

The EU Divorce Jurisdiction of Brussels IIB Regulation and Its Implementation in Austria

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Abstract: To accommodate the needs of its citizens in building relationships across borders, the EU has provided several regulations. Since its first establishment in 2000, the EU regulations on divorce and legal separation jurisdiction have been amended twice. There are some significant changes in this jurisdiction, from its original regulation in 2000 to its amendment version in 2003 up to the current version that was established in 2019. This paper tries to investigate the implementation of the current ruling EU instrument in Austria through three approaches by evaluating: 1) the infringement cases, 2) preliminary ruling proceedings, and 3) further official actions conducted by Austria. It can be concluded that Austria has never been accused of any infringements of the three regulations. The court judgments of the two proceedings of preliminary ruling submitted by Austrian courts concerning Brussels IIA Regulation are also in accordance with the regulated law of EC No 2201/2003. The establishment of an introductory decree on the summary and legal explanations of the Council Regulation EU No 1111/2019 by Austria is a very good practice that can be adopted by other EU member states. Therefore, this paper suggests that Austria has effectively implemented the 2019 EU instrument.

Keywords: : Brussels IIB Regulation, Divorce, Legal Separation, Jurisdiction

1. Introduction

Nowadays, people become very interconnected due to globalization and massive development of transportation and infrastructure. They have been gradually becoming more embedded within other societies and integrated with each other. They build very close connections with one another through relationships across the globe. This trend has also been experienced by European countries as their citizens have become more connected and bound with other societies through partnership and marriage relationships across borders¹.

While there are many reasons for couples to develop their relationship into a marriage², this current transnational family phenomenon has also faced some challenges in the matter of "spatial practice" and "emotional as well as material needs"³. It appears to also experience some cultural concerns and obstacles when the couple are in a cross-cultural marriage or partnership⁴. In addition, given that the couple are originally from two different countries/cultures, it is also more likely to have some other more complex

¹ Joëlle Moret, Apostolos Andrikopoulos and Janine Dahinden, "Contesting Categories: Cross-border Marriages from the Perspectives of the State, Spouses and Researchers." *Journal of Ethnic and Migration Studies* 47, no. 2 (2021): 325-342.

² Case, Mary Anne, "The Status of Marriage." *NTU L. Rev.* 16 (2021): 187.

³ Deborah Bryceson and Ulla Vuorela, eds. *The Transnational Family: New European Frontiers and Global Networks*. (Routledge, 2020) 1.

⁴ Rosemary Breger and Rosanna Hill, eds. *Cross-cultural Marriage: Identity and Choice*. (Routledge, 2021) 1.

challenges if it comes to a separation and divorce, particularly regarding the legal proceedings and some other administration procedures⁵.

The governments of European countries have tried to accommodate the needs of their people to be connected in such relationships through several regulations implemented in their own territory⁶. The European Commission also provides regulations for the member states to have standardized rules that can be implemented at national levels. The most current EU regulation regarding this matter is European Council Regulation EU 2019/1111 of 25 June 2019 on Jurisdiction, Recognition, and Enforcement of Judgments in Matrimonial Matters and Parental Responsibility and on International Child Abduction, known as Brussels IIB Regulation, that has been formally binding since 1 August 2022.

Since the Brussels IIB Regulation repeals the previous two regulations⁷, it is important to evaluate how EU member states implement the most current applicable rule and the history of their efforts to apply the previous amended regulations. Thus, this paper will critically analyze the EU regulation on divorce and legal separation jurisdiction and its implementation in Austria.

2. The EU Law and Its Member States Regulation

2.1. The Role of European Union Law for Its Member States

The sources of international law indicated by Article 38 of the Statute of the International Court of Justice (ICJ) include customary international law, international treaties, and general principles of law⁸. While there are several critics concerning the validity of international law as a "law"⁹, it cannot be denied that international law has gained a more powerful position and is more respected in the global world, compared to several years back, especially in the political, economic, social, and humanitarian affairs¹⁰. It becomes a very important instrument to be used as a rule, assigned by involved states that can bind themselves in such a way to achieve their common goals and their shared interests together with other states¹¹.

⁵ Michael Wagner, "On Increasing Divorce Risks." *Divorce in Europe: New Insights in Trends, Causes and Consequences of Relation Break-ups* (2020): 37-61.

⁶ Apostolos Andrikopoulos, "Love, Money and Papers in the Affective Circuits of Cross-border Marriages: Beyond the 'sham'/'genuine' Dichotomy." In *Cross-Border Marriages*, (Routledge, 2023) 19-36.

⁷ 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 [2019] OJ L178/1, a recast of EC 2201/2003 of 27 November 2003 [2003] OJ L338/1 repealing EC 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses [2000] OJ L160/19.

⁸ Dingle, Lesley. *Guide to Electronic Sources of International Law. The Cambridge Companion to International Law* (2012) 421.

