OPINION OF ADVOCATE GENERAL ELEANOR SHARPSTON delivered on 20 May 2010 [1]

1. Twins, one of whom is now in Germany with his mother while the other is in Spain with her father, are the subject of a custody dispute between the parents, who have never been married and have ended their former cohabitation. A Spanish court has made a provisional order awarding custody of both to the father, who seeks recognition and enforcement of that order in Germany. The German Bundesgerichtshof (Federal Court of Justice) seeks guidance on whether such a provisional order must be recognised and enforced in another Member State in the same way as a judgment of the competent court definitively awarding custody.

Legislative background

2. The referring court seeks a ruling on the interpretation of Articles 2(4), 20 and 21 et seq. of the 'Brussels II bis' (or 'IIa') Regulation. [2] Other parts of the Regulation are, however, also relevant.

Preamble

3. The preamble to the Regulation contains, inter alia, the following recitals:

'(2) The Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area, and identified visiting rights as a priority.

...

1 — Original language: English.

2 — Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and [in] matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1) (hereinafter 'the Regulation' or, when appropriate to distinguish it from other regulations, 'the present Regulation').

(5) In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

…

(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.

(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 [3] [sh]ould continue to apply as complemented by the provisions of this Regulation, in particular Article 11. …

…

(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.

(22) Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to "judgments" for the purpose of the application of the rules on recognition and enforcement.

…

(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be "automatically recognised throughout the Union without any intermediate proceedings or grounds for

3 — Convention on the civil aspects of international child abduction, concluded on 25 October 1980 ('the 1980 Hague Convention').

refusal of enforcement". This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.

(24) The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.

…'

Structure of the Regulation

4. The Regulation covers both matrimonial matters and matters of parental responsibility. Some of its provisions are relevant to only one or other of the two fields, while others are common to both. I shall set out below only those relevant to the issues of parental responsibility raised in the present case. However, it may be useful to bear in mind the overall structure of the Regulation.

5. Chapter I concerns scope and definitions, and contains Articles 1 and 2. Chapter II concerns jurisdiction, and is divided into three sections: Section 1 (divorce, legal separation and marriage annulment) contains Articles 3 to 7; Section 2 (parental responsibility), Articles 8 to 15; and Section 3 (common provisions), Articles 16 to 20. Chapter III, on recognition and enforcement, contains six sections: Section 1 (recognition) contains Articles 21 to 27; Section 2 (application for a declaration of enforceability), Articles 28 to 36; Section 3 (provisions common to sections 1 and 2), Articles 37 to 39; Section 4 (enforceability of certain judgments concerning rights of access or requiring the return of the child), Articles 40 to 45; Section 5 (authentic instruments and agreements), Article 46; and Section 6 (other provisions), Articles 47 to 52). Chapter IV, on cooperation between central authorities in matters of parental responsibility, contains Articles 53 to 58. Chapter V, on relations with other instruments,

contains Articles 59 to 63, while Chapters VI and VII, containing transitional and final provisions respectively, account for the remainder of the text.

Scope and definitions

6. In accordance with Article 1(1)(b) and (2)(a), the Regulation applies, whatever the nature of the court or tribunal, in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility including, in particular, rights of custody and rights of access.

7. Article 2 provides a number of definitions. In particular:

'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 [inter alia] 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;

5. the term "Member State of origin" shall mean the Member State where the judgment to be enforced was issued;

6. the term "Member State of enforcement" shall mean the Member State where enforcement of the judgment is sought;

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;

8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;

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;

10. the term "rights of access" shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;

11. the term "wrongful removal or retention" shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

...'

Jurisdiction

8. Article 8 of the Regulation, which covers general jurisdiction in matters of parental responsibility, provides:

'1. 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 seized.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.'

9. Article 9 provides:

'1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.'

10. Article 10 concerns jurisdiction in cases of child abduction. In brief, its effect is that, if a child is wrongfully removed to or retained in a Member State other than that in which he or she was habitually resident up to that point, no new habitual residence giving jurisdiction to the courts of the new Member State will be automatically acquired, so that the courts of the original Member State of habitual residence retain their jurisdiction. (Article 11 makes provision for the child's return to be ordered in such circumstances.)

11. Article 12 concerns prorogation of jurisdiction. In particular, under Article 12(3), in proceedings not related to an application for divorce, separation or marriage annulment, the courts of a Member State may have jurisdiction in relation to parental responsibility, where (a) the child has a substantial connection with the Member State, in particular where one of the holders of parental responsibility is habitually resident there or the child is a national of the State and (b) that jurisdiction has been accepted expressly or unequivocally by all the parties concerned at the time the court is seised and is in the best interests of the child. [4]

12. Under Article 13(1), where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present have jurisdiction.

13. Article 15 allows a court which has jurisdiction on the substance of the matter exceptionally to transfer jurisdiction to a court of another Member State with which the child has a particular connection (in particular where it is the child's new or former State of habitual residence, the State of the child's nationality or the State of habitual residence of a holder of parental responsibility), if that court would be better placed to hear the case and if it would be in the best interests of the child.

4 — Although not, perhaps, directly relevant here, under Article 12(1), a court exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment has jurisdiction in any connected matter relating to parental responsibility where (a) at least one of the spouses has parental responsibility; and (b) jurisdiction has been accepted expressly or unequivocally by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

14. Article 17 requires a court of a Member State to declare of its own motion that it has no jurisdiction if it is seised of a case over which, under the Regulation, it has no jurisdiction but a court of another Member State does have jurisdiction.

15. Article 19 concerns *lis pendens* and dependent actions. It provides, in particular:

'…

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action 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.

…'

16. Article 20, entitled '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.'

Recognition

17. Article 21 of the Regulation provides, in so far as is relevant:

'1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

…

Enforcement

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.

…

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.'

18. Article 23 sets out a list of grounds on which a judgment relating to parental responsibility is not to be recognised. Briefly, those grounds relate to public policy, to the non-hearing of the child or of a party, to irreconcilability with a later judgment or to failure to comply with child placement procedures. None of them appears to have been relied upon as relevant to the present case.

19. Articles 24 and 26 preclude any review (in the Member State of enforcement) of, respectively, the jurisdiction of the court of the Member State of origin or the substance of the judgment.

20. Article 28(1) of the Regulation 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.'

21. In accordance with Article 30(1), the procedure for making the application is governed by the law of the Member State of enforcement. Under Article 30(3), read in conjunction with Articles 37 and 39, the application must be accompanied by (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity and (b) a certificate issued by the competent court or authority of the Member State of origin in the form set out in Annex II. That certificate takes the form, in substance, of a list of particulars of the court which delivered the judgment, of the parties and children concerned, and of the judgment, its enforceability in the Member State of origin and its essential contents.

22. Under Article 31(1) and (3), the court applied to for a declaration of enforceability

must give its decision without delay, without reviewing the judgment as to its substance. At that stage, neither the person against whom enforcement is sought nor the child is entitled to make any submissions on the application. However, the decision on the application may be appealed against, in accordance with rules laid down in Articles 33 to 35, by either party. Under Article 31(2), the application may be refused only for one of the reasons set out in Article 23 (although, presumably, it could also not be granted if either of the conditions in Article 28(1) – enforceability in the Member State of origin and service on the defendant – were not fulfilled).

Authentic instruments and agreements

23. Article 46 of the Regulation provides:

'Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.'

Cross-border cooperation

24. Article 53 requires the Member States to set up central authorities to assist with the application of the Regulation. Under Article 55, the tasks of those authorities include, with regard to cases specific to parental responsibility, facilitating communications between courts, in particular for the application of Article 15 (which allows for a transfer to a court better placed to hear the case).

Preliminary rulings

25. It should be added that the Regulation was adopted on the basis of Articles 61(c) and 67(1) EC, in Title IV of Part Three of the EC Treaty, on visa, asylum, immigration and other policies related to the free movement of persons.

26. Consequently, as long as that Treaty was in effect (until 30 November 2009), in accordance with Article 68(1) EC, only courts or tribunals against whose decisions there was no judicial remedy under national law could

request the Court of Justice to give a ruling on its interpretation.

27. Since the entry into force of the Treaty on the Functioning of the European Union on 1 December 2009, however, Article 68(1) EC has been repealed, and competence to request a preliminary ruling on matters falling within the area in question is no longer limited to courts against whose decisions there is no judicial remedy.

28. Moreover (whether before or after 30 November 2009), a court or tribunal of the latter kind is not only competent, but obliged, to seek such a ruling if it considers that a decision on the question is necessary in order to enable it to give judgment. [5]

29. Finally, where appropriate, this Court may, either at the request of the referring court or of its own motion (and bearing in mind the ultimate aim of achieving, as soon as possible, long-term stability in the lives of young children), deal with a request for a preliminary ruling in this area by a special, urgent procedure in accordance with Article 23a of its Statute and Article 104b of its Rules of Procedure.

Precursors to the Regulation in European Union law

30. The Regulation is part of a process of organic development in European Community (and now Union) law which began with the Brussels Convention of 1968, [6] now almost entirely superseded by Regulation No 44/2001. [7] Those instruments, however, do not cover matters of parental responsibility, which were first dealt with (although only in relation to the children of married couples) in Regulation No 1347/2000, [8] now repealed

5 — Third paragraph of, respectively, Article 234 EC and Article 267 TFEU.

6 — Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968. A consolidated version of the Convention, as amended by the four subsequent Accession Conventions, is published in OJ 1998 C 27, p. 1. It is still in force in relations between Denmark and the other Member States, as well as in respect of certain overseas territories.

7 — 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), as amended – also known as the 'Brussels Regulation'.

8 — 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) – also known as the 'Brussels II Regulation'. This regulation was preceded by, and largely reproduces the terms of, the 'Brussels II Convention' on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (OJ 1998 C 221, p. 2), which was never in fact ratified, but on the drafting of which there is an explanatory report (the Borrás Report, ibid., p. 27).

and replaced by the present Regulation.[9] None the less, many of their provisions concerning recognition and enforcement, in particular with regard to provisional measures, are similar to those in the Regulation. Where that is so, case-law and other authority[10] relating to such provisions may also be relevant in the context of the present Regulation.

31. None of the rules on jurisdiction in any of the precursor instruments concerns matters of parental responsibility which are independent of matrimonial proceedings.

32. As regards *lis pendens*, Article 21 of the Brussels Convention, Article 11 of Regulation No 1347/2000 and Article 27 of Regulation No 44/2001 contain provisions having the same effect, *mutatis mutandis*, as Article 19(2) and (3) of the present Regulation.[11]

33. As regards provisional measures, Regulation No 1347/2000 contained, in Article 12, a provision worded identically to Article 20(1) of the present Regulation,[12] and Article 24 of the Brussels Convention and Article 31 of Regulation No 44/2001 contain a substantially similar provision.

