Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 16 April 2015 [1]

Case C-4/14

Christophe Bohez
v
Ingrid Wiertz

(Request for a preliminary ruling from the Korkein oikeus (Finland))

(Judicial cooperation in civil matters — Regulation (EC) No 44/2001 — Jurisdiction and the enforcement of judgments in civil and commercial matters — Excluded matters — Family law — Regulation (EC) No 2201/2003 — Jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility — Judgment on rights of access coupled with a periodic penalty payment — Enforcement of the penalty payment)

I – **Introduction**

1. The Korkein oikeus (Supreme Court of Finland) asks the Court, first, about the application of Regulation (EC) No 44/2001 [2] to the enforcement, in one Member State, of a judicial decision delivered in another Member State, where that decision imposes a penalty payment to ensure compliance with rights of access and, second, about the conditions for enforcement of the penalty payment.

2. Viewed from a global perspective, this case highlights how difficult it is to identify which body of rules applies to penalty payments in the system for the recognition and enforcement of judicial decisions within the European Union. This difficulty is compounded in the specific case where the right safeguarded by the penalty payment is a right of parental access. This is the context in which the Court is asked to reply to the questions referred for a preliminary ruling by the national court.

1 — Original language: French.

2 — Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

II – **Legal framework**

A – *EU law*

1. Regulation No 44/2001

3. Article 1(1) and (2)(a) of Regulation No 44/2001, which concerns the scope of the regulation, provides:

‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession.’

4. Articles 45(2) and 49 of Regulation No 44/2001 form part of Chapter III entitled ‘Recognition and enforcement’.

5. Article 45(2) of the regulation provides:

‘2. Under no circumstances may the foreign judgment be reviewed as to its substance.’

6. Article 49 of the regulation is worded as follows:

‘A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.’

2. Regulation (EC) No 2201/2003

7. Article 1 of Regulation No 2201/2003 [3] defines the scope of the regulation as follows:

‘1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

…

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

…’

8. Article 26 of the regulation states:

‘Under no circumstances may a judgment be reviewed as to its substance.’

3 — Council Regulation 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).

9. As regards the enforceability of judgments relating to rights of access, Article 28(1) of Regulation No 2201/2003 provides:

'A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.'

10. Some judgments relating to rights of access may be subject to special rules. The first subparagraph of Article 41(1) of the regulation provides:

'The rights of access … granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.'

11. Article 47 of the regulation provides:

'1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) … shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.

…'

B – *Belgian law*

12. Penalty payments are governed by Articles 1385 *bis* to 1385 *nonies* of the code judiciare ('the Judicial Code').

13. Article 1385 *bis* of the Judicial Code provides:

'On the application of one of the parties, the court may order the other party to pay a sum of money, known as a penalty payment, if the principal obligation laid down in the judgment has not been performed, without prejudice to damages, where appropriate. …'

14. Article 1385 *ter* of the Judicial Code is worded as follows:

'The court may set the penalty payment at a fixed amount or at an amount determined by unit of time or by breach. In the last two cases, the court may also set an amount above which the order to pay the penalty payment shall cease to have effect.'

15. Article 1385 *quater* of the Judicial Code provides:

'The whole amount of the accrued penalty payment is payable to the party who obtained the order. That party may pursue recovery of the penalty payment on the basis of the order imposing it. …'

16. Article 1385 *quinquies* of the Judicial Code is worded as follows:

'The court that imposed the penalty payment may also cancel it, suspend its accrual for a stipulated period or reduce its amount, on application by the party ordered to pay the penalty, if he is permanently or temporarily entirely or partially unable to perform the principal obligation. The court may not cancel or reduce the penalty payment if it has accrued before the circumstances causing the inability arise.'

17. Since the enforceable instrument permitting recovery of the penalty payment is the judicial decision imposing that penalty (Article 1385 *quater* of the Judicial Code), the beneficiary does not need to have the penalty payment quantified prior to enforcement.

18. If the debtor challenges enforcement, the creditor of the penalty payment must produce evidence to establish the breaches alleged. It will then be for the court dealing with the enforcement proceedings to decide whether the conditions for payment of the penalty are satisfied.

C – *Finnish law*

19. Under Finnish law, the imposition of penalty payments to ensure compliance with rights of access is governed by the Law on rights of custody and access (lapsen huoltoa ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta annettu laki, 'the TpL') and by the applicable part of the Law on penalty payments (uhkasakkolaki, 'Law on penalty payments').

20. Pursuant to Paragraph 16(2) of the TpL, after a judgment on rights of access has been given, the court before which a case is brought concerning the enforcement of those rights may require the respondent to comply with the judgment, failing which he or she will be subject to a penalty payment.

21. Penalty payments are generally set at a fixed amount. However, if there is a particular reason for so doing, a periodic penalty payment may be imposed (Paragraph 18(1) and (2) of the TpL).

22. Penalty payments must always be paid to the State and not to the other party.

23. Following a fresh application, the court may order payment of the penalty imposed if it considers that there are grounds for doing so. Payment of the penalty may not be ordered where the party subject to the obligation shows that he had good reason for failing to perform the obligation, or where the obligation has been performed in the intervening period (Paragraph 19(1) and (2) of the TpL).

24. The court may reduce the amount of the penalty payment originally imposed if the principal obligation has in substance been performed, if the ability of the party subject to the obligation to pay has significantly deteriorated or if there are other good reasons for reducing the amount (Paragraph 11 of the Law on penalty payments).

25. Paragraph 12(2) of the Law on penalty payments provides that if circumstances have changed or crucial new information has come to light, or if the judgment was based on a clearly incorrect application of the law, the authority which imposed the penalty payment may set aside its judgment and hear the case afresh, in whole or in part.

III – **Facts in the main proceedings, questions referred for a preliminary ruling and procedure before the Court**

26. According to the order for reference, Christophe Alfons Adrien Bohez and Ingrid Wiertz married in Belgium on 16 May 1997 and had two children. They divorced in 2005 and Ms Wiertz moved to Finland.

