Chapter 2
The Evolution of Free Movement of Civil Judgments in the European Union

Abstract This chapter outlines the development of legislation on free movement of civil judgments in the European Union. This legislation has evolved radically over the past decades. The chapter shows that whereas legislation on civil justice cooperation was originally motivated by the internal market rationale, aimed at facilitating trade, the objective of creating a true European area of freedom, security, and justice, and the introduction of mutual recognition, meant that civil justice cooperation became more ideologically motivated. Since the Tampere European Council of 1999 made mutual recognition a principle of civil justice cooperation, the EU legislature made it a priority to simplify cross-border recognition and enforcement as much as possible and to remove potential obstacles. The chapter then goes on to discuss how recognition and enforcement are currently organized under EU legislation in the field of civil justice. It considers how this mechanism is laid down in a number of instruments: the Brussels I bis Regulation (the recast Brussels I Regulation), the Brussels II bis Regulation, the Insolvency Regulation and the Succession Regulation. It also discusses the two uniform European Procedures, the European Small Claims Procedure (ESCP) and the European Order for Payment Procedure (EOP), as well as the European Enforcement Order for uncontested claims (EEO).

Keywords Recognition and enforcement · Exequatur · Mutual recognition · Mutual trust · European Union civil justice cooperation · Area of Freedom · Security and Justice

Contents

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2.1 Introduction

In an integrated legal order such as the European Union (EU), free movement of civil judgments is essential to enabling cross-border trade and to ensuring legal certainty. In order to achieve free movement, EU legislation long since facilitated the recognition and enforcement of civil judgments delivered in one Member State in another Member State. This legislation has evolved radically over the past decades. Since the Tampere European Council of 1999 made mutual recognition a principle of civil justice cooperation, the EU legislature made it a priority to simplify cross-border recognition and enforcement as much as possible and to remove potential obstacles. This chapter outlines the evolution within the EU of the rules facilitating recognition and enforcement of civil judgments and shows the changes that have an impact on the protection of both parties' right to a fair trial.

This chapter starts by placing the development of mechanisms for recognition and enforcement in the broader context of legislation in the field of judicial cooperation in civil matters (Sect. 2.1). It shows that whereas legislation on civil justice cooperation was originally motivated by the internal market rationale, aimed at facilitating trade, the objective of creating a true European area of freedom, security, and justice, and the introduction of mutual recognition, meant that civil justice cooperation became more ideologically motivated. Justice has become increasingly accessible to all types of litigants, and the recognition and enforcement of civil judgments is now seen not simply as the fulfilment of a legal obligation but as an expression of trust among Member States. This ideology led to the gradual abolition of obstacles to complete free movement of civil judgments, as Sect. 2.1.3 explains.

Section 2.2 goes on to discuss how recognition and enforcement are currently organized under EU legislation in the field of civil justice. It shows that the mechanism obtaining permission for enforcement is characterized by a strict separation into what is called judgment import, the simplified and nearly automatic procedure

for obtaining a declaration of enforceability (exequatur), and what is called judgment inspection, the opportunity to challenge the recognition or enforcement on appeal on the basis of a limited number of grounds for refusal. After these general observations, the chapter considers how this mechanism is laid down in a number of instruments: the Brussels I bis Regulation (the recast Brussels I Regulation), the Brussels II bis Regulation, the Insolvency Regulation and the Succession Regulation. It also discusses the two uniform European Procedures, the European Small Claims Procedure (ESCP) and the European Order for Payment Procedure (EOP), as well as the European Enforcement Order for uncontested claims (EEO). It discusses to what extent these instruments achieved complete free movement of judgments in their respective fields. The discussion of the existing legislation provides a basis for Chap. 3, which examines the consequences of the abolition of obstacles to free movement of civil judgments for the protection of the right to a fair trial.

2.2 Free Movement of Civil Judgments in the EU: Historical and Political Background

2.2.1 Free Movement of Judgments and the Internal Market

Free movement of civil judgments means that parties are able to invoke a judgment in a civil case in a state other than the state where it was delivered. This requires that recognition of the judgment is possible, and that enforcement of the judgment is facilitated. Recognition of a foreign judgment means that its legal effects may be relied on. An example of this may be where a judgment from one state establishes that the seizure of goods was unlawful, and is invoked to claim damages for the unlawful seizure in another state.[1] Enforcement means that the judgment creditor may take measures, assisted by an enforcement authority such as a bailiff if necessary, to ensure that he indeed receives what the judgment awarded him: for example by attaching a bank account. In this research, free movement of judgments refers to the facilitation, to the greatest extent possible, of cross-border recognition and enforcement, by EU legislation. Complete free movement means that judgments are recognized and can be enforced across borders without the interested parties needing to surmount any procedural obstacles.

Free movement of civil judgments across national borders is essential to fostering international trade and to facilitating the free movement of persons across borders. It is especially important in the EU, an internal market in which goods, people and capital move freely across its Member States. Early on, it was realized that international trade within the Union would be greatly aided if the rights arising out of legal relationships concluded across borders could be adequately recognized and enforced throughout the Union. If a judgment resulting

[1] CJEU Case C-681/13 *Diageo Brands v Simiramida-04 EOOD* ECLI:EU:C:2015:471.

from a trade conflict could not be recognized or enforced over a debtor's assets in another Member State, this would greatly discourage parties from entering into cross-border trade relationships. Effective mechanisms for cross-border recognition and enforcement are therefore a prerequisite for international trade. The benefits of securing cross-border recognition and enforcement are not limited to the interests of the parties involved. As summed up by Michaels:

> Parties are interested in transnational legal certainty and in avoiding repeated litigation and conflicting decisions; the general public has an interest in avoiding resources spent on re-litigation and in international decisional harmonies; and States have a common interest in promoting inter-State transactions.[2]

Facilitating cross-border recognition and enforcement of judgments resulting from civil and commercial cases has therefore long been on the European legislative agenda. The founding Treaty on the European Economic Community (EEC Treaty) already contained a provision requiring the Member States to enter into negotiations in order to "simplify formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."[3]

In 1959 the Commission of the European Economic Community invited the then six Member States to enter into such negotiations. In its letter, it stated that:

> [A] true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.[4]

The Member States entered into such negotiations, which resulted in the first EU instrument regulating jurisdiction, recognition and enforcement: the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[5] or the 'Brussels Convention', signed by the then six Member States of the European Economic Community (EEC) on 27 September 1968.[6] The Brussels Convention applied to most types of civil and commercial matters, excepting family matters, insolvency proceedings, social security, and

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[2] Michaels (2009) para 1.

[3] Treaty Establishing the European Economic Community, Rome 1957, OJ 25 March 1957, Article 220.

[4] Jenard (1979) p. 3.

[5] Convention of 27 September 1968 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels on 27 September 1968 ('Brussels Convention').

[6] The Lugano Convention extends the Brussels regime to three EFTA Member States: Switzerland, Norway and Iceland. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988.

arbitration. The introduction of rules on jurisdiction is understandable considering that jurisdiction of the court of origin is a common prerequisite for recognition and enforcement in many national legal systems.[7]

One of the most important elements of the Convention was the introduction of a common procedure for obtaining a declaration of enforceability (*exequatur*), in the Member State where enforcement was sought, of the judgments falling within its scope. The introduction of this procedure was important because it greatly reduced the procedural steps interested parties would need to take in order to have their judgments enforced in other EU Member States. Prior to the introduction of this common procedure, recognition and enforcement of foreign judgments was either governed by national procedural law—and therefore different in each state—or governed by bi-or multilateral treaties.[8] In some states enforcement of foreign judgments was very difficult, if not almost impossible, necessitating complicated procedural steps. What was revolutionary about the newly introduced regime for recognition and enforcement was that it guaranteed, to the furthest extent possible, the recognition and enforcement of judgments, and created a simple and uniform procedure for obtaining recognition. All judgments were recognized automatically,[9] which meant that the effects of the judgment could be relied on in all EU Member States without any procedural steps being necessary. As for enforcement, the Convention provided for both 'judgment import' and 'judgment inspection'. In order to enforce a judgment from one Member State in another Member State a declaration of enforceability had to be obtained: the exequatur.[10] The exequatur effectively imported the foreign judgment into the legal order of the Member State where enforcement was sought.

The Brussels Convention balanced this simple procedure for cross-border enforcement, which greatly benefited judgment creditors, with protection for judgment debtors: it allowed Member States to refuse recognition or enforcement if one of a number of specific refusal grounds applied (judgment inspection). The introduction of common refusal grounds became a standard feature of EU legislation in the field, as they provided protection of the debtor's (and other interested parties') rights, while also being narrowly defined and thus providing clarity on the grounds on which recognition or enforcement could be refused. The Brussels Convention authorized Member States to refuse recognition or enforcement if such recognition or enforcement would be 'contrary to public policy in the State in which recognition is sought' (Article 27(1)). The concept of public policy or *ordre public*, which is discussed in detail further on,[11] encompasses principles that are

[7] For example France (Rosner (2004) p. 233); Germany (Section 328(1) *Zivilprozessordnung*) Switzerland (Article 26 Federal Statute on Private International Law).

[8] Of course this is still the case for judgments falling outside the scope of European Union legislation. See for an historical overview Berglund (2009).

[9] Article 26, Brussels Convention.

[10] Article 31, Brussels Convention.

[11] Section 3.2.

deemed to be of fundamental importance in the legal order of the Member State where enforcement is sought. As the next chapter shows, the public policy exception has proved instrumental in protecting the debtor's right to a fair trial.