⁹ See, for instance, Mary Ellen O'Connell, *The Power and Purpose of International Law* (Oxford University Press, 2008) 2; David Lefkowitz, *Philosophy and International Law* (Cambridge University Press, 2020) 3; Jeffrey Dunoff, Monica Hakimi, Steven R. Ratner and David Wippman. *International Law: Norms, Actors, Process* (Aspen Publishing, 2023) 31; Anthony D'amato, *International Law: Process and Prospect* (Martinus Nijhoff Publishers, 2023) 1; Catherine Barnard, and Steve Peers, eds. *European Union Law* (Oxford University Press, 2023) 192.

¹⁰ Mark Weston Janis, *Aspen Treatise for International Law* (Aspen Publishing, 2021) 8.

¹¹ Jan Klabbers, *International Law* (Cambridge University Press, 2020) 27.

In the scope of the EU, it is important to acknowledge that EU law is a source of international law for its member states. This law can be particularly associated with international treaties, as a source of international law since the institution of the EU itself was established by a treaty¹². In addition, one of the main sources of EU law which is represented by the Court of Justice of the European Union (CJEU) can be effectively operated based on the agreed common values and norms of EU member states referring to EU treaties. This judicial institution is very crucial for the interpretation and the application of the EU law regulations and principles in its member states¹³.

In relation to its well-known position as a supranational organization founded based on its member states' common values, the EU has its own unique and distinct rule of law that is very different from other so-called international law organizations. It has its own main actors to govern its power through what is called *trias politica*, in which executive actors are represented by the European Council and the European Commission, the legislatures consist of the European Parliament and national parliaments, and the judges of CJEU and national courts are recognized as its judicial actors¹⁴.

In addition, according to some legal scholars, it is argued that "The European Union (EU) is a constitutional 'federative' order rather than an intergovernmental organization" due to its elaboration into internal hierarchical norms and its determination in the national legal orders of all member states¹⁵. The significant contribution, that national law has in the EU law, also provides more obvious reasoning that the relationship between these two has a significant distinction from the other general dichotomy between public international law and domestic law¹⁶. For these non-comparable characteristics of the relationship between EU law and its member states national law, it is therefore important to highlight that EU law plays a very significant role for its implementation in the national law of its member states.

2.2. Types of The European Union Legal Act

According to Article 288 of the Treaty on the Functioning of the European Union (TFEU)¹⁷, there are at least four different types of legal acts that the EU may adopt to be implemented in its member states. These types of law are also determined as the secondary legislation established by the supranational European Union (EU) after the treaties¹⁸. Even though it is understood that a distinctive feature of the EU legal instruments is the absence of any hierarchical legal acts commonly seen in the national

¹² Jan Wouters, Frank Hoffmeister, Geert De Baere and Thomas Ramopoulos. *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (Oxford University Press, 2021) 421.

¹³ Marina Matić Bošković, "Role of Court of Justice of the European Union in Establishment of EU Standards on Independence of Judiciary." *EU and Comparative Law Issues and Challenges Series* (ECLIC) 4 (2020): 329-351.

¹⁴ Pieter De Wilde, "On a Plurality of Critiques and Justifications for European Integration." *Reconnect Work Package* 14, no. 3 (2021) 14.

¹⁵ Allan Rosas, "European Union Law and National Law: A Common Legal System." *International Actors and the Formation of Laws*; Karjalainen, K., Tornberg, I., Pursiainen, A., Eds (2022): 11-28.

¹⁶ Ibid 13.

¹⁷ Consolidated Version of Treaty on the Functioning of the European Union [2016] OJ C202/1.

¹⁸ Nigel G. Foster, *EU Law Directions* (Oxford University Press, 2023) 97.

legal orders¹⁹, it is essential to see those instruments based on their own attributes and characteristics to better understand the implementation of each substance.

The first legal act, known as regulation, can immediately deliberate legal consequences, including rights and obligations, for its member states. It contains detailed forms of law that are identical in every EU member state. It is automatically binding and directly applicable or self-executing in all member states without any further actions required after its entry into force. Besides, "the European Court of Justice (ECJ) has introduced a doctrine according to which national rules to implement regulations are improper"²⁰.

The second type of the EU legal act is directive by which member states are required to transpose the EU general guidelines into national law to have a legal binding implication. This transposition procedure must be quickly taken following the deadline set by the EU that is generally within two years. When a member state doesn't transpose the directive, the EU Commission could initiate infringement proceedings against the state before the Court of Justice of the European Union (CJEU). In other words, to implement a directive, member states are required to regulate their own national policies derived from that Directive. This is because the EU directive is a regulation that requires member states to achieve specific goals without excessive force, since it also provides liberty regarding its implementation. It highlights some guidelines that must be met by the member states while at the same time allowing them to determine how to ensure compliance through national laws²¹.

The last two types of EU legal act are "decision" and "recommendation". A decision is the third type of EU legal act that specifies to whom this decision is addressed, and it shall be binding only on them²². The example of this would be around competition law that determines the agreements between companies to be either already in line with, or opposition to, EU competition law rules²³. Finally, "recommendation", the fourth type of EU legal act, has no binding force. Nevertheless, it is also recognized that recommendations generally provide any legal perspectives derived from relevant regulation and directives or extend their application scope²⁴.