27. On 28 March 2007, the tribunal de première instance de Gand (Court of First Instance, Ghent) (Belgium) gave judgment concerning custody, residence, rights of access and maintenance with respect to the children ('the judgment of 28 March 2007'). In order to ensure compliance with the rights of access granted to Mr Bohez, the court made provision in its judgment for a penalty payment. The terms of that penalty payment were that EUR 1 000 per child was to be paid to Mr Bohez for every day of the child's non-appearance. The maximum amount of the penalty payment was set at EUR 25 000.

28. Mr Bohez applied to the Finnish courts for an order requiring Ms Wiertz to pay him the penalty payment imposed in the judgment of 28 March 2007, namely EUR 23 398.69, in respect of access visits which did not take place, or for a declaration that the judgment was enforceable in Finland. In support of his application, he argued before the Itä-Uudenmaan käräjäoikeus (Itä Uusimaa District Court) that numerous access visits had not taken place and that, as a result, the maximum amount of the penalty payment set in the judgment had already been reached. Relying on the fact that, under Belgian law, recovery of penalty payments is effected directly by the enforcement authorities, without there being any need for fresh court proceedings, Mr Bohez submitted that his application was to be considered to be an application for recovery of a monetary claim that has fallen due, so that it fell within the scope of Regulation No 44/2001.

29. Ms Wiertz contended that the payment obligation had not been definitively confirmed by the Belgian court and, therefore, the judgement was not enforceable. There had been no determination by the authorities as to the existence of breaches giving rise to the obligation to pay the penalty. Ms Wiertz also argued that she had not prevented the access visits provided for in the judgment of 28 March 2007.

30. By judgment of 8 March 2012, the Itä-Uudenmaan käräjäoikeus found that the application did not concern the enforcement of a judgment on rights of access, but rather to the enforcement of a penalty payment imposed to ensure compliance with the judgment of 28 March 2007. It concluded that in so far as the application concerned the enforcement of a judgment laying down a monetary obligation, it fell within the scope of Regulation No 44/2001. However, pointing out that the judgment of 28 March 2007 provided only for a penalty payment the amount of which had not been finally determined, contrary to the requirements of Article 49 of Regulation No 44/2001, the Itä-Uudenmaan käräjäoikeus held that Mr Bohez's application was inadmissible.

31. By decision of 16 August 2012, the Helsingin hovioikeus (Court of Appeal, Helsinki) confirmed the dismissal of Mr Bohez's application as inadmissible. However, the analysis set out in the grounds of that decision differed from the analysis carried out by the court at first instance. The Helsingin hovioikeus considered that the application pertained to the enforcement of a judgment concerning rights of access and held that, in view of Article 1(2)(a) of Regulation No 44/2001, the application did not fall within the scope of that regulation, but rather within that of Regulation No 2201/2003. Therefore, in accordance with Article 47(1) of Regulation No 2201/2003, the enforcement procedure would be governed, in this case, by Finnish law, namely the TpL.

32. Mr Bohez lodged an appeal before the Korkein oikeus, arguing that the judgment of the Helsingin hovioikeus should be set aside and reiterating the heads of claim put forward at first instance.

33. In those circumstances, by decision of 31 December 2013 which was received at the Court Registry on 6 January 2014, the Korkein oikeus decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 1(2) of … Regulation [No 44/2001] to be interpreted as meaning that cases concerning the enforcement of a penalty payment (*astreinte*) imposed to ensure compliance with the principal obligation in a case concerning child custody or rights of access are outside the scope of the regulation?

(2) If the cases set out in the preceding paragraph fall within the scope of … Regulation [No 44/2001], is Article 49 of [that r]egulation to be interpreted as meaning that a periodic penalty payment which is enforceable as such in the amount stated in the State in which judgment was given, but whose final amount may be changed on the application or arguments of the party subject to the penalty payment, is enforceable in a[nother] Member State only if its amount has been separately determined in the State in which judgment was given?

(3) If cases such as those identified above are outside the scope of … Regulation [No 44/2001], is Article 47(1) of … Regulation [No 2201/2003] to be interpreted as meaning that penalties and protective measures concerning child custody and rights of access fall within the enforcement procedure referred to in that provision which is governed by the legislation of the Member State of enforcement, or can they form part of the judgment concerning child custody and rights of access which is enforceable in another Member State under … Regulation [No 2201/2003]?

(4) When enforcement of a penalty payment is sought in another Member State, is it a requirement that the amount of the penalty payment to be enforced has been finally determined separately in the Member State in which judgment was given, even if … Regulation [No 44/2001] does not apply in the enforcement proceedings?

(5) If a periodic penalty payment imposed as a means to ensure compliance with rights of access is enforceable in another Member State without the amount of the penalty payment to be enforced having separately been finally determined:

   (a) does the enforcement of the penalty payment nevertheless require a review of whether the failure to comply with rights of access was based on obstacles which it was essential to take into consideration on account of the rights of children, and

   (b) which court has jurisdiction to examine such factors, and, more specifically,

      (i) is the jurisdiction of the court of the State of enforcement always limited solely to an examination of whether the alleged failure to comply with rights of access has occurred for reasons which are expressly set out in the judgment in the main proceedings, or

      (ii) does it follow from the protection of the rights of children in the Charter of Fundamental Rights of the European Union that the court of the State of enforcement has a more extensive right or obligation to examine whether the failure to comply with rights of access was based on grounds which it was essential to take into consideration in order to safeguard the rights of children?'

34. Written observations were submitted by the parties in the main proceedings, by the Finnish, Spanish and Lithuanian Governments, and by the European Commission.

35. Mr Bohez, the Finnish Government and the Commission also presented oral arguments at the hearing on 8 January 2015.

IV – **Analysis**

36. The request for a preliminary ruling from the Korkein oikeus essentially raises two problems connected with the enforcement in one Member State of a judicial decision handed down in another Member State, where that decision imposes a penalty payment whose final amount is set on a cumulative basis for the purpose of ensuring compliance with rights of access ordered by the court of origin.[4] The first problem concerns the regulation that applies to such penalty payments while the second concerns the conditions for their enforcement.

