Funded by
the European Union

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

Editors
Lucia Ruggeri and **Roberto Garetto**

Edizioni Scientifiche Italiane

Publisher Edizioni Scientifiche Italiane s.p.a.
80121 Napoli, via Chiatamone 7
Internet: www.edizioniesi.it
E-mail: info@edizioniesi.it

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

Editors Lucia Ruggeri, Roberto Garetto

Scientific Committee Stathis Banakas, University of East Anglia
Silvia Landini, University of Florence

The book as whole and each individual contribution were double blind peer reviewed.

Publication Year 2021

ISBN 978-88-495-4759-7

This e-book is published as a part of the EU funded Justice Project "E-training on EU Family Property Regimes (EU-FamPro)" no 101008404-JUST-AG-2020/JUST-JTRA- EJTR-AG-2020), and is available for downloading at the Project website www.euro-family.eu.

This project was funded by the European Union's Justice Programme (2014-2020)

European Family Property Relations

Article-by-Article Commentary on EU Regulations 1103 and 1104/2016

Lucia Ruggeri
Roberto Garetto

Editors

Edizioni Scientifiche Italiane

Article 37
Grounds of non-recognition

Maria Cristina Gruppuso

Regulation (EU) 2016/1103	Regulation (EU) 2016/1104
A decision shall not be recognised:	(Same text)
(a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought;	
(b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;	
(c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;	
(d) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.	

Summary: I. Introduction. – II. Public policy. – III. Lack of service. – IV. Irreconcilable decisions.

I. Introduction

Art 37 of the European Regulations in matters of matrimonial property regimes and of the property consequences of registered partnerships, which has identical formulation for both Regulations, states the grounds of non-recognition of foreign decisions.
The above grounds are the same that legitimate denial of declarations of enforceability of the decision; in fact, Art 51, which likewise presents an identical formulation for both of the Regulations, envisages that 'the court shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Art 37.'[1]
The Regulations under examination reproduce a list of typified grounds - already present in previous European Regulations - that is deemed exhaustive, it being necessary to consider that, also in conformance with the principle of mutual trust between States, recognition cannot be denied on grounds other than the ones referred to.[2]

---

[1] The grounds for non-recognition have a dual nature because they operate both as grounds for refusing recognition and as grounds for refusing or revoking the declaration of enforceability. Cf E. D'Alessandro, 'Articles 40-41, Grounds of Non-recognition; No Review as to the Substance', in A.L. Calvo Caravaca et al eds, *The Eu Succession Regulation. A Commentary* (Cambridge University Press: Cambridge, 2016), 545.

[2] From a reading of the combined provisions of Art 37 and 51 it emerges that, in the case where one of the circumstances referred to in Art 37 arises, the court of the State where recognition is sought must deny recognition since no margin for discretionality can exist. Cf G. Cuniberti, 'Article 37: Grounds of non-recognition', in I. Viarengo and P. Franzina eds, *The Eu Regulations on the Property Regimes of International Couples. A Commentary* (Cheltenham: Edward Elgar, 2020), 345. On the other hand, the Court of Justice has stated that the list of the grounds referred to in Art 34 of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, the letter of which is identical to that of the Article under examination, constitutes an exhaustive list to be interpreted restrictively. See: Case C-157/12, *Salzgitter Mannesman Handel GmbH* v *SC Laminorul SA*, Judgment of 26 September 2013, available at www.eur-lex.europa.eu (last visited

In analysing what is envisaged by these Regulations, it will be necessary to bear in mind that in the preamble and, more precisely, in Recital (55) of the Regulation (EU) 2016/1103 and in Recital (56) of the Regulation (EU) 2016/1104, identified as general objective is the mutual recognition of the decisions given in the Member States in matters of property regime between spouses and of property consequences of registered partnerships.
Now, in proceeding to a classification of the grounds underlying non-recognition, these pertain to: public policy (*ordre public*) in its restricted sense - Art 37, letter a); lack of service - Art 37, letter b); irreconcilable decisions - Art 37, letters c) and d).