There is no doubt that maintaining the effectiveness of cooperation between different states in any international organization is noticeably challenging. The difficulties and obstacles faced by these diverse states could become main factors in the barriers to implementing any agreed regulation²⁵. In this regard, there have been several challenges experienced by EU member states in implementing the EU law.

¹⁹ Koen Lenaerts and Marlies Desomer, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures." *European Law Journal* 11, no. 6 (2005): 744-765.

²⁰ Jens Blom-Hansen, Jørgen Grønnegård Christensen, Caroline Howard Grøn, Michael Hansen Jensen, and Peter B. Mortensen, "Transposition of EU Regulations: the Politics of Supplementing EU Regulations with National Rules." *Journal of European Public Policy* 30, no. 12 (2023): 2786-2806..

²¹ Bernard Steunenbergh and Mark Rhinard, "The Transposition of European Law in EU Member States: between Process and Politics." *European Political Science Review* 2, no. 3 (2010): 495-520.

²² Robert Schütze, *European Union Law* (Oxford University Press, 2021) 167.

²³ Nigel G. Foster, *EU Law Directions* (Oxford University Press, 2023) 116.

²⁴ Ibid.

²⁵ Tanja A. Börzel, *Why Noncompliance: The Politics of Law in the European Union* (Cornell University Press, 2022)

2.2.1 The Role of National Parliaments in Implementing the EU Law

National parliaments play a pivotal role in implementing EU law. They are the first institution to whom the EU law is referred. In practice, however, it is often the case that they experience implementation difficulties due to several factors such as the complexity of the EU law, political sensitivity, a significant departure from existing law within the state, and the administrative structures scrutiny of the EU law²⁶. Consequently, it often happens that the infringement cases conducted by EU member states are rather related to the role of national parliaments²⁷.

2.2.2 The Transposition of European Directives in the EU Member States

Another challenge that is often faced by the EU member states in implementing EU law is directive transposition. When a directive is agreed by the member states of the EU, this policy instrument still has several steps before it is finally implemented at the national level. During directive transposition, EU member states may experience several common difficulties such as the incompliance between directive instruments and the existing domestic norms, domestic opposition to the directive implementation, and other issues of conflicting of interests. These difficulties eventually lead to the delays of the implementation of EU law from EU member states²⁸.

2.2.3 Judicial EU Law Enforcements by the EU and Its Member States

Besides national parliament actor, another important actor who has a very important involvement in implementing EU law is the court institution. Indeed, since the suitability of any kind of regulation and policy established by EU law will be eventually investigated by court proceedings, both nationally by state courts and internationally by CJEU, judicial actors also provide significant contributions to the effectiveness of EU law implementation. In this regard, the relevant challenges that might be faced by member states include the fundamental jurisprudence on judicial independence and irrevocability²⁹ and the conflicting legal norms between the EU and the national level³⁰. These challenges can be overcome by providing intensive cooperation between CJEU and national courts actors, especially in applying the common values and norms of the EU for the sake of the needs of their wider community.

²⁶ Melanie Smith, *Challenges in the Implementation of EU Law at National Level*. (2018).

²⁷ See, for example, Commission, 'Monitoring the Application of European Union Law 2022 Annual Report' COM (2023) 453 final.

²⁸ Bernard Steunenberg and Mark Rhinard, "The Transposition of European Law in EU Member States: between Process and Politics." *European Political Science Review* 2, no. 3 (2010): 495-520.

²⁹ Kim Lane Scheppele, Dimitry Vladimirovich Kochenov, and Barbara Grabowska-Moroz, "EU Values are Law, After all: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union." *Yearbook of European law* 39 (2020): 3-121.

³⁰ Koen Lenaerts, "New Horizons for the Rule of Law within the EU." *German Law Journal* 21, no. 1 (2020): 29-34.

3. EU Regulation on Divorce and Legal Separation Jurisdiction

The EU has established several divorce regulations for its Members States³¹. The EU regulation that specifically regulates divorce and legal separation jurisdiction is Council Regulation EU No 2019/1111 of 25 June 2019 (Brussels IIB Regulation), a recast version of EC No 2201/2003 of 27 November 2003 (Brussels IIA Regulation) which was also repealing EC No 1347/2000 of 29 May 2000. Since it has been amended twice, for the purpose of this implementation analysis, this divorce jurisdiction regulation history is worth discussing to highlight some changes made. Overall, the regulation covers some aspects of matrimonial matters, divorce and legal separation, parental responsibility, and international child abductions.

According to the latest version of this EU instrument, there are at least eight significant changes made by Brussels IIB Regulation in modifying Brussels IIA Regulation³². Those include: 1) international jurisdiction, 2) hearing of the child, 3) international child abduction, 4) abolition of exequatur, 5) enforcement, 6) authentic instruments and agreements, 7) placement of children in another member states, and 8) cooperation. Below are some brief explanations of the key features of those changes raised by the current applicable regulation.

