JUDGMENT OF THE COURT (Second Chamber)

9 November 2010 *

In Case C-296/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Amtsgericht Stuttgart (Germany), made by decision of 31 May 2010, received at the Court on 16 June 2010, in the proceedings

Bianca Purrucker

v

Guillermo Vallés Pérez,

THE COURT (Second Chamber),

composed of J. N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), U. Lõhmus and A. Ó Caoimh, Judges,

* Language of the case: German.

Advocate General: N. Jääskinen,
Registrar: B. Fülöp, Administrator,

having regard to the decision of the President of the Court of 15 July 2010 to apply to the case the accelerated procedure under Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Court's Rules of Procedure,

having regard to the written procedure and further to the hearing on 27 September 2010,

after considering the observations submitted on behalf of:

— Ms Purrucker, by B. Steinacker, Rechtsanwältin,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the Czech Government, by M. Smolek, acting as Agent,

— the Spanish Government, by J.M. Rodríguez Cárcamo, acting as Agent,

— the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,

— the United Kingdom Government, by F. Penlington, acting as Agent,

— the European Commission, by A.-M. Rouchaud-Joët and S. Grünheid, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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 2003 L 338, p. 1).

2 The reference has been made in proceedings between Ms Purrucker and Mr Vallés Pérez concerning rights of custody in respect of their son Merlín.

Legal context

3 Regulation No 2201/2003 was preceded by Council Regulation (EC) No 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 (OJ 2000 L 160, p. 19). Regulation No 1347/2000 was repealed by Regulation No 2201/2003, the scope of which is broader.

4 Recitals 12, 16 and 21 of the preamble to Regulation No 2201/2003 state:

'(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

…

(16) This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State.

…

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.'

5 Under Article 2 of Regulation No 2201/2003:

'For the purposes of this Regulation:

(1) the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;

…

(4) the term "judgment" shall mean … a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

…

(7) the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

…

(9) the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

…'

6 Article 8(1) of that regulation provides:

'The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised'

7 Article 16 of Regulation No 2201/2003, headed 'Seising of a Court', provides:

'1. A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.'

8 Under Article 17 of that regulation:

'Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.'

9 Article 19(2) and (3) of that regulation provide:

'2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action ["le même objet et la même cause"] are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.'

10 Article 20 of the same regulation, headed 'Provisional, including protective, measures', provides:

'1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.'

11 Article 21 et seq. of Regulation No 2201/2003 relate to the recognition and enforcement of judgments. Article 21(1) provides in particular that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required.

12 Article 24 of Regulation No 2201/2003 provides that the jurisdiction of the court of the Member State of origin may not be reviewed.

The facts in the main proceedings and the ongoing proceedings

13 It is clear from the order for reference, from the account of the facts in the judgment of 15 July 2010 in Case C-256/09 *Purrucker* [2010] ECR I-7353 ('*Purrucker I*'), and from the procedural file sent to the Court by the referring court, that in mid-2005 Ms Purrucker, who is of German nationality, went to live in Spain with Mr Vallés Pérez, who is of Spanish nationality though born in Germany. Their relationship resulted in the birth of twins, who were born prematurely on 31 May 2006, Merlín, a boy, and Samira, a girl. Mr Vallés Pérez acknowledged paternity. As the parents were cohabiting, they have, under Spanish law, joint rights of custody. The children have dual German and Spanish nationality.

14 The relationship of Ms Purrucker and Mr Vallés Pérez deteriorated: Ms Purrucker wanted to return to Germany with her children, while Mr Vallés Pérez was, initially, opposed to this. On 30 January 2007 the parties signed an agreement before a notary which had to be approved by a court in order to be enforceable, according to which Ms Purrucker was to move to Germany with the children.

15 Because of complications and the need for surgery, Samira could not leave hospital on the planned day of departure. Thus, Ms Purrucker left for Germany on 2 February 2007 with only her son, Merlín. Whether, because of those particular circumstances, Mr Vallés Pérez continued to agree to the departure of Ms Purrucker with Merlín is a matter of dispute between the parties in the main proceedings.

16 The place of residence of the family members has not changed since the departure of Ms Purrucker on 2 February 2007.

17 There are three sets of proceedings under way involving Ms Purrucker and Mr Vallés Pérez:

— the first, brought in Spain by Mr Vallés Pérez before the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial, concerns the granting of provisional measures. It is conceivable that, under certain conditions, these proceedings could be regarded as substantive proceedings concerned with the award of rights of custody of Merlín and Samira;

— the second, brought in Germany by Mr Vallés Pérez, concerns the enforcement of the judgment of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial granting provisional measures, and is the subject of the judgment in *Purrucker I*, cited above, and

— the third, brought by Ms Purrucker in Germany, is concerned with the award of rights of custody of the abovementioned children. These are the proceedings which have given rise to this reference for a preliminary ruling.