II. Public policy

Art 37, letter a) contemplates as first hypothesis of non -recognition the one in which recognition of the decision proves to be 'manifestly contrary to public policy (*ordre public*)' in the Member State where recognition is sought.
Public policy, insofar as it constitutes a general clause, presents a content determination of which cannot disregard application to the concrete case and the outcome of which varies in relation to the different legal system and historical periods of reference.
More precisely, by the term 'public policy' is meant the set of the fundamental principles expressing the values identifying the legal system of a State.[3]
Given that not all the principles of legal system can be said to identify the latter, in recognising foreign decisions the court must evaluate according to a criterion of reasonableness, by balancing the principles and values that emerge in the concrete case, whether there exist one or more principles - namely of public policy - that prevent recognition of the decision. Hence, what is important are those principles held to be essential and absolutely unrenounceable for the State where recognition is sought. In fact, in the restricted sense under

18 September 2021). In the same sense, A. Briggs, *Civil jurisdiction and judgments* (Abingdon: Informa law, 6th ed, 2015), 648.

[3] G. Perlingeri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Naples: Edizioni Scientifiche Italiane, 2019), *passim*.

examination here, public policy consists of the fundamental principles characterising a Member State, as well as the fundamental principle of Community law.[4]

In this perspective, as emerges also from Art 40 - 'No review as to substance'- it is of no importance that the substantive law applied in the dispute is different from that of the State in which recognition is sought; the divergence between the rules applied by the court of the State of origin and those that the court of the State in which recognition is sought would have applied, in fact, cannot legitimise non-recognition.[5]

---

[4] In fact, also the principles crystallised in the European Convention on Human rights (ECHR) fall within that core of fundamental principles that constitute the limit of public policy. In particular, the contracting States of the ECHR do not have to carry into effect decisions issued in infringement of fundamental rights consecrated in the Convention since the latter can be held to a fundamental and integral part of national law and the law of the European Union. See: I. Pretelli, 'I motivi di diniego del riconoscimento (Art 40)', in A. Bonomi and P. Wautelet eds, *Il Regolamento europeo sulle successioni. Commentario al Reg. UE 650/2012 applicabile dal 17 agosto 2015* (Milan: Giuffrè, 2015), 520; A. Briggs, n 2 above, 651; V. Égéa, 'Article 38. Motifs de non reconnaissance', in S. Corneloup et al eds, Le droit européen des régimes patrimoniaux des couples. Commentaire des règlements 2016/1103 et 2016/1104 (Paris: Société de législation comparée, 2018), 360; E. D'Alessandro, n 1 above, 547.

[5] On this point compare: E. D'Alessandro, *Il riconoscimento delle sentenze straniere* (Turin: Giappichelli Editore, 2007), 135; P. Bruno, *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate. Commento ai Regolamenti (UE) 24 giugno 2016, nn 1103 e 1104 applicabili dal 29 gennaio 2019* (Milan: Giuffrè Francis Lefebvre, 2019), 253; I, Pretelli, n 4 above, 528; G. Cuniberti, n 2 above, 346. On the other hand, in a recent pronouncement of the Corte di Cassazione 14 August 2020 no 17170, available at www.dejure.it (last visited 18 September 2021), it has been stated that, as regards recognition of foreign decisions and of public policy, the court is precluded from making any evaluation on the legal relationship deduced or from calling into question the content given that the fact that the foreign decision applies a discipline out of line with imperative or unrenounceable domestic rules cannot constitute an obstacle to recognition. Otherwise, the conflict-of-law rules would work only in the case where they led to enforcement of substantive provisions that have a contest similar to Italian ones, thus cancelling out the diversity between legal systems and rendering pointless the rules of private international law. In the specific case, the question regarded recognition of the decision of divorce pronounced by the Supreme Court of Theran between two Iranian spouses.

The Court of Justice [6] has pointed out that, even though it does not pertain to the Court to define the content of the public policy of a State, it falls within its faculties to control the limits within which the court of a State where recognition is sought can use this clause to deny recognition of the foreign decision.

The phrase of Art 37, letter a) in relation to the adverb 'manifestly,' referring to the way in which opposition to public policy must emerge, has generated considerable perplexity.