3.1. International jurisdiction

One of the main changes in the latest divorce jurisdiction regulation is that this current EU instrument takes account of more aspects of international jurisdiction of international divorce. Internationality and cross-border aspects are, in fact, what mostly encouraged the need to reform the EU norms. This appears to be prompted by some ongoing discussions on the issues related to conflicts of laws, international competence, recognition and execution of foreign judgements in the EU. Therefore, by providing more space on the current adoption of internationalization values, this recent EU instrument brings hope in eliminating any potential legal and jurisdiction problems across the EU member states³³.

3.2. Hearing of the child

It is pointed out that the proposal of the amendment for this issue is because the Brussels IIA Regulation appears to take precedence over the 1980 Hague Convention regarding the rights of custody and the best interest of the child. This issue has been profoundly raised in the private international law field discussions³⁴. To reduce the legal consequences of this concern, and to focus more on the best interest of the child, this

³¹ One of the most important EU regulations in divorce matter is Council Regulation (EU) No 1259/2010 of 20 December 2010 (Rome III Regulation) that provides citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility. Due to its object and scope differences, it does not affect the application of EC 2201/2003 of 27 November 2003 which was repealed by the EU 2019/1111 of 25 June 2019.

³² Boriana Musseva, *The Recast of the Brussels Iia Regulation: the Sweet and Sour Fruits of Unanimity*. In ERA forum, vol. 21, no. 1, pp. 129-142. (Berlin/Heidelberg: Springer Berlin Heidelberg, 2020) 129.

³³ Carmen A. Gheorghe, "New aspects in the Regulation of International Divorce. Eu Regulation 2019/1111 on Jurisdiction, Recognition, and Enforcement of Judgments in Matrimonial Matters and Parental Responsibility and on International Child Abduction." *Bulletin of the Transilvania University of Brasov*. Series VII, Social Sciences and Law. 15 (2022): 103-110.

³⁴ Sanja Marjanović, "The EU Commission's Proposal to Revise the Brussels IIA Regulation: Shortcomings of the "Overriding Rule"." *Teme-Časopis za Društvene Nauke* 43, no. 3 (2019): 901-923.

new EU regulation proposes more participation by the child and provides some more spaces for the views of the child in the decision-making processes, especially in return proceedings (Article 26).

3.3. International child abduction

This EU 2019/1111 also strongly emphasizes dealing with the issues around international child abduction. It specifically regulates rules based on the child's best interests and child-centered strategies and aims at enhancing their protection. Derived from the principle of the child's best interests and the right of the child to be heard, this EU instrument tries to eliminate any kind of international child abduction conducts in Europe, by particularly referring to the 1980 Hague Convention with some adaptations due to some significant changes of the circumstances in typical child abduction scenarios. At the same time, it also assumes a greater role in protecting human rights in general³⁵.

3.4. Abolition of exequatur

In terms of recognition and enforcement, the two main novelties of the latest EU instrument, according to scholars, are 1) the abolition of the exequatur, and 2) the ground for refusal of recognition and enforcement, especially regarding the right of children to express their views³⁶. To comply with the principle of the autonomy of the different Member States' legal systems, the EU instrument tries to build "the idea of mutual trust and the effective protection of the best interests of the child" by providing the substance of the rules on recognition of decision and enforcement, as well as the recognition of the refusal of its enforcement³⁷. It also concerns two types of provisional measures: 1) provisional measures ordered by a court which has jurisdiction to the substance of the matter, and 2) provisional measures taken by the court of the member state to which the child was removed or in which he/she was retained.

3.5. Enforcement

Regarding the jurisdiction enforcement, it is believed that the most three significant modifications between Brussels IIA Regulation and Brussels IIB Regulation are 1) the choice of court agreements, 2) transfer of jurisdiction, and 3) urgent provisional measures³⁸. Recognition of decision and enforcement is specifically regulated in Article 30 of this new EU instrument. To make it more suitable to be applied for and adopted by all EU member states, not only does this regulation provide the descriptions and narratives in this regard, but it also provides templates, certificates and forms to be used in its annexes. This is very practical and can be acknowledged as a very important tool since it can be easily adopted and followed with less risk of any administrative

³⁵ Thalia Kruger, Laura Carpaneto, Francesca Maoli, Sara Lembrechts, Tine Van Hof, and Giovanni Sciacaluga. "Current-day International Child Abduction: Does Brussels Iib Live up to the Challenges?." *Journal of Private International Law* 18, no. 2 (2022): 159-185.

³⁶ Leonard Luszkat, "The Brussels Iib Regulation—Most Significant Changes Compared to Its Predecessor and Enhancement of the 1980 Hague Convention on International Child Abduction." *Journal of Private International Law* 20, no. 1 (2024): 129-153.

³⁷ Luís de Lima Pinheiro, "A General Approach to the Recognition of Other Member States' Decisions Under the Brussels Iiter Regulation." *Centro de Investigação de Direito Privado (CIDP) Research Paper* 20 (2022).

³⁸ Leonard Luszkat, "The Brussels Iib Regulation—Most Significant Changes Compared to Its Predecessor and Enhancement of the 1980 Hague Convention on International Child Abduction." *Journal of Private International Law* 20, no. 1 (2024): 129-153.

misconduct. Apart from this recognition, the refusal of recognition and enforcement is also regulated in Article 38.