37. Against that background, I consider it necessary to examine, at the outset, the ever sensitive question of the classification of penalty payments under Finnish and Belgian law for the purpose of identifying, in the present case, the rules applicable to such measures in the system for the recognition and enforcement of judicial decisions within the European Union.

A – *Preliminary observations on the legal nature of penalty payments*

38. First of all, I should point out that the referring court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law.[5]

39. Against that background, it must be noted, first, that penalty payments are used in several Member States,[6] including penalty payments to ensure rights of access.[7] A comparative analysis of national laws governing penalty payments indicates that whilst there are many similarities, there are also major differences.[8] That is the case, in particular, with Finnish and Belgian law, at issue in the main proceedings.[9]

4 — In the present case, the amount is set per breach and per child, although it is subject to a ceiling. See point 27 of this Opinion.

5 — *Econord*, C-182/11 and C-183/11, EU:C:2012:758, paragraph 21.

6 — See Articles 1050 and 1050[1] of the Polish Code of Civil Procedure, Articles 709 and 711 of the Spanish Code of Civil Procedure, Articles L 131-1 to 131-4 of the French Code of Civil Enforcement Proceedings, and Paragraph 888 of the German Code of Civil Procedure. See, inter alia, Grzegorczyk, P., 'Egzekucja świadczeń polegających na wykonaniu lub zaniechaniu czynności w państwach europejskich', *Proces Cywilny. Nauka, kodyfikacja, praktyka*, Grzegorczyk, P., Knoppek, K., Walasik, M. (eds), Warsaw, 2012, pp. 1021 to 1055, and Ramien, O., *Rechtsverwirklichung durch Zwangsgeld*, J.C.B. Mohr (Paul Siebeck) Tübingen, 1992.

7 — See Articles 598[15] and 598[16] of the Polish Code of Civil Procedure.

8 — Except for Belgian, Luxembourg and Dutch law, which are identical in that respect. See Payan, G., *Droit européen de l'exécution en matière civile et commerciale*, Éditions Bruylant, Brussels, 2012, pp. 172 to 184. The provisions concerning penalty payments derive from the Law of 31 January 1980 approving the Benelux Convention providing a uniform law on penalty payments, and the Annex (uniform law on penalty payments), signed in The Hague on 26 November 1973 (*Moniteur belge* of 20 February 1980, p. 2181).

9 — The similarities and differences between the national laws applying to penalty payments have already been discussed in various explanatory reports published on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32, 'the Brussels Convention') and Regulation No 44/2001. See, in this connection, the report drawn up by Mr Schlosser on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and to the Protocol concerning its interpretation by the Court of Justice, signed in Luxembourg on 9 October 1978 (OJ 1979 C 59, p. 132), as well as the report on the implementation of Regulation No 44/2001 in the Member States (the Heidelberg Report), prepared by Hess, B., Pfeiffer, T., and Schlosser, P., Munich, 2007. Also see the explanatory report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 (OJ 2009 C 319, p. 46).

40. Second, as regards the similarities between these two national laws, the order for reference indicates that penalty payments are ancillary to the principal obligation, they must be authorised by a court [10] and they exert financial pressure on the debtor to ensure that he complies with the judicial decision handed down against him. Indeed, under Finnish and Belgian law, [11] penalty payments are of a coercive nature and become due solely as a result of the failure to comply with the judicial decision. It is thus this coercive nature that makes penalty payments akin to measures of enforcement. [12]

41. Third, as to the points of divergence, it is apparent from the order for reference that the differences between Finnish law and Belgian law relate above all to the procedure leading to the imposition and enforcement of a penalty payment and to the determination by the beneficiary of the sums owed thereunder. [13]

42. As regards, in the first place, the procedure leading to the imposition and enforcement of a penalty payment, the differences essentially relate to when the payment becomes due and payable and the detailed rules on quantification. According to the order for reference, under Belgian law, the penalty payment system, which also applies in cases involving rights of access, excludes all forms of quantification procedure. [14] In other words, the beneficiary does not need a court to quantify the penalty payment prior to enforcement. [15] Indeed, under Article 1385 *quater* of the Judicial Code, a penalty payment is final and is due and payable on the basis of the judicial decision imposing it. Pursuant to that decision, when — after service of the decision — the conditions set out therein are satisfied, the penalty payment becomes payable in full and may be recovered without a fresh judicial decision being necessary, [16] including where the amount of the penalty is to be determined by unit of time, for example per day, or by breach. [17] Under Article 1385 *quinquies* of the Judicial Code, the review of penalty payments is governed by the principle that such payments may be cancelled, varied or reduced only by the trial court that ordered them and the amount set in the decision imposing the penalty payment may not be reduced retroactively. [18]

10 — See Article 1385 *bis* of the Judicial Code and Paragraph 16(2) of the TpL.

11 — Belgian law defines a penalty payment as an 'order to pay a sum of money, handed down on an ancillary basis by a court, in order to exert pressure on the debtor to ensure that he complies with the order made against him'. See Van Ommeslaghe, P., 'Les obligations — Examen de jurisprudence (1974-1982) — Les obligations', *Revue critique de jurisprudence belge*, 1986, no 94, p. 198, and van Compernolle, J., *L'astreinte*, ed. Larcier, 2007, p. 33. According to Belgian legal literature, penalty payments are therefore 'a means of coercion reserved to the courts to ensure that the person to whom an order is addressed complies with that order'. See Moreau-Margrève, I., 'L'astreinte', *Annuaire de droit de Liège*, 1982, p. 14.