According to a first reconstruction, the ground of non-recognition could be invoked only when there is a blatant contrast with the ensemble of fundamental principles that come under public policy such that the result of application of the foreign rule appears 'unacceptable.'[7]

However, another part of the doctrine has emphasised that the use of the aforesaid adverb adds nothing to the restrictive concept of public

[6] Case C-7/98, *Dieter Krombach* v *André Bamberski,* [2000] ECR I-1935; Case C-38/98, *Régie Nationale des Usines Renault SA* v *MAxicar SpA, Orazio Formento*, [2000] ECR I-2973; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609; Case C-619/10, *Trade Agency Ltd* v *Seramico Investments Ltd*, Judgment of 6 September 2012, available at www.eur-lex.europa.eu (last visited 18 September 2021); Case C-599/14, *Rudolfs Meroni* v *Recoletos Limited, third parties: Aivars Lembergs, Olafs Berķis, Igors Skoks, Genādijs Ševcovs*, Judgment of 25 May 2016, available at www.eur-lex.europa.eu (last visited 18 September 2021). Moreover, the serious economic consequences deriving from recognition do not constitute an infringement of the public policy of the Member State where recognition is sought (cf Case C-302/13, *flyLAL-Lithuanian Airlines AS, in liquidation* v *Starptautiskā lidosta Rīga VAS, AIr Baltic Corporation AS*, Judgment of 23 October 2014, para 58, available at www.eur-lex.europa.eu (last visited 18 September 2021).

[7] Basically the court which is called upon not to recognise a decision given in another Member State should do so only where the introduction of that decision into the legal system of its own is to be deemed 'intolerable' and such as to arouse disapproval. See: P. Bruno, n 5 above, 253; I Pretelli, n 4 above, 521. Cf Case C-54/99, *Association Église de Scientologie de Paris, Scientology International Reserves Trust* v *the prime Minister*, [2000] ECR I-1335: the Court stated that 'public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.' On the other hand, the court of the State where recognition is sought in evoking the limit of public policy must provide adequate reasons. Thus F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione)* (Assago: Wolter Kluwer Italia; Padua: CEDAM, 4th ed, 2015), 345.

policy already adopted by the Court of Justice.[8] In fact, to return to the reconstruction already made at the start of the section, the Court has for some time now deemed that recourse to the clause on public policy can be had only where recognition or enforcement of the decision given in another Member State is in contrast, to an unacceptable extent, with the legal system in which enforcement thereof is required insofar as said recognition or enforcement infringes a fundamental principle.[9]

In conclusion, public policy assumes the function of limit; eg it becomes an instrument through which to preclude entry into State where recognition is sought in the event of legal situations that run contrary to the fundamental and identifying values of the legal system.[10]

Before proceeding to an examination of the subsequent grounds of non-recognition, it is necessary to dwell somewhat on one last point linked to the content of the clause under examination.

Art 37, letter a) excludes recognition both in cases of contrast with the substantive public policy and in those cases of infringement of procedural public policy that do not fall within the, so to speak 'special' provision, referred to in Art 37, letter b).[11]

---

[8] G. Cuniberti, n 2 above, 347, for whom it is not possible to hold that only the most evident and most important infringements are to be sanctioned (if this were the case, the formulation of the regulation would have had to be different); E. D'Alessandro, *Il riconoscimento* n 5 above, 138.

[9] The Court of Justice adopted a restrictive interpretation already when the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968 was in force, Art 27, no 1, of which did not contain the adverb 'manifestly.' See: Case C-7/98, *Dieter Krombach* v *André Bamberski*, n 6 above, para 37; Case C-38/98, *Régie Nationale des Usines Renault SA* v *MAxicar SpA, Orazio Formento*, n 6 above, para 30. Subsequently, Case C-619/10, *Trade Agency Ltd* v *Seramico Investments Ltd*, n 6 above, para 51.

[10] It would appear expedient to recall in this sense the metaphor of public policy as 'drawbridge' set at entrance to the 'ideal castle' constituted by the legal system of the State where recognition is sought, effectively used by G. Perlingeri and G. Zarra, n 3 above, 3.