3.6. Authentic instruments and agreements

There is no such regulation regarding the recognition and enforcement of authentic instruments and agreements in the previous two amended regulations. In the newest version, especially article 65, it is stated that "Authentic instruments and agreements on legal separation and divorce and in matters of parental responsibility which have binding legal effect in the Member State of origin shall be recognized in other Member States without any special procedure being required". This is particularly seen as an approach to limit the application of the so-called "private divorces"³⁹. The refusal of recognition of authentic instruments and agreements is also provided in Article 68 to avoid any possible wrongdoing.

3.7. Placement of children in another member states

According to the latest version of this EU instrument, the member state court in which the child had his/her habitual residence immediately before his/her unlawful removal will remain competent and has jurisdiction until the child is entitled with his/her habitual residence in another Member State⁴⁰. In this regard, the voice of the child is also taken into consideration by the court, especially in the child return jurisdiction. It is strongly argued that "Brussels IIB Regulation highlights the importance of providing the mature enough child with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body"⁴¹.

3.8. Cooperation

This Brussels IIB Regulation provides a sufficient legal basis for the national authorities, particularly for the cooperation between relevant authorities. In this regard, the central authorities are obligated to provide any legal aid information and to facilitate communication between courts (Article 79). Article 80 also specifies that "The Central Authorities are also empowered further to request consideration of protective measures of the person or property of the child". It also covers the possibility to request any legal assistance to implement the decision of parental responsibility in another EU member states (Article 81)⁴².

³⁹ Boriana Musseva, *The Recast of the Brussels Ila Regulation: the Sweet and Sour Fruits of Unanimity*. In ERA forum, vol. 21, no. 1, pp. 129-142. (Berlin/Heidelberg: Springer Berlin Heidelberg, 2020) 141; Also see, for example, Malte Kramme, "Private Divorce in Light of the Recast of the Brussels Iibis Regulation." *Zeitschrift Für Das Privatrecht Der Europäischen Union* 18, no. 3 (2021): 101-106; Katažyna Bogdzevič, Natalija Kaminskienė, and Laima Vaigė, "Non-judicial Divorces and the Brussels II Bis Regulation: to Apply or Not Apply?." *International Comparative Jurisprudence*. Vilnius: Mykolas Romeris universitetas, 2021, vol. 7, no. 1. (2021).

⁴⁰ Carmen A. Gheorghe, "New Aspects in the Regulation of International Divorce. EU Regulation 2019/1111 on Jurisdiction, Recognition, and Enforcement of Judgments in Matrimonial Matters and Parental Responsibility and on International Child Abduction." *Bulletin of the Transilvania University of Brasov. Series VII, Social Sciences and Law*. 15 (2022): 103-110.

⁴¹ Jakub Pawliczak, "Reformed Polish Court Proceedings for the Return of a Child under the 1980 Hague Convention in the Light of the Brussels Iib Regulation." *Journal of Private International Law* 17, no. 3 (2021): 560-586.

⁴² Leonard Luszkat, "The Brussels Iib Regulation—Most Significant Changes Compared to Its Predecessor and Enhancement of the 1980 Hague Convention on International Child Abduction." *Journal of Private International Law* 20, no. 1 (2024): 129-153; Also see, for instance, Cristina González Beilfuss, Laura Carpaneto, Thalia Kruger, Ilaria

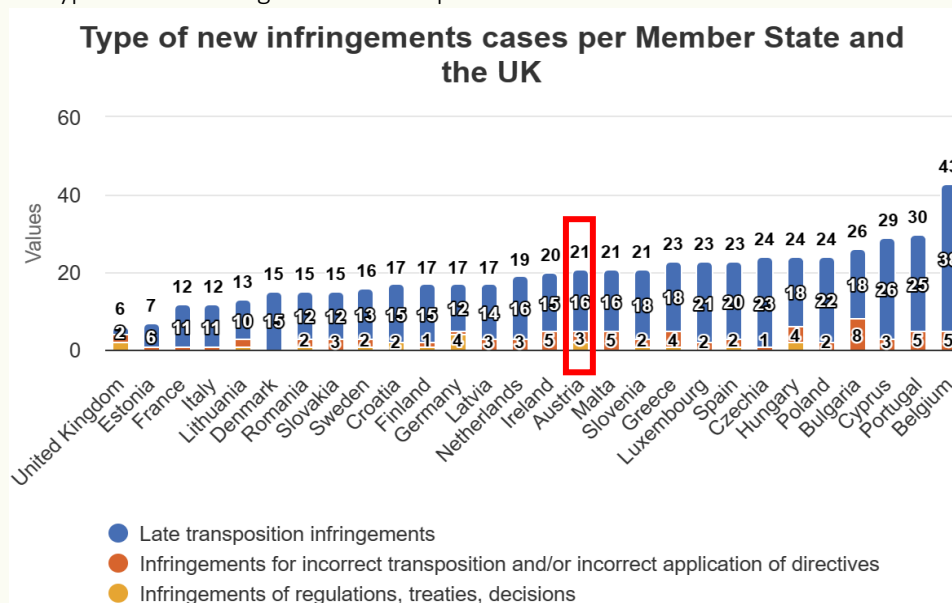
4. The Implementation of Brussels IIB Regulation in Austria