12 — French legal literature categorises penalty payments as 'indirect' or 'amicable' measures of enforcement. Penalty payments differ from measures of compelled enforcement in that the latter enable the creditor to secure what is owed to him in the complete absence of cooperation by the debtor, while the aim of the financial pressure exerted by the former on the debtor is to encourage him to comply voluntarily. The non-payment of sums owed under a penalty payment may mean that creditors turn to measures of compelled enforcement to secure recovery. See, to that effect, Payan, G., op. cit., p. 172. Some writers describe penalty payments as a legal standard, which are not therefore caught by the territoriality of the coercion characterising the special rules on compelled enforcement. See Cuniberti, G., 'Quelques observations sur le régime de l'astreinte en droit international privé', *Gazette du Palais*, 2009, no 332, p. 2 et seq.

13 — The national laws also differ as to the scope of penalty payments. In certain legislative systems, including Belgian, Luxembourg and Dutch law, a penalty payment may not be imposed if the principal obligation is an obligation to pay a sum of money. In this respect, so far as Belgian law is concerned, see Article 1385 *bis* of the Judicial Code. By contrast, under French law, penalty payments may, in principle, be imposed when the obligation deriving from the judicial decision is not only an obligation to do or to refrain from doing something, but also an obligation to pay a sum of money. See Payan, G., op. cit., p. 177.

14 — Under domestic law, this exclusion applies to the trial court as well as the court responsible for enforcement. See van Compernolle, J., op. cit., pp. 38 and 77.

15 — The party against whom enforcement is sought may, however, challenge the application of the penalty payment before the court responsible for enforcement, under Article 1498 of the Judicial Code. Ibidem, p. 78.

16 — See the judgment of 25 September 2000 of the Belgian Court of Cassation. Also see van Compernolle, J., op. cit., p. 38.

17 — The beneficiary of the penalty payment has the burden of proving that the conditions under which it falls due are satisfied. More often than not, in the event of a challenge, such proof must be submitted to the court responsible for enforcement. That court conducts an *ex post facto* review of the existence of any failure to perform the principal obligation and of the lawfulness of the measure of enforcement by examining the conditions under which the penalty payment falls due. See van Compernolle, J., op. cit., pp. 38 and 78.

18 — See the second sentence of Article 598^{16}(1) of the Polish Code of Civil Procedure: '[i]n exceptional cases, a court may vary the amount of the penalty payment referred to in Article 598^{15} if the circumstances have changed.'

43. By contrast, under Finnish law — according to the assertions of the national court and the Finnish Government — the purpose of penalty payments under Paragraph 16 of the TpL is to encourage contact between the child and the applicant in accordance with the decision on rights of access. The decision ordering payment of the penalty postdates the main decision and requires the applicant to bring fresh proceedings.[19] Only if the party liable to pay the penalty disagrees will the court dealing with the enforcement proceedings examine whether he has failed to perform the principal obligation in whole or in part[20] and whether there is any justification for that. Under Paragraph 19(2) of the TpL, payment of the penalty may not be ordered if the debtor shows that there was a good reason preventing him from performing the obligation or if the obligation has been performed in the intervening period.[21] In contrast to Belgian law, Finnish law allows the courts to re-examine the amount of the penalty payment and reduce it if the principal obligation has in substance been performed, if the ability of the party subject to the obligation to pay has significantly deteriorated, or if there are other good reasons for reducing the amount.[22]

44. As regards, in the second place, the determination by the beneficiary of the amount owed under the penalty payment, the order for reference states that, under Belgian law, this amount is payable to the creditor, in accordance with Article 1385 *quater* of the Judicial Code,[23] whilst under Finnish law, it is paid to the State.[24]

45. I shall now examine the two problems raised in this request for a preliminary ruling which are mentioned in point 36 above: which regulation applies in the main proceedings and what are the conditions for enforcement of the penalty payment?

B – *Applicability of Regulation No 44/2001*

46. The first question referred for a preliminary ruling seeks to ascertain whether a judicial decision handed down in Belgium coupled with a penalty payment — such as that at issue in the main proceedings — in order to ensure compliance with rights of access can be enforced in Finland on the basis of Regulation No 44/2001. With regard to that question, Ms Wiertz, the Governments of the Member States that have taken part in these proceedings and the Commission argue that this regulation does not apply.

47. It is apparent from the order for reference that, as regards the applicable regulation, the doubts expressed by the Korkein oikeus are based on the fact that the obligation in respect of which enforcement is sought, namely payment of a penalty payment, is a monetary claim that relates to rights of access. Although the court considers that a penalty payment of this kind does not, in principle, fall within the scope of Regulation No 44/2001, it nevertheless has doubts concerning the enforcement of such a penalty under Regulation No 2201/2003.

19 — According to the order for reference, it is for the applicant to adduce evidence that the other party impeded his rights of access.

20 — See Paragraph 19(1) of the TpL.

21 — According to the order for reference, the following constitute good reasons within the meaning of that provision, among others: illness of the child which impedes the rights of access; failure by the parent with rights of access to collect the child in the agreed manner; and objection to access by a sufficiently mature child. The court is required to take into account, of its own motion, relevant facts regarding the best interests of the child.

22 — See Paragraph 11 of the Law on penalty payments.

23 — Also see Payan, G., op. cit., p. 181.

24 — That is also the case under German law, where the proceeds of the penalty are paid to the Treasury. See the judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) of 2 March 1983 IVb ARZ 49/82. Also see Hüßtege, R., *Zivilprozessordnung*, Thomas, H., Putzo, H. (ed.), 29th edition, Munich 2008, § 888, paragraph 15; Stöber, K., in Zöller, R. (ed.), *Zivilprozessordnung*, 28th edition, Cologne 2010, § 888, paragraph 13.

48. In order to answer the first question referred for a preliminary ruling, I think it is necessary to determine whether, in the context of the interpretation of Article 1 of Regulation No 44/2001, a penalty payment such as that at issue in the main proceedings meets the criteria laid down in the case-law of the Court of Justice.

49. First of all, in so far as the Brussels Convention has been replaced by Regulation No 44/2001 [25] in relations between Member States, [26] the interpretation of that convention by the Court continues to apply to the corresponding provisions of the regulation. [27] Furthermore, it is clear from recital 19 in the preamble to Regulation No 44/2001 that continuity in interpretation between the Brussels Convention and that regulation should be ensured.