[11] According to F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (CE) N. 44/2001 (La revisione della Convenzione di Bruxelles del 1968)* (Padua: CEDAM, 3rd ed, 2006), 336-337, Art 34, no 1, of the Regulation (EC) 44/2001 is the instrument, apart from Art 34, no 2, through which it is possible to enforce the limits of procedural publicpolicy.

By this latter statement it is to be understood that denial of recognition on the grounds of the latter being contrary to public policy in conformance with letter a) can intervene also where the foreign decision is manifestly contrary to a fundamental principle of procedural public policy of the State where recognition is sought,[12] except in the case where it is a principle of procedural public policy that pertains to the scope of letter b) of the same Article.

III. Lack of service

Art 37, letter b), in stating as grounds for non recognition of the decision the condition that, in the case where said decision was given in default of appearance, 'the defendant was not served with the document which instituted the proceedings or an equivalent document in sufficient time and such in a way as to enable him to arrange for his defence (...),' implies, as has been anticipated, reasons connected to procedural public policy.

Reference is in particular to the principle of fair trial, which is disciplined by Art 6 of the European Convention on Human Rights (ECHR) and Art 47 of the Charter of Fundamental Rights of the European Union, as well as being contemplated and protected by the common constitutional traditions of the Member States.

According to the interpretation of the Court of Justice, Art 6 of the European Convention on Human Rights sanctions certain principles that have come to constitute fundamental values of the European Union. Assuming particular importance here amongst the above

[12] E. D'Alessandro, *Il riconoscimento* n 5 above, 156: for example, injury to the guarantee of neutrality and impartiality of the judge. Cf Corte di Cassazione 26 February 2021 no 5327, available at www.dejure.it (last visited 18 September 2021), which instituted that integrating an infringement of the right to evidence of the party, who must respect the obligations following upon the Court decision for which enforcement is required, and likewise an infringement of the procedural public policy, is the decision of the foreign court which, in relation to ascertainment of naturale paternity, bases that decision upon altogether peremptory reasons adduced after first ordering *ex officio*, and then revoking without explanation, admission to the DNA test, albeit in the presence of declared availability on the part of the alleged father to undergo the test, there thus emerging the irrationality of interruption of the procedure that constitutes evidence of particularly probative value.

principles is the right of defence, which, insofar as it is a fundamental principle of Community law, for this very reason must be guaranteed in any proceedings. [13]

Inherent in exercise of the right of defence are: the right of every subject to be informed of the proceedings pending in his regard, and hence the right to be put in the condition he can take part therein; the right of reply, which implies the possibility of knowing in sufficient time the claim of the counterparty; and observance of the adversarial principle.

Non-recognition operates in the event that there has been an injury to the trial guarantees of the defence, namely in the case where the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.

It is expedient, at this point, to investigate the conditions required by the provision under examination, bearing in mind that the notions of 'document which instituted the proceedings,' 'defendant in default of appearance,' and 'sufficient time' are notions independent of those formulated in the Member States.

In the first place, the defendant must be 'in default of appearance,' eg he must not have appeared before the court of the State of origin, either in person, or through the representation of a lawyer. Also considered as being in default of appearance is the defendant who is not cognisant of the proceedings instituted against him and who has

---

[13] Case C-135/92, *Fiskano AB* v *Commission of the European Communities*, [1994] ECR I-2885; Case C-7/98, *Dieter Krombach* v *André Bamberski*, n 6 above, para 42, where the Court stated that the 'observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question;' Case C-394/07, *Marco Gambazzi* v *DaimlerChrysler Canada Inc., CIBC Mellon Trust Company*, [2009] ECR I-2563, para 28, which reads: 'With regard to exercise of the rights of defence, (...) the Court has pointed out that this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States and from the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, among which the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, is of particular importance.'

not been duly represented because in court a lawyer appeared upon whom he had not conferred any mandate.[14]

Another condition is the lack or tardiness of service. The provision regarding service does not circumstantiate application to the document which instituted the proceedings alone but extends it to any other 'equivalent document' owing to the fact that each legal system may contemplate different documents and formalities for instituting proceedings. By 'equivalent document' is to be understood the document whereby the legal action is instituted, and in particular, according to the perspective of the Court of Justice, the document or documents service of which to the defendant performed in sufficient time enables the latter to assert his rights before an executory measure is issued in the State of origin.[15] In concrete terms, this equivalent document is the document the contents of which allow the defendant to know of the existence of the proceedings against him (in the course of which he can assert his rights), as well to identify the subject-matter of the plaintiff's claim and the cause of action.[16]

