible changes.¹⁰ The possibility of requesting protective measures cannot in any case be considered subordinate to additional and different needs from those required for the declaration of enforceability.¹¹

The Court of Justice,¹² albeit with reference to a similar provision of Art 39 of the Brussels Convention, in Case C-119/84 *Cappelloni and Aquilini v. Pelkmans*, stated that the party who requested and obtained authorisation for enforcement can, during the time specified for an appeal and until any such appeal has been determined, proceed directly with protective measures against the property of the party against whom enforcement is sought, and is under no obligation to obtain specific authorisation. In this sense, European legislation is preferred to domestic regulations.¹³ Basically, there is a tendency to ensure the coherence of the protective measure within a common regulatory framework.

In any case, taking into account the variety of measures offered by the domestic legislation of various Member States, it would be useful to indicate, within the Twin Regulations, a uniform notion of provisional and protective measures.¹⁴

1195, where it is pointed out that this mechanism strengthens the position of the party granted an exequatur, allowing it to benefit from an element of surprise.

¹⁰ P. Bruno, n 3 above, 292.

¹¹ Cf L. Sandrini, n 5 above, 418.

¹² Case C-119/84 *Capelloni and Aquilini v Pelkmans*, Judgment of 3 October 1985, available at www.curia.europa.eu (last visited 30 June 2021).

¹³ On the subject, see I. Pretelli, n 9 above, 1194.

¹⁴ *ibid*

III. Limits

Art 53, para 3 states that during the time specified for an appeal pursuant to Art 49 para 5 against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought. Under this assumption, the judge finds himself having to possibly grant the protective measure that refers only to the assets of the party against whom enforcement is sought. In this case, the enforcement is limited to the assets of the party to whom the enforcement is addressed and is not also extended to a third party. This limitation allows the third party to be protected from any damage deriving from a protective measure granted based on a decision for which an enforceable ruling has not yet been rendered.

Article 54 **Partial enforceability**

Manuela Giobbi

Regulation (EU) 2016/1103

Regulation (EU) 2016/1104

1. Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them. (Same text)
2. An applicant may request a declaration of enforceability limited to parts of a decision.

Summary: I. Partial enforceability of a decision

I. Partial enforceability of a decision

Art 54 of Regulations 2016/1103 and 2016/1104¹ provides that a decision can be declared partially enforceable. In particular, this provision states that where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

According to the provisions of Art 54, para 1, if the judge verifies that not all the matters of the application based on which the decision was given can be declared enforceable, he shall proceed *ex officio* with the

¹ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30.

declaration of partial enforceability. It does not appear from the wording of the provision that the court can take a decision of a discretionary nature. The judge to whom the request is submitted therefore has an ‘obligation’ to limit enforceability exclusively to the parts to which it can actually be granted.

Art 54, para 2 also allows the party to request a declaration of enforceability limited to parts of a decision. In this case, it is the same applicant party that limits the request for enforceability to some specific items that have been the subject of the request² and which in any case meet the parameters indicated in Art 37 of the Twin Regulations. By limiting the request for enforceability to only some parts of the decision, the party can prevent the judge from issuing a provision of total denial. According to the provisions of Art 37, for example, in no case could decisions manifestly contrary to public policy be recognised. Nor could the enforceability of parts of the decision be recognised if these contain discriminating elements against one of the spouses or partners.³

The partial declaration of enforceability may also depend on the fact that the same decision concerns some matters included in the scope of the 2016/1103 and 2016/1104 Regulations, and others that fall within a different regulatory framework. Some problems also stem from the need for the various matters of the decision to be separable from each other and are not interdependent so that the judge can proceed with the declaration of partial enforceability.⁴ In the event that the parts of the decision are closely connected, the existence of a reason for denial of enforceability will affect the entirety of the provision. According to what is indicated in Recital 64 of Regulation 2016/1103 and Recital 63 of Regulation 2016/1104, the recognition and enforcement of a decision on matrimonial property regime or on the property consequences of a registered partnership should not in any way imply the recognition of the marriage or the registered partnership which

² In this regard, see P. Bruno, *I Regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate* (Milan: Giuffrè Francis Lefebvre, 2019), 281.

³ On this point, see P. Bruno, n 2 above, 281.

⁴ On the subject, see I. Pretelli, ‘Article 54’, in A. Bonomi and P. Wautelet eds, *Le droit européen des relations patrimoniales de couple. Commentaire des Règlements (EU) 2016/1103 et 2016/1104* (Brussels: Bruylant, 2021), 1197.

gave rise to the decision.⁵ Therefore, it seems that the partial enforceability of the decision can be declared by the judge even where the parts are interdependent.

The Court of Justice⁶ also specified that when the same decision has ruled both on property relations and maintenance obligations, the judge called to rule on enforceability is required to distinguish between the various aspects by referring to each specific case. A decision can therefore be partially enforced as long as it is based on the assessment of the factual aspects of the various parts of which it is composed.

⁵ G. Cuniberti, 'Article 54. Partial Enforceability', in P. Franzina and I. Viarengo eds, *The EU Regulation on the Property Regimes of International Couples: A Commentary*, (Cheltenham: Edward Elgar, 2020), 420-421.

⁶ See Case C-220/95 *Van den Boogaard v Laumen*, Judgment of 27 February 1997, paras 21 and 22, available at www.curia.europa.eu (last visited 30 June 2021).