Given that Brussels IIB Regulation is the newest version of divorce and legal separation jurisdiction regulation replacing the previous two regulations, this paper will not only analyze the implementation of the current applicable regulation in Austria, but it will also investigate the previous implementation efforts undertaken by Austria in applying the other 2 former amended regulations. Regarding this, to gain a better understanding of how this regulation has been implemented by Austria, three methods will be used. This essay will be initiated with evaluating infringements cases against EU Laws conducted by Austria in year 2022. It will then be followed with some analysis of preliminary ruling procedures submitted by Austrian Courts to CJEU concerning EU 2019/1111 and the other two former EU regulations. As a third method, further action by Austrian government in response to the establishment of this Brussels IIB Regulation is also evaluated to conclude this EU instrument implementation analysis.

4.1. The Infringements Cases against Brussels IIB Regulation in Austria

Every year, the EU Commission publishes a report on monitoring the application of EU law by its member states. The report reviews key aspects of the application of EU law by member states resulting in the Commission's actions to enforce it each year⁴³. The following graphic shows an information of EU annual report in the year 2022 indicating the number of infringements conducted by each EU member state.

Graph 1. Type of new infringements cases per Member State and the UK in 2022.



Source: EU Annual Report, 2023

According to this 2022 Annual Report on monitoring the application of EU law based on new infringements cases, Austria conducted 16 new late transpositions infringements,

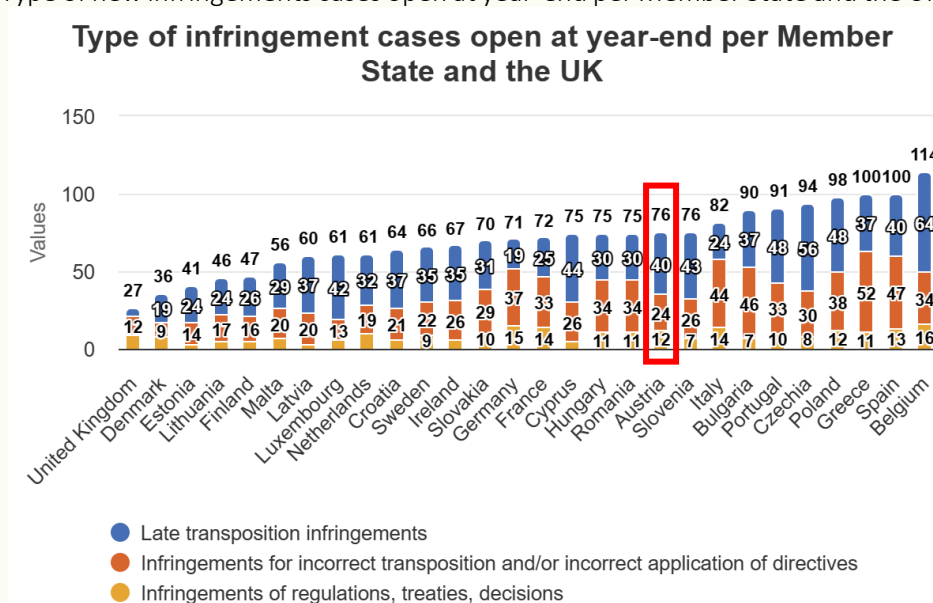
Pretelli, and Mirela Župan, *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters: A Commentary on Regulation 2019/1111 (Brussels Iib)*. (Edward Elgar Publishing, 2023)

⁴³ Catherine Barnard and Steve Peers, eds. *European Union Law* (Oxford University Press, 2023)

three incorrect directive transposition or application infringements, and two regulations infringements. From all these infringement cases shown in this report, it can be concluded that none of these infringement cases is about the Austrian infringement conduct against EU 2019/1111⁴⁴.

Meanwhile, also according to 2022 Annual Report on monitoring the application of EU law based on infringement cases open at year-end (as shown in the following graph), Austria conducted 40 late transpositions infringements, 24 incorrect directive transposition or application infringements, and 12 regulations infringements. From all these infringement cases reported, none of these infringement cases are seen as infringement actions conducted by Austria against EU 2019/1111⁴⁵.

Graph 2. Type of new infringement cases open at year-end per Member State and the UK in 2022.



Source: EU Annual Report, 2023

It might be true that the infringements cases by EU member states against the EU 2019/1111 in 2022 do not exist because the regulation itself had just entered into force on 1 August 2022 (i.e. records only 5 months activity). However, the real time infringements database of EU member states provided on the official website also indicates that Austria has never conducted any infringement actions against the regulation⁴⁶. From this first analysis, it can be concluded that Austria has never experienced any indications of infringement conducts against EU 1111/2019 as well as the other two revised EU regulations in divorce and legal separation jurisdiction.