The proceedings commenced in Spain to obtain the grant of provisional measures in relation to the custody of the children and possibly to obtain a judgment on the substance of the matter

18 In June 2007, since Mr Vallés Pérez no longer felt bound by the agreement signed before a notary, he brought proceedings before the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial to obtain the grant of provisional measures and, in particular, rights of custody in respect of Samira and Merlín.

19 The hearing took place on 26 September 2007. Ms Purrucker submitted written observations and was represented at the hearing.

20 By judgment of 8 November 2007, the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial held that it had jurisdiction and adopted urgent and provisional measures, concerning, inter alia, the custody of the children. That judgment was the subject of a correcting judgment dated 28 November 2007.

21 According to the information provided in the documents before the Court, under Spanish law, where provisional measures are requested and obtained prior to the initiation of substantive proceedings, their effects are to expire if the main action to initiate proceedings is not lodged within the period of 30 days following the adoption of the provisional measures.

22 On an unspecified date in January 2008, the date not being disclosed in any document within the file sent by the referring court, Mr Vallés Pérez initiated substantive proceedings before the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial. Ms Purrucker claims that those proceedings were out of time.

23 By judgment of 28 October 2008, the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial stated its position on the issue of the 'court first seised' within the meaning of Article 19(3) of Regulation No 2201/2003. The court pointed out that it had already dealt with the issue of its jurisdiction in the judgment of 8 November 2007 and restated the various facts indicative of connection, referred to in that judgment. The court stated that on 28 June 2007 it admitted the action for the grant of provisional measures relating to the custody of the children. Since the German court was not seised until September 2007 by the mother, the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial considered that it was the 'court first seised' and declared that it had jurisdiction to hear the case in accordance with Article 16 of Regulation No 2201/2003.

24 By judgment of 21 January 2010 the Audiencia Provincial de Madrid (Spain), before whom Ms Purrucker brought an appeal, upheld the judgment of 28 October 2008. The appeal court considered that, as regards the application of Article 16 of Regulation No 2201/2003, the first action was the action to obtain provisional measures lodged in accordance with Spanish law before the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial, prior to the action brought before the German court. On the other hand, Article 20 of Regulation No 2201/2003, relied on by Ms Purrucker, while it is applicable to the case before the court, does not lay down any rule on the subject of jurisdiction and is concerned solely with the adoption of protective measures exclusively in cases of urgency, whereas jurisdiction, which is the matter at issue in the case before the court, is determined in accordance with the rules laid down in Article 19 of that regulation. That solution is, moreover, consistent with Article 22(3) of the organic law on the judiciary (Ley Orgánica del Poder Judicial).

The proceedings commenced in Germany in order to obtain enforcement of the judgment of 8 November 2007 of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial

25 These are the proceedings which gave rise to the judgment in *Purrucker I*. Mr Vallés Pérez initially requested, inter alia, the return of Merlín and brought, as a precautionary measure, an action for a declaration that the judgment delivered by the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial was enforceable. Next, he sought, as a matter of priority, the enforcement of that judgment. Consequently, the Amtsgericht Stuttgart, by a decision of 3 July 2008, and the Oberlandesgericht Stuttgart (Germany), by a decision on appeal of 22 September 2008, ordered enforcement of that judgment.

26 Following an appeal on a point of law brought by Ms Purrucker, the Bundesgerichtshof (Germany) referred a question to the Court for a preliminary ruling. The answer given by the Court in *Purrucker I* was that the provisions of Article 21 et seq. of Regulation No 2201/2003 do not apply to provisional measures, in relation to rights of custody, falling within the scope of Article 20 of that regulation.

27 In paragraph 76 of *Purrucker I*, the Court stated in particular that where the substantive jurisdiction, in accordance with Regulation No 2201/2003, of a court which has taken provisional measures is not, plainly, evident from the content of the judgment adopted, or where that judgment does not contain a statement, which is free of any ambiguity, of the grounds in support of the substantive jurisdiction of that court, with reference made to one of the criteria of jurisdiction specified in Articles 8 to 14 of that regulation, it may be inferred that that judgment was not adopted in accordance with the rules of jurisdiction laid down by that regulation.

The proceedings commenced in Germany in order to obtain rights of custody

28 On 20 September 2007 Ms Purrucker brought substantive proceedings before the Amtsgericht Albstadt (Germany) seeking the award to herself of sole rights of custody in respect of Merlín and Samira. Notice of that action was not served on Mr Vallés Pérez until 22 February 2008 by registered mail with recorded delivery. However, both he and the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial had prior knowledge of that action.