50. In *Realchemie Nederland*, [28] the Court held that the scope of Regulation No 44/2001 is, like the Brussels Convention, limited to 'civil and commercial matters', as set out in Article 1(1) thereof. [29] Thus, under Article 1(2)(a) rights in property arising out of a matrimonial relationship are also excluded from the scope of the regulation. In this respect, the Finnish, Spanish and Lithuanian Governments as well as the Commission argue that Regulation No 2201/2003 was adopted precisely to cover part of that gap. Regulation No 2201/2003 applies to judgments delivered in matters of parental responsibility, [30] which, according to Article 1(2)(a) thereof, include rights of access. [31]

51. As to the question whether a dispute falls within the scope of Regulation No 44/2001, the Court has held that that scope is determined essentially according to the factors characterising the nature of the legal relationships between the parties to the dispute or its subject-matter. [32] More particularly, as regards interim measures, the Court considers that their inclusion in the scope of Regulation No 44/2001 is determined not by their own nature but by the nature of the rights that they serve to protect. [33]

52. In this case, under Article 1385 *bis* of the Judicial Code, the penalty payment at issue in the main proceedings is, as I have explained in point 40 of this Opinion, ancillary to the principal obligation. In this instance, the principal obligation imposed on Ms Wiertz enables Mr Bohez to exercise the rights of access granted to him.

53. With regard to the enforcement of a judgment handed down by a court, which includes an order to pay a fine for the purpose of ensuring compliance with a judicial decision concerning civil and commercial matters, the Court has stated that the nature of that right of enforcement will depend on the nature of the subjective right for infringement of which enforcement was ordered, [34] in this case, Mr Bohez's rights of access.

25 — See Article 68(1) of Regulation No 44/2001.

26 — For the Kingdom of Denmark, see the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Brussels on 19 October 2005 (OJ 2005 L 299, p. 62).

27 — *Draka NK Cables and Others*, C-167/08, EU:C:2009:263, paragraph 20; *SCT Industri*, C-111/08, EU:C:2009:419, paragraph 22; *German Graphics Graphische Maschinen*, C-292/08, EU:C:2009:544, paragraph 27; *Realchemie Nederland*, C-406/09, EU:C:2011:668, paragraph 38; *Sapir and Others*, C-645/11, EU:C:2013:228, paragraph 31; and *Sunico and Others*, C-49/12, EU:C:2013:545, paragraph 32.

28 — C-406/09, EU:C:2011:668, paragraph 39.

29 — Ibidem, paragraph 39.

30 — Article 1(1)(b) of Regulation No 2201/2003.

31 — As regards the reasons for excluding questions relating to the status of natural persons from the Brussels Convention, in the report prepared by P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 10), it is stated that '[e]ven assuming that the Committee managed to unify the rules of jurisdiction in this field, and whatever the nature of the rules selected, there was such disparity on these matters between the various systems of law, in particular regarding the rules of conflict of laws, that it would have been difficult not to re-examine the rules of jurisdiction at the enforcement stage'.

32 — *Realchemie Nederland*, C-406/09, EU:C:2011:668, paragraph 39 and the case-law cited.

33 — Ibidem, paragraph 40.

34 — See, by analogy, *Realchemie Nederland*, C-406/09, EU:C:2011:668, paragraph 42.

54. In my view, it follows that the recovery of a penalty payment, such as that at issue in the main proceedings, does not fall within the scope of Regulation No 44/2001. First, the penalty payment is ancillary and is closely linked to the rights of access it serves to enforce and, second, questions relating to rights of access are excluded from Regulation No 44/2001.

55. I therefore propose that Question 1 be answered as follows: a judicial decision handed down in one Member State coupled with a penalty payment in order to ensure compliance with rights of access cannot be enforced in another Member State on the basis of Regulation No 44/2001.

56. In the light of my proposed answer to Question 1, it is not necessary to answer Question 2.

C – *Conditions for enforcement of the penalty payment under Regulation No 2201/2003*

57. By the third question referred for a preliminary ruling, the national court essentially asks the Court whether the penalty payment, inasmuch as it ensures the enforcement of a judicial decision on rights of access, is to be regarded as a measure of enforcement and, on that ground, as falling within the enforcement procedure for rights of access which, under Article 47(1) of Regulation No 2201/2003, is governed by national law, or whether it forms part of the judgment on rights of access and is, on that ground, directly enforceable on the basis of Regulation No 2201/2003.

58. In order to answer that question, I shall first consider the legal nature of the penalty payment in the light of the system for the recognition and enforcement of judicial decisions within the European Union. Second, I shall examine whether a penalty payment such as that at issue in the main proceedings is an integral part of the substance of the judgment on rights of access or whether, on the contrary, it can be taken in isolation as a self-standing obligation.

1. Legal nature of the penalty payment in the light of the system for the recognition and enforcement of judicial decisions within the European Union

59. In general terms, as mentioned in point 39 of this Opinion, penalty payments are used in a number of Member States. Their purpose is to ensure the performance of an obligation which, in the main proceedings, consists in compliance with rights of access. They are therefore of an ancillary nature and are based on the assumption that the prospect of having to pay a significant sum of money should encourage the debtor to perform his obligation voluntarily. As I have already indicated, this aspect of penalty payments makes them akin to measures of enforcement.

60. The different stages in the application of penalty payments clearly illustrate their complexity and enable their nature to be better understood. Each of these stages, namely the adoption of the principal order imposing the penalty payment, the quantification of the amount actually calculated and the voluntary or compelled enforcement of the penalty, may be subject to different rules and procedures.[35] The complexity of penalty payments is even more pronounced when the measure is to be adopted in a cross-border context.[36]

61. This last element — the cross-border context — goes some way to explaining how difficult it is to identify the body of rules that applies to penalty payments in the system for the recognition and enforcement of judicial decisions within the European Union, which is the situation in the main action.

35 — See, to that effect, the Opinion of Advocate General Cruz Villalón in *DHL Express France*, C-235/09, EU:C:2010:595, points 47 and 48.