The debtor's procedural rights were also protected by the another ground for refusal, improper service in default proceedings. Recognition or enforcement could be refused where the judgment was given in default of appearance, if the defendant was not duly served with the document that instituted the proceedings, or with an equivalent document, in sufficient time to enable him to arrange for his defence (Article 27(2)). Recognition or enforcement could also be refused for judgments that were irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition was sought, or a judgment given in a third state, provided it involved the same cause of action and the same parties and fulfilled the conditions necessary for its recognition in the state addressed (Articles 27(3) and (5)).[12]

The early Treaties on the European (Economic) Community did not give the European Community (EC) the capacity to pass legislation on free movement of judgments, which is why the first instrument within the context of the EU was a convention concluded by its Member States. This changed with the 1993 Treaty of Maastricht, which created the first legal basis for the European institutions to legislate in this field under Title VI of the Treaty on European Union. The 1997 Treaty of Amsterdam then moved this legal basis to Title IV of the EC Treaty.[13] This enabled the EC to pass legislation on these matters if necessary to guarantee free movement, and firmly entrenched judicial cooperation in the framework of the internal market. It also meant that legislation on cooperation in the field of civil justice could now take the form of EC regulations.

For the cross-border recognition and enforcement of judgments, this meant that the Brussels Convention was replaced by a regulation. On 1 March 2002, Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, or the 'Brussels I Regulation', entered into force.[14] This regulation simplified the procedure for obtaining an exe-

[12] Article 27(4) is not discussed here because it was removed when the Convention became a Regulation and therefore was not a factor in the discussion on the abolition of refusal grounds. Article 27(4) allowed recognition or enforcement to be refused if the court of the State of origin, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State.

[13] Under the current Treaty on the Functioning of the European Union (TFEU) judicial cooperation in civil matters is based on Title V (Articles 67–89) of Part III (Consolidated version of the Treaty on the Functioning of the European Union OJ C 83/47). With the adoption of the Lisbon Treaty in 2009 the European Union has replaced and succeeded the European Community.

[14] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments, OJ L 12/1 (the 'Brussels I Regulation').

quatur: whereas under the Brussels Convention the court in the Member State where enforcement was requested could review the grounds for refusal at the judgment import stage, before it issued a declaration of enforceability, under the Brussels I Regulation this review was no longer possible.[15] This meant that a declaration of enforceability would be issued after a check of only formal requirements. The party against whom enforcement was sought would then have to take the initiative to invoke the refusal grounds, in either an application for refusal of the declaration of enforceability, or incidentally in another procedure.[16] The Brussels I Regulation thus clearly distinguished between a judgment import and a judgment inspection stage.

Furthermore, two of the grounds for refusal were limited: the Brussels I Regulation codified the limitation on public policy[17] introduced by the Court of Justice of the European Union (CJEU) in its case law.[18] Recognition or enforcement could now only be refused in case of a 'manifest' incompatibility with public policy. The Brussels I Regulation also limited the application of the ground for refusal of undue service upon the defendant in case of a default judgment[19] so that it no longer applied in cases where the defendant did not lodge an appeal even though he was able to do so. This increased legal certainty for the creditor.[20]

The creation of a Europe without internal borders did not just facilitate cross-border trade, but also the movement of individuals (such as workers and students), families and property. This meant that the recognition of other legal claims across borders became increasingly important. The harmonized procedure for recognition and enforcement devised in the Brussels system was therefore transposed (with some specifics) to a number of instruments in specific areas of civil justice. Most of these are found in the area of family law. The mechanism for recognition and enforcement of the Brussels system thus became a standard feature of EU instruments on civil justice cooperation. However, the introduction of mutual recognition in 1999 brought about radical reforms of this mechanism.

2.2.2 The Introduction of Mutual Recognition

The development of EU policies on judicial cooperation gathered momentum with the introduction of the 'Area of Freedom, Security and Justice'. Created by the 1992 Maastricht Treaty, this policy area encompasses police and judicial

[15] Article 41, first sentence, Brussels I Regulation.

[16] Article 43 Brussels I Regulation.

[17] Article 34(1) Brussels I Regulation.

[18] See in more detail Sect. 3.2.5.

[19] Article 34(2) of the Brussels I Regulation, Article 27(1) of the Brussels Convention.

[20] See Sect. 3.3.1.

cooperation in criminal matters as well as judicial cooperation in civil matters. It became more prominent after the Treaty of Amsterdam intensified cooperation in criminal matters within the Third Pillar (Justice and Home Affairs), increasing openness and accountability,[21] while cooperation in civil matters was moved to the Community pillar entirely. The area of freedom, security and justice was the topic of the 1999 European Council in Tampere. In its Conclusions,[22] the Presidency of the European Council introduced the principle of mutual recognition as the cornerstone for cooperation in this area.[23] The implementation of mutual recognition meant that intermediate steps necessary for the enforcement of judgments across borders would need to be reduced.[24] The introduction of this principle therefore led to a new policy goal: the abolition of the requirement for an exequatur and reform of the grounds for refusal, for all types of civil cases.

The implementation of this plan started in 2004 with the adoption of the EEO.[25] The EEO regulation authorizes the court of origin of a judgment resulting from an uncontested claim to certify the judgment as an EEO. This Order is then enforceable throughout the EU without an exequatur being required and without any possibility for refusing its recognition or enforcement. The regulation applies only to uncontested claims and is intended to reduce the delay and expenses associated with the need for an exequatur.[26]

The EEO paved the way for two unprecedented uniform European procedures: the European Order for Payment Procedure (EOP),[27] and the European Small Claims Procedure (ESCP).[28] These instruments do not require an exequatur, but result in decisions that are immediately enforceable throughout the EU. Instead of refusal grounds, they contain minimum standards that are intended to safeguard the procedural rights of the debtors. All three instruments are available only in civil or commercial matters that have cross-border implications. Their purpose, according to their recitals, is to increase speed and reduce costs in cross-border

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[21] Craig and De Bùrca (2015) p. 966.

[22] Tampere European Council, 15–16 October 1999, Presidency Conclusions (the 'Tampere Conclusions').

[23] Tampere Conclusions, para 33. See Storskrubb (2016). See in general on the topic of mutual recognition Janssens (2013), Thunberg Schunke (2013), Ouwerkerk (2011), Thomas (2013).

[24] See Sect. 2.1.3 of this chapter.

[25] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 134/15 (the 'EEO Regulation').

[26] Recital 9, EEO Regulation.

[27] Regulation (EC) No 1896/2006 of the European Parliament and the Council of 12 December 2006 creating a European Order for Payment Procedure, OJ L 399/1 (the 'EOP Regulation'). See Sect. 2.2.7.

[28] Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199/1 (the 'ESCP Regulation'). See Sect. 2.3.7.

litigation. While the EEO and EOP seek to facilitate commercial litigation, the ESCP is primarily aimed at consumer cases.

Having achieved complete free movement of judgments in these three instruments, the European legislature pursued this goal for the Brussels I Regulation. As opposed to the three instruments discussed above, which are optional and have a limited scope, the Brussels I Regulation applies to most civil judgments and is mandatory. The proposed abolition of exequatur and refusal grounds under this instrument therefore met with more resistance than the introduction of the three optional instruments.

The proposal for reform of Brussels I was buttressed by the finding of the 2007 Heidelberg Report[29] that the exequatur procedure of the Brussels I Regulation had functioned quite efficiently, given that in 90 % of cases a declaration of enforceability was granted and that it was seldom challenged successfully. The European Commission, in its 2009 Green Paper on the Review of Brussels I,[30] concluded on the basis of these numbers that abolition of exequatur for all civil and commercial matters would be feasible. In 2010 the Commission therefore submitted a proposal for a recast[31] of the Brussels I Regulation in which the exequatur was abolished. The grounds for refusal would be narrowed, and their application redistributed among the Member State of origin and the Member State of enforcement. The public policy exception was to be replaced with a more narrow reference to 'fundamental principles underlying the right to a fair trial'. The 2010 Proposal also entailed a redistribution of the authority to apply refusal grounds between the Member State of origin and the Member State of enforcement: the ground for refusal of undue service upon the defendant in case of a default judgment (Article 34(2) of Brussels I) would be applicable only in the Member State of origin.[32]

The 2010 Commission Proposal provoked much discussion on the value of the exequatur and the grounds for refusal. From the reactions to the 2009 Green Paper, it was clear that abolition of the exequatur was generally supported, but that reform or abolition of the refusal grounds was not.[33] The recast Regulation

[29] Hess et al. (2007) p. 221. The findings of this report are discussed in more detail in Sect. 2.2.4.

[30] Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2009) 175 final.

[31] Recasting is a legislative technique that involves bringing together in a single new act a legislative act and all the amendments made to it. The new act passes through the full legislative process and repeals all the acts being recast. Apart from codification, recasting involves new substantive changes, as amendments are made to the original act during preparation of the recast text. See http://ec.europa.eu/dgs/legal_service/recasting_en.htm, last visited 06 March 2016.

[32] See Zilinsky (2011) para 2.3.

[33] Oberhammer (2010); see the contributions to the consultation on the 2009 Green Paper on the review of Regulation 44/2001, available at http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm, from Austria; Belgium; Bulgaria; Denmark; Finland; Germany; less clearly, Greece; Latvia; Lithuania; Malta; Slovenia; and the UK.

1215/2012,[34] which entered into force on 10 January 2015,[35] indeed abolished the exequatur as it existed under Brussels I. All that is needed for enforcement today is a certificate issued by the court of origin, but this only serves to provide information to the enforcement authorities and does not as such constitute an enforceable title. The grounds for refusal however remain intact.[36]

The introduction of mutual recognition also had a profound impact in the field of family law. Regulation 2201/2003 (the Brussels II bis Regulation),[37] which facilitates the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, allowed for complete free movement of judgments ordering the return of a child in order to simplify and speed up the return of a child in cases of abduction.[38] An exequatur is still required for custody orders.[39] A 2014 report by the European Commission expressed a clear intention to pursue the further abolition of exequatur for judgments in the field of family law.[40]

The 2009 Maintenance Regulation also abolished exequatur and refusal grounds for maintenance orders.[41] According to the proposal for the regulation, the reasons for proposing abolition of exequatur were (1) simplifying the citizen's life, (2) strengthening legal certainty, and (3) ensuring effectiveness and continuity of recovery.[42]

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[34] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) OJ L 351/1 (the 'Brussels I bis Regulation').

[35] In accordance with its decision to implement it Regulation 1215/2012 will also be applicable in Denmark. Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 79/4, 31 March 2013.