34. With regard to recognition, provisions similar (though not identical) to those cited above[13] are to be found in Articles 26 to 29 of the Brussels Convention, Articles 14, 15, 17 and 19 of Regulation 1347/2000 and Articles 33 to 36 of Regulation No 44/2001. However, the grounds for non-recognition are, understandably, specific to the type of measure concerned, and neither the Brussels Convention nor Regulation No 44/2001 entirely precludes review of the jurisdiction of the court of origin, as does Article 24 of the present Regulation.

35. With regard to enforcement, the provisions of Article 31 et seq. of the Brussels

9 — There was also an intermediate proposal from the Commission for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility (COM(2001) 505 final, OJ 2001 C 332E, p. 269), which was never adopted as such.

10 — The Court has, for example, on many occasions referred for guidance to the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) and the Schlosser Report on the Convention on the accession of Denmark, Ireland and the United Kingdom thereto (ibid., p. 71). The Borrás Report mentioned in footnote 8 may similarly provide some guidance for the interpretation of Regulation No 1347/2000 and its successor, the present Regulation, as may the explanatory memoranda to the Commission's various proposals for regulations.

11 — See point 15 above.

12 — See point 16 above; it is also identical (except for the use of the word 'Regulation' rather than 'Convention') to Article 12 of the Brussels II Convention cited in footnote 8.

13 — See points 17 to 19 above.

Convention, Article 21 et seq. of Regulation No 1347/2000 and Article 38 et seq. of Regulation No 44/2001 present certain parallels with those of Article 28 et seq. of the Regulation. [14]

36. Finally, as regards authentic instruments and agreements, Articles 50 and 51 of the Brussels Convention and Articles 57 and 58 of Regulation No 44/2001 provide for enforcement under conditions similar to those in Article 46 of the Regulation, [15] although there was no such provision in Regulation No 1347/2000.

37. I shall refer to such precursor provisions in more detail in my analysis below, to the extent that they may be useful for the interpretation of the Regulation.

International precursors to the Regulation

38. However – as perhaps befits a measure dealing with family law – the Regulation has more than one line of ancestry.

39. A first Hague Convention [16] relating to the settlement of guardianship of minors was concluded in 1902. [17] It has been largely superseded by the 1961 Child Protection Convention. [18] The latter has been succeeded in turn (though not as largely superseded, as ratification is not complete) by the most recent 1996 Hague Child Protection Convention. [19]

14 — See points 20 to 22 above.

15 — See point 23 above.

16 — The various Hague Conventions referred to can be found on the website (http://www.hcch.net) and in the publications of the Hague Conference on Private International Law, of which all the Member States and the European Union itself (see Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, OJ 2006 L 297, p. 1, read in conjunction with the last sentence of Article 1 TEU) are members. The website also includes the Steiger Report on the 1961 Convention, the Pérez-Vera Report on the 1980 Convention and the Lagarde Report on the 1996 Convention, which may be referred to.

17 — Convention du 12 juin 1902 pour régler la tutelle des mineurs ('the 1902 Convention').

18 — Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, concluded on 5 October 1961 ('the 1961 Convention'). For States parties to both the 1902 and 1961 Conventions, the latter applies. The 1902 Convention is, as far as Member States are concerned, still in force in relationships between Luxembourg, Belgium and Romania (see *Comparative study on enforcement procedures of family rights*, T.M.C. Asser Instituut, The Hague, 2007, p. 84). The 1961 Convention has been ratified by 11 of the current Member States, including both Germany and Spain.

19 — Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, concluded on 19 October 1996 (OJ 2008 L 151, p. 39). It has been signed by all the Member States of the Union, but ratified at present by only eight, not including Germany or Spain; all the remaining Member States except Denmark have been authorised to ratify or accede to it, simultaneously, in the interest of the Union (see Council Decision 2008/431/EC, ibid., p. 36).

In a related field, there is a 1980 Hague Child Abduction Convention. [20]

40. There is, in addition, a 1980 Council of Europe Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children. [21]

41. Pursuant to Articles 60 to 62 of the Regulation, essentially, in relations between Member States which are party to them, the 1961, 1980 and 1996 Conventions continue to have effect in matters not governed by the Regulation, although the latter takes precedence in matters which it does govern.

42. As regards jurisdiction in matters of guardianship, the 1902 Convention essentially conferred competence on the authorities of the child's nationality. However, Article 7 provided that, pending a decision on guardianship, and in all cases of urgency, any necessary measures to protect a foreign child's person or interests could be taken by the local authorities. The convention was silent as to the recognition or enforcement of any such measures in another State.

43. The 1961 Convention favours the law of the child's nationality in relation to 'subjecting the infant to authority', but in other regards gives competence to the authorities of the State of habitual residence to take measures directed to the protection of the child's person or property. Under Article 7, all such measures are to be recognised in all Contracting States but, where enforcement is required in another State, recognition and enforcement are to be governed either by the domestic law of the country in which enforcement is sought, or by the relevant international conventions. Article 9 – to which the rules on mutual recognition and enforcement in Article 7 do not however apply – provides that, in all cases of urgency, the authorities of any Contracting State in which the child is present or has property may take any necessary measures of protection.

44. The 1996 Convention abandons any reference to nationality and gives jurisdiction in all matters of parental responsibility (defined broadly in Article 3) to the judicial or administrative authorities of the Contracting State of the child's habitual residence. However, under Article 11, in all cases of urgency, the authorities of any Contracting State in which

20 — Cited in footnote 3 above. The 1980 Hague Convention has been ratified by all the Member States.

21 — Concluded in Luxembourg on 20 May 1980, European Treaty Series No 105 ('the 1980 European Convention'). It has currently been ratified by all the Member States except Slovenia.

the child is present or has property may take any necessary measures of protection, which lapse as soon as the authorities of the State of habitual residence have taken the measures required by the situation. Under Article 12, the authorities of a Contracting State in which the child is present (other than as a result of wrongful removal or retention) or has property may take provisional protective measures whose territorial effect is limited to the State in question. Articles 23 to 28 provide for mutual recognition and enforcement on lines comparable to the provisions of the Regulation but in more general terms. Significantly, Article 23(2)(a) allows review of the jurisdiction of the court of origin.

45. The 1980 Hague Convention seeks (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States (Article 1). It states, inter alia, that removal or retention is to be considered wrongful where (a) it is in breach of rights of custody attributed under the law of the State in which the child was habitually resident immediately before the removal and (b) at the time of removal those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention, specifying that the rights of custody in question may arise in particular by operation of law, by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State (Article 3). Under Article 16, authorities notified of a wrongful removal or retention may not decide on rights of custody until it has been determined that the child is not to be returned, or unless no application for return is lodged within a reasonable time.

46. The 1980 European Convention does not contain any provisions on jurisdiction but lays down a general rule of mutual recognition and enforcement of decisions relating to custody given in any Contracting State, subject to certain exceptions, comparable to, but more extensive than, those laid down in Article 23 of the Regulation.[22] In particular, the competence of the authority giving the decision may be questioned on certain grounds (Articles 9(1)(b) and 10(1)). No distinction is, however, drawn according to whether a measure is or is not provisional or urgent in nature. The convention also sets out a general procedural framework for obtaining

22 — See point 18 above.

recognition and enforcement, but in less detail than the Regulation (Articles 13 to 16).

47. Again, I shall refer to the provisions of those conventions to the extent useful for the interpretation of the Regulation.

Bilateral convention between Germany and Spain

48. A bilateral convention between Germany and Spain, on the recognition and enforcement of judicial decisions and settlements and of enforceable public documents in civil and commercial matters,[23] was signed in Bonn on 14 November 1983. It provides for mutual recognition and enforcement of decisions (including those in matrimonial matters and matters of family relationships) taken by a court of either State which was competent in accordance with rules laid down in the convention. That convention is mentioned in the provisional order at issue in the present case. However, Article 59(1) of the Regulation specifies that (subject to certain other provisions which are not relevant here), for the Member States, the Regulation supersedes 'conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation'.

23 — Vertrag zwischen der Bundesrepublik Deutschland und Spanien über die Anerkennung und Vollstreckung von gerichtlichen Entscheidungen und Vergleichen sowie vollstreckbaren öffentlichen Urkunden in Zivil- und Handelssachen; Convenio entre España y la República Federal de Alemania sobre reconocimiento y ejecución de resoluciones y transacciones judiciales y documentos públicos con fuerza ejecutiva en materia civil y mercantil ('the 1983 bilateral convention').

Facts, procedure and question referred

49. The mother of the twins whose custody is in issue is a German national. The father is a Spanish national. They have never been married, but lived together in Spain from mid-2005 to early 2007. The children – M, a boy, and S, a girl – were born prematurely on 31 May 2006. Their condition required hospital care for several months after that. M was able to leave hospital in September 2006, but S was not discharged until March 2007.

50. By that time, however, the parents no longer wished to live together. On 25 January

2007, they signed an agreement regulating the termination of their relationship. As regards the children, although the two parents were to retain parental authority and custody, the mother was to return with both twins to Germany, where the father would have a right of access.

51. That agreement was then formalised by a notary public in the presence and with the consent of both parties, on 30 January 2007, in the form of a *convenio regulador* (an agreement regulating the termination of a marriage or equivalent relationship, which must be approved by a court in order to be enforceable [24]). The notarial deed specified that, in order to take full effect, the agreement had to receive approval by a court, [25] and that the parties explicitly agreed to submit to any subsequent court decisions relating to the matters covered.

52. However, as S could not be discharged before the planned travelling date of 2 February 2007, the mother in fact flew to Germany on that date, with M alone of the twins, but also with an older son, the child of an earlier relationship.

Proceedings brought by the father in Spain

53. On 28 June 2007, the father applied to his local first instance court (the Juzgado de Primera Instancia No 4 de San Lorenzo de El Escorial, hereinafter 'the Spanish court'), for 'immediate and urgent preliminary measures' [26] awarding him custody of both children, requiring M's return to Spain and ordering the mother to pay EUR 300 per month for the maintenance of each child.

54. The Spanish court expressly considered whether it had jurisdiction to order such measures, and concluded that it had.

55. Its order mentions that the father's application for provisional measures relied on Articles 1 and 2 of the 1980 Hague Convention, on the Regulation and on Article 8 of the 1983 bilateral convention with regard to the jurisdiction of the Spanish courts.

24 — Articles 81, 86 and 90 of the Spanish Civil Code; Article 777 of the Ley de enjuiciamiento civil (Law on civil procedure, 'LEC').

25 — See Article 46 of the Regulation, quoted in point 23 above. It appears, however, that such court approval was not in fact subsequently obtained.

26 — It appears that 'preliminary' provisional measures may be requested prior to the introduction of an application for divorce, separation or nullity of marriage under Article 771 of the LEC, provided that the main application is submitted within a certain time limit, failing which they lapse. That procedure seems to have been requested and applied by analogy in the present case, where the parents were not married. See further footnote 34 below.