29 It is apparent in particular from the decisions of 25 September 2007 and 9 January 2008 of the Amtsgericht Albstadt that, in the opinion of that court, Ms Purrucker's action could not succeed. Since the parents were not married to each other and ostensibly there was no declaration of joint rights of custody, given that the agreement of 30 January 2007 signed before a notary could not be interpreted as constituting such a declaration, Ms Purrucker had exclusive rights of custody in respect of the children, with the result that a decision to award rights of custody was not necessary. Further, the Amtsgericht Albstadt referred to the proceedings pending in Spain.

30 By judgment of 19 March 2008 the Amtsgericht Albstadt dismissed Ms Purrucker's action, on grounds of lack of jurisdiction in particular, in so far as it related to Samira. That judgment was upheld on 5 May 2008 by the Oberlandesgericht Stuttgart. In its judgment the Oberlandesgericht Stuttgart observed that Samira had, from birth, her habitual residence in Spain. In the opinion of that court, Article 9 of Regulation No 2201/2003 was not applicable to the facts of the case before it and the conditions of Article 15 of that regulation were not satisfied.

31 By a separate judgment of 19 March 2008, the Amtsgericht Albstadt stayed its proceedings in relation to rights of custody in respect of Merlín under Article 16 of the

Hague Convention of 25 October 1980 on the civil aspects of international child abduction ('the 1980 Hague Convention'). Those proceedings were resumed on 28 May 2008 at the request of Ms Purrucker because, at that date, Mr Vallés Pérez had not submitted any application for return on the basis of the 1980 Hague Convention. No application has been submitted since that date.

32 Because of the action brought by Mr Vallés Pérez seeking enforcement of the judgment of 8 November 2007 of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial, the proceedings relating to rights of custody were assigned to the Amtsgericht Stuttgart, in accordance with Article 13 of the German law on the enforcement and application of various legal instruments on international family law (Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts).

33 On 16 July 2008, on the basis of Article 20 of Regulation No 2201/2003, Ms Purrucker brought before the Amtsgericht Stuttgart an action seeking the grant of a provisional measure awarding her exclusive custody in respect of her son Merlín, or, alternatively, the exclusive right to determine that child's place of residence. The background to that application was marked by the emergence of problems in precautionary medical examinations. By judgment of 28 July 2008, the measure requested was refused, on grounds of lack of urgency within the meaning of Article 20 of Regulation No 2201/2003. The Amtsgericht Stuttgart observed in particular that the child was covered by his father's social security insurance in Spain and that, if necessary, it would be possible to order delivery to the mother of the sickness insurance card.

34 The procedural file sent to the Court by the referring court states that, in the months of August, September and October 2008, the Amtsgericht Stuttgart attempted, in connection with the substantive proceedings pending before it, on several occasions and by various means, including the intervention of the Spanish liaison magistrate in the European Judicial Network (EJN), to establish contact with the Juzgado de Primera

Instancia of San Lorenzo de El Escorial to discover whether there were also substantive proceedings before that court. Those efforts have however proved fruitless.

35 On 28 October 2008 the Amtsgericht Stuttgart issued a judgment in which it sets out the steps taken through the Spanish liaison magistrate and the lack of response from the Juzgado de Primera Instancia of San Lorenzo de El Escorial. The court asked the parties to provide it with information, supported by evidence, of, first, the date of the application for provisional measures by the father in Spain, second, service of the judgment of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial of 8 November 2007 and, third, the lodging of an action to initiate substantive proceedings by the father in Spain and the date of service of that action on the mother.

36 On the same date, 28 October 2008, the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial delivered the judgment the content of which is described in paragraph 23 of this judgment and in which it refers to the letter which was sent to it by the Amtsgericht Stuttgart.

37 After inviting the parties again to state their views, the Amtsgericht Stuttgart delivered a judgment on 8 December 2008. It made reference to the judgment of 28 October 2008 of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial and of the appeal to be brought by Ms Purrucker against the latter judgment. The Amtsgericht Stuttgart considered that it could not itself give a ruling on the issue of the 'court first seised' because it would compromise legal certainty if two courts of different Member States were able to hand down contradictory judgments. The issue had to be resolved by the court which was the first to declare that it had jurisdiction. Consequently, the Amtsgericht Stuttgart decided to stay its proceedings in accordance with Article 19(2) of Regulation No 2201/2003 until the judgment of 28 October 2008 of the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial acquired the force of *res judicata*.