[36] See under 2.3.3.

[37] Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, OJ L 338/1 (the 'Brussels II bis Regulation'. This instrument replaced Regulation 1347/2000, or the Brussels II Regulation, which was the first piece of EC legislation in the field of private international law in family matters (other than maintenance) and was therefore considered a landmark (see (Stone 2006) p. 384); 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 L 160/19.

[38] Regulation 2201/2003, Recital 17. See also Jänterä-Jareborg (2003) p. 205; see on the free movement of judgments in these matters Sect. 2.2.5.

[39] Regulation 2201/2003, Articles 21–52.

[40] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, COM (2014) 225 final, pp. 10–11.

[41] Council Regulation (EC) 4/2009 of 18 December 2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L7/1 (the 'Maintenance Regulation').

[42] See Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2005) 649 final, pp. 4–6.

The recast Insolvency Regulation[43] allows for enforcement of judgments opening insolvency proceedings by incorporating the mechanism of the Brussels I bis Regulation.[44] Exequatur has therefore been abolished for these types of judgments. The recast Insolvency Regulation includes one refusal ground (the public policy exception).[45]

The 2012 Regulation on Wills and Succession[46] still contains an exequatur procedure for decisions in matters relating to succession (Chapter IV); as do two proposals[47] for regulations on matrimonial property[48] and property consequences of registered partnerships.[49] In the text of these proposals, the Commission points out that an exequatur procedure is deemed necessary because the proposals are a first step in the harmonization of property regimes resulting from marriage or registered partnerships,[50] but that abolition will become an option once these instruments have been evaluated.[51]

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[43] Regulation (EC) No 1346/2000 on Insolvency Proceedings, OJ L 160/1.

[44] Article 32 of Regulation (EU) 2015/… of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) 2012/0360 (COD) LEX 1607, PE-CONS 31/15 (not yet published in the Official Journal) ('recast Insolvency Regulation').

[45] Article 33 of the recast Insolvency Regulation.

[46] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[47] These two Proposals were not adopted after a failure to reach political agreement. Instead, in March 2016 the European Commission adopted a proposal for a Council decision authorising enhanced cooperation on these topics. European Commission, Proposal for a Council Decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, COM (2016) 108 final.

[48] Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 final.

[49] Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM (2011) 127 final.

[50] Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 final, para 5.4; Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM (2011) 127 final, para 5.4.

[51] The European Parliament was of the opinion that the exequatur procedure should indeed be retained for these procedures given their complexity. (European Parliament, Report on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011)0126—C7-0093/2011—2011/0059(CNS)) Committee on Legal Affairs, rapporteur: Alexandra Thein, Explanatory statement.

The latest instrument based on mutual recognition is the European Account Preservation Order (EAPO).[52] It is an instrument that allows creditors to preserve the amount owed in a debtor's bank account. The EAPO exists as an alternative to national procedures for cross-border cases. It is an *ex parte* procedure, which means the debtor is not notified of the application for the EAPO. The EAPO can be requested from a court in the Member State that has jurisdiction over the substance of the matter (Article 6(1)) or, where a judgment has already been obtained, from the court in the Member State that issued the judgment (Article 6(3)). This court shall issue the EAPO when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure in the form of a preservation order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult (Article 7(1)). When the EAPO has been issued, it is recognized and enforceable in all other Member States without the need for a declaration of enforceability (Article 22). There are no grounds for refusal of recognition or enforcement in the Member State addressed, though the debtor may apply to the court of origin of the EAPO, which may revoke or modify it when the conditions set out in the regulation are not met; for instance, where the Order was not served on him within 14 days of the preservation of his account or accounts (Article 33(1)).

The EAPO facilitates cross-border debt recovery by offering a uniform instrument for account preservation. However, the EAPO is not a (final) judgment, but rather a protective measure that is issued *ex parte*, without the defendant being summoned to appear. Under Brussels I bis, such measures are already excluded from the scope of the regime for recognition and enforcement, and therefore also from the scope of the refusal grounds.[53] The innovation of the EAPO is therefore primarily that it provides a uniform and automatically enforceable provisional measure, not that it contains no refusal grounds. Since it does not facilitate the recognition and enforcement of judgments, it is outside the scope of this research. The EAPO is however another example of the simplification of cross-border litigation in civil cases pursued by the European legislature and therefore worth mentioning.

To conclude, considering the amount of legislation that has recently been adopted in this field, it seems safe to say that the simplification of the regime for cross-border recognition and enforcement of civil judgments in the EU will remain a legislative priority for the future.

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[52] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189/59.

[53] Article 2(a) Brussels I bis Regulation. See CJEU Case 125/79 *Denilauler v SNC Couchet Frères*, ECLI:EU:C:1980:130; see further under 2.3.1.1.

2.2.3 The Role of Mutual Recognition and Mutual Trust

Under current legislation on civil justice cooperation within the EU, free movement of judgments is based on the principle of mutual recognition, which in turn presupposes mutual trust. In order to understand how these principles function, it is necessary to define them and explain how they have shaped the development of legislation in the field of civil justice.

There is no widely accepted definition of mutual trust as of yet,[54] but it generally refers to the confidence Member States have, or should have, in the functioning of each other's legal systems. It is a matter for discussion whether mutual trust in fact exists between the Member States, or whether it is assumed to exist in order for EU legislation to function effectively. It is also a matter for discussion whether mutual trust implies a blanket presumption that a fellow Member State's legal system functions adequately or whether Member States are entitled to review, in specific cases, whether that trust is justified. These questions were the subject of a number of highly important CJEU and ECtHR judgments, that are discussed in Part II of this book.[55]

Mutual recognition can be seen as the practical application of mutual trust: if one Member State trusts another, then it should recognize judicial decisions and other acts of the other Member State without second-guessing whether it conforms to its own national standards. Mutual recognition presupposes and is based on mutual trust. Mutual recognition is a well-established mode of cooperation within the European Union,[56] and was first introduced by the CJEU in its seminal judgment *Cassis de Dijon*.[57] In this judgment, which concerned the free movement of goods between Member States, the CJEU ruled that goods lawfully marketed in one Member State should, in principle, be admitted to the market of any other Member State.[58] This principle makes sense from the internal market perspective: it would be incompatible with the idea of an internal market if States were free to prevent goods from being brought to market within their territory by imposing their own requirements on top of those the product had already fulfilled in the Member State of origin. Put rather superficially, mutual recognition reduces the need for extensive harmonization of, for instance, product standards, though in practice a certain level of harmonization has always been achieved to mediate the consequences of mutual recognition.[59]

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[54] Andersson (2005).

[55] Sections 5.4.5 and 6.3.3.

[56] See for a discussion on how mutual recognition was 'transferred' to the justice context Storskrubb (2016).

[57] CJEU Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42 (Cassis de Dijon) para 14.

[58] Craig and De Bùrca (2015) p. 674 onwards.

[59] Storskrubb (2016) p. 301.

In the context of free movement of civil judgments, the concept of trust in another state's legal system was as such not new.[60] The 1968 Brussels Convention's regime, with common and narrowly defined grounds for refusal, was also based on the premise that differences between Member States' civil procedure law should not, in principle, be an obstacle to recognition and enforcement of judgments (though the concept of 'mutual trust' was as such not used). The Member State where recognition or enforcement was sought did however retain the authority to refuse recognition or enforcement, and a declaration of enforceability still needed to be obtained from that Member State. The purpose of the introduction of mutual recognition was, as is explained below, intended to increasingly simplify this regime, to the extent where the Member State where recognition or enforcement is sought retains no discretionary power at all.

The 1999 Tampere European Council introduced mutual trust and mutual recognition as leading principles within the context of the creation of an area of freedom, security and justice. The Maastricht Treaty of 1992 first introduced the objective of creating such an area. It intended to provide Member States with a framework through which they could cooperate in certain politically sensitive areas: immigration, asylum, border controls, police and judicial cooperation in criminal matters, and judicial cooperation in civil matters. As these policy areas were considered politically sensitive and closely connected to national sovereignty, the Maastricht Treaty created a 'pillar' structure in which these issues were separated from the supranational Community decision-making process; it devised a structure that was more intergovernmental, with almost no—or a much reduced—role for the Community institutions.[61] The Treaty of Amsterdam of 1997, however, moved judicial cooperation in civil matters to the Community Pillar. This change was significant, because it not only greatly reduced the obstacles for decision-making on these matters, but it also shows that these issues were no longer considered particularly sensitive. Yet, the legislative developments in this area were still very much governed by economic objectives. In 1998, the European Commission still proclaimed that:

> full abolition of the registration (exequatur) procedure is inconceivable, if only because of the wide procedural divergences between Member States as regards enforcement.[62]

The 1999 Tampere European Council shifted focus from mere economic rationales to the creation of an area of freedom, security and justice. Its Conclusions first articulated the role of the principle of mutual recognition in the creation of such an area. Though this document does not use the term "mutual trust", it starts by referring to values common to all Member States:

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[60] See Weller (2015) p. 73.

[61] Craig and De Bùrca (2015) p. 965.

[62] Commission Communication to the Council and the European Parliament 'Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union', COM(97) 609 final, OJ 1998, C 33/3.

> From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union.

It then goes on to state that while the primary goal of the Union, the creation of an internal market, has already been achieved, the freedom this internal market grants the EU citizens can only be exercised effectively if there is also a genuine area of justice, in which people can approach courts and judicial authorities in other Member States as easily as in their own. For civil justice, this meant that citizens should not be prevented from exercising their rights due to incompatibility or complexity of legal or administrative systems in the Member States. In order to facilitate the protection of such rights and the cooperation between judicial authorities, the Tampere Council:

> endorse[d] the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union.[63]

The Council then went on to state what this would mean specifically:

> 34. In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgement in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgements in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.

The principle of mutual recognition is thus used as a basis to call for the 'further reduction' of intermediate measures for the recognition and enforcement of judgments—though it is not further explained why this principle is deemed appropriate in this context. More importantly, however, the Tampere Conclusions refer to the "reduction" of "intermediate measures", but it is not clear what exactly this means.