36 — Ibidem, paragraphs 47 and 48.

62. Having regard to the foregoing considerations, the decisive issue is the legal nature of a penalty payment such as that at issue in the main proceedings.

2. The penalty payment as an integral part of the substance of the judgment on rights of access

63. I shall begin my analysis, if I may, with a question: should the penalty payment at issue in the main proceedings be considered to be an integral part of the substance of the judgement on rights of access or, on the contrary, can it be taken in isolation as a self-standing obligation?

64. As regards the main proceedings, I am of the view that such a penalty payment is an integral part of the substance of the judgment on rights of access.

65. I should point out first of all that, according to the order for reference, the penalty payment imposed by the Belgian court is intended to ensure compliance with a judgment concerning rights of access. It was set by the court of the Member State of origin at the same time as the judgment on the substance and is therefore of an ancillary nature. This is the first stage in the application of the penalty payment, as mentioned in point 60 above, namely the adoption of the principal order imposing the penalty payment.

66. The Commission rightly pointed out at the hearing that the situation with which we are concerned here, that is, the enforcement in another Member State of a judgment on rights of access coupled with a penalty payment, should not be confused with the situation where the court of the Member State of origin has delivered a judgment on rights of access without accompanying it with a penalty payment.[37] In that hypothetical case, the subsequent imposition of a penalty payment by the Member State of enforcement would certainly be governed by Article 47(1) of Regulation No 2201/2003 and be subject to the law of the Member State of enforcement. However, Article 26 of that regulation prevents the judgment on rights of access from being reviewed as to its substance.

67. Second, I would like to state emphatically that, as is apparent from the order for reference and the written observations of the Commission, the enforcement of the penalty payment at issue in the main proceedings presupposes that the parent with custody of the child has failed to comply with her obligation to cooperate in giving effect to the rights of access. In this respect, I agree with the argument put forward by the Finnish, Spanish and Lithuanian Governments and by the Commission that the penalty payment is an integral part of the judgment on rights of access. Consequently, it is logical to consider that, in principle, the penalty payment has the same enforceability as the judgment on rights of access itself, as provided for in Regulation No 2201/2003.

68. On the other hand, if, in the present case, the Finnish Government's interpretation were to be accepted, according to which the penalty payment falls under the enforcement procedure as referred to in Article 47(1) of Regulation No 2201/2003, it could not be recognised or enforced on the basis of that regulation, and would instead be subject to the law of the Member State of enforcement,[38] as the Finnish Government itself points out. On that interpretation, there is a danger that the penalty payment imposed by the court of the Member State of origin, in this case by the Belgian court, to ensure compliance with rights of access would be rendered redundant, when its very aim is to ensure compliance with rights of access. The coercive nature of the penalty payment would therefore be exclusively restricted to the Member State of origin.

37 — I should point out that, as a rule, when a penalty payment is imposed by the court of the Member State of origin in order to ensure compliance with the principal obligation, namely rights of access, the ancillary nature of the penalty payment in any judgment post-dating the judgment ruling on those rights persists. Consequently, it cannot be governed by Article 47(1) of Regulation No 2201/2003.

38 — In my view, this line of argument is contradictory as the Finnish Government considers that the penalty payment is an integral part of the judgment on rights of access.

69. I must therefore conclude that a penalty payment which is an integral part of the judgment on rights of access, such as that at issue in the main proceedings, is, on that ground, directly enforceable on the basis of Regulation No 2201/2003 and cannot be regarded as a measure of enforcement falling under the enforcement procedure as referred to in Article 47(1) of Regulation No 2201/2003.

D – *Quantification of the penalty payment under Regulation No 2201/2003: analogous application of Article 49 of Regulation No 44/2001*

70. By the fourth question referred for a preliminary ruling, the national court asks whether, prior to enforcement in the requested Member State, the penalty payment must form the subject-matter of a fresh judicial decision in the Member State of origin so that its amount can be finally determined by a court in that Member State.

71. The written observations of the Finnish and Lithuanian Governments show that they consider the intervention of the court of the Member State of origin to be unnecessary, as in any event enforcement of the penalty payment falls within the scope of the national rules of the Member State of enforcement under Article 47(1) of Regulation No 2201/2003. By contrast, the Spanish Government and the Commission submit in their observations that the fact that Regulation No 2201/2003 does not contain a rule such as that appearing in Article 49 of Regulation No 44/2001 should be remedied by means of an application by analogy of Article 49.

72. I concur with the second view.

73. It is true that Regulation No 2201/2003 makes no provision on quantification of the penalty payment. However, in the present case, the application by analogy of Article 49 of Regulation No 44/2001 warrants examination.[39] The EU legislature mentions penalty payments only in the context of Article 49 of Regulation No 44/2001.[40] The effect of the EU legislature's intervention in this field is that judicial decisions handed down in one Member State imposing such a measure 'will be enforced in another [Member] State only if the amount of the payment has been finally determined by the courts of the State in which judgment was given'.[41] The application of this article is therefore subject to quantification of the penalty payment.[42] In other words, Article 49 of Regulation No 44/2001 does not allow a penalty payment to be quantified in a Member State other than the

39 — See Magnus, U., and Mankowski, P., 'Introduction', *Brussels II bis Regulation*, Magnus, U., and Mankowski, P. (eds), Sellier European Law Publishers, 2012, p. 32: '[it] ought to be stressed again that it would be foolish to dispose lightly of the treasure contained in the Brussels I regime and the experiences made in that realm. Prospective adventure trips might turn into entertainment journeys where Brussels I has already paved the ways.'

40 — The difficulties in the interpretation of Article 49 of Regulation No 44/2001 as regards the concept of 'penalty payment' in different national laws has led certain writers to take the view that this concept should be subject to an 'autonomous interpretation', focussing on the function of the measure, namely 'to order or threaten to order a person to pay a sum of money for the purpose of ensuring compliance with a judicial decision handed down in civil and commercial matters'. See Guinchard, E., 'Procédures civiles d'exécution en droit international privé', Guinchard, S. and Moussa, T. (ed.), *Droit et pratique des voies d'exécution*, Dalloz, 7th ed., 2012, pp. 2172 and 2192.