3.2. Preliminary Ruling Proceedings concerning the Jurisdiction

According to Article 267 of the Treaty on the Functioning of the European Union (TFEU), preliminary ruling proceeding is a question from the national court of a member state to

⁴⁴ Commission, 'Monitoring the Application of European Union Law 2022 Annual Report' COM (2023) 453 final.

⁴⁵ Ibid.

⁴⁶ Commission Decisions on Infringements, https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/, accessed 23 April 2024.

the Court of Justice of the European Union (CJEU)⁴⁷. One of the main goals of this proceeding is to seek an authoritative interpretation of an EU act or a decision on the validity of such an act. It is final and binding on the referring court by which the court must apply to the case before it. It is also highlighted that the preliminary ruling procedure is a mechanism of cooperation between the CJEU and the national courts. It can determine whether national legislation and practices are in line with EU Law⁴⁸. This paper will analyze two preliminary ruling procedures submitted by Austrian courts concerning the current applicable divorce and legal separation jurisdiction regulation as well as the previous 2 former regulations as a case study to examine the Austrian judicial practice in its implementation.

Overall, since the establishment of the first regulation, EC 1347/2000 of 29 May 2000, there have been 57 preliminary ruling procedures submitted by EU member states⁴⁹. Of these 57 proceedings, one referred to EC No 1347/2000, one is regarding both EC No 2201/2003 and EU No 2019/1111, another one is concerning EU 2019/1111, and the other 54 referred to EC 2201/2003. In this regard, Austrian courts have submitted 4 preliminary ruling procedures to CJEU concerning Brussels IIA Regulation, of which two will be critically analyzed in this paper as a case study.

4.2.1 Case 1 (C-87/22)

This preliminary ruling procedure was submitted by the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) on 9 February 2022 regarding the case between TT, a Slovak national residing in Austria, and AK, a Slovak national, concerning the care of their two children residing in Slovakia with AK⁵⁰. This proceeding was later decided by CJEU on 13 July 2023.

Based on the chronological order narratives provided in the CJEU decision dated 13 July 2023⁵¹, it is mentioned that TT and AK are the parents of V and M, born outside marriage in Slovakia in 2012. TT and AK separated at the beginning of 2020, and In July 2020, AK brought the children to live with her in Slovakia, without TT's consent.

For this reason, TT submitted a court proceeding application to the Okresný súd Bratislava I (District Court, Bratislava I, Slovakia) requesting the return of the children from Slovakia to Austria who were wrongfully moved to Slovakia without notice. In parallel, TT also lodged an application before the Bezirksgericht Bruck an der Leitha (District Court, Bruck an der Leitha, Austria) seeking a sole custody right for his two children. By a decision of 4

⁴⁷ Consolidated Version of Treaty on the Functioning of the European Union [2016] OJ C202/1.

⁴⁸ Allan Rosas, "The Interaction Between the European Court of Justice and National Courts in Preliminary Ruling Proceedings: Some Institutional and Procedural Observations." In *International Law and Litigation*, pp. 603-624. (Nomos Verlagsgesellschaft mbH & Co. KG, 2019)

⁴⁹ Preliminary ruling proceedings on EC No 1347/2000 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000R1347&qid=1719544575925> accessed 17 April 2024; Preliminary ruling proceedings on EC No 2201/2003 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003R2201&qid=1719544575925> accessed 17 April 2024; Preliminary ruling proceedings on EU No 2019/1111 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32019R1111&qid=1719544575925> accessed 17 April 2024.

⁵⁰ Case C-87/22 TT v AK [2023] CJEU.

⁵¹ Ibid.

January 2021, that Austrian District Court rejected TT's application by upholding the plea of a lack of international jurisdiction raised by AK.

TT brought an appeal before the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) where he successfully received a regional court decision on 23 February 2021 by which the previous district court's decision was revised. Following an extraordinary appeal on a point of law, that regional court decision was also confirmed by order of the Oberster Gerichtshof (Supreme Court, Austria) of 23 June 2021.

However, on 23 September 2021, AK lodged an application before the Bezirksgericht Bruck an der Leitha (District Court, Bruck an der Leitha) to cease the court proceedings which was eventually approved and granted by this district court. TT then lodged an appeal against that judgment before the Landesgericht Korneuburg (Regional Court, Korneuburg).

The Austrian regional court then submitted a preliminary ruling proceeding to CJEU concerning the interpretation of Article 10 and 15 of Brussels IIA Regulation about the original jurisdiction of the case and the regulation of the possibility to transfer the jurisdiction into another EU member state jurisdiction.

The judgement of CJEU to this preliminary ruling proceeding confirms that the court of a member state may exceptionally request the transfer of that case to a court of the member state to which the child has been wrongfully removed by one of his or her parents. This decision was made by referring to Article 10 of Brussels IIA Regulation stating that:

*"In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State"*⁵².

From this first case, it can be concluded that even though the decision of Austrian district court in the first proceeding was still not in accordance with the Brussels IIA Regulation, the decision of the Austrian regional court in the later appealing proceeding is already in line with this EU instrument.