On the matter of mutual trust, the European Commission made quite clear that it assumed this to be at an appropriate level to proceed with the introduction of mutual recognition in the field of civil justice. It made this most explicit in its first proposal for the Recast Brussels I Regulation. In its Explanatory Memorandum, it stated that:

> Today, judicial cooperation and the level of trust among Member States has reached a degree of maturity which permits the move towards a simpler, less costly, and more automatic system of circulation of judgments.[64]

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[63] Tampere Conclusions, para 33.

[64] Explanatory Memorandum, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) COM (2010) 748 final, p. 6.

In the 2000 Draft Programme of Measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters,[65] the European Council presented a number of explicit legislative objectives. First, in the chapter entitled 'Degrees of mutual recognition' the Programme explains the 'state of play'. It refers to the (then) existing 1968 Brussels Convention as the 'first degree' of mutual recognition (containing a harmonized and simplified exequatur procedure) and to the (then) proposed Brussels I Regulation as the 'second degree', containing a 'streamlined' exequatur procedure. It then goes on to formulate goals and proposals for the enhancement of mutual recognition. In a rather technical-sounding section entitled "First series of measures: further streamlining of intermediate measures and strengthening the effects in the requested State of judgments made in the State of origin" it mentions the following measures for such streamlining: "Limiting the reasons which can be given for challenging recognition or enforcement of a foreign judgment (for example, removal of the test of public policy, taking account of cases in which this reason is currently used by the Member States' courts)." It also removes all doubt as to the long-term goal (called 'second series of measures') of these efforts: "Abolition, pure and simple, of any checks on the foreign judgment by courts in the requested country".[66]

Two more recent Council Programmes, the 2004 Hague Programme and the 2010 Stockholm Programme, expand the line of reasoning of the Tampere Conclusions by placing cooperation on the basis of mutual trust (now explicitly stated) and mutual recognition within the framework of the protection of fundamental rights. Both documents start with an affirmation of the Union's commitment to protecting fundamental rights, pointing out the introduction of the EU CFR and its intention to accede to the ECHR. The effective enforcement of rights is also placed in this context: the Stockholm Programme states in a section entitled "Promoting citizenship and fundamental rights" that "Citizens of the Union and other persons must be able to exercise their specific rights to the fullest extent within, and even, where relevant, outside the Union."[67] It then reaffirms that mutual recognition facilitates cooperation between authorities and the judicial protection of individual rights.[68] Next, in the section entitled "Furthering the implementation of mutual recognition" the Council states, "the process of abolishing all intermediate measures (the exequatur), should be continued".

This shift of focus is telling: instead of being a fundamental, yet pragmatic market-oriented measure to promote efficiency of cross-border trade, mutual recognition seems to have now taken on a normative value: it is necessary for the protection of fundamental rights, as differences in national procedures

[65] Council Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, OJ 2001, C 12/1.

[66] Council Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, OJ 2001, C 12/1, 5 sub A(2)(b).

[67] European Council, The Stockholm Programme—an open and secure Europe serving and protecting citizens, OJ C/115/10. 2010 (the 'Stockholm Programme').

[68] Stockholm Programme, p. 11.

prevent Union citizens from exercising their rights effectively. Fundamental rights protection is thus presented as a reason for the introduction of mutual recognition. The question, of course, is whether legislation based on absolute mutual recognition which presupposes mutual trust between the Member States, especially when it does so by abolishing cross-border checks, is indeed the best way of protecting fundamental rights, or if it is even compatible with fundamental rights. This is because the cross-border checks that some Regulations abolished in favour of absolute mutual recognition protect the rights of the judgment debtor. These questions are central to the following chapters. Chapter 6 in particular examines whether the European legislature takes its commitment to fundamental rights seriously when it introduces legislation that abolishes grounds for refusal and relies on absolute mutual recognition.

2.2.4 Practical Arguments for Increased Free Movement

2.2.4.1 Recognition and Enforcement Under Brussels I in Practice

It was already touched upon above that the European Commission took the successful practical application of the exequatur procedure of Brussels I as a sign that the time was ripe to abolish it. The empirical data the Commission based its conclusion on were gathered in the 2007 Report on the Application of Brussels I in the Member States, commonly referred to as the Heidelberg Report.[69] This Report was prepared in order to evaluate the application of the Brussels I Regulation as provided by its Article 73. The data were gathered through questionnaires and interviews with stakeholders engaged in European cross-border litigation: lawyers, judges and businessmen as well as organizations representing consumers.[70] The data were collected from the (then) 24 EU Member States, although, as the authors admit, this proved difficult in the Member States that had only joined the EU in 2004, as not much practice could be reported.[71] Nevertheless, its empirical findings on the operation of the Regulation in practice are of considerable value.

On the matter of the exequatur procedure, the conclusions were predominantly positive. The authors concluded that, as a rule, exequatur proceedings operated efficiently. The most influential of the Report's conclusions on the matter of exequatur is probably the statistic that the great majority, more than 90 % (and often 100 %) of decisions on the declaration of enforceability were ultimately

[69] Hess et al. (2007). The paragraph numbers cited refer to Study JLS/C4/2005/03, published in September 2007, available on http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. The Report was also published in book form, with some additions Hess et al. (2008).

[70] Hess et al. (2007) para 4.

[71] Hess et al. (2007) para 5.

successful.[72] The procedure for obtaining a declaration of enforceability was found to be "characterized by speed and simplicity". In most Member States, the creditor could access the competent authorities without representation by a lawyer, and the review by the court of enforcement was restricted to formalities: the court would only review its territorial competence, the authenticity of the decision, the existence of a civil or commercial matter and the regularity of the required certificate.[73]

The average time for obtaining a declaration of enforceability was deemed to be "fairly short", even though the data show that the time periods differed considerably between the Member States (from 7 days to 4 months on average) and that even within Member States the margins were wide (Greece reported a time period of 10 days to 7 months).[74] Another point of concern was the costs of the declaration of enforceability. In practice, most Member States levied costs, and the ways in which these were calculated differed considerably. The authors also highlighted the costs incurred by the representation by a lawyer as an obstacle: even though legal representation is not required by the regulation, practice shows that creditors appoint a lawyer because they are not sufficiently informed about the foreign procedural law. These findings led the authors to conclude that the situation was "unsatisfactory and even problematic with respect to the guarantee of due process".[75]

Another influential finding was that the great majority of decisions were not appealed: the percentage of appeals was found to be "between 1 and 5 % of all decisions".[76] Appeal procedures were found to be handled efficiently, though the duration of appeal procedures could differ considerably.[77] On the question of which grounds for refusal were most applied, the report found that though the "insufficient service in default procedures" provision of Article 34(2) was most important, its practical impact had been reduced after it was amended with the introduction of the Brussels I Regulation. The report concluded that national courts generally only allow an objection on this ground in exceptional cases and that judges were in general rather favourable towards the recognition of European judgments and the granting of declarations of enforceability.[78] Little use was also made of the provisions concerning irreconcilability (Articles 34(3) and (4)). The report concluded that this was likely because the provisions on pendency of Articles 27–30 of Brussels I were generally respected, limiting the risk of irreconcilable judgments. The Report drew a similar conclusion with regard to Article 35, which concerns review of jurisdiction of the court of origin. This was found to be of little practical importance—because the court of enforcement would be bound

[72] Hess et al. (2007) para 52.

[73] Hess et al. (2007) para 505.

[74] Hess et al. (2007) para 514. See for an interpretation Timmer (2013) p. 145.

[75] Hess et al. (2007) para 525.

[76] Hess et al. (2007) para 506. This corresponds with the figure found by Muller and Cuniberti (2013) see below.

[77] Hess et al. (2007) para 576.

[78] Hess et al. (2007) para 541.

by the findings of fact of the court of origin—and because it was not in line with mutual trust, the authors of the report suggested its removal.[79]

The report was more nuanced on the public policy exception. It concluded that the public policy exception was often invoked, but rarely successfully.[80] At the same time, the reporters pointed out that public policy is of great value from a legal-political perspective,[81] and that even though they are rare, there are still constellations in the European judicial area in which the application of the public policy exception is needed in order to adequately protect the rights of the defendant.[82]

The Heidelberg Report thus reported favourably on the exequatur procedure as it functioned under the Brussels I Regulation. It showed its efficiency, but also pointed to the divergence in the time periods and costs incurred between the Member States. It also quite clearly looked for ways to limit the grounds for refusal, though it was quite nuanced on the value of the public policy exception.

In 2013, Muller and Cuniberti published an empirical study on the functioning of the exequatur procedure in the so-called Grande Région, which encompasses Luxembourg and parts of France, Germany, and Belgium and within which economic and cultural relations are strong. The researchers point out that many people working in Luxembourg live within other parts of the region, so that the existence of borders has become almost irrelevant.[83] This makes research into the practice of cross-border enforcement of judgments in this region especially interesting.

By providing empirical data on the functioning of the exequatur procedure in a number of courts in the Grande Région, the researchers intended to add to the debate on whether the economic benefits of abolishing the exequatur would outweigh the risks posed to fundamental rights protection.[84] Their conclusions, based on data concerning costs, duration and success rate of the exequatur, are strongly in favour of its abolition. The researchers conclude that since the great majority of claims submitted for exequatur do not exceed EUR10,000 and are therefore relatively low, legal costs associated with the exequatur are likely prohibitive in many cases.[85] On top of this, they conclude that since only in a small percentage of cases an appeal is brought, and that it is rarely successful, "the value of the exequatur procedure is statistically very weak".[86] This is exacerbated by the fact that exequatur proceedings result in delays for the judgment creditor.

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[79] Hess et al. (2007) p. 252. This view is also taken by Arenas Garcia (2010) p. 365 and Dickinson (2011) p. 10.

[80] Hess et al. (2007) p. 244. The statistical data gathered by Hess c.s. in their 2011 study on the application of the public policy exception in EU instruments of private international and procedural law appear to reinforce this conclusion. Hess and Pfeiffer (2011) pp. 49–50, 94, 103, 119, 134, 138, 145.