56. It also states that the mother was not herself present at the hearing on 26 September 2007, [27] but submitted her own written observations in German (which were translated into Spanish and taken into consideration by the court), challenging the jurisdiction of the Spanish courts and requesting that the proceedings should be pursued in Germany, where they had by then been initiated. [28] She was also represented in court by a lawyer, who argued that M had moved lawfully to Germany, on the basis of the notarised agreement, and that his interests should be dealt with there.

57. In deciding that it had jurisdiction, the Spanish court referred generally to 'the European legislation adduced and the conventions ratified by Spain and Germany'. More specifically, it cited Article 769(3) of the LEC, which gives jurisdiction, in proceedings relating solely to the custody of children or to claims between parents for maintenance in respect of a child, to the first instance court for the place of the parents' last joint residence. It also referred to Article 1 of the 1980 Hague Convention as conferring jurisdiction on the competent court for the child's place of residence, M having been habitually resident in Spain until 2 February 2007.

58. It further referred explicitly to Article 19 of the Regulation, concerning *lis pendens*, considering that, if the proceedings initiated by the mother in Germany [29] involved the same cause of action as the father's earlier application in Spain, the German court should stay the proceedings before it.

59. The Spanish court did not, however, refer to Article 20 of the Regulation, concerning provisional, including protective, measures taken in cases of urgency. That might indicate that it regarded itself as having substantive jurisdiction, and not merely the more limited (permissive and exceptional) competence to take urgent provisional or protective measures in respect of persons within its territorial jurisdiction.

60. The Spanish court noted also that the public attorney, who had made submissions in favour of its jurisdiction, cast doubt on the lawfulness of M's departure from Spain, pointing out that the notarised agreement had not received court approval. [30] The court further mentioned (though not explicitly as a

27 — In her observations to the Court, she states that she had to look after M, who was ill at the time.

28 — On 20 September 2007; see point 67 et seq. below.

29 — See point 67 et seq. below.

30 — See point 51 above, and Article 46 of the Regulation, in point 23.

basis for jurisdiction) that the father claimed to have been pressured or deceived into signing the agreement and had, on the day he signed the notarial deed, gone to the police in an attempt to stop the mother leaving for Germany with the children.

61. Taken together, those aspects might suggest that the Spanish court considered M to have been wrongfully removed within the meaning of the Regulation and of the 1980 Hague Convention, so that it retained jurisdiction pursuant to Article 10 of the Regulation. However, the order makes no explicit reference either to that provision or to Article 8, on the basis of which it might also have considered itself competent in the light of its position on M's habitual residence. [31]

62. Having decided that it had jurisdiction to order the measures applied for, the Spanish court made an order on 8 November 2007, rectified as regards custody on 28 November 2007 ('the contested order'). As an urgent and immediate protective measure, it provisionally:

— awarded custody of the twins to the father, [32] while leaving *patria potestad* (parental authority, rights and duties) to be shared by both parents; in that connection, the mother was ordered to return M to his father in Spain, while retaining unrestricted rights of access to both children;

— prohibited the children from being taken out of Spanish territory without prior authorisation;

— ordered their passports to be kept by the father;

— required any change in their domicile to be authorised by the court; and

— made no order against the mother to pay maintenance for the children.

63. It appears from a court document accompanying the contested order, dated 11 January 2008, and from Articles 451 and 452 of the LEC to which the document refers, that an

31 — By contrast, to the extent that M's move to Germany might have been lawful, Articles 8 and 9, read together, would have implied that he had acquired a new habitual residence there, founding jurisdiction in the German courts.

32 — Prior to rectification, the order had awarded *joint* custody to the father; that is described as a 'material error' in the rectifying order.

application ('recurso de reposición') could have been made to the same court, within five days, to have the order set aside or varied. In its observations to this Court, the Spanish Government states that no appeal lies against an interlocutory order such as the contested order, but that it may be varied in the course of the subsequent main proceedings. Interlocutory measures, it explains, become effective only if followed by an application for a substantive decision and, in the present case, there was a subsequent procedure in January 2008.

64. Also on 11 January 2008, the Spanish court issued a certificate in the form set out in Annex II to the Regulation. [33] That certificate stated, inter alia, that the judgment was not given in default of appearance, that it was enforceable according to the law of the Member State of origin, that it had been served on the mother, against whom enforcement was sought, and that it entailed the return of the child to the father.

65. The national case-file forwarded by the Bundesgerichtshof contains documents lodged by the mother's lawyer in Germany, stating that the order of 8 November 2007 was notified to her lawyer in Spain on 16 November 2007, and that she supposes that the father's lawyer also received notification of it on the same date. She further states that the father's application for a substantive decision was lodged with the Spanish court on 21 January 2008 whereas, in order to validate the interlocutory order, it should have been lodged within 30 working days from notification. [34]

66. In addition, in response to questions from this Court, the mother's German lawyer has indicated that, on 28 October 2008, the Spanish court confirmed its international jurisdiction and again asserted itself as the 'court first seised' within the meaning of Article 19(2) of the Regulation. The mother then appealed to the Audiencia Provincial (Provincial Court) in Madrid, challenging that assumption of jurisdiction in the substantive proceedings. Shortly before the hearing in

33 — See point 21 above. That form of certificate concerns judgments on parental responsibility. Although one of the measures ordered required the mother to return M to the father, the Spanish court did not use the form of certificate in Annex IV, which is for judgments concerning the return of the child in situations following an abduction, an initial order for the child's return and a judgment of non-return pursuant to the 1980 Hague Convention (see Articles 11(8), 40(1)(b) and 42 of the Regulation and Article 13 of the 1980 Hague Convention).

34 — This appears to be pursuant to Article 771(5) of the LEC ('Los efectos y medidas acordados de conformidad con lo dispuesto en este artículo sólo subsistirán si, dentro de los *treinta días siguientes a su adopción* se presenta la demanda de nulidad, separación o divorcio' – emphasis added). Article 771, to which the Spanish court refers in its order, concerns provisional measures preliminary to an application for nullity, separation or divorce. Under Article 772(1), if the application is accepted as admissible, the previous provisional measures are then subsumed into the new procedure. Although the parents were never married, those provisions appear to be applicable by analogy, in the light, as the Spanish Government has stated, of Article 748(4), under which the provisions of the title of which they form part apply to procedures which concern exclusively the custody of minor children.

the present preliminary reference proceedings, the appeal court dismissed that challenge, confirming the jurisdiction of the first instance court in respect of *both* twins, and mentioning Article 20 of the Regulation in its decision. However, no further substantive decision had yet been taken by the first instance court.

Proceedings brought by the mother in Germany

67. On 20 September 2007, while the above proceedings were already pending in Spain but before the contested order was made, the mother had commenced proceedings before the Amtsgericht (Local Court) Albstadt, seeking custody of both children.

68. The order for reference states that those custody proceedings were postponed in accordance with Article 16 of the 1980 Hague Convention. [35] The Amtsgericht Stuttgart, to which the case was then assigned for procedural reasons, doubts whether it has jurisdiction and, having regard to the substantive proceedings pending in Spain, intends to stay proceedings in accordance with Article 19(2) of the Regulation.

69. According to the relevant judicial decisions produced by the mother's lawyer at the Court's request, the Amtsgericht did stay proceedings on that basis, on 8 December 2008. However, following an appeal by the mother to the Oberlandesgericht (Regional Court) Stuttgart, its decision to do so was overturned, on 14 May 2009. The appeal court noted that the Spanish proceedings were interlocutory in nature whereas the German proceedings concerned a definitive award of custody; it considered, therefore, that the two did not involve the same cause of action within the meaning of Article 19(2), and that the lower court should reconsider its jurisdiction in that light.

70. However, in a decision dated 8 June 2009, the Amtsgericht indicated that it was still not convinced – mainly because it was unsure whether M's move to Germany was lawful, thus conferring jurisdiction on the German courts by virtue of Article 9 of the Regulation, or wrongful, in which case the Spanish courts would retain jurisdiction under Article 10. It considered also that the question of jurisdiction could be resolved only by

35 — See point 45 above.

referring a question to the Court of Justice for clarification. [36]

Proceedings brought by the father in Germany

71. In the proceedings giving rise to the present request for a preliminary ruling, the father seeks to have the contested order declared enforceable in Germany.

72. According to the order for reference, he originally applied principally for an order for M's return, and only as a precaution for the contested order to be declared enforceable. Subsequently, however, he has claimed that his priority is the declaration of enforceability.

73. The national case-file forwarded to the Court includes certified copies (and certified German translations) of the original order and rectifying order from the Spanish court, together with that court's certificate of 11 January 2008 in the form set out in Annex II to the Regulation.

74. The competent first-instance and appeal courts (again the Amtsgericht and Oberlandesgericht Stuttgart) have therefore attached an enforcement clause to the decision of the Spanish court, and have warned the mother that she may be fined in the event of non-compliance. It is against those decisions that she has brought her appeal on a point of law before the Bundesgerichtshof, which summarises the appeal court's judgment as follows.

75. There is no obvious reason why the decision of the Spanish court should not be enforceable. It is a provisional measure, but Article 2(4) of the Regulation does not distinguish between different forms of decision for the purposes of recognition and enforcement. The children were not heard by the Spanish court, but that does not breach any essential procedural requirement of German law, especially since they were only one and a half years old at the time. The mother argues that the Spanish decision is not enforceable because the main proceedings were brought out of time, but the Spanish court has issued a certificate pursuant to Article 39 of the Regulation. Nor are there any grounds to refuse enforcement under Article 23 of the Regulation. There is no obvious infringement of German public policy, and the mother's right to be heard was preserved by her summons to appear in court. The fact that she did

36 — The Court has not yet received any such question from the Amtsgericht – which, of course, was not competent to refer a question in this area before the Treaty on the Functioning of the European Union came into effect on 1 December 2009.

not appear in person, but was represented by a lawyer, is a matter for her. In recognition and enforceability proceedings, the court is barred from examining the substance of the custody proceedings determined in Spain.

76. The mother argues before the Bundesgerichtshof that the recognition and enforcement provisions of the Regulation do not apply to provisional measures governed by Article 20, which cannot be classified as a 'judgment relating to parental responsibility' within the meaning of Article 2(4).

77. The Bundesgerichtshof considers various approaches advocated in the literature.

78. A first group of writers excludes measures taken in the circumstances set out in Article 20(1) of the Regulation from the scope of the provisions on recognition and enforcement. They classify that provision purely as a jurisdictional rule – an interpretation which may be supported by the judgment in *A*,[37] according to which provisional measures within the meaning of Article 20 must be provisional in nature and their implementation and binding nature are determined in accordance with national law. Provided that both parties are heard, provisional measures (other than in relation to matrimonial matters and matters of parental responsibility) are to be recognised and enforced under the Brussels Convention and Regulation No 44/2001, subject only to the restrictions imposed by the Court of Justice. Although the position under the present Regulation seems comparable, Article 20(1) concerns measures taken under the law of the Member State 'in respect of persons or assets in that State', thus linking the subject-matter of the measure to territorial jurisdiction. It follows from Articles 1(1), 2(4) and 20(1) that the scope of the provisions on recognition and enforcement in the Regulation is limited to decisions in the main proceedings.