There thus emerges from the words of the Court the criterion that must guide evaluation of the interpreter called upon to decide whether the case under analysis falls within the provision of Art 37, letter b), with consequent non-recognition. This criterion is the effective

---

[14] Case C-78/95, *Bernardus Hendrikman, Maria Feyen* v *Magenta Druck & Verlag GmbH*,[1996] ECR I-4943, para 18. Instead the Court of Justice has held that the defendant is to be deemed as appearing when, in the context of a claim for compensation proposed in criminal proceedings, he has presented his defence through a lawyer in the course of the hearing, but not in the context of civil claim. Cf Case C-172/91, *Volker Sonntag* v *Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, [1993] ECR I-1963, para 44.

[15] Case C-474/93, *Hengs Import BV* v *Anna Maria Campese*, [1995] ECR I-2113.

[16] Case C-14/07, *Ingenieurbüro Michael Weiss und Partner GbR* v *Industrie- und Handelskammer Berlin, joined party: Nicholas Grimshaw & Partners Ltd*, [2008] ECR I-3367, para 73: 'Such a document must make it possible to identify with a degree of certainty at the very least the subject-matter of the claim and the cause of action as well as the summons to appear before the court or, depending on the nature of the pending proceedings, to be aware that it is possible to appeal'; Case C-39/02, *Maersk Olie & Gas A/S* v *Firma M. de HAan en W. de Boer*, [2004] ECR I-9657, para 56, where the Court pointed out that these grounds of denial cannot be invoked in the case where the defendant 'was notified of the elements of the claim and had the opportunity to arrange for his defence.'

respect of the rights of the defence, a parameter in the light of which further reflections can be brought forward and the questions that derive therefrom can be resolved.

Given that the provision of the Regulations connects the denial of recognition to cases of lack of service or tardiness of service, it is necessary to pose oneself the question regarding whether the decision should be recognised or not on case that service of the defendant with the judicial document that institutes the proceedings or with an equivalent document presents profiles of irregularity.

Unlike Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968 - of which Art 27, no 2, envisages as grounds for non-recognition, not only the lack of service to the defendant in default of appearance of the document which instituted the proceedings or of an equivalent document 'in sufficient time,' but also the case where the introductory document has not been duly served - no reference to regularity appears in the text of the provision under examination.[17]

The formal regularity of the introductory document cannot hence be considered a decisive element for the purposes of recognition.[18] In fact, the lack of such an indication in the text of the Regulations (EU) 2016/1103 and 2016/1104 has led interpreters to maintain that the mere irregularity does not render legitimate the denial of recognition unless said lack results in the impossibility for the defendant to arrange for his own defence.[19]

Thus in the same way an albeit formally regular service could prove unsuitable for guaranteeing the addressee exercise of the aforesaid right of defence. In this perspective, the court of the State in which recognition in sought, taking into account all the concrete circumstances, such as the means employed for effecting service, the relationship between the plaintiff and the defendant, and the nature of the action that has had to be undertaken to prevent judgment from

---

[17] Reference to regularity no longer appears with the Council Regulation (EC) 44/2001.

[18] F. Salerno, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (CE) N. 44/2001*, n 11 above, 325.

[19] Case C-283/05, *ASML Netherlands BV* v *Semiconductor Industry Services Gmbh (SEMIS)*, [2006] ECR I-12041.

being given in default, could reach the conclusion that the formal regularity of the document has not been sufficient to allow the defendant to arrange for his defence.

Consequently, the reasoning must be always founded upon the respect of the right of defence, which presupposes a concrete and effective protection.