[81] Hess et al. (2007) para 543.

[82] Hess et al. (2007) para 544.

[83] Muller and Cuniberti (2013) p. 3.

[84] Muller and Cuniberti (2013) p. 3.

[85] Muller and Cuniberti (2013) p. 12.

[86] Muller and Cuniberti (2013) p. 13.

The researchers thus provide some strong critique of the costs and delays associated with the exequatur procedure. Their statistical evidence on the success rate of appeals is also remarkable, though without knowing in which cases an appeal was successful and why, it is difficult to draw substantiated conclusions as to the exequatur's value for the protection of fundamental rights—something the researchers acknowledge with the qualification "statistically". In order to draw conclusions as to whether the exequatur protects fundamental rights it is necessary to distinguish between different types of cases and degrees of fundamental rights infringements, as Cuniberti concluded in an earlier article.[87] This problem is further considered below.

The Heidelberg Report and the statistics gathered by Cuniberti and Muller lead to the conclusion that even if the exequatur procedure functions efficiently, and even in a region in which courts are presumably accustomed to dealing with these proceedings, the costs and delays associated with obtaining a declaration of enforceability are considerable. It is therefore no surprise that the European Commission has strongly emphasized the economic case for the abolition of exequatur. In its Impact Assessment, the Commission suggested that the overall annual cost exequatur proceedings in the EU amounts to approximately EUR 48 million and that this is a deterrent to cross-border trade.[88]

It is more difficult, however, to draw conclusions from the statistical data as to the reform of grounds for refusal. The authors of the Heidelberg Report argue in favour of abolition of the review of jurisdiction, on the basis that it is statistically almost irrelevant, but more importantly because it does not comport with mutual trust. On the public policy exception, both reports are undecided. Though the data show that the public policy exception is rarely used successfully, both groups of researchers point out that statistics are of little use here and that the public policy exception has a primarily legal-political value.

2.2.4.2 Recognition and Enforcement Under Other Instruments in Practice

The Brussels II bis Regulation abolished exequatur and refusal grounds for decisions ordering the return of a child and those ordering access to a child. For decisions on divorce, legal separation or marriage annulment, and on parental responsibility, refusal grounds still apply and an exequatur is needed for judgments on parental responsibility. A 2015 evaluation of the Regulation found that the existence of these intermediate procedures "hindered smooth enforcement" and that the safeguards, particularly those protecting the best interests of the child, were not necessarily effective because they were not being applied by courts but by administrative personnel.[89] The divergence in Member State practice concerning the

[87] Cuniberti (2012) pp. 575–576.

[88] Dickinson (2012) p. 140.

[89] Study on the assessment of the Brussels II bis Regulation (2015) p. 35.

hearing of the child proved created problems at the enforcement stage, because a failure to hear the child is a ground for refusal of enforcement.[90] However, further on, the Study states: "the (automatic) recognition of judgments in matrimonial matters and cases of parental responsibility functions well in practice".[91] Apparently, some decisions on parental responsibility were never enforced due to practical obstacles during enforcement procedures, such as delays caused by lack of resources.[92] Practical obstacles to the enforcement of child return orders, which should be enforced automatically, were also reported.[93] The problems with the automatic enforcement of child return orders are discussed in more detail in Chap. 3, particularly in Sect. 3.5. It is clear that the abolition of exequatur for judgments within the scope of the Brussels II bis Regulation remains a priority. In a 2014 report, the European Commission stated that the fact that certain categories of judgments do not benefit from the abolition of exequatur leads to complex, lengthy and costly procedures, and to inconsistencies in application.[94] The Commission did point out that, particularly in parental responsibility matters, there was great divergence in the interpretation of the public policy exception.[95] It also acknowledged the varying interpretations of the child's right to be heard. However, the Commission recommended extending the abolition of exequatur, in combination with the appropriate safeguards to take the place of these refusal grounds.[96] A proposal for amendment of the Brussels II bis Regulation is being prepared.[97]

The Insolvency Regulation was evaluated and the corresponding report published in 2012.[98] This report did not, however, cover recognition extensively. This was decided because the Regulation "already provides for the maximum solution that can be achieved in this context, i.e. a direct recognition of foreign proceedings without intermediate steps" and because the reporters were not aware of any problems calling for fundamental changes.[99] Some problems were reported, mainly to do with a lack of information on foreign proceedings and publication of decisions opening the proceedings[100] and uncertainty as to the distinction between liquida-

[90] Study on the assessment of the Brussels II bis Regulation (2015) p. 34. See also pp. 43–44 of the Study.

[91] Study on the assessment of the Brussels II bis Regulation (2015) p. 36.

[92] Study on the assessment of the Brussels II bis Regulation (2015) pp. 35–36.

[93] Study on the assessment of the Brussels II bis Regulation (2015) p. 36.

[94] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, COM (2014) 225 final, p. 10.

[95] *Ibid.,* p. 10.

[96] *Ibid.,* pp. 10–11.

[97] See on this proposal De Boer (2013) and Scott (2015).

[98] Hess et al. (2013).

[99] Hess et al. (2007, 2013) p. 384.

[100] Hess et al. (2013) p. 385.

tion and reorganization proceedings.[101] The report also found that the public policy was rarely raised successfully to prevent the recognition of insolvency proceedings, and that the guiding principles of the CJEU were generally applied.[102]

No statistical evidence is yet available on the functioning of the exequatur procedure in the Regulation on Wills and Succession, because this Regulation has only applied since 2015 and will only be evaluated in 2025.[103]

2.2.5 Concluding Remarks

Free movement of judgments is essential to guaranteeing legal certainty, which in turn fosters international trade and encourages free movement of businesses and people across borders within the EU. To facilitate free movement of judgments, the 1968 Brussels Convention and the 2001 Brussels Regulation, as well as a number of other instruments, contained a mechanism consisting of a uniform procedure for obtaining an exequatur, combined with refusal grounds that the Member State of enforcement could apply. This mechanism, which aimed at combining efficiency for the judgment creditor with protection of the debtor's rights, was found to have functioned quite satisfactorily by the 2007 Heidelberg Report.

The introduction of mutual recognition to the field of justice cooperation within the EU marks what may be termed a paradigm shift in the manner cross-border enforcement is organized in EU legislation. Mutual recognition, which is based on the assumption that sufficient mutual trust exists between the EU Member States as regards the quality of their legal system, has led to the gradual abolition of the exequatur but also, more controversially, to reform or abolition of refusal grounds. The following section explains how these changes were incorporated into current EU legislation on recognition and enforcement of civil judgments.

2.3 Recognition and Enforcement Under Current EU Legislation

2.3.1 Features of Recognition and Enforcement in EU Civil Justice Cooperation

2.3.1.1 Definitions

First, the scope of the following discussion needs to be determined. The instruments discussed in this research all facilitate the recognition and enforcement of

[101] Hess et al. (2013) p. 384.

[102] Hess et al. (2013) p. 393.

[103] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, Article 82.

judgments, namely, judicial decisions that have been, or have been capable of being, the subject of an inquiry in adversarial proceedings. This is to say that they have to be the outcome of a trial or procedure in which both parties appeared or were capable of appearing. The discussion does not include the recognition or enforcement of provisional or protective measures issued *ex parte*, where the defendant is not summoned to appear. It is important to establish this, since not only do such measures fall outside the scope of the Brussels I bis Regulation,[104] the ECtHR also held that for such rules it may not be possible to comply immediately with all the requirements of Article 6(1) ECHR, lest their effectiveness be impaired.[105] Article 6(1) may therefore not apply in the same way to these *ex parte* measures, and they would need a separate discussion. This research is limited to the recognition and enforcement of judgments and decisions that fall within the scope of the regulations discussed. It is important to note that with regard to the Brussels I bis Regulation, this also includes judgments delivered by default,[106] i.e., judgments where the defendant had the opportunity to appear, but chose not to. Such judgments are often given without a full hearing on or examination of the merits and may not contain any reasoning at the national level; yet this does not exclude them from the scope of the Regulation. Included in its scope are also provisional and protective measures that were issued with notice to the defendant,[107] and judgments such as payment orders that are initially issued *ex parte* but can be opposed by the defendant.[108] Judgments need not be *res judicata* or final and conclusive, though Article 33 of Brussels I bis requires that the judgment is enforceable in the Member State of origin.

2.3.1.2 Judgment Import and Judgment Inspection

The EU mechanism of cross-border enforcement of judgments is characterized by a distinction between two elements: judgment import and judgment inspection. The distinction between these two elements has been a standard feature of the European instruments on recognition and enforcement since the 1968 Brussels Convention. It is important to distinguish between these two elements and to discuss their functions separately, since both are important with a view to safeguarding the involved parties' rights and interests.[109] It is shown that the formal

[104] Recital 33, Brussels I bis Regulation; CJEU *Denilauler v SNC Couchet Frères*, para 13; Franq (2016) pp. 97–98.

[105] ECtHR *Micallef v. Malta* [GC], appl. no. 17056/06 ECHR 2009-V, para 85.

[106] Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* ECLI:EU:C:2012:531.

[107] Recital 33, Brussels I bis Regulation.

[108] Case 166/80 *Peter Klomps v Karl Michel* ECLI:EU:C:1981:137.

[109] This distinction is widely accepted in literature (see for instance Oberhammer (2010) pp. 197–198) but not always made in practice. See on this issue Oberhammer (2010), Dickinson (2010) p. 255, Beaumont and Johnston (2010) p. 105.

aspect of the mechanism (judgment import) is instrumental in this regard, but that the abolition of the grounds for refusal, or judgment inspection, has proved controversial. The preceding discussion showed that the introduction of mutual recognition aimed, on one hand, to abolish the exequatur or declaration of enforceability (judgment import); and on the other hand, to abolish or narrow the refusal grounds (judgment inspection). In policy documents, the distinction between these two goals was not always clear from the start.[110]

The judgment import function of the mechanism for cross-border enforcement exists to allow the foreign decision to be accepted in the forum. This aspect or function of the procedure serves merely a formal goal, which is to import the foreign decision, so that it can be enforced. The judgment inspection is substantive: it offers the possibility to invoke grounds of refusal and thus inspect the decision's conformity with certain important values such as public policy.