79. A second group would extend the scope of Article 2(4) to provisional measures taken by a competent court within the ambit of the main proceedings, provided that the right to a hearing is given at least in retrospect. Unlike the Brussels Convention and Regulation No 44/2001, the present Regulation deals with triangular relationships in which a third person – the child – has a particular need of protection. The right to be heard must

37 — Case C-523/07 [2009] ECR I-2805.

therefore be ensured at some stage, even if only after the provisional order is made. [38]

80. A third group would restrict the application of the Regulation to provisional measures taken only after the parties have been heard. Mere retrospective satisfaction of the requirement for a fair hearing is not sufficient. It is a failing of the Regulation that it adopts for custody matters instruments designed for inter partes proceedings; that should not be extended at the expense of the balanced system of the 1980 Hague Convention.

81. Finally, a fourth group argues that all provisional measures should be included within the system of the Regulation for recognition and enforcement. Some of that group regard measures taken in the circumstances set out in Article 20 as 'judgments' within the meaning of Article 2(4), while others do not, but all agree that the provisions of Article 21 et seq. apply to them.

82. The outcome of the mother's appeal, and of the father's request for recognition of the contested order, would therefore vary according to the approach followed. However, like the appeal court, the Bundesgerichtshof accepts that the order does not offend against German public policy, that the mother had an adequate opportunity to put her case to the Spanish court and that the fact that a child of 18 months was not heard is not a ground to deny recognition and enforcement of the order.

83. Having regard to all those considerations, the Bundesgerichtshof seeks a preliminary ruling on the following question:

'Do the provisions of Article 21 et seq. of [the Regulation] concerning the recognition and enforcement of decisions of other Member States, in accordance with Article 2(4) of that regulation, also apply to enforceable provisional measures, within the meaning of Article 20 of that regulation, concerning the right to child custody?'

84. In response to a question from the Court whether the urgent procedure pursuant to Article 104b of the Rules of Procedure should be applied, the Bundesgerichtshof confirmed that it did not consider such a step necessary. Nor has the Court initiated the procedure of its own motion, although the President has decided that the case should be given priority in accordance with the first subparagraph of Article 55(2) of those Rules.

38 — Compare Case 166/80 *Klomps* v *Michel* [1981] ECR 1593.

85. Written observations have been submitted by the mother, by the Czech, German, Hungarian, Italian, Portuguese, Spanish and United Kingdom Governments and by the Commission. At the hearing on 17 March 2010, the same parties, with the exception of the Italian, Hungarian and Portuguese Governments, were represented and made oral submissions. The father has made no representations to the Court.

Assessment

General considerations

86. Disputes concerning custody of children following the breakdown of the parents' relationship are among the bitterest and most emotionally charged which courts of law are called upon to settle. The quest to reconcile the visceral passions which such disputes arouse taxes the abilities of counsellors, social workers and lawyers alike. When a judicial decision is necessary, it is often perceived as unjust by at least one of the parents concerned.

87. When such a dispute spans more than one country and more than one legal system – as is increasingly common in today's European Union – the difficulties may well be exacerbated by uncertainty as to which authorities are competent, and by the likelihood that one of the parents will have to deal with a legal system even less familiar than his or her own, often in a language which is not his or her own.

88. As if that were not enough, there is a widespread, half-articulated suspicion in the popular imagination – often encouraged by the popular media, which tend to fasten upon such cases of compelling human interest – that the courts of a foreign land are less just than one's own domestic courts, and more likely to favour unfairly their own nationals.

89. Such difficulties cannot be legislated out of existence. They highlight, however, the absolute necessity of a clear set of EU-wide rules on jurisdiction and on recognition and enforcement of judgments in this area, where delay and uncertainty can be particularly harmful to the best interests of those primarily concerned – the children. It is such a set of rules which the Regulation seeks to provide. In the event of doubt (of which there appear to be some instances, at least among the German academic writers summarised by

the Bundesgerichtshof), their interpretation must be rendered clear by the Court. [39]

90. Those rules must be applied dispassionately, without regard to any impact which they might appear likely to have on the substantive decision. They are purely procedural in nature. Their purpose is to ensure, first, that the substantive issues are decided promptly – not in haste, but unhindered by the delay that might well ensue from lengthy disputes over jurisdiction – by a court whose competence, determined in the light of the best interests of the child, having particular regard to the criterion of proximity, can be clearly ascertained; and, second, that the decisions of that court are given full effect, again without delay, throughout the European Union.

91. As regards jurisdiction, the Regulation has been drafted with a view to providing a clear framework in which to determine the competent court. However, there will inevitably be situations in which some degree of uncertainty arises. For that reason, and because of the danger that a disappointed parent will see a court's declaration of its own competence as bound up with its adverse substantive decision, itself likely to be perceived as unjust, it seems essential that the finding of jurisdiction should in each case be reasoned as explicitly, as clearly and as thoroughly as possible. It is regrettable that the contested order does not achieve that essential aim.

92. As regards recognition and enforcement, the Regulation is based on a particularly high degree of mutual trust, requiring recognition without recourse to any special procedure, keeping grounds for non-recognition to a minimum and prohibiting review both of the jurisdiction of the court of origin and of the substance of its judgment. Such a degree of mutual trust – which is essential in order to avoid the delays and conflicts which would otherwise bedevil proceedings of the type concerned – in turn imposes a high degree of responsibility on the court which accepts jurisdiction and requires appropriate procedural safeguards to be available in the Member State of origin, given that in general the resulting order cannot be challenged in the Member State of recognition or enforcement.

93. In that regard, I can do no better than to quote from an initiative for the adoption of a directive on rights to interpretation and

39 — See also points 70 to 74 of the view of Advocate General Bot in Case C-403/09 PPU *Detiček* [2009] ECR I-12193.

translation in criminal proceedings, published the day after the hearing in the present case. [40] Recital 4 in the preamble to the proposed directive reads as follows:

'Mutual recognition can only operate effectively in a spirit of confidence, whereby not only judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of one's partners rules, but also trust that those rules are correctly applied.'

94. That statement can, I think, be transposed in its entirety from the field of criminal process to that of procedures relating to parental responsibility, custody and care in respect of children.

Twins and the Regulation

95. A noteworthy aspect of this case is that it concerns a dispute over the custody of twins, who are currently present – and perhaps now habitually resident, for the purposes of the Regulation – in different Member States. An extremely powerful principle governing any decision concerning parental responsibility, custody or care, is that siblings – and above all twins – should remain together unless very exceptional reasons militate to the contrary. At the very least, it seems essential that the question of their custody should be dealt with by one and the same court – a point made, indeed, in the contested order.

96. The Regulation makes no specific provision for such a situation. [41] That seems an unfortunate omission, although I accept that the precise formulation of such a provision could prove a delicate matter. In the absence of any such rule, however, the Regulation does make provision (in Article 15) for a court having jurisdiction to transfer a case to a court of

40 — Initiative of the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden with a view to the adoption of a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings (OJ 2010 C 69, p. 1).

41 — It is plausible – although I have discerned no explicit statement to that effect in either case – that the Spanish court in its contested order, and the Spanish Government in its submissions at the hearing, have taken the view that, for the purposes of the Regulation, twins are deemed to have a joint habitual residence, and do not acquire a new one until *both* have moved to a new Member State. Whatever view they may have taken, no such rule is laid down in the Regulation, nor, it seems to me, can it reasonably be deduced therefrom.

another Member State with which the child has a particular connection, if the latter court would be better placed to hear the case and if that would be in the best interests of the child, and requires the courts to cooperate for that purpose. It also (in Article 55) requires central authorities to facilitate communication between courts with a view to the application of that provision. In *A*,[42] the Court stressed the obligation on national courts to communicate directly or through their central authorities.

97. It seems highly desirable that, in a case such as the present – which involves a single dispute over the custody of both twins and must therefore require, at the very least, a single, coherent appreciation of the overall situation – the courts and central authorities concerned should actively envisage the use of those provisions with a view to agreeing that the matter should be dealt with by one and the same court, namely whichever of the two seems better placed, having regard to all the circumstances, in particular the twins' best interests.

98. Such an agreement, reached at an early stage, might well be capable of averting lengthy appeal procedures, disputes over jurisdiction and a reference to this Court – all in the best interests of the children. It is possible that to one court, on the basis of the evidence presented to it by only one parent, a transfer of jurisdiction to the other court might appear fraught with danger. But communication and cooperation might well dispel such an initial impression, and an attempt to communicate and cooperate seems essential in the interests of the children.

99. Regrettably, however, the Court has been given no indication that any such initiative has been taken in the present case.

100. It would be even more regrettable – indeed, it would indicate a failure on the part of the Community legislature – if a mechanical application of the Regulation were to have the result that a single question of parental responsibility with regard to twins was summarily carved up between courts in two different Member States, which might well reach different decisions giving rise to discordant situations, to the clear detriment of the children.

42 — Cited in footnote 37 above, paragraph 61 et seq., points 4 and 5 of the ruling.

The scope of the question and of Article 20

101. The German courts must decide whether the contested order is to be recognised and enforced in Germany in accordance with the Regulation.

102. The question which the Bundesgerichtshof has referred to the Court is, essentially, whether provisional measures within the meaning of Article 20 of the Regulation, which are enforceable in the Member State in which they are ordered, are to be recognised and enforced in other Member States in the same way as other enforceable judgments.

103. The assumption is therefore that the contested order falls within Article 20. The basis for that assumption is not entirely clear. It may be imposed on the Bundesgerichtshof by the formulation of the mother's appeal on a point of law or by the findings of the court below, as explained by the German Government at the hearing. In any event, it seems plausible that it is ultimately founded on the belief either that the Spanish court considered the conditions set out in Article 20(1) to be fulfilled or that all provisional measures fall within Article 20, regardless of the court which took them. If that is the case, however, neither belief appears to me to be justified.

104. As regards the first, it has been pointed out in a number of the observations submitted to the Court that the contested order does not refer to Article 20 at all and that M was, at the material time, no longer in Spain. The precise basis on which the Spanish court assumed jurisdiction is not stated. However, the indications in its order all seem explainable by the hypothesis that it considered itself to have substantive jurisdiction to regulate parental responsibility vis-à-vis both children [43] and that its provisional order was, procedurally, an interlocutory prelude to taking a more definitive decision in that regard following fuller submissions from both parents in substantive proceedings, rather than an urgent measure taken in the circumstances set out in Article 20.

43 — See points 54 to 61 above. In certain circumstances, the parents' last joint residence, and the father's continuing residence, in Spain could have founded jurisdiction under Article 12(1) (see footnote 4 above), while M's previous habitual residence there, coupled with the father's (albeit somewhat uncertain) objections to his removal could have founded jurisdiction under Article 10 (see point 10 above); and the reference to priority under Article 19 seems relevant only in relation to conflicts of substantive jurisdiction (see further point 169 below).