The doctrine has occupied itself with the question of service of a document written in a language unknown to the defendant, concluding precisely in this direction that the lack of a translation of the document may constitute a circumstance that legitimises non-recognition of the decision in the case where such an omission has had adverse repercussions on the effective protection of the rights of defence of the addressee.[20]

Such is the logic that is to be observed also (and especially) in determining whether the defendant has been served with the document which instituted the proceedings or equivalent document in 'sufficient time,' eg, in the time necessary to allow the defendant to exert his right of defence.[21]

---

[20] On this point E. D'Alessandro, *Il riconoscimento* n 5 above, 155-156: the Author follows a similar line of reasoning in relation to Art 34, no 2, of the Regulation (EC) 44/2001 and to the Council Regulation (EC) no 1348/2000 of 29 May 2000 on service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2000] OJ L160/37. Likewise compare Case C-529/13, *Alpha Bank Cyprus Ltd* v *Dau Si Senh and o.*, Judgment of 16 September 2015, para 43, available at www.eur-lex.europa.eu (last visited 18 September 2021). In this case, the Court, in interpreting the Regulation (EC) no 1393/2007 of the European parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) no 1348/2000 [2007] OJ L324/79, stated: 'In essence, that court will be required, in each individual case, to ensure that the respective rights of the parties concerned are upheld in a balanced manner, by weighing the objective of efficiency and of rapidity of the service in the interest of the applicant against that of the effective protection of the rights of the defence on the part of the addressee.'

[21] Case C-166/80, *Peter Klomps* v *Karl Michel*, [1981] ECR 1593, para 21, the Court stated: 'the court in which enforcement is sought may as a general rule confine itself to examining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time for his defence. However the court is also required to consider whether, in a particular case, there are exceptional

Finally, the lack or tardiness of the service of the document which instituted the proceedings or equivalent document cannot constitute grounds for non-recognition where the defendant 'failed to commence proceedings to challenge the decision when it was possible for him to do so.'

The rights of defence that the European Regulations aim at guaranteeing and protecting through the formulation of Art 37, letter b) do not undergo a compression or limitation in the case where the defendant has had the possibility of appealing against the decision given in default of appearance by essentially asserting the lack or tardiness of service that has prevented him from defending himself previously.[22]

Given that the *ratio* of the Article is the guarantee of the right of defence, the final phrase of the provision referred to in letter b) is aimed at discouraging any possible strategic intentions of the defendant in default of appearance, preventing him from tactically awaiting the procedure of recognition in the State where recognition is sought in order to assert infringement of the rights of defence of which, in actual fact, he had the possibility of complaint by lodging an appeal against the decision given in default of appearance in the State of origin.

The Court of Justice has pointed out that the defendant in default of appearance has the possibility of challenging a decision in default issued against him, and hence of availing himself of the means contemplated by the legal system *a quo* to cause lapsing of the defective judgment when he has had knowledge of the content of the decision, of course on the assumption that the service of the decision has been effected in sufficient time to enable him to arrange for his defence before the court of the State of origin. It cannot, however, be expected that the defendant, in order to protect his rights, takes action 'going beyond normal diligence.'[23]

---

circumstances such as the fact that, although service was duly effected, it was nevertheless inadequate for the purpose of causing that time to begin to run.'

[22] Case C-420/07, *Meltis Apostolides* v *David Charles Nowms, Linda Elizabeth Nowsm*, [2009] I-3571, para 80.

[23] Case C-283/05, *ASML Netherlands BV* v *Semiconductor Industry Services Gmbh (SEMIS)*, n 19 above, paras 42-43, where, *inter alia*, the Court of Justice draws a parallel between the document instituting the proceedings and the judgment

IV. Irreconcilable decisions

The conditions mentioned in Art 37, letters c) e d) may be treated jointly since they constitute grounds for non-recognition that can both be subsumed in the sphere of irreconcilable decisions.
The provision of the Regulations concerning *lis pendens* and related actions should make it possible to avoid and prevent any contrast between decisions; where, however, in the stage of recognition and enforcement there emerged irreconcilable decisions, it will be necessary to resolve the conflict according to the modalities contemplated by the Article under examination.
A preliminary question addressed in the doctrine[24] regards the scope of Art 37, letters c) and d). The grounds for non-recognition refer to incompatibility between 'decisions,' where by 'decision' is to be understood, pursuant to Art 3 of the Regulations, 'any decision (...) given by a court of a Member State, whatever the decision may be called.'[25]
Notwithstanding this, Recital (63) of the Regulations (EU) 2016/1103 and Recital (62) of the Regulation (EU) 2016/1104 state that, in the event of incompatibility between an 'authentic instrument' and a decision, 'regard should be had to the grounds of non-recognition of decisions' under the Regulation itself.
In line with the grounds of non-recognition referred to in Art 37, letter c), recognition is hindered whenever the foreign decision runs counter to another decision issued between the same parties in the State in which recognition is sought.