4.2.2 Case 2 (C-522/20)

This preliminary ruling procedure was submitted by the Oberster Gerichtshof (Supreme Court, Austria) on 19 October 2020 regarding the case between OE, an Italian national, and VY, a German national, for the dissolution of their marriage⁵³. This proceeding was later decided by CJEU on 10 February 2022.

Based on the narratives provided in the CJEU decision dated 10 February 2022⁵⁴, it is mentioned that OE and VY have been married since 2011 in Ireland where the couple decided to reside in. In May 2018, OE left the habitual residence and started moving to be situated in Austria from August 2019. On 28 February 2020, OE submitted a court

⁵² 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 [2003] OJ L338/1.

⁵³ Case C-522/20 OE v VY [2022] CJEU.

⁵⁴ Ibid.

proceeding application to the Bezirksgericht Döbling (District Court, Döbling, Austria) for the dissolution of his marriage with VY. By order of 20 April 2020, the Bezirksgericht Döbling (District Court, Döbling) dismissed OE's application reasoning that it lacked jurisdiction to hear it.

OE brought an appeal before the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria) where his appeal proceeding was also rejected on 29 June 2020, affirming the previous order of the Bezirksgericht Döbling (District Court, Döbling).

OE then submitted another appeal application before the referring court, the Oberster Gerichtshof (Supreme Court, Austria). The Supreme Court then submitted a preliminary ruling application to CJEU concerning the interpretation of a precondition to the jurisdiction of the courts of the State of residence regulated in Article 3 of Brussels IIA Regulation against the prohibition of discrimination regulated in Article 18 of The Treaty on the Functioning of the European Union (TFEU).

The answer from CJEU to this preliminary ruling is that the minimum period of being resident of the applicant is not met (six months shorter than what is required). This court judgment was made based on the applicable rule of law regulated by Article 3 of Brussels IIA Regulation mentioning that:

*"In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State, a) in whose territory: the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made with the courts of the Member State,..."*⁵⁵

From this second case, it can also be concluded that the Austrian court decisions to reject OE's court proceeding application in both district and regional levels are already in accordance with the Brussels IIA Regulation.

3.3. Austrian Response to Brussels IIB Regulation

It is interesting to note that although the number of directives is lower than the number of regulations established by the EU, the attention to the implementation of the directives, especially for the purpose of infringement annual reports, appears to have more weight than the regulations implementation⁵⁶. This is alarming since both EU regulations and directives have significant contributions to the application of the EU common values and norms for the wider society. Given that the EU legal instruments have no hierarchical positions as commonly seen in the national legal orders⁵⁷, the attention to all types of EU legal acts need to be more stabilized and balanced. After all,

⁵⁵ 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 [2003] OJ L338/1.

⁵⁶ Jens Blom-Hansen, Jørgen Grønnegård Christensen, Caroline Howard Grøn, Michael Hansen Jensen, and Peter B. Mortensen, "'Transposition' of EU Regulations: the Politics of Supplementing EU Regulations with National Rules." *Journal of European Public Policy* 30, no. 12 (2023): 2786-2806.

⁵⁷ Koen Lenaerts and Marlies Desomer, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures." *European Law Journal* 11, no. 6 (2005): 744-765.

to make all the EU legal acts to be effectively implemented, good cooperation between the EU and all its member states is strongly encouraged.

Even though the EU regulation is directly applicable without further actions required, some actions executed by the states are still needed to effectively implement this regulation. In fact, the effective application of all EU legal acts will rely mainly on how an EU member state takes further actions. Regarding this, following up on the establishment of Brussels IIB Regulation that is in force since 1 August 2022, Austria established a decree No 2022-0.521.902 regarding an Introductory Decree to Brussels IIB Regulation issued by Austrian Federal Ministry of Justice dated 12 July 2022⁵⁸, three weeks before this new EU regulation officially had its legal binding. The decree is established for information purposes only and is not intended to prejudice the interpretation by the independent courts. This 25-page decree contains the summary and some legal explanations of Brussels IIB Regulation that can be very useful for all wider society. From this further action, we can see how Austria has taken further actions to implement this Brussels IIB Regulation by establishing this decree so that all relevant parties in the national level can properly understand the law and can eventually better implement it.

5. Conclusion

To conclude, there are several substantial changes in the jurisdiction of divorce and legal separation matters from its original regulation EC No 1347/2000 that was repealed by EC No 2201/2003 and replaced by EU No 2019/1111. Based on the implementation analysis of the current applicable EU instrument in Austria derived from the three approaches used, this paper suggests that Austria has effectively applied this EU regulation. Austria has never experienced any infringement conducts against EU No 1111/2019, as well as the other 2 former amended regulations, in divorce and legal separation jurisdiction matters. From the four court proceedings of preliminary rulings concerning Brussels IIA Regulation submitted by Austrian courts, the court judgments of the two cases being analyzed are already in accordance with the law regulated in EC No 2201/2003. Even though there is no need for the EU member states to establish a national policy in response to the establishment of any EU regulation, the good practice of Austrian Federal Ministry of Justice, by establishing a decree containing the summary and some legal explanations of the Council Regulation EU No 1111/2019, is one of important further actions that could be very suitable to be adopted by other EU member states.

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