38 Ms Purrucker brought an appeal against the judgment of 8 December 2008 of the Amtsgericht Stuttgart. On 14 May 2009 the Oberlandesgericht Stuttgart set aside that judgment and referred the case back to the Amtsgericht Stuttgart for reconsideration. The Oberlandesgericht Stuttgart held that a court is bound to assess its own jurisdiction and that Article 19 of Regulation No 2201/2003 does not confer on any of the courts which are seised exclusive jurisdiction to decide which court was first seised. The Oberlandesgericht Stuttgart observed that the application for rights of custody brought in Spain in June 2007 by Mr Vallés Pérez formed part of proceedings brought for the granting of provisional measures, whereas the application for rights of custody brought in Germany on 20 September 2007 by Ms Purrucker was an action relating to the substance of the matter. Such an action and proceedings to obtain provisional measures were concerned with different legal issues or different claims. If necessary, the existence of a positive conflict of jurisdiction between two courts should be recognised.

39 By an order dated 8 June 2009, the Amtsgericht Stuttgart again asked the parties what stage had been reached in the proceedings commenced in Spain and invited their views on the possibility of referring to the Court of Justice a preliminary question on how the court first seised was to be determined, in accordance with Article 104b of the Court's Rules of Procedure.

40 By an order dated 19 October 2009, the Amtsgericht Stuttgart proposed to the parties an agreement, whereby they could either jointly decide that Merlín's place of habitual residence was with Ms Purrucker and Samira's with Mr Vallés Pérez, while maintaining joint rights of custody, or request, by mutual agreement, that rights of custody in respect of Merlín be awarded to Ms Purrucker while rights of custody in respect of Samira be granted to Mr Vallés Pérez. However, that proposal was not accepted.

41 On 13 January 2010 a hearing was held before the Amtsgericht Stuttgart with the parties to the main proceedings in attendance and Mr Vallés Peréz represented by his lawyer. The differences in the parties' opposing viewpoints could not be reconciled or resolved.

42 On 21 January 2010 the Audiencia Provincial de Madrid ruled on the appeal brought by Ms Purrucker in the judgment to which reference is made in paragraph 24 of this judgment. Notice of that judgment of 21 January 2010 was sent to the Amtsgericht Stuttgart by means of a letter sent by the German lawyer of Mr Vallés Pérez.

The order for reference and the questions referred for a preliminary ruling

43 In the order for reference, the Amtsgericht Stuttgart sets out why, in its opinion, there is no reasonable doubt that Merlín had his habitual residence in Germany on 21 September 2007, the date when Ms Purrucker brought her application that rights of custody be awarded to her.

44 According to that court, the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial did not have, on the basis of Article 10 of Regulation No 2201/2003, a continuing jurisdiction until 21 September 2007 because the family members had previously had their joint habitual residence in Spain, since it is neither probable nor proven that the removal of Merlín by Ms Purrucker from Spain to Germany was wrongful. The agreement of 30 January 2007 signed before a notary, and further, the fact that no notice of an application for return was given on the basis of Article 11 of Regulation No 2201/2003 in conjunction with the 1980 Hague Convention are factors which militate against any suggestion of unlawful child abduction within the meaning

of Article 2(11) of the Regulation. Nor does the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial base its jurisdiction on that provision.

45 The Amtsgericht Stuttgart states that, under Article 16 of Regulation No 2201/2003, a court is to be deemed to be seised at the time when the document instituting the proceedings is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent.

46 The Amtsgericht Stuttgart adds that the application of 20 September 2007 was lodged with the Amtsgericht Albstadt on 21 September 2007, but notice was not served on Mr Vallés Pérez until 22 February 2008, for reasons which exclude any fault on the part of Ms Purrucker, being linked to the disputed international jurisdiction of that court in respect of adopting measures relating to rights of custody in respect of the daughter of the parties to the main proceedings, Samira.

47 Article 19(2) of Regulation No 2201/2003 provides that a Member State court which is first seised of an action relating to parental responsibility for a child has priority of jurisdiction over the court of another Member State subsequently seised of proceedings which have the same cause of action. According to the referring court, the object of the dispute which gave rise to the bringing, in June 2007, of proceedings before the Spanish court to obtain provisional measures is identical to that which gave rise to the substantive proceedings brought before the German court in September 2007. The object of both sets of proceedings is an application to a court seeking to obtain measures in relation to parental responsibility for the same child of the two parents.

Each of the two parties seeks, in each case, the award of sole custody in his or her favour. In both proceedings, the parties are identical.