105. As regards the second, it seems to me that the interpretation does not stand up to scrutiny.

106. First, in Articles 8 to 15, the Regulation sets out a comprehensive set of rules on jurisdiction in relation to matters of parental responsibility. It is in the nature of such matters that many decisions will be of a provisional character. Then, Article 20 makes it clear that those rules do not prevent courts of a Member State from taking urgent provisional measures under national law in respect of persons in that State, even if a court of another Member State has jurisdiction as to the substance, and that such measures will cease to apply when the latter court has taken appropriate action. Such a provision does not seek to regulate all provisional measures. Nor does it seek to confer any substantive jurisdiction. It merely allows, in specified circumstances, another court, which is temporarily better placed for that purpose than the court having substantive jurisdiction, to take urgently necessary provisional measures which remain subordinate to the measures decided on by the latter court. [44]

107. That being so, an answer confined to the status of measures taken in the circumstances set out in Article 20 would not help to solve the underlying substantive issue of the recognition and enforcement of the contested order – even though it may perhaps assist the Bundesgerichtshof in reaching a decision on the appeal before it if (as a result of constraints imposed by the national procedure) that decision must proceed on the basis that the contested order *was* taken in the circumstances set out in Article 20. It would be even less helpful to decline to answer the question, as the Czech Government has suggested, on the ground that, in the light of the facts, it is hypothetical.

108. Rather, the Court has consistently considered that a preliminary ruling procedure, involving as it does cooperation between national courts and itself, requires it to provide an answer which will be of use to the national court and enable the latter to determine the case before it. In doing so, the Court has a duty to interpret all provisions of EU law necessary for that purpose, including provisions not expressly indicated in the questions referred, and may have to reformulate those questions. [45]

109. Such an approach seems all the more necessary in a dispute concerning parental responsibility which has already been

44 — See further point 169 below.

45 — See, for example, Joined Cases C-329/06 and C-343/06 *Wiedermann and Funk* [2008] ECR I-4635, paragraph 45 and the case-law cited there.

excessively protracted. It is now more than two years, and more than half the twins' lifetime, since the contested order was made and certified by the Spanish court. That is in complete contradiction to the Regulation's central aim of serving the child's best interests by ensuring that decisions are taken and put into effect promptly, free from procedural delays resulting from the cross-border nature of the situation.

110. I disagree, therefore, with the German Government's restrictive approach (that only the referring court, having full knowledge of the proceedings and issues before it, is in principle qualified to define and delimit the question to be answered). I shall, rather, endeavour to address all the apparently relevant issues and provisions in such a way as to provide the most helpful answer possible with a view to a speedy overall solution, in the twins' best interests.

111. A point to note when identifying the issues is that the father's application, with which the case before the Bundesgerichtshof is concerned, *in fact* seeks recognition and enforcement of the contested order only as regards M, who is in Germany. As regards S, who remains in Spain, there is no need for the order to be recognised, and no scope for it to be enforced, in Germany. A separate issue, in the proceedings pending before the Amtsgericht Stuttgart (and which has also, apparently, been considered in the appeal proceedings before the Audiencia Provincial in Madrid), is whether it is the German or Spanish courts which have jurisdiction to determine parental responsibility with regard to one or both of the twins, but no question has been referred to the Court on that issue. None the less, since the two issues are intertwined, some considerations may touch, at least indirectly, on the latter issue as well.

112. As we have seen, the Regulation provides for almost automatic recognition and enforcement of judgments, based on a high degree of mutual trust, which in turn requires a high degree of responsibility and cooperation. There are some exceptions to the requirement of recognition and enforcement but one might therefore have expected, as a matter of principle, that the Spanish court's contested order should be recognised and enforced in Germany.

113. A number of objections to that outcome have however been advanced – principally by the mother, although several Member States have put forward overlapping considerations. There are, essentially, five such arguments: (i) the Spanish court had no substantive jurisdiction under the Regulation to determine parental responsibility with regard to M; (ii)

the contested order was a provisional measure, and no provisional measures of any kind are required to be recognised or enforced under Article 21 et seq. of the Regulation; (iii) the contested order was a provisional measure within the meaning of Article 20 of the Regulation, and provisional measures of that specific kind are not required to be recognised or enforced under Article 21 et seq.; (iv) the Spanish court was not authorised by Article 20 of the Regulation to determine parental responsibility with regard to M; and (v) despite the certificate issued by the Spanish court pursuant to Article 39 of the Regulation, the contested order ceased to be enforceable in Spain when the father failed to institute substantive proceedings within 30 working days from the date of the order.

114. I shall endeavour to address all of those points within a systematic framework, in which I shall also consider the nature of the contested order, a matter which seems essential to the final decision on whether it is to be recognised or enforced.

115. First, I shall take the hypothesis that the Spanish court considered itself to have substantive jurisdiction, under Article 8 et seq. of the Regulation, in relation to both twins. I shall examine how the Regulation may allow the mother, if she disputes that jurisdiction, to ensure that the order is not recognised or enforced in Germany. In that context, I shall consider whether the fact that the contested order was provisional makes a difference.

116. Secondly, I shall assume the Spanish court to have considered that (in relation to M) it did not have substantive jurisdiction but that its provisional order was permitted by Article 20 of the Regulation, and ask whether the measures with which that article is concerned are normally to be recognised and enforced in other Member States. If they are, I shall again address the steps to be taken if jurisdiction is disputed.

117. Before addressing either of those hypotheses, however, it seems helpful to clarify briefly what is meant by a 'provisional' measure.

'Provisional' measures

118. At first sight, the need for clarification may seem doubtful: a provisional measure is, self-evidently, one which is intended to produce its effects only for a limited period – until a certain event occurs or a certain period of time has elapsed.

119. However, it is of the nature and essence of family law that, as children grow up and circumstances change, *substantive* decisions on parental responsibility may need to be varied (or indeed reversed). Consequently, no such decision is definitive or final in the sense that a decree of divorce is definitive or final. And all decisions on parental responsibility produce their effects only for a limited period, in that they necessarily lapse when the child reaches the age of majority.

120. In the context of Article 20 of the Regulation, the situation is clear: a provisional measure is one taken in circumstances of urgency, which ceases to apply when the court having substantive jurisdiction takes the measures it considers appropriate.

121. By analogy, one might say that a provisional decision on parental responsibility taken by a court having substantive jurisdiction is one taken often in order to deal with pressing circumstances which do not allow for full consideration of the matter, and in principle with the specific intention of its being superseded by a subsequent decision to be taken after more thorough consideration, itself *not* specifically intended to be replaced or amended unless there is a change in circumstances. For the sake of concision, I shall refer to the latter type of decision as 'firm', since it is not truly final or definitive.

122. In the context, therefore, a degree of urgency is a usual characteristic of a provisional measure (and a necessary one where Article 20 is involved). It seems important to bear in mind that urgent measures are often adopted by means of a summary procedure which may lack some or many of the normal safeguards. It may not be possible to hear all the interested parties or to consider all the relevant evidence. Some decisions may even be taken by telephone, giving rise simply to a handwritten note in the file. [46]

123. With those considerations in mind, I turn to address the two hypotheses set out above.

46 — An example given in the Lagarde Report on the 1996 Hague Convention, cited in footnote 16 above, point 120.

First hypothesis: substantive jurisdiction

Firm decision

124. The terms and scheme of the Regulation are quite clear: a judgment given in a Member State must be recognised in the other Member States without any special procedure being required, and a judgment given in a Member State which is enforceable there and has been served must be enforced in another Member State when it has been declared enforceable there in accordance with the procedures set out in the Regulation. Specific and limited grounds for non-recognition and for refusal of an application for a declaration of enforceability are set out in Article 23, read in conjunction with Article 31(2) – to which must presumably be added a lack of enforceability in the Member State of origin and a failure to serve on the defendant, as seems clear from Article 28(1). Where none of those grounds applies, there is simply no scope for refusing recognition or enforcement. In the present case, the only such ground which has been alleged (by the mother, before the Amtsgericht Stuttgart) is that the validity of the contested order had lapsed in Spain by the time the father brought proceedings for a declaration of enforceability in Germany – a point which I shall address below, at point 148 et seq.

125. In addition, it is quite clear that the courts of the Member State of recognition or enforcement may not review either the jurisdiction of the court of origin or the substance of its decision.

126. The prohibition of review of jurisdiction is also inherent in Article 19 of the Regulation, in relation to *lis pendens*. Where proceedings relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised must of its own motion stay its proceedings until the jurisdiction of the court first seised is established, at which point it must decline jurisdiction in favour of that court. And, according to the case-law on the substantially equivalent provision in Article 21 of the Brussels Convention, it is for the court first seised to decide whether

its jurisdiction is established.[47] (I agree that the case-law on the Brussels Convention or its successor, Regulation No 44/2001, cannot be applied automatically and indiscriminately to the present Regulation[48] but, in this particular regard, there seems no reason not to transpose it.)

127. What, then, can be done if, as in the present case, a party challenges the jurisdiction of the court which took the decision whose recognition or enforcement is sought? The obvious answer is to do so before that court itself. If the contested order had been a firm decision on parental responsibility, the Regulation would clearly not have allowed the mother to obtain a refusal to recognise or enforce it in Germany or to bring subsequent proceedings there seeking a new firm decision on the ground that the German, not the Spanish, courts had jurisdiction. Therefore, her only recourse would have been to appeal, within the Spanish system, against the Spanish court's assumption of jurisdiction,[49] with the prospect – at the latest in the court of final instance – of a request for a preliminary ruling by this Court.

128. Such a course of action could prove lengthy[50] (although one would hope that the proceedings would be expedited to the extent possible and, of course, in cases of doubt even the first instance court may now refer a question to this Court and request an urgent procedure), but it is the only course of action available under the Regulation. This again underlines the high degree of responsibility placed on national courts when they assume jurisdiction, and the need for them to give explicit, full and clear reasons for doing so. Only such conscientiousness can foster a true climate of mutual trust as required by the Regulation, and only such reasons can enable an appeal court, a court of enforcement in another Member State or the Court of Justice,

47 — In Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317, paragraph 22 et seq., the Court noted that the objective of avoiding negative conflicts of jurisdiction may be achieved without the court second seised examining the jurisdiction of the court first seised, and that in no case is it better placed to determine whether the latter has jurisdiction. The Convention rules are common to both courts and may be interpreted and applied with the same authority by each of them. Where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised. In Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 46 et seq., the Court confirmed those statements, pointing out that Article 21 was a procedural rule based clearly and solely on the chronological order in which the courts involved are seised.

48 — See, for example, points 63 and 64 of Advocate General Kokott's Opinion in *A*, cited in footnote 37 above.