41 — This condition was included in Article 43 of the Brussels Convention. See the report drawn up by P. Jenard, op. cit., p. 54. This approach was also taken in the Lugano Convention of 16 September 1988 and was followed in Article 49 of the (new) Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2007 L 339, p. 1).

42 — This approach was criticised, in particular, in the report drawn up by Hess, B., Pfeiffer, T., and Schlosser, P., op. cit, pp. 271 to 275, which noted the difficulties in the interpretation of Article 49 of Regulation No 44/2001. Also see Hess, B., Pfeiffer, T. and Schlosser, P., *The Brussels I. Regulation (EC) No 44/2001*, Beck München, 2008, pp. 156 to 159. Along the same lines, Article 67 of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM(2010) 748 final of 14 December 2010, pp. 271 to 275), was drafted as follows: '[a] foreign judgment given in a Member State which orders a periodic payment by way of a penalty shall be enforceable in the Member State of enforcement in accordance with Sections 1 or 2, as the case may be. The competent court or authority in the Member State of enforcement shall determine the amount of the payment if that amount has not been finally determined by the courts of the Member State of origin.' As the Commission pointed out in its written observations, it was nevertheless concluded, after the negotiations, that the condition relating to the determination of the final amount of the penalty was the only real way to ensure the enforcement of penalty payments abroad, and the provision remained unchanged when Regulation No 44/2001 was recast. Also see my comments in the following footnote.

Member State in which it was imposed.[43] Consequently, judicial decisions ordering a penalty payment whose amount has not been 'finally determined' in the Member State of origin are excluded from the application of the principle of free movement of judgments in civil and commercial matters, which is one of the fundamental objectives of Regulation No 44/2001, in accordance with recital 6 in the preamble thereto.

74. I am of the view that an application by analogy of this provision is relevant in the present case. That application calls for the following observations on my part.

75. In the first place, as stated above, quantification of the penalty payment is not a requirement in all Member States.[44] The stage of prior quantification of the penalty payment may therefore be subject to different rules and procedures in the different national legal systems. That is the case here, since Belgian law does not make any provision for such quantification. This divergence between national laws is the reason why the rule set out in Article 49 of Regulation No 44/2001 was adopted.[45] More specifically, it is apparent from the report drawn up by Mr Schlosser[46] that this rule was inserted '[w]ith a view to overcoming the difficulties which this could cause for the inter-State enforcement of judgments ordering specific acts … if the sanction takes the form of a fine ("astreinte")'.

76. According to the Commission, even though Regulation No 2201/2003 does not contain a provision equivalent to Article 49 of Regulation No 44/2001, this issue was not raised during negotiations or addressed during the drafting of Regulation No 2201/2003. As it submitted at the hearing, this does not, however, provide a ground for inferring that the legislature's intention was to exclude the enforcement of penalty payments from the scope of that regulation.

77. In the second place, the application by analogy of Article 49 of Regulation No 44/2001 would avoid any kind of review as regards the substance of the judgment handed down by the court of the Member State of origin, which might result from action on the part of the court of the Member State of enforcement,[47] which is precluded under Article 26 of Regulation No 2201/2003.[48] By taking steps to adapt the penalty payment so as to incorporate the procedural elements required under national law, the latter court would not only encounter difficulties specific to the application of the procedural rules of another legal system, but above all, and more importantly, it would contravene the enforcement regime laid down in Regulation No 2201/2003 and the principle of mutual recognition of judicial decisions on which that regulation is based.[49] In this connection, I think it appropriate to note also that, according to recitals 2 and 21 in the preamble to Regulation No 2201/2003, the recognition and enforcement of judicial decisions is the cornerstone for the creation of a genuine judicial area and is based on the principal of mutual trust.

43 — See Article 55 of Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ 2012 L 351, p. 1). Even though the wording of this article differs from the wording of Article 49 of Regulation No 44/2001, the requirement for judicial quantification of the penalty payment appears in both articles. Also see Article 66 of Regulation No 1215/2012: '1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015. 2. Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.'

44 — See point 42 of this Opinion.

45 — See Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe. Règlement No 44/2001. Conventions de Bruxelles et de Lugano*, 4th ed., L.G.D.J., 2010, p. 487.

46 — Op. cit., p. 132.

47 — See McEleavy, P., 'Article 48', *Brussels II bis Regulation*, Magnus, U. and Mankowski, P. (eds.), op. cit., pp. 398 to 402, p. 399: 'It was clear … that courts in the State of enforcement were afforded a limited power through Article 48 to review the foreign order to assess the modalities of its operation'.

48 — In that regard, also see Article 45(2) of Regulation No 44/2001.

49 — See, by analogy, *Aguirre Zarraga*, C-491/10 PPU, EU:C:2010:828, paragraphs 69 and 70.

78. Furthermore, I would state that given the specific nature of rights of access so far as their practical exercise is concerned,[50] the only power that the court of the Member State of enforcement holds in respect of the judgment on rights of access is that conferred on it by Article 48 of Regulation 2201/2003 relating to the practical arrangements for the exercise of those rights.[51] That provision leaves some latitude to the court of the Member State of enforcement, enabling it to intervene in order to ensure that rights of access are actually complied with. However, the court of the Member State of enforcement may not review the judgment as to its substance; it must confine itself to checking whether the judgment contains practical provisions on the exercise of those rights and whether those provisions are sufficient.[52] In this respect, the Commission submits in its written observations that the courts should use the powers conferred on them by Article 48 of Regulation No 2201/2003 to ensure that rights of access are always possible and, where necessary, ensure that they can be put into effect. I agree with that view.