48 An assessment of whether particular proceedings have priority in time should be made under Article 16 of Regulation No 2201/2003. The Amtsgericht Stuttgart observes however that the wording of that provision makes no distinction between substantive proceedings and proceedings for interim relief which are designed to obtain the grant of provisional measures. That being the case, various views of the law with regard to the scope of Article 19(2) of Regulation No 2201/2003 can be taken.

49 It is apparent from the view of the law taken by the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial and by the Audiencia Provincial of Madrid that a Spanish court is deemed to be seised, within the meaning of Articles 16 and 19(2) of Regulation No 2201/2003, when an application for interim measures is brought. Proceedings for interim relief, together with substantive proceedings brought subsequently, constitute one procedural unit. An interim relief order however *ipso jure* ceases to have effect if substantive proceedings are not brought within 30 days following service of the interim relief order.

50 On the other hand, according to the order of the Oberlandesgericht Stuttgart of 14 May 2009, Article 19(2) of Regulation No 2201/2003 is not concerned with the relationship between substantive proceedings and proceedings for interim relief since those proceedings have different objectives, despite the fact that a decision relating to the custody of a child has identical effects whether delivered in substantive proceedings or in proceedings for interim relief. That interpretation is also supported by the fact that Article 21 et seq. of Regulation No 2201/2003 do not apply to provisional measures, within the meaning of Article 20 of that Regulation.

51 In the light of the foregoing, the Amtsgericht Stuttgart decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 19(2) of Regulation [No 2201/2003] applicable if a court of a Member State first seised by one party to resolve matters of parental responsibility is called upon to grant only provisional measures and a court of another Member State subsequently seised by the other party of an action with the same object is called upon to rule on the substance of the matter?

(2) Is [Article 19(2)] also applicable if a ruling in the isolated proceedings for provisional measures in one Member State is not capable of recognition in another Member State within the meaning of Article 21 of Regulation No 2201/2003?

(3) Is the seising of a court in a Member State for isolated proceedings for provisional measures to be equated to seising as to the substance of the matter within the meaning of Article 19(2) of Regulation No 2201/2003 if under the national rules of procedure of that State a subsequent action to rule on the substance of the matter must be brought before that court within a specified period in order to avoid adverse procedural consequences?'

Procedure before the Court

52 In the order for reference, the Amtsgericht Stuttgart asked that an accelerated procedure under Article 104b of the Court's Rules of Procedure be applied to the reference for a preliminary ruling, suggesting further that the reference be assigned to the same formation of the Court which had considered the reference for a preliminary ruling by the Bundesgerichtshof. By letter of 1 July 2010 the Amtsgericht Stuttgart clarified its request and stated that it sought the application not of Article 104b of the Rules of Procedure, but rather of Article 104a of those rules.

53 By order of 15 July 2010 the President of the Court granted that request.

Consideration of the questions referred for a preliminary ruling

54 By its first question, the referring court asks whether Article 19(2) of Regulation No 2201/2003 is applicable where the court of a Member State first seised by one of the parties in order to obtain measures in matters of parental responsibility is seised only of an action to obtain an order for provisional measures and where a court of another Member State is second seised by the other party of an action with the same object seeking to obtain a judgment as to the substance of the matter. The second question relates to the application of Article 19(2) to a judgment ordering provisional measures which is not capable of recognition within the meaning of Article 21 of that regulation, while the third question relates to the application of Article 21 to proceedings, directed to obtaining provisional measures, which may be linked to substantive proceedings.

55 Those questions should be considered together.

Observations of the parties

56 Two points of view were argued before the Court.

57 On the one hand, Ms Purrucker, the German Government and the European Commission maintain that no *lis pendens* arises in the case of substantive proceedings which are concurrent with proceedings directed to obtaining provisional measures which have resulted in the delivery of a judgment, even though those proceedings may constitute a procedural unit together with an action to initiate substantive proceedings, if such an action is brought within a legally prescribed period of time. Each form of proceedings should be regarded as an independent entity and *lis pendens* comes to an end as soon as a judgment is delivered.

58 If that were not the case, the German Government states, a change of the child's habitual residence could not be taken into account even though Regulation No 2201/2003 takes such a change into consideration, a situation which is contrary to the objective of that regulation, which is to enable the court which is nearest the child to rule on matters of parental responsibility. Moreover, if it were to be held that *lis pendens* arises in a case where substantive proceedings are concurrent with proceedings directed at obtaining provisional measures which have resulted in the delivery of a judgment, that would compel the court second seised to carry out enquiries into the national law of the Member State of the court first seised, in order to ascertain whether the granting of provisional measures does or does not mean that substantive proceedings are still pending. Lastly, the German Government argues that there is a risk of forum shopping if the criterion of urgency can be relied on to allow a court to declare that it

has jurisdiction, grant urgent provisional measures and remain seised of the action to initiate substantive proceedings.