49 — As, indeed, she appears to have done in the subsequent main proceedings in Spain, even before any firm decision has been taken.

50 — I note, from the mother's statements in writing and at the hearing, that her appeal against the Spanish court's decision of 28 October 2008, confirming its international jurisdiction with regard to both twins in the main proceedings, was not decided until February or March 2010.

as the case may be, to determine any disputed aspects as swiftly as possible.

Provisional decision

129. What difference, if any, does it make if the decision (taken by a court considering itself to have jurisdiction as to the substance) is clearly a provisional one? That may be a plausible analysis of the situation in the present case.

130. First of all, as has been pointed out in a number of the written observations, the Regulation makes no explicit distinction between final or firm decisions on the one hand and provisional decisions on the other. Article 2(4) defines the term 'judgment' broadly, without regard to the formal terminology used, and contains no suggestion that any category is to be excluded; the provisions of Chapter II on jurisdiction [51] do not distinguish between proceedings according to whether the judgment, thus broadly defined, is to be provisional or not; the provisions of Chapter III on recognition and enforcement refer to recognition and enforcement of judgments, again without distinction; and, within that chapter, Article 23(b) contemplates that a 'judgment' may be given in cases of urgency, implying that it may be provisional.

131. Nor do I see any pressing reason, connected with the nature of provisional measures, to draw a distinction. A court having substantive jurisdiction is a court of the Member State with which the child has, in principle, the closest link (at the very least, a substantial connection). It is also the court which will take the substantive decision as to parental responsibility, a decision which must, under the Regulation, be recognised and enforced in all other Member States. It must necessarily have jurisdiction also to take whatever provisional measures are necessary until such time as a firm decision can be reached. [52] And such provisional measures will be closely bound up with the subsequent firm decision. The court will decide on those measures in the light, inter alia, of its own duty to reach such a firm decision as swiftly as is compatible with thorough consideration

51 — Other than Article 20, with which the present hypothesis is not concerned.

52 — As has recently been recognised, at least implicitly, by the Court in *Detiček* (cited in footnote 39 above), holding that a provisional award of custody by the court having substantive jurisdiction prevailed over a subsequent provisional award, purportedly based on Article 20, by a court in another Member State to which the child had been removed, unlawfully in terms of the earlier award.

of the merits, and will seek to ensure, as far as possible, that the provisional measures do not compromise or predetermine that decision.

132. Seen in that light, it seems to me that provisional measures taken by a court having substantive jurisdiction under the Regulation must be recognised and enforced in other Member States under the same conditions as the subsequent judgment which the same court will be called upon to deliver. Any other approach would carry the risk of prejudicing that subsequent judgment by undermining any efforts made to ensure continuity – and would render the Regulation largely ineffective with regard to a wide range of decisions taken daily by family courts throughout the European Union.

133. It might be argued, none the less, that the often summary nature of proceedings leading to the adoption of a provisional measure, perhaps lacking some of the procedural safeguards which normally ensure a fair hearing, militates against automatic recognition and enforcement.

134. To that, however, it may be answered that Article 23 of the Regulation specifies the circumstances in which recognition and enforcement may be refused, and that such summary proceedings were clearly in the legislator's mind: refusal may be granted, inter alia, if the child was not given an opportunity to be heard (except in cases of urgency); or if the judgment was given in default when the person in default was not given adequate notice to prepare his or her defence; or if it infringes the parental responsibility of a person who was not given an opportunity to be heard. [53]

135. It seems, therefore, that the Regulation makes no general exclusion from the normal regime of recognition and enforcement simply because proceedings are such that some of the ordinary safeguards may be absent. There is exclusion only when certain specific safeguards are actually denied. It is not suggested in the present case that any such safeguard was denied; the children were too young to be heard, and the mother was given ample opportunity, of which she made use, to present her case.

136. Another possible argument for treating provisional measures more cautiously is that the provisional decision will perhaps not be subject to appeal, so that the party wishing to

53 — Article 23(b), (c) and (d) respectively.

challenge jurisdiction might have no possibility of doing so in either the Member State of origin or the Member State of enforcement.

137. Whether such a situation prevails in the present case is not clear from the documents in the case. [54] Nor, in my view, has it been made entirely clear by the Spanish Government's answers to the Court's questions, whether written or oral. It is, in any event, at least suggested that some kind of appeal could have been available against the Spanish court's assumption of jurisdiction to make the contested order, and it seems that the mother was at least able to challenge that jurisdiction in the context of the subsequent main proceedings. However, whatever the truth of the matter in the present context, if, in any particular case, no appeal lies against the court's assumption of jurisdiction, then, in the event of a challenge before it, that court is one of those obliged, under the third paragraph of Article 267 TFEU (Article 234 EC), to seek a preliminary ruling from the Court of Justice – and its request would, one hopes, be dealt with by an urgent procedure.

138. In her written observations to the Court, the mother has suggested another ground for not recognising or enforcing provisional decisions (of a court assuming substantive jurisdiction) in the same way as firm decisions. Having first argued that measures taken in the circumstances set out in Article 20 should not be recognised or enforced in other Member States (a point which I shall address below [55]), she reasons that the same approach must be taken when the court is not acting in such circumstances but assumes substantive jurisdiction and takes provisional measures within the ambit of that jurisdiction. Taking a different approach would require the court of the Member State of enforcement to determine whether the court of origin had based its jurisdiction on Articles 8 to 14 or on Article 20 – whereas review of the jurisdiction of the court of origin is expressly prohibited by Article 24 of the Regulation.

139. That analysis is, I think, misconceived, regardless of whether a distinction should be drawn between the two categories of provisional measure. In order to determine whether a provisional measure was taken on the basis of substantive jurisdiction derived from the rules in the Regulation or in the circumstances set out in Article 20, it is

54 — See point 63 above. See also Case C-14/08 *Roda Golf & Beach Resort* [2009] ECR I-5439, paragraphs 24 to 30.

55 — See point 156 et seq. below.

not necessary to *review* the jurisdiction of the court of origin but merely to *ascertain* the basis on which it considered itself competent.

140. Admittedly, it may not always be easy to ascertain that basis. In the present case, the contested order is not as fully or as clearly reasoned as would be desirable – although it appears that the Spanish court did consider the matter from several angles and did satisfy itself as to its competence, referring to several possible grounds of substantive jurisdiction but not to Article 20. In other cases, the reasoning may be far more laconic, even completely absent, thereby totally failing to observe the duties which fall on national courts as a corollary to the principle of mutual trust which pervades the Regulation.

141. The Commission and the German Government in particular suggest that, if the basis on which jurisdiction is assumed cannot be clearly ascertained from the terms or content of the decision whose recognition or enforcement is sought, then, by analogy with *Mietz*, [56] it should be presumed to be based on Article 20. At the hearing, the Czech Government appeared to advocate precisely the opposite approach.

142. In *Mietz*, the Court stressed (in the context of the Brussels Convention) that in ordering interim payment the court of origin had not expressly referred to its substantive jurisdiction under the Convention, and that no such jurisdiction was evident from the terms of its judgment (as would have been the case if, for example, the judgment had shown that the defendant was domiciled in the Contracting State of the court of origin and none of the types of exclusive jurisdiction set out in the Convention was applicable). Consequently, the Court considered, where the court of origin is silent as to the basis of its jurisdiction, the need to ensure that the Convention rules are not circumvented requires that its judgment be construed as meaning that it founded its jurisdiction to order provisional measures on its national law and not on any substantive jurisdiction derived from the Convention.

143. As I have noted, not all aspects of the case-law on the Brussels Convention and Regulation No 44/2001 are suitable for unqualified transposition to the context of the present Regulation. This aspect, it seems to

56 — Case C-99/96 [1999] ECR I-2277, in particular, paragraphs 50 and 55.

me, calls for qualification – though I can see no reason for the complete reversal proposed by the Czech Government.

144. The present Regulation – unlike the Brussels Convention and Regulation No 44/2001 – specifically contemplates communication between courts, facilitated where necessary by the central authorities of the relevant Member States. It is in conformity with the spirit of mutual cooperation which underpins the Regulation for such communication to extend to all matters which can facilitate or expedite proceedings concerned with the recognition or enforcement of judgments. Since all that is required here is to ascertain the basis on which the court of origin considered itself competent, the communication should not be too arduous.

145. I would therefore nuance the approach taken by the Court in the context of the Brussels Convention. The heightened cooperation and the specific provision for communication between courts in the Regulation – the duty to make use of which is apparent from the case-law [57] – require a court of enforcement, in doubt as to the basis of jurisdiction assumed by the court of origin, to seek to ascertain that basis from the court concerned. Only if that endeavour fails to produce a reasonably prompt result should it be presumed that jurisdiction was assumed in the circumstances set out in Article 20(1).

146. In the present case, it seems to me that, even if the contested order is not as explicit as could have been wished, a very natural conclusion to draw from it is that the Spanish court considered itself to have substantive jurisdiction and placed no reliance on Article 20. [58]

147. It may be added that no reliance could properly have been placed on Article 20 in the circumstances of the case, since M was not present in Spain at any stage during the course of the proceedings before the Spanish court. (It might appear, from paragraphs 50 to 52 of the judgment in *Detiček*, [59] that, for a provisional measure concerning parental responsibility to be taken in the circumstances set out in Article 20, not only the child but also the persons previously and/or newly exercising that responsibility must be present in the Member State concerned. However, I agree with the view expressed at the hearing by a number of those present that such an approach would be incorrect, and that it is the presence of the child alone which determines whether urgent provisional measures may be taken with respect to him or her.) As for S, the fact that she has never left Spanish territory since birth means that the substantive

57 — See point 96 and footnote 42 above.

58 — See points 54 to 61 and 104, and footnote 43 above.

59 — Cited in footnote 39 above.

jurisdiction of the Spanish courts under Article 8 is incontestable, and that there is (at present) no issue of recognition or enforcement in another Member State.

148. Finally, the mother has alleged before the Amtsgericht Stuttgart that, despite the certificate issued by the Spanish court pursuant to Article 39 of the Regulation, the contested order is unenforceable in Spain because provisional measures of the kind concerned lapse unless substantive proceedings are commenced within 30 working days and, in the present case, the father did not commence such proceedings within that period. [60]

149. Whether that allegation is or is not well founded in fact and in Spanish procedural law is not a matter which can be determined by this Court. However, an issue relating to the Regulation may arise if a party seeks a declaration of enforceability in another Member State of a measure which has ceased to be enforceable in the Member State of origin but in respect of which a certificate has been issued.

150. According to Article 28(1) of the Regulation, in order to be enforced in another Member State, a judgment on the exercise of parental responsibility must be enforceable in the Member State of origin. In accordance with Articles 37(1)(b) and 39, the application for a declaration of enforceability must be accompanied by a certificate in the form set out in Annex II, issued by the competent court of the Member State of origin. At point 9.1 of that certificate, the court in question is required to state whether the judgment is enforceable according to the law of that State. The question therefore arises whether it is open to the court of the Member State of enforcement to look beyond that certificate, once issued, in order to ascertain whether the judgment is (still) enforceable.