79. In the third place, the application by analogy of Article 49 of Regulation No 44/2001 is, in my opinion, a necessary exception to the general rule set out in Article 41(1) of Regulation No 2201/2003. That rule provides for the recognition and enforcement of a judgment on rights of access 'in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2'. Accordingly, any variation of rights of access in order to meet the best interests of the child more effectively and respond to any changes which may arise falls exclusively within the jurisdiction of the court of the Member State of origin. The court of the Member State of enforcement must be able to base its decision on a penalty payment whose final amount has been determined.

80. In the main proceedings, Mr Bohez therefore needs to obtain confirmation from the Belgian court of the final amount of the penalty payment, even though there is no requirement for a fresh judgment under Belgian law. In this connection, I consider it appropriate to refer to the case-law and legal literature in Belgium in this area. The Belgian courts have held that recourse to the courts of the Member State of origin is justified under Regulation No 44/2001, even though Belgian law does not lay down any procedure for the quantification of penalty payments.[53] According to Belgian legal literature, in the context of the 'European area', Regulation No 44/2001 takes precedence and the Belgian court responsible for enforcement has jurisdiction to quantify the penalty payment, even if enforcement proceedings have not been initiated in Belgium.[54] In any event, jurisdiction to quantify the penalty payment lies with the competent authorities of the Member State of origin.

81. In the fourth place, it seems to me that a requirement for quantification of the penalty payment under Regulation No 2201/2003 is consistent with an area as sensitive as family relationships in general and rights of access in particular. Article 24(3) of the Charter of Fundamental Rights of the European Union provides that '[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or

50 — Rights of access often depend on external factors, such as the child's health or the distance between parent and child, factors that take on greater importance in a cross-border context.

51 — Under Article 48 of Regulation No 2201/2003, provided that 'the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance of the matter and provided the essential elements of this judgment are respected'.

52 — See McEleavy, P., op. cit., p. 398.

53 — See order of the President of 17 September 2003, delivered by the President of the tribunal de première instance de Liège (Court of First Instance, Liège): '… this is a preventive action that is admissible where the conduct of the debtor clearly shows that the levying of the penalty payment is disputed. Moreover, the prior determination of the amount of the penalty payment is required by Article 49 of Regulation (EC) No 44/2001 …, which justifies recourse to the courts of the Member State of origin under that regulation even though Benelux legislation does not lay down any procedure for the quantification of penalty payments'.

54 — See de Leval, G. and van Compernolle, J., *Saisies et astreinte*, Éditions de la Formation permanente CUP, — October 2003, Université de Liège, p. 272, and van Compernolle, J., op. cit., p. 47: '[u]like the provision made in the Benelux area, the European area requires a fresh application to be made before the courts of the Member State of origin in order to secure a further judicial decision quantifying the penalty payment, on the basis of which a procedure for compelled recovery may take place. European legislation therefore takes precedence and the court responsible for enforcement has jurisdiction to quantify the penalty, even if enforcement proceedings have not been initiated'.

her interests'.[55] It is apparent from recital 2 in the preamble to Regulation No 2201/2003 that rights of access are considered to be a priority. It is therefore of crucial importance, in order to protect the rights of the child, that both parents are actually able to exercise their rights of access, which is precisely the aim pursued by penalty payments.

82. Against that background, the application by analogy of Article 49 of Regulation No 44/2001 would enable a court to review the breaches of the principal obligation alleged by the creditor. That review is of the utmost importance for the purpose of meeting the best interests of the child more effectively. It presupposes that the court of the Member State of origin will rule not only on the number of non-appearances of the child, but also on the reasons for those non-appearances, for example if they were due to an accident, to the health of the child or of a parent, to the unwillingness of an adolescent to maintain a relationship with the parent without custody or to the parents' financial difficulties.

83. Lastly, as is apparent from point 79 of this Opinion, if a penalty payment is imposed by a judgment on rights of access and its enforcement is sought in another Member State, both of the courts involved must cooperate in order to ensure that all aspects of the case are taken into consideration, in the best interests of the child. To that end, they may use the powers conferred on them by Article 48 of Regulation No 2201/2003. Such cooperation entails the sharing of powers and responsibilities between the court of the Member State of origin and the court of the Member State of enforcement with a view to ensuring that the child receives the protection to which he is entitled under EU law. The best interests of the child must therefore be taken into account, as a matter of priority, by the courts involved.[56]

84. Consequently, in view of the foregoing considerations, I am of the opinion that, prior to enforcement in the requested Member State, the penalty payment must form the subject-matter of a fresh judicial decision in the Member State of origin so that its amount can be finally determined by a court in that Member State.

85. In the light of the answers given to Questions 3 and 4, it is not necessary to answer Question 5.

V – **Conclusion**

86. In view of all of the foregoing considerations, I propose that the Court give the following reply to the questions referred by the Korkein oikeus:

(1) A judicial decision handed down in one Member State coupled with a penalty payment in order to ensure compliance with rights of access cannot be enforced in another Member State on the basis 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.

(2) A penalty payment which is an integral part of the judgment on rights of access, such as that at issue in the main proceedings, is, on that ground, directly enforceable on the basis 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

55 — See recital 33 in the preamble to Regulation No 2201/2003. Also see Lenaerts, K., 'The Interpretation of the Brussels II Bis Regulation by the European Court of Justice', *En hommage à Albert Weitzel — L'Europe des droits fondamentaux*, *Sous la direction de Luc Weitzel*, Pedone, A., 2013, pp. 129 to 152, p. 132: 'The Regulation must be interpreted in compliance with the fundamental rights of the child concerned, notably with Articles 7 and 24 of the Charter of Fundamental Rights of the European Union.'

56 — See Lenaerts, K., op. cit., p. 151: 'When interpreting the provisions of the Brussels II bis Regulation relating to matters of parental responsibility, the ECJ always takes into account the best interests of the child.'

responsibility, repealing Regulation (EC) No 1347/2000, and cannot be regarded as a measure of enforcement falling under the enforcement procedure as referred to in Article 47(1) of that regulation.

(3) Prior to enforcement in the requested Member State, the penalty payment must form the subject-matter of a fresh judicial decision in the Member State of origin so that its amount can be finally determined by a court in that Member State.