The import function is most clearly important to legal practice: it would be incompatible with the principle of legal certainty, the principle of *res judicata* and the substantive rights of the judgment debtor if a decision obtained as a result of a lengthy legal procedure would have no effect across state borders.[111] The EU regulations therefore provide a means of transferring a foreign judgment to the state where enforcement is sought. Under the Brussels Convention and the Brussels I Regulation, this procedural aspect consisted of obtaining a declaration of enforceability from the competent court in the Member State of enforcement. The term 'judgment import' also signifies the import of a foreign judgment as it stands; this as opposed to mechanisms where a new procedure needs to be started which results in a national title, as is, for example, the case in the Netherlands[112] and England[113] (for judgments that do not fall within the scope of one of the EU Regulations or another international instrument).

The second function of the mechanisms for cross-border recognition and enforcement is the judgment inspection function. It refers to the fact that a mechanism for cross-border enforcement provides an opportunity to inspect whether the decision meets certain important requirements. These are not merely formal requirements, such as whether the decision can indeed be qualified as a judgment, but principles of fundamental value.[114] Many European states that have an exequa-

[110] For instance, the 2000 Draft Programme (discussed under 2.2.3) advocates the 'abolition, pure and simple, of any checks on the foreign judgment by courts in the requested country', which later turned out to mean only the abolition of the formal check of the exequatur, not the refusal grounds.

[111] Michaels (2009) para 1.

[112] Article 431 of the Dutch Code of Civil Procedure states that (in the absence of any international treaty or law) judgments given by foreign courts may not be enforced, and that the matters may be brought before a Dutch judge. See Van der Grinten (2006) p. 72.

[113] Hartley (2015) p. 397.

[114] Rosner (2004) pp. 253–254.

tur procedure for example require that the court of origin had jurisdiction,[115] that the judgment does not infringe its national public policy,[116] and that it does not conflict with an earlier proceeding started in that state.[117]

In the European regime, this second function is operationalized in a limited number of grounds for refusal, which are explained below. The grounds for refusal are narrowly and exhaustively defined and must be applied restrictively. Nevertheless, the grounds of refusal are an important tool in the hands of the judgment debtor. Refusal of enforcement means that the judgment creditor is no longer able to take measures to enforce compliance by the judgment debtor with the judgment. This means that the judgment has essentially become without legal consequence in the Member State where enforcement is sought. On what grounds recognition and enforcement may be refused therefore has great significance, discussed in Sect. 2.2.2 onwards.

The EU Regulations on cross-border recognition and enforcement are characterized by a separation between the two functions: the procedure consists of a simplified, nearly automatic stage in which a declaration of enforceability is obtained (judgment import); and a second stage, in which the grounds for refusal may be examined if the judgment debtor chooses to invoke them (judgment inspection). Some, like Brussels I, abolish only the judgment import procedure, while others abolish both judgment import and judgment inspection, such as Brussels II bis (for certain decisions), the EEO Regulation and the uniform procedures.

2.3.1.3 Recognition and Enforcement

A second feature of the EU instruments is the distinction between recognition and enforcement. Recognition means accepting the determination of rights and obligations made by the court of origin[118]; in other words, accepting its legal effects. The parties may then invoke it, either by taking steps to enforce it, or raising it in another procedure. For example, a judgment granting a divorce may be used in order to obtain a maintenance order in a separate procedure.

Enforcement presupposes recognition, but goes a step further: it allows the judgment creditor to take action in order to make sure that the debtor obeys the order of the court of origin.[119] It implies that steps of an official nature are taken to

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[115] For example France Rosner (2004) p. 233; Germany (Section 328(1) *Zivilprozessordnung*) Switzerland (Article 26 Federal Statute on Private International Law).

[116] For example France Rosner (2004) pp. 239–246, Germany (Section 328(4) *Zivilprozessordnung*) Switzerland (Articles 27(1) and 27(2) Federal Statute on Private International Law).

[117] France: Rosner (2004) pp. 250–252; Germany (Article 328(1) subparagraph 3 *Zivilprozessordnung*); Switzerland (Article 27(2) subparagraph (c) Federal Statute on Private International Law).

[118] Hartley (2015) p. 349.

[119] Hartley (2015) p. 350.

ensure that the judgment is complied with, whether that means that something should be done (such as the payment of a sum of money or the performance of a contract) or not be done (such as in the case of injunctions preventing the commission of an act which would constitute a tort or breach of contract). Enforcement is governed by the domestic law of the state in which enforcement is sought, meaning that only those measures that are provided for in domestic law (such as seizure of goods or the attachment of bank accounts) may be taken.[120] It is clear that enforcement matters most to monetary judgments, though judgments in other areas of law may also require action from enforcement authorities, such as judgments ordering the return of a child.

Recognition and enforcement are separated under the European instruments discussed below: recognition of judgments within the remit of these instruments is entirely automatic, while for enforcement the exequatur procedure needs to be followed in order to obtain a declaration of enforceability. It must be noted that while the European instruments all contain a section on 'enforcement', they do not in fact harmonize enforcement procedures. What is meant is therefore only the procedure for obtaining permission for enforcement of condemnatory judgments—exequatur. Declaratory and constitutive judgments that fall within the scope of the European instruments are by their nature automatically recognized across the EU. However, the regulations that contain refusal grounds, such as Brussels I bis, do allow recognition to be refused (see below).

2.3.1.4 Application of the Refusal Grounds and Its Consequences

Under the Brussels regime, invoking the refusal grounds has increasingly become the responsibility of the judgment debtor or another interested party. Article 34 of the Brussels Convention of 1968 allowed the court to refuse to issue a declaration of enforceability when one of the refusal grounds of Article 27 applied. Refusal grounds could therefore be applied at the judgment import stage.

Under Brussels I bis and Brussels I, examination of refusal grounds (judgment inspection) only takes place in the second instance. Under Brussels I, the court requested to issue a declaration of enforceability is expressly prohibited from applying the refusal grounds during that first stage of the proceedings (Article 41). Examination of the refusal grounds may only happen in the second instance, when the judgment debtor applies for refusal of recognition or enforcement.[121] Under

[120] That enforcement procedures vary among Member States is shown by Andenas et al. (2005). That this divergence may constitute a bottleneck for effective cross-border enforcement even in the presence of a harmonized exequatur procedure is signaled by Jänterä-Jareborg (2003) p. 205.

[121] The question remains whether, even though the refusal grounds may only be applied on the application of an interested party, a court is allowed or required to apply the refusal grounds of his own motion, for instance where it considers that a refusal ground other than the one expressly invoked also applies. It appears from the wording that the court may do so, since Article 45 implies that enforcement or recognition must be refused if one of the grounds applies. See Franq (2016) p. 871.

Brussels I bis, the refusal grounds can only be considered "on the application of any interested party".[122] The interested party must therefore take the initiative to invoke one of the grounds. The burden of proving that the particular ground applies lies with the party who applies for refusal. Under Brussels I bis, judgment import has therefore become entirely automatic (though the requirement of a certificate could be seen as a form of judgment export), while judgment inspection takes place at the second instance.

The refusal grounds can be invoked by applying for refusal of recognition or enforcement (Article 46). According to Article 47, the application shall be submitted by the court that the Member State of enforcement has designated to hear such applications. The decision on the application for refusal may be appealed by either party (Article 49). The decision on appeal may then be contested only if the Member State where enforcement is sought has appointed a court to hear such contestations (Article 50). The refusal grounds can also be invoked by applying for a pre-emptive declaration that no refusal grounds apply (Article 36(2)); this possibility may be used by a judgment creditor seeking to ascertain that enforcement of the judgment will not at a later stage be contested.

The refusal grounds can also be raised incidentally during court proceedings. An example of the latter situation is the recent case of *Diageo v. Simiramida*,[123] in which Simiramida claimed damages in the Netherlands from Diageo on the basis of a Bulgarian judgment that established that Diageo had wrongfully seized goods belonging to Simiramida. Diageo invoked the public policy exception against recognition of the Bulgarian judgment, stating that the judgment was contrary to EU law (though this appeal was unsuccessful). Since recognition of a judgment means that the determination of rights and obligations by the court of origin is accepted, refusal of recognition means that this determination is no longer accepted as having legal merit by the court deciding in the second procedure. This means that certain claims may have to be relitigated, to the expense of the parties involved.

Article 22(1) of the ESCP Regulation and Article 22(1) of the EOP Regulation both provide that enforcement shall be refused upon application by the defendant by the Member State of enforcement if the judgment is irreconcilable with another decision, as specified in the Articles.

Articles 22 and 23 of the Brussels II bis Regulation however can be applied at the first stage of enforcement proceedings. Article 28(1) requires a declaration of enforceability for judgments concerning parental responsibility, to be issued in the Member State of enforcement. Article 31(2) allows the court to refuse the application for a declaration of enforceability on the basis of one of the grounds of Articles 22 and 23. In the case of judgments concerning divorce, legal separation or marriage annulment, refusal of recognition is most likely to take place incidentally, when the judgment is invoked in another procedure, for instance to claim alimony.

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[122] The Brussels I bis Regulation does not define the scope of the class of persons who may be considered an 'interested party'. See Fitchen (2015) pp. 437–440.

[123] Case C 681/13 *Diageo Brands v Simiramida-04 EOOD* ECLI:EU:C:2015:471; see Hazelhorst (2016).