151. It seems to me that such a possibility is open to the court to which application is made for a declaration of enforceability. Although Article 31(2) states that the application may be refused only for one of the reasons specified in Article 23, it seems logically necessary that refusal must also be possible if the judgment is not enforceable in the Member State of origin, since such enforceability is a condition explicitly laid down in Article 28(1). Production of the Annex II certificate is however not an absolute requirement for fulfilment of that condition, as Article 38(1) allows the court of the Member State of enforcement to accept equivalent documents or other information. Moreover, nothing in Sections 2 and 3 of Chapter III, which govern proceedings for a declaration of enforceability of judgments relating to parental responsibility,

60 — See point 65 above.

states that the Annex II certificate is binding or unchallengeable.

152. That is in clear contrast to the provisions of Section 4, governing enforceability of certain judgments concerning rights of access or requiring the return of the child. That section provides for certificates using the forms in Annexes III and IV respectively, and for recognition and enforcement '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'. [61] It also stipulates that no appeal may lie against the issuing of a certificate [62] but, by making no allowance for accepting other equivalent documents or information, in fact makes the production of a certificate an absolute prerequisite for enforcement.

153. It seems to me, therefore, that the legislature's intention was to distinguish between, on the one hand, judgments on the exercise of parental responsibility and, on the other hand, those concerning rights of access or requiring the return of the child. [63] For the latter, the certificate as to, inter alia, enforceability in the Member State of origin is crucial; it is both necessary and binding. For the former, the certificate is important, but neither an absolute necessity nor immune to challenge.

154. Where a measure is not enforceable indefinitely in the Member State of origin, but will or may lapse after a period of time, or through the occurrence or non-occurrence of a particular event, it is, of course, not merely desirable but inherent in the system of mutual trust which pervades the Regulation that the limitation should be indicated by the court of origin in its certificate. When there is no such indication, it remains open to any interested party to adduce evidence that the measure is no longer enforceable. In that event, the same means of communication between courts and central authorities are available as when it is necessary to ascertain the basis of jurisdiction. When such means provide a satisfactory response, the court of enforcement should

61 — See Articles 41(1) and 42(1).

62 — Article 43(2).

63 — That view appears to be borne out by recitals 23 and 24 in the preamble, which seem to relate only to 'judgments on rights of access and judgments on return' when speaking of automatic recognition without grounds for refusal of enforcement and of the impossibility of appealing against a certificate.

obviously look no further but, in the absence of such a response, it should not preclude the parties from adducing timely proof by other means.

used to verify whether the decision is (still) enforceable in the Member State of origin, if the accuracy of a certificate issued pursuant to Article 39 is challenged.

Second hypothesis: measure permitted by Article 20

155. I thus arrive at the view that provisional measures adopted by a court of a Member State on the basis of competence derived by that court from the rules on substantive jurisdiction in the Regulation must be recognised and enforced in other Member States in the same way as any other judgment adopted on the same basis, in accordance with Article 21 et seq. of the Regulation. A court hearing an application for recognition or non-recognition of such a measure, or for a declaration of enforceability, is entitled to ascertain the basis of jurisdiction relied on by the court of origin either from the terms or content of its decision or, if necessary, by communicating with that court directly or through the appropriate central authorities. If, but only if, such communication fails to produce a reasonably prompt result, it should be presumed that jurisdiction was assumed in the circumstances set out in Article 20(1). In the case of (provisional) decisions on parental responsibility, the same means of communication may be

156. Does the same conclusion, as regards recognition and enforcement, apply where the provisional measures in question are not adopted on the basis of substantive jurisdiction under the Regulation but on the basis of national law in the limited circumstances permitted by Article 20?

157. An obvious initial observation is that the very wording of Article 20 circumscribes the nature of the measures covered ('in respect of persons or assets in that State') in such a way that issues of recognition or enforcement in another State may not often arise. In addition, the fact that such measures lapse as soon as the court having substantive jurisdiction takes action means that any recognition or enforcement may well be of only ephemeral

value to the party seeking it. [64] However, the fact that such situations are perhaps much less likely to arise in the circumstances set out in Article 20 than in the case of provisional measures taken by a court having substantive jurisdiction does not mean that they can never arise, particularly in circumstances where an incident occurs during a child's lawful temporary presence in a third Member State.

158. Of those who have submitted written observations, only the Spanish and Italian Governments consider that measures taken in the circumstances set out in Article 20 should be recognised and enforced in other Member States. Both point to the extremely broad definition in Article 2(4) of the Regulation of 'judgment', [65] which is the term used in all the provisions on recognition and enforcement and which, they consider, must cover any enforceable decision of any court, regardless of the basis on which it was adopted. The Italian Government stresses the importance of the right to be heard, which it regards as the only essential criterion for a decision to be enforceable in other Member States. The Spanish Government considers that the useful effect of the Regulation would be undermined if measures taken in the circumstances set out in Article 20 were excluded from the provisions on recognition and enforcement. [66]

159. The Commission, although expressing in its written observations the view that Article 20 was not relevant in the context of the main proceedings, developed a rather original approach at the hearing. It suggested that the provisions of Article 21 et seq. of the Regulation were indeed applicable to measures taken in the circumstances set out in Article 20(1), but only if each of those circumstances – presence of the person or property in question, urgency, and provisional nature of the measure – could be rigorously verified, and the right to be heard had been guaranteed. In particular, it argued that the provisional nature of the measure should be explicit in the decision taken and the term of validity indicated.

160. While that might well be a desirable approach, it seems to me to have no basis in the Regulation itself. In particular, it would appear to involve applying Article 21 et seq.

64 — Some measures, of course, such as judicial authorisation for the sale of perishable property belonging to the child (or to the couple, since Article 20 covers also divorce, legal separation or marriage annulment), or for a surgical operation to the child (both examples cited in the Lagarde Report on the 1996 Hague Convention, cited in footnote 16 above, point 68, concerning Article 11(1) of that convention), will have de facto effects which cannot but be recognised in other Member States.

65 — '... 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.'

66 — Citing Case C-195/08 PPU *Rinau* [2008] ECR I-5271, paragraph 80 et seq.

whilst modifying the application of Article 24, which prohibits any review of jurisdiction. I therefore do not consider that such an approach is justified by the legislation as it currently stands.

161. The other parties who have submitted written observations put forward a number of often overlapping arguments, all tending towards the view that the rules on recognition and enforcement in Article 21 et seq. do not apply to provisional measures adopted on the sole basis of Article 20.

162. First, the Portuguese and United Kingdom Governments suggest that, because Article 20 refers to provisional 'measures' rather than 'judgments', it was specifically intended to exclude such measures from the 'judgments' referred to in the rest of the Regulation, in particular in the provisions relating to recognition and enforcement. I do not find that a convincing argument, particularly in view of the words 'whatever the judgment may be called, including a decree, order or decision' in Article 2(4), read in conjunction with the very broad definition of a 'court' in Article 2(1). In that context, if the legislature had intended to distinguish in Article 20 between a 'measure' and a 'judgment', I would have expected it to be more explicit. Rather, it seems to me, the choice of word is likely to stem from the ancestry of the provision, whose precursors [67] refer almost exclusively to 'measures'.

163. Next, the Czech, Portuguese and United Kingdom Governments all stress that Article 20 is an exception to the general scheme of the Regulation and, as such, should be interpreted strictly. I accept that Article 20 is an exception – but it is an exception to the general rules on jurisdiction (including *lis pendens* [68]) in Chapter II, among which it is to be found, and not to those on recognition and enforcement in Chapter III. I agree, therefore, that Article 20 must be interpreted strictly when deciding whether a situation falls within its scope, in particular as regards the conditions of urgency and presence within the territory. I am not however convinced that it should give rise, as an automatic corollary, to a restricted application of the provisions on recognition and enforcement, particularly in view of the apparently exhaustive list of grounds of non-recognition in Article 23 of the Regulation. [69]

67 — See points 30 to 47 above.

68 — See point 169 below.

69 — See point 18 above; a corresponding list of grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment is in Article 22. I note, moreover, that at point 56 of her Opinion in *A* (cited in footnote 37 above), on which the United Kingdom Government relies, Advocate General Kokott was addressing only the question of jurisdiction, with which that case was concerned, and not the question of recognition and enforcement.

164. A further argument, advanced by the mother and by the Hungarian and United Kingdom Governments, is based on paragraphs 50 to 52 of the judgment in *A*,[70] where the Court stated essentially that, since the measures with which Article 20 is concerned are those 'available under the law of that Member State', it is for the national legislature to lay them down and that, since they are adopted on the basis of national law, their binding nature must stem from the national legislation concerned. Therefore, those parties submit, provisional measures adopted on the basis of Article 20 alone derive no binding force from the Regulation itself and, since any such force derives from national law, it must be confined to the territory where that law is applicable.

165. However, it seems to me that any decision with which the Regulation is concerned, whether provisional or otherwise, whether taken on the basis of substantive jurisdiction under the Regulation or simply on the basis of Article 20, derives its binding force in the first place from the national law of the court adopting it, and only subsequently from the Regulation.[71] Indeed, under Article 28(1), it is an explicit condition for a declaration of enforceability in another Member State that a judgment on the exercise of parental responsibility must be enforceable in the Member State of origin. There seems thus to be no reason to treat issues relating to the enforcement of provisional measures taken in the circumstances set out in Article 20 differently from any other measures on the sole basis of the source of their binding force.[72]

166. Another argument advanced by the United Kingdom in its written observations is that recognition and enforcement of 'Article 20 measures' outside the territory of the originating State might undermine the overall scheme of the Regulation and the general rule that jurisdiction should lie with the Member State of the child's habitual residence. Article 20 ensures that there is no gap in jurisdiction, but entails a risk of delay before the court with substantive jurisdiction can act. That risk could increase if Article 20 measures are to be enforced in other Member States. For example, one parent might seek an interim custody order from a court lacking substantive jurisdiction under the Regulation, in the circumstances set out in Article 20. If the other parent attempted to seise the court with substantive jurisdiction in the Member

70 — Cited in footnote 37 above.

71 — Moreover, since the Regulation contains no provisions of substantive law in either of the fields to which it relates, it will always be the case, even where jurisdiction is clearly based on one of the provisions of Articles 8 to 15, that any measures ordered must be, in practice, 'available under national law'.

72 — I would again stress (see footnote 69 above with regard to Advocate General Kokott's Opinion) that, in its judgment in *A*, the Court was not addressing any issue of enforcement in another Member State, but was merely asked whether provisions of national law concerning a provisional measure taken in the circumstances set out in Article 20 were binding – and replied that it was a matter for national law.

State of the child's habitual residence, that court could not take jurisdiction until the court first seised declined it. As a matter of practice, that could take some time – during which the first parent would have obtained an order which was recognised and enforceable throughout Europe.