---

delivered in default of appearance and affirms that 'it is service of the document instituting the proceedings and the default judgment, (...), in sufficient time and in such a way as to enable the defendant to arrange for his defence which afford him the opportunity to ensure that his rights are respected before the courts of the State in which the judgment was given.' Cf case C-70/15, *Emmanuel Lebek* v *Janusz Domino*, Judgment of 7 July 2015, available at www.eur-lex.europa.eu (last visited 18 September 2021). On this point M. De Cristofaro, 'L'onere di impugnazione della sentenza quale limite al rilievo dei vizi nella fase introduttiva del giudizio chiuso da sentenza contumaciale: tra diritto di difesa e full faith and credit' *Int'l Lis*, 7 (2007).

[24] G. Cuniberti, n 2 above, 352; I. Pretelli, n 4 above, 535.

[25] Art 3, para 1, letter d), Regulation (EU) 2016/1103 and Art 3, para 1, letter e), Regulation (EU) 2016/1104.

The Court of Justice[26] stated that irreconcilability of decisions manifests itself when the controversial decisions produce juridical effects that are mutually exclusive.

As regards the criterion to be adopted to understand which of the conflicting decisions is to prevail, in the absence of any specification in the letter of the provision of the Regulations regarding the temporal criterion, it is deemed that recognition is to be denied, not only in the case where the foreign decision runs counter to a preceding domestic decision, but also in the case where there is incompatibility with a subsequent domestic decision; essentially, the court of the State in which recognition is sought is called upon to recognise primacy of the decision of the forum.[27]

If this were not so, by authorising recognition of a foreign decision that runs counter to a jurisdictional pronouncement issued in the State in which recognition is sought, according to the Luxembourg Court,[28] a result contrary to the principle of legal certainty would be arrived at.

Other are the conditions that justify the non-recognition referred to in Art 37, letter d).

In the first place, the irreconcilability lies between the foreign decision and a decision made in another Member State or in a third State provided that such decision 'fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.'

In the second place, relevant for the purposes of conflict is the decision issued previously and between the same parties in proceedings having the same cause of action.

---

[26] Case C-145/86, *Horst Ludwing Martin Hoffman* v *Adelheid Kreig*, [1988] ECR 645, para 22: in the case in point the Court established that 'a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable (...) with a national judgment pronouncing the divorce of the spouses.' On this point see also Case C-80/00, *Italian Leather SpA* v *WECO Polstermöbel GmbH & Co.*, [2002] ECR I-4995.

[27] P. Bruno, n 5 above, 260-261; A. Briggs, n 2 above, 661; I. Pretelli, n 4 above, 537, for whom this solution responds to the need to ensure the priority, in the State where recognition is sought, of the national decisions.

[28] Case C-80/00, *Italian Leather SpA* v *WECO Polstermöbel GmbH & Co.*, n 26 above, para 51.

On the other hand, the conditions set out in the provision under examination recall the conditions laid down in Art 17 of both Regulations, which concerns *lis pendens*.
However, as anticipated, where this mechanism, which ought to have avoided onset of the conflict, has not worked - since, for example, it has not emerged that proceedings involving the same cause of action and between the same parties have been brought before courts of different Member States or that the court has not suspended the proceedings - the question of irreconcilable decisions under examination arises.[29]
It should be noted that the ground referred to in letter d), by limiting non-recognition to decisions stemming from disputes with subjective and objective identity, as well as by attributing importance to the temporal criterion, reproposes a notion of conflict that is more restrictive than that of letter c).[30]

[29] *Amplius* I. Pretelli, n 4 above, 538-539.
[30] ibid.