The grounds for refusal are harmonized, strictly defined in the respective legal instruments, and restrictively applied, removing the possibility of arbitrary refusal of recognition or enforcement and reducing the chance that a judgment may not be invoked, increasing legal certainty. The refusal grounds are thus limitative and must be interpreted restrictively. This means that a court may not use any of the grounds for a purpose for which it is not intended. Lack of jurisdiction of the court of origin is not a ground for refusal under any of the regulations and some even explicitly forbid it, save in certain exceptional cases.[124]

Review of a foreign judgment on the merits is also prohibited.[125] If it were not, the recognition and enforcement regime would make little sense, since if a court in the State addressed were allowed to review a case on the merits, this would amount to deciding the case anew. Not only would this undermine the efficiency of the regime, it would also amount to the court in the State addressed putting its decision above that of the court of origin, which is incompatible with the underlying idea of mutual trust.[126] The prohibition of review on the merits means that a court must accept the findings of fact made by the court of origin, but also the findings of law: the court of the Member State addressed may not substitute its own discretion for that of the court of origin.[127] An appeal for refusal of recognition or enforcement is not in any way an appeal on the merits. This means that the court addressed must not question the validity or correctness of the original decision, the substantive or legal soundness of the conclusions, or whether the correct substantive law was applied.[128]

Notwithstanding these qualifications, the grounds for refusal are obligatory, which means that recognition or enforcement *must* be denied if one of them is found to apply.[129]

Refusal of enforcement means that the judgment creditor is no longer able to take measures to ensure compliance by the judgment debtor with the judgment. This means that the judgment has essentially become without legal consequence in the Member State where enforcement is sought. It must be emphasized that refusal of recognition or enforcement does not affect the validity of the judgment as such: it remains valid in the Member State where it was delivered. It may still be invoked in other states, though there is of course the possibility that another state will also

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[124] Article 45(3) Brussels I bis Regulation.

[125] Article 52, Brussels I bis Regulation; Article 22(2) ESCP Regulation; Article 22(2) EOP Regulation; Article 21(2) EEO Regulation; Article 26, Brussels II bis Regulation; Article 41, Succession Regulation.

[126] Mankowski (2016) p. 964; he posits that "the judiciary in the Member States is deemed equivalent and equally apt to decide cases which assertion in turn vastly disposes of a necessity for review and control. Whereas control freaks and Leninists might go berserk, European ideology demands so", citing the dictum attributed to Lenin: "Trust is good, but control is better".

[127] Mankowski (2016) p. 964.

[128] Mankowski (2016) pp. 964–965.

[129] This is implied by the wording of, for instance, Article 45(1) Brussels I bis Regulation, which provides that recognition 'shall' be refused if one of the refusal grounds is found to apply.

deny recognition or enforcement on the same ground, unless it upholds a different interpretation of the refusal ground, which may happen with public policy (see below). However, it is clear that refusal of recognition or enforcement has radical consequences for the judgment creditor. Unless the debtor has assets in another state, which may very well not be the case with many non-international businesses and consumers, enforcement of the judgment may have become impossible. This goes against the principle of *res judicata* and renders the exercise of the debtor's right to enforcement utterly impossible. This explains why refusal of recognition or enforcement is only a proportional sanction in the most serious of cases, for instance where the right to a fair trial was violated. The following provides an overview of the refusal grounds, whereas the following chapter contains an extensive analysis as to how the refusal grounds have acted as a remedy for fundamental rights violations.

2.3.1.5 Three 'Models' of Free Movement of Judgments

The EU Regulations that facilitate cross-border enforcement can be divided into three 'models', according to the degree they have achieved complete free movement of judgments.

First, there are regulations that require exequatur (for certain categories of judgments in their scope) and contain grounds for refusal of recognition and enforcement. This category includes the Succession Regulation, the Brussels II bis Regulation (for judgments concerning parental responsibility), and the two proposed regulations on matrimonial property[130] and property consequences of registered partnerships.[131] Because these instruments still operate on the basis of this traditional model and have not reformed or abolished the refusal grounds, they fall outside the scope of this research, which is concerned with the consequences of such reforms. They are therefore not discussed in detail in this section.

The second model is the Brussels I bis Regulation, which has abolished the exequatur, instead requiring the court of origin of the judgment to issue a certificate. The grounds for refusal remain applicable. This model is discussed in Sect. 2.2.3.

The third model is one where both exequatur and grounds for refusal have been abolished,[132] thus attaining complete free movement of judgments. Within this model there are variations. The Maintenance Regulation has abolished exequatur and all grounds for refusal completely. The Brussels II bis Regulation has abolished exequatur for judgments ordering the return of a child and those concerning access to children, but has replaced the judgment inspection function with a check of 'minimum requirements' (procedural standards) by the court of origin. The EEO

[130] Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 final.

[131] Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM (2011) 127 final.

[132] Except for the refusal ground pertaining to irreconcilability, as discussed under 2.3.2.3.

operates in a similar manner, by essentially making the Member State of origin of the judgment responsible for both judgment import and judgment inspection.

An entirely new approach can be observed in the uniform European procedures, the ESCP and the EOP. These instruments can be seen as circumventing exequatur by providing alternative procedures that result in a title that is immediately enforceable throughout the EU.

2.3.2 Grounds for Refusal

The exequatur procedure's purpose of guaranteeing free movement is also borne out by the fact that recognition and enforcement can only be opposed on the basis of a limited number of grounds for refusal. This section provides a brief overview of the grounds for refusal that are found in the currently existing EU instruments.

2.3.2.1 Public Policy

The first, and most contentious, ground for refusal is the public policy exception (Article 45(1)(b) of Brussels I bis).[133] This entails that recognition or enforcement may be refused if it would be manifestly contrary to the public policy (*ordre public*) of the Member State addressed—to those principles that are believed to be of fundamental value in the legal order of that State, including internationally recognised fundamental rights. The words 'of the Member State addressed' indicates that it is primarily the national conception of the State in which enforcement is sought which determines the content of public policy; however, the limits of this concept have been defined by the CJEU in its case law and it must be interpreted restrictively.[134] The court may also not use it to review whether the court of origin had jurisdiction.[135] Public policy has two elements: substantive public policy, which concerns the substance of the foreign judgment; and procedural public policy, which concerns the procedure of which the judgment is the result. Since a court may not review a foreign judgment as to its substance,[136] a successful objection on the basis of substantive public policy is rare.[137] Procedural public policy, however, is much more often invoked, though often unsuccessfully.[138]

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[133] Article 40(a) of Regulation 650/2012; Articles 22(a) and 23(a) of the Brussels II bis Regulation; the Insolvency Regulations and both proposed Regulations discussed earlier refer to the Brussels I Regulation.

[134] To be discussed in Sect. 3.2.5.

[135] Article 24 of the Brussels II bis Regulation.

[136] Article 52, Brussels I bis Regulation; Article 26, Brussels II bis Regulation.

[137] Franq (2016) p. 883; Hess et al. (2007) para 559.

[138] Hess et al. (2007) para 548.

In addition, the Brussels II bis Regulation provides that a review on the basis of public policy shall take into account the best interests of the child (Article 23(a)).

Though Chap. 3 discusses the application of the public policy exception in instruments of EU civil procedure in detail, some information as to its role is needed here in order to understand why its (proposed) abolition has proven to be so controversial. The public policy exception is often seen as an 'emergency brake'[139]: due to its general formulation, it may be used, in extreme cases, against violations of fundamental principles, including fundamental rights. The primary example of such a violation is the case *Krombach v. Bamberski*,[140] which is discussed in detail in the following chapter.

2.3.2.2 Insufficient Service in Default Proceedings

A second ground for refusal that is found in EU instruments[141] is contained in Article 45(1)(b) of the Brussels I bis Regulation. This Article concerns the position of a defendant in case the judgment was delivered by default. It aims to protect the right of the defendant to a fair hearing at the stage of recognition and enforcement. The conditions for application are rather strict. A judgment may only be refused recognition or enforcement where:

(a) it was given in default of appearance[142]; but,
(b) only 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;
(c) unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

Article 45(1)(b) should be read in conjunction with Article 28(2) of Brussels I, which also aims to protect the rights of the defendant in default proceedings by enabling the court to stay proceedings until it is satisfied that the defendant has received the requisite documents. Article 28(2) therefore concerns the proceedings before the court of origin, while Article 45(1)(b) provides a safety net at the court of enforcement, which explains why the latter only applies under very strict circumstances.

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139 Kramer (2011) p. 640.

140 CJEU Case C-7/98 *Dieter Krombach v André Bamberski* ECLI:EU:C:2000:164.

141 Article 40(b) of Regulation 650/2012. Articles 22(b) and 23(c) of the Brussels II bis Regulation are a little more lenient: recognition and enforcement may only be refused if the first two conditions apply and if the person in default has accepted the judgment unequivocally. This means that inactivity on the part of the person in default does not necessarily preclude an appeal on the basis of these articles.

142 The term 'default of appearance' is applied autonomously and independently of national procedural law. See further Franq (2016) p. 908, citing Kropholler (2005) Article 34 para 27: "with respect to the aim of Article 45(1)(b) the defendant cannot be considered as having failed to appear as soon as he or his counsel presented arguments before the court from which it can be deduced that he has actual knowledge of the proceedings and enjoyed enough time to prepare his defence".

The document instituting the proceedings must have reached the defendant not only in sufficient time for him to prepare his defence, but also in such a way as to enable him to do so, though these two aspects are often intertwined.[143] This places the focus on the actual possibility of the defendant to prepare his defence: an irregularity of service may not prohibit recognition or enforcement if it did not in fact prevent the defendant from arranging his defence.

Finally, if the defendant did not exercise his right to challenge the decision in the country of origin when he was able to do so, he loses the possibility of later raising Article 45(1)(b), or the corresponding article in other regulations, for opposing its recognition.[144] The rationale behind this is that it is deemed more effective if a defendant is able to challenge the decision in its country of origin, rather than at the stage of enforcement in another country, when there is only limited scope for review.[145] Article 45(1)(b) thus encourages the defendant to actively exercise his rights if he is able to do so; passivity on his side to challenge the decision may later prevent him from opposing its recognition.

This ground for refusal provides protection of the procedural rights of the defendant under specific circumstances. As was explained above, the public policy exception may also be used to protect procedural rights, but only as a subsidiary to Article 45(1)(b); that is, if the conditions of Article 45(1)(b) have not been met.