59 On the other hand, the Czech, French and Spanish Governments maintain that the nature of proceedings, whether for interim relief or as to the substance, has no effect on the application of Article 19 of Regulation No 2201/2003. Referring to point 130 of the Opinion of Advocate General Sharpston in the case which gave rise to *Purrucker I*, the French Government states that Regulation No 2201/2003 overall makes no distinction between final or firm decisions on the one hand, and provisional decisions on the other, either in Chapters 1 and 2 of that regulation or in Chapter 3 thereof which deals with recognition. The relevant test therefore is whether the two pending actions have the same cause of action, which is the case where two parents each apply for custody of the same child, whether by way of provisional measure or final judgment.

60 All the interested persons within the meaning of Article 23 of the Statute of the Court who have lodged observations consider that there is no *lis pendens* where one of the actions is directed to obtaining provisional measures within the meaning of Article 20 of Regulation No 2201/2003, or where the court first seised has already ordered provisional measures within the meaning of that provision.

61 The Commission states however that it is difficult, for the court second seised, to determine whether provisional measures have been taken by a court which has jurisdiction as to the substance of the matter or whether the provisional measures concerned have been taken under Article 20 of Regulation No 2201/2003. For that reason the Commission supports the same position as that advocated by the German Government, namely that proceedings directed to obtaining provisional measures are independent proceedings which are brought to an end by the delivery of a judgment granting such measures. The Commission accepts however that an exception to that rule should be allowed where it is a requirement of national law that a person

bringing legal proceedings begin by initiating proceedings for interim relief before he can bring proceedings as to the substance of the matter.

62 Most of the interested persons who have submitted observations have stated that, while the rule relating to *lis pendens* to be found in Article 19 of Regulation No 2201/2003 is the same as that to be found in Article 21 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — amended text — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) ('the Brussels Convention'), and in Article 27 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), those different texts differed too much in their objectives and in other provisions to permit the application, in the context of Regulation No 2201/2003, of any solutions adopted in the context of the Brussels Convention or Regulation No 44/2001.

63 The German Government emphasises in particular that, in the matters of civil law within the scope of Regulation No 44/2001, a provisional measure is vested with only a limited finality as *res judicata*, whereas the judgment on the substance of the case acquires full finality as *res judicata*. That is not true of a provisional measure adopted on a matter of parental responsibility, which has only the force of procedural, but not material, *res judicata*, in the sense that such a measure could subsequently be the subject of a fresh decision to take account of changed circumstances. Moreover, as stated by the Commission, the rules relating to conflicting judgments are different.

The Court's reply

64 The rules relating to *lis pendens* are intended, in the interests of the proper administration of justice within the European Union, to prevent parallel proceedings before the courts of different Member States and to avoid conflicts between decisions which might result therefrom (see, to that effect, in relation to the Brussels Convention, Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 41, and Case C-39/02 *Mærsk Olie & Gas* [2004] ECR I-9657, paragraph 31).

65 Under Article 19(2) of Regulation No 2201/2003, there is *lis pendens* where proceedings relating to parental responsibility in respect of a child and involving the same cause of action are brought before courts of different Member States. In that regard, there is no requirement that the parties to the proceedings are the same.

66 Having regard to the objectives pursued by Regulation No 2201/2003 and the fact that the wording of Article 19(2) thereof, instead of referring to the term '*lis pendens*' as used in the different national legal systems of the Member states, lays down a number of substantive conditions as components of a definition, it must be concluded that the terms used in Article 19(2) in order to determine whether a situation of *lis pendens* arises must be regarded as autonomous (see, to that effect, in relation to the Brussels Convention, Case 144/86 *Gubisch Maschinenfabrik* [1987] ECR 4861, paragraph 11).

67 The term 'the same cause of action' ('le même objet et la meme cause') must be defined by taking into account the objective of Article 19(2) of Regulation No 2201/2003, which is to prevent decisions which are incompatible.

68 The Court has previously ruled, in the context of the Brussels convention, that the 'object of the action' ('objet') is the end the action has in view (see Case C-406/92 *Tatry* [1994] ECR I-5439, paragraph 41). To ascertain whether two actions have the same object, account must be taken of the applicants' respective claims in each of the sets of proceedings (Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, paragraph 26). Further, the Court has interpreted the concept of the 'cause of the action' ('cause') as comprising the facts and the rule of law relied on as the basis of the action (see *Tatry*, paragraph 39).