167. That approach thus appears to assume that, where application is made to a court of a Member State on the sole basis that the circumstances set out in Article 20 of the Regulation are present, that court is the 'court first seised' for the purposes of the rules on *lis pendens* in Article 19, so that the 'court second seised' cannot act until the former has declined jurisdiction. [73]

168. At the hearing, however, the United Kingdom took a different approach, viewing Article 20 as 'carving out', from the jurisdictional rules in the rest of the Regulation, a specific area in which those rules do not apply but national jurisdictional rules are preserved.

73 — An assumption which may be shared by the Amtsgericht and Oberlandesgericht Stuttgart (see points 69 and 70 above).

The German Government added that, on a purely formal level, Article 20 followed Article 19, which applied only to the jurisdictional rules preceding it, and that Article 20 would be denied much of its useful effect if the rules on *lis pendens* applied to it. The Commission considered that the rules on *lis pendens* did apply, but that the Article 19 test of 'the same cause of action' should be applied rigorously with the result, in its view, that the cause of action would in practice virtually never be the same in substantive proceedings and in proceedings in the circumstances set out in Article 20(1).

169. I take the view that a court acting by virtue of Article 20 alone does not enjoy any jurisdiction conferred by the Regulation. It is merely 'not prevented' from taking such urgent measures as are necessary and as are available under national law, in respect of persons or assets within its territorial jurisdiction, to apply only until such time as the court having substantive jurisdiction takes appropriate action. The very fact that it acts solely on the basis of Article 20 means that its jurisdiction *cannot* be established for the purposes of Article 19, so that the proceedings before it do not trigger the rules on *lis pendens*. It seems clear from the structure of Article 20, and in particular from Article 20(2), that the provision creates no bar to seising the court having substantive jurisdiction under the Regulation, whose decisions

will immediately supersede those taken on the basis of Article 20. The Commission's view, on the other hand, while perhaps reaching much the same result in practice, seems unnecessarily convoluted and uncertain.

170. I therefore see no danger of undermining the overall scheme of the Regulation or the general rule conferring jurisdiction on the courts of the Member State of the child's habitual residence if provisional measures taken in the circumstances set out in Article 20 are recognised or enforced in Member States other than that in which they were issued. As I understand that overall scheme, once it has been seised, the court having substantive jurisdiction remains competent at all times to take any appropriate measures. Any competence of another court to take provisional measures in the circumstances set out in Article 20 remains subordinate to that substantive jurisdiction. If there is any risk of delay, it stems not from the rules on *lis pendens* or from the enforceability of the measures taken in the circumstances set out in Article 20 but only from a possible lack of diligence in seising the court with substantive jurisdiction. On the other hand, the efficacy of measures taken in those circumstances – which are, by definition, urgently necessary – would be potentially easy to avoid, pending such seisin, if their enforceability were to evaporate as soon as the child was taken across a national border.

171. Of the arguments I have examined so far, therefore, none has convinced me that provisional measures taken in the circumstances set out in Article 20 of the Regulation must be treated differently, as regards recognition and enforcement in other Member States, from measures, provisional or otherwise, taken by a court having substantive jurisdiction under the Regulation. Another argument, however, advanced by the mother and by the German and Hungarian Governments, appears rather more cogent.

172. The wording of Article 20(1) of the present Regulation is identical to that of Article 12 of Regulation No 1347/2000 and (apart from the reference to 'Convention' rather than 'Regulation') to that of Article 12 of the Brussels II Convention. The explanatory memorandum to the Commission's 1999 proposal leading to the adoption of Regulation No 1347/2000 [74] and the Borrás Report on the Brussels II Convention [75] both state (in identical terms) in relation to those provisions: 'The rule laid down in this Article is confined to establishing territorial effects in the State in which the measures are adopted.' For its part, the explanatory memorandum to the Commission's 2002 proposal for the present

74 — COM(1999) 220 final.
75 — Cited in footnote 8 above.

Regulation [76] states, with regard to Article 20: 'This Article follows closely Article 12 of Council Regulation (EC) No 1347/2000. ...', although it makes no explicit mention of territorial effect.

173. The context is thus indicative of a deliberate intention on the part of the drafters of all three instruments to exclude provisional measures taken simply on the basis of urgency and presence, by a court lacking substantive jurisdiction, from the scope of the provisions on recognition and enforcement in other Member States. The Council must be presumed to have been aware of that intention when it adopted Regulation No 1347/2000 and to have approved it by making no alteration to Article 12 thereof. It may also, I think, be presumed that some explicit change would have been required in order to modify that approach in the context of the present Regulation.

174. It must be acknowledged that other elements in the more remote ancestry of the Regulation might militate in favour of recognition and enforcement. The Schlosser Report on the 1978 accessions to the Brussels Convention, [77] for example, stated, with regard to the equivalent provision of the Convention, that the wide variety of provisional measures available in the law of Ireland and of the United Kingdom would involve certain difficulties 'where provisional judgments given in these States have to be given effect by the enforcement procedures of the original Member States of the Community' – thus making it clear that enforcement in other Member States was contemplated. And the Lagarde Report on the 1996 Hague Convention [78] shows that measures of protection taken on the basis of urgency under Article 11 of that convention are to be recognised in all the Contracting States, whereas non-urgent provisional measures under Article 12 have only territorial effect.

175. None the less, despite such indications, persuasive though they may be, and despite the advantages which I can see [79] in the possibility of recognising and enforcing under the Regulation, in other Member States, measures ordered in the circumstances set out in Article 20(1) until such time as the court with substantive jurisdiction has taken action, it seems to me clear from the direct legislative history of the provision that such measures are intended to have their primary effect only within the Member State in which they are ordered. The provisions of Article 21 et seq. of the Regulation, which provide for near-automatic recognition and enforcement on

76 — COM(2002) 222 final.
77 — Cited in footnote 10 above, point 183.
78 — Cited in footnote 16 above, points 72 and 75.
79 — See point 170 above, *in fine*.

other Member States, therefore do not apply to them.

176. However, I would stress that the conclusion which I have thus reached does not mean that the Regulation *precludes* any recognition or enforcement, in other Member States, of measures ordered in the circumstances set out in Article 20(1). It means, rather, that the recognition and enforcement of such measures are not governed by the Regulation. And, for matters not governed by the Regulation, pre-existing conventions remain applicable in relations between Member States. [80] One relevant convention might be the 1980 European Convention, [81] which does not distinguish between provisional and other measures, but Article 14 of which requires Contracting States to 'apply a simple and expeditious procedure for recognition and enforcement of decisions relating to the custody of a child'. In the present case, the 1983 bilateral convention [82] might also prove relevant.

177. Consequently, if a provisional measure taken in the circumstances set out in Article 20(1) – and thus on the basis of jurisdiction and remedies available under national law – cannot benefit from the near-automatic recognition and enforcement procedures laid down in the Regulation, it may none the less benefit from other, albeit possibly more cumbersome, procedures derived from national law, and in particular those required by multilateral or bilateral conventions to which the Member States concerned are parties.

178. Having reached that view, I do not think it necessary to address the question (objection (iv) in point 113 above) whether the court of the Member State of enforcement can query jurisdiction assumed on the basis of Article 20. The fact that M was not in Spain at the time the contested order was made, and that one of the conditions in Article 20(1) was thus not fulfilled, is of no relevance to the German courts if the provisions on recognition and enforcement in the Regulation do not, in any event, apply when jurisdiction is assumed on that basis. The same type of consideration applies, in that case, to the allegation that the validity of the contested order had lapsed by the time its enforcement was sought.

179. In any event, if recognition and enforcement of a measure taken in the circumstances set out in Article 20(1) are not matters governed by the Regulation, then the prohibition of review of jurisdiction in Article 24 will not

80 — See Articles 59 to 62 of the Regulation.
81 — See points 40 and 46 above.
82 — See point 48 above.

apply when such recognition or enforcement is sought.

Final remarks

180. I have found it necessary, when analysing the issues raised in this reference for a preliminary ruling, to take a broad approach, and to consider matters which may well, in the final event, prove not wholly relevant to the resolution of the issues to be decided.

181. That is largely due to the apparent discrepancy between the basis (whatever it was) on which the Spanish court in fact considered itself to have jurisdiction and the assumption, in the proceedings before the referring court, as to what that basis was.

182. That discrepancy – taken together, it has to be said, with the lack of any submissions of any kind from the father – will have hindered not only the Court in its endeavour to provide a useful answer to the basic issue raised but also the Member States and the Commission in their attempts to assist the Court in that regard. Overall, it has probably contributed to the lengthening of a procedure which should, on the contrary, have been expedited to the extent possible, having regard to the best interests of the children concerned.

183. The discrepancy has arisen, it would seem, partly as a result of the lack of clarity of the contested order in stating the basis of jurisdiction on which it was adopted and partly, perhaps, from the procedural constraints imposed by or on the form of the mother's appeal on a point of law to the Bundesgerichtshof.

184. Whatever its causes, however, the existence and the effects of the discrepancy lead me to stress yet again the duties placed on national courts as a corollary to the system of mutual trust set up by the Regulation, an essential aim of which is to ensure speedy resolution of disputes concerning parental responsibility by the court best placed to take a decision in the child's best interests – and in this case the best interests of very young twins.

185. That aim has not been achieved in the present case.

Conclusion

186. In the light of all the above considerations, I am of the opinion that the Court should answer the question raised by the Bundesgerichtshof as follows:

— 'Provisional measures adopted by a court of a Member State on the basis of competence derived by that court from the rules on substantive jurisdiction in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and [in] matters of parental responsibility must be recognised and enforced in other Member States in the same way as any other judgment adopted on the same basis, in accordance with Article 21 et seq. of that Regulation.

— Provisional measures adopted by a court of a Member State on the basis of national law in the circumstances set out in Article 20 of Regulation No 2201/2003 do not have to be recognised or enforced in other Member States in accordance with Article 21 et seq. of the Regulation. That Regulation does not, however, preclude their recognition or enforcement in accordance with procedures derived from national law, in particular those required by multilateral or bilateral conventions to which the Member States concerned are parties.

— A court hearing an application for recognition or non-recognition of a provisional measure, or for a declaration of enforceability, is entitled to ascertain the basis of jurisdiction relied on by the court of origin either from the terms or content of its decision or, if necessary, by communicating with that court directly or through the appropriate central authorities. If, but only if, neither of those means produces a clear and satisfactory result, it should be presumed that jurisdiction was assumed in the circumstances set out in Article 20(1). In the case

of provisional decisions on parental responsibility, the same means of communication may be used to verify whether the decision is (still) enforceable in the Member State of origin, if the accuracy of a certificate issued pursuant to Article 39 of Regulation No 2201/2003 is challenged; and, if such communication is unsuccessful, other means of proof may be used, provided that they are adduced in a timely manner.'