2.3.2.3 Irreconcilability

A final ground for refusal common to most instruments[146] is that a decision may be denied recognition or enforcement if it is irreconcilable either with:

(a) a decision given in proceedings between the same parties in the Member States in which recognition is sought[147]; or,

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[143] The circumstances surrounding the delivery will often determine whether the defendant had enough time to prepare: for example, if the defendant was served with a document in a foreign language a longer period of time will have been necessary. Franq (2016) p. 913.

[144] Except under the Brussels II bis Regulation, see footnote 71.

[145] CJEU Case C-123/91 *Minalmet GmbH v Brandeis Ltd* ECLI:EU:C:1992:432, para 19.

[146] Articles 45(1)(c) and (d) Brussels I bis Regulation; Article 22(1) ESCP Regulation; Article 22(1) EOP Regulation; Article 21(1) EEO Regulation; Article 21(2) Maintenance Regulation; Article 40(c) Succession Regulation. Again, Regulation 2201/2003 provides an exception for judgments concerning parental responsibility: only irreconcilability with a *later* judgment can lead to refusal of recognition or enforcement. This shows that the Regulation accepts the inherent nature of custody orders, as being open to modification by reason of a subsequent change in circumstances. See Borràs (1998) para 73.

[147] Article 25(3) of the Insolvency Regulation 1346/2000 (there is no such ground for refusal for judgments opening proceedings); Articles 22(c) and 23(e) of the Brussels II bis Regulation; Article 40(c) of Regulation 650/2012.

(b) with an earlier decision given in another Member State or a third state in proceedings involving the same cause of action and between the same parties, provided that the earlier decision fulfills the conditions necessary for its recognition in the Member State in which recognition is sought.[148]

It should be noted that this ground for refusal is the only one that was not abolished by the regulations that otherwise allow for complete free movement, as enforcement of two irreconcilable decisions is simply practically impossible. As the ECJ explained, judgments are irreconcilable where they entail mutually exclusive legal consequences.[149] Where the irreconcilability is between a judgment given in the Member State where enforcement is sought and one in another Member State, the judgment in the Member State of enforcement is prioritized[150]: its existence precludes recognition or enforcement, even if it was delivered later.[151] In these situations, the judgments do need to concern the same parties, though they need not be on the same cause of action. Where the irreconcilability is with a judgment delivered in another Member State or a third state, the judgments do need to concern the same cause of action.[152] In these situations, priority is given to the earlier judgment.

2.3.2.4 No Review of Jurisdiction, with Some Exceptions

As a rule, the court deciding on the declaration of enforceability may not review whether or not the court of origin had jurisdiction.[153] Review of jurisdiction 'through the back door' by applying the public policy exception is also not permitted.[154] However, there are some exceptions. The Brussels I bis Regulation contains a number of special rules of jurisdiction that are intended to protect the weaker party in certain legal relationships, namely matters relating to insurance, consumer contracts, employment and certain exclusive jurisdiction grounds, among others those that apply to immovable property (Sections 3, 4, 5 and 6 of Chapter II). A judgment may not be recognized if it does not comply with these provisions, though the court of enforcement is bound by the findings of fact of the court of origin (Article 45(2)).

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[148] Article 25(3) of Regulation 1346/2000 (there is no such ground for refusal for judgments opening proceedings); Articles 22(d) and 23(f) of Regulation 2201/2003; Article 40(d) of Regulation 650/2012. It should be noted that 'third State' refers to a state that is not an EU Member State.

[149] CJEU Case C-145/86 *Hoffman v Krieg* ECLI:EU:C:1988:61.

[150] This is the situation covered by Article 45(1)(c) of Brussels I bis and its equivalents.

[151] CJEU *Hoffman v. Krieg.*

[152] This is the situation covered by Article 45(1)(d) of Brussels I bis and its equivalents.

[153] Article 24 of the Brussels II bis Regulation explicitly forbids review of jurisdiction of the court of origin.

[154] Article 45(3) Brussels I Regulation. This was affirmed by the CJEU in *Krombach v. Bamberski*, see the discussion under 3.2.5.

2.3.2.5 Specific Grounds for Refusal Under Brussels II bis

Finally, the Brussels II bis Regulation contains some specific grounds for refusal of recognition of judgments concerning parental responsibility, which are necessary considering the sensitivity of these matters. Recognition may be refused if the child concerned was not heard (Article 23(b)), except when this was not possible due to urgency; and when any person claims that the judgment infringes his or her parental responsibility, if it was given without that person having been given an opportunity to be heard (Article 23(d)). A final ground for refusal is where the special procedure laid down in Article 56 for the placement of a child in another Member State was not followed. As discussed, no refusal grounds apply to decisions ordering the return of a child or those ordering access to a child; see for a detailed discussion 2.2.5, below.

2.3.2.6 Concluding Remarks

Under the Brussels I bis Regulation and other instruments of EU civil justice cooperation, recognition or enforcement may only be refused on the basis of a limited number of grounds. Of these grounds, irreconcilability and incorrect service in default proceedings are only applicable under very specific circumstances—especially the latter has been limited in its practical value with the addition that it may not be relied upon unless the judgment debtor has done everything in his power to make himself heard. The public policy exception is the only ground for refusal that provides some room for interpretation, though the threshold has been set very high by the CJEU, as is discussed in the next chapter.

The next sections discuss how the various regulations facilitate recognition and enforcement.

2.3.3 The Brussels I bis Regulation

The regime for recognition and enforcement under the Brussels I bis Regulation[155] takes a step back from the radical 2010 Proposal.[156] Brussels I bis abolishes the requirement for a declaration of enforceability, and therefore the judgment import

[155] See for a general discussion Nielsen (2013) pp. 524–528, Zilinsky (2014), Hazelhorst and Kramer (2013), Kramer (2013), Cadet (2013).

[156] As Sect. 2.2.2 discussed, the 2010 Proposal included, alongside the abolition of the exequatur a narrowing of the grounds for refusal. The public policy exception was to be replaced with a more narrow reference to 'fundamental principles underlying the right to a fair trial'. The 2010 Proposal also included a redistribution of the authority to apply refusal grounds between the Member State of origin and the Member State of enforcement: the ground for refusal of undue service upon the defendant in case of a default judgment (Article 34(2) of Brussels I) would be applicable only in the Member State of origin.

aspect of the exequatur procedure; but the grounds for refusal, and the mechanism for invoking them, remain the same. In fact, a ground for refusal has been added, with the inclusion of a breach of the jurisdiction rules in employment cases as laid down in Section 5 of Chapter II of the Regulation, improving legal protection for employees.

2.3.3.1 Steps Required to Achieve Enforcement Under Brussels I bis

The new regime for recognition and enforcement takes place over four procedural steps.[157] As under Brussels I, recognition of a judgment from one Member State in the other Member States is automatic (Article 36(1)). Article 39 provides that "a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required". To streamline the process of cross-border enforcement, Article 42 prescribes the documents that need to be submitted to the enforcement authority. It provides that, at the request of any interested party, the court of origin shall first issue a certificate (Article 42) using the form set out in Annex I (Article 53). The purpose of this certificate is to certify that the decision is indeed enforceable, as well as providing information as to the costs of the procedure and interest. Next, the judgment creditor must submit this certificate to the enforcement authority along with a copy of the judgment which satisfies the conditions necessary to establish its authenticity (Article 42(2)).

According to Article 43, the certificate shall then be served on the defendant in reasonable time before the first enforcement measure, along with the judgment itself if it has not yet been served. The purpose of this provision is to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State (Recital 32). If the defendant so requires he may request a translation of the certificate (Article 42(3)).

It should be noted that the certificate is not comparable to an EEO, since its provision is not conditional on certain minimum requirements having been fulfilled. The certificate serves only to provide the enforcement authority in the Member State where enforcement is sought with relevant information about the judgment; it does therefore not as such constitute "permission" to enforce a judgment in another Member State. The function of the certificate is to aid communication between the court of origin and the enforcement authorities in the Member State of enforcement; it does not as such constitute an enforceable title.

Finally, the judgment creditor must present the required documents to the enforcement authority in the Member State in which enforcement is sought, which may then take measures in order to enforce the judgment. According to Article 41 of the Regulation, the law of the Member State of enforcement shall govern enforcement. This provision likely leaves room for enforcement disputes that are provided for by national law, since the provision does not substantively differ from its equivalent

[157] See for a general discussion Nielsen (2013), Beraudo (2013).

provision under the Brussels I Regulation. On this provision the CJEU ruled in *Prism Investments* that it did not exclude national enforcement disputes on grounds not included in the Regulation, despite the limitative system of grounds for refusal.[158]

2.3.3.2 Grounds for Refusal

The grounds for refusal are laid down in Article 45, which is found in Section 3, subsection 1, entitled "Refusal of recognition". Evidently, the grounds of refusal can be invoked to oppose recognition, thus reversing the 2010 Proposal that limited the use of grounds for refusal only to the enforcement of judicial decisions.

According to Article 45(1) recognition shall be refused:

(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;
(b) where the judgment 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 judgment when it was possible for him to do so;
(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;
(d) if the judgment is irreconcilable with an earlier judgment 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 judgment fulfils the conditions necessary for its recognition in the Member State addressed; or
(e) if the judgment conflicts with:
    (i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or
    (ii) Section 6 of Chapter II.

The grounds for refusal have thus remained the same as under the Brussels I Regulation, apart from Article 45(1)(e), which has extended the categories of jurisdiction rules whose obedience is required to Section 5 of Chapter II, which includes special jurisdiction rules in employment cases and thus creates additional legal protection for employees, the weaker party that this section is designed to protect.

According to Article 46, enforcement may be refused when one of the grounds for refusal of Article 45 is found to exist. The application for refusal of enforcement shall be submitted with the court that the Member State concerned (that is, the Member State where enforcement is sought) has communicated to the European Commission as being authorized to examine such requests. As under the

[158] Hazelhorst and Kramer (2013).

Brussels I Regulation, all grounds for refusal must be examined by a court—not an enforcement authority, as