69 All the parties who submitted observations rightly maintain that there cannot be any *lis pendens* between an action brought to obtain provisional measures within the meaning of Article 20 of that Regulation and an action initiating substantive proceedings.

70 As the Court stated in paragraph 61 of *Purrucker I*, Article 20 of Regulation No 2201/2003 cannot be regarded as a provision which determines substantive jurisdiction.

71 Further, the application of that provision does not prevent the court which has jurisdiction as to the substance of the matter being seised. Article 20(2) of Regulation No 2201/2003 ensures that there is no possibility that the decisions made in a judgment granting provisional measures within the meaning of Article 20 of that regulation and a judgment handed down by the court which has jurisdiction as to the substance of the matter can contradict each other, since it provides that provisional measures within the meaning of Article 20(1) of that regulation are to cease to apply when the court which has jurisdiction as to the substance of the matter has taken the measures it considers appropriate.

72 *Lis pendens* within the meaning of Article 19(2) of Regulation No 2201/2003 can therefore exist only where two or more sets of proceedings with the same cause of

action are pending before different courts, and where the claims of the applicants, in those different sets of proceedings, are directed to obtaining a judgment capable of recognition in a Member State other than that of a court seised as the court with jurisdiction as to the substance of the matter.

73 In that regard, no distinction can be drawn on the basis of the nature of the proceedings brought before those courts, that is, according to whether they are proceedings for interim relief or substantive proceedings. Neither the concept of 'judgment', defined in Article 2(4) of Regulation No 2201/2003, nor Articles 16 and 19 of the regulation relating, respectively, to the seising of a court and *lis pendens*, indicate that the regulation makes such a distinction. The same is true of the provisions of Regulation No 2201/2003 relating to recognition and enforcement of judgments, such as Articles 21 and 23 thereof.

74 Moreover, recourse to one or other form of proceedings might be determined by the specific features of national law. The Commission raised the possibility of national law providing that the bringing of proceedings for interim relief is a precondition of bringing proceedings as to the substance of the matter.

75 Having regard to the case-law mentioned in paragraph 68 of this judgment, and more particularly, *Gantner Electronic*, the crucial issue therefore is whether the applicant's claim before the court first seised is directed to obtaining a judgment from that court as the court with jurisdiction as to the substance of the matter within the meaning of Regulation No 2201/2003.

76 By making a comparison of the applicant's claim before that court and the claim of the applicant before the court second seised, the latter court will be able to assess whether or not there is *lis pendens*.

77 If it is manifestly clear from the object of the action brought before the court first seised and from the account of the facts set out therein that that action contains no ground on which the court seised by that action could justifiably claim jurisdiction as to the substance of the matter within the meaning of Regulation No 2201/2003, the court second seised will be able to hold that there is no *lis pendens*.

78 On the other hand, if it is evident from the applicant's claims or from the factual background contained in the action brought before the court first seised that, even where the action is directed to obtaining provisional measures, the action has been brought before a court which, *prima facie*, might have jurisdiction as to the substance of the matter, the court second seised must stay its proceedings in accordance with Article 19(2) of Regulation No 2201/2003 until such time as the jurisdiction of the court first seised is established. According to circumstances and if the conditions of Article 20 of the regulation are satisfied, the court second seised may take such provisional measures as are necessary in the interests of the child.

79 The existence of a court judgment granting provisional measures, when it is not clearly stated, in that judgment, whether the court which has taken those measures has jurisdiction as to the substance of the matter, cannot constitute evidence, in support of an objection of *lis pendens,* that there is an action as to the substance of the matter, in the absence of clear indications of the jurisdiction of the court first seised and of the factual circumstances contained in the action initiating the substantive proceedings.

80 However, it falls to the court second seised to ascertain whether the judgment of the court first seised, in that it grants provisional measures, was only a preliminary step towards a subsequent judgment delivered by that court when better informed of

the case and in circumstances where the need to make an urgent decision no longer arises. The court second seised should moreover ascertain whether the claim relating to provisional measures and the claim brought subsequently relating to matters of substance constitute a procedural unit.

81 According to what is permitted by provisions of its national law, the court second seised may, where the opposing parties in two sets of proceedings are the same, seek information from the party relying on the objection of *lis pendens* on the existence of the alleged proceedings and the content of the action. Moreover, taking into consideration the fact that Regulation No 2201/2003 is based on judicial cooperation and mutual trust, that court may advise the court first seised that an action has been brought before it, alert the court first seised to the possibility of *lis pendens*, and invite the court first seised to send to it information on the action pending before it and to state its position on its jurisdiction within the meaning of Regulation No 2201/2003 or to notify it of any judgment already delivered in that regard. Lastly, the court second seised will be able to approach the central authority in its Member State.

82 If, notwithstanding efforts made by the court second seised, it has no information supporting the existence of an action brought before another court which enables it to determine the cause of that action and serves, in particular, to demonstrate the jurisdiction of the other court seised in accordance with Regulation No 2201/2003, it is the duty of that court, after a reasonable period of time when answers to questions raised are awaited, to proceed with the consideration of the action brought before it.

83 The duration of that reasonable waiting period must be determined by the court having regard above all to the interests of the child. The fact that a child is very young is one criterion to be taken into consideration in that regard (see, to that effect, Case C-195/08 PPU *Rinau* [2008] ECR I-5271, paragraph 81).

84 It must be recalled that an objective of Regulation No 2201/2003 is to ensure, in the best interests of the child, that the court which is nearest the child and which, accordingly, is best informed of the child's situation and state of development, takes the necessary decisions.

85 Lastly, it must be emphasised that, under Article 24 of Regulation No 2201/2003, the jurisdiction of the court of the Member State of origin may not be reviewed. However, while Article 19(2) of that Regulation provides that the court second seised must stay proceedings in the event of *lis pendens*, the specific purpose of its doing so is to enable the court first seised to rule on its jurisdiction.

86 It follows from all of the foregoing that the questions referred should be answered as follows:

— The provisions of Article 19(2) of Regulation No 2201/2003 are not applicable where a court of a Member State first seised for the purpose of obtaining measures in matters of parental responsibility is seised only for the purpose of its granting provisional measures within the meaning of Article 20 of that regulation and where a court of another Member State which has jurisdiction as to the substance of the matter within the meaning of the same regulation is seised second of an action directed at obtaining the same measures, whether on a provisional basis or as final measures.

— The fact that a court of a Member State is seised in the context of proceedings to obtain interim relief or that a judgment is handed down in the context of such proceedings and there is nothing in the action brought or the judgment handed down which indicates that the court seised for the interim measures has jurisdiction within the meaning of Regulation No 2201/2003 does not necessarily preclude the possibility that, as may be provided for by the national law of that Member State, there may be an action as to the substance of the matter which is linked to the action to obtain interim measures and in which there is evidence

to demonstrate that the court seised has jurisdiction within the meaning of that regulation.

— Where, notwithstanding efforts made by the court second seised to obtain information by enquiry of the party claiming *lis pendens*, the court first seised and the central authority, the court second seised lacks any evidence which enables it to determine the cause of action of proceedings brought before another court and which serves, in particular, to demonstrate the jurisdiction of that court in accordance with Regulation No 2201/2003, and where, because of specific circumstances, the interest of the child requires the handing down of a judgment which may be recognised in Member States other than that of the court second seised, it is the duty of that court, after the expiry of a reasonable period in which answers to the enquiries made are awaited, to proceed with consideration of the action brought before it. The duration of that reasonable period must take into account the best interests of the child in the specific circumstances of the proceedings concerned.

Costs

87 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

The provisions of Article 19(2) of 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, are not applicable where a court of a Member State first seised for the purpose of obtaining measures in matters of parental responsibility is seised only for the purpose of its granting provisional measures within the meaning of Article 20 of that regulation and where a court of another Member State which has jurisdiction as to the substance of the matter within the meaning of the same regulation is seised second of an action directed at obtaining the same measures, whether on a provisional basis or as final measures.

The fact that a court of a Member State is seised in the context of proceedings to obtain interim relief or that a judgment is handed down in the context of such proceedings and there is nothing in the action brought or the judgment handed down which indicates that the court seised for the interim measures has jurisdiction within the meaning of Regulation No 2201/2003 does not necessarily preclude the possibility that, as may be provided for by the national law of that Member State, there may be an action as to the substance of the matter which is linked to the action to obtain interim measures and in which there is evidence to demonstrate that the court seised has jurisdiction within the meaning of that regulation.

Where, notwithstanding efforts made by the court second seised to obtain information by enquiry of the party claiming *lis pendens*, the court first seised and the central authority, the court second seised lacks any evidence which enables it to determine the cause of action of proceedings brought before another court and which serves, in particular, to demonstrate the jurisdiction of that court in accordance with Regulation No 2201/2003, and where, because of specific

circumstances, the interest of the child requires the handing down of a judgment which may be recognised in Member States other than that of the court second seised, it is the duty of that court, after the expiry of a reasonable period in which answers to the enquiries made are awaited, to proceed with consideration of the action brought before it. The duration of that reasonable period must take into account the best interests of the child in the specific circumstances of the proceedings concerned.

[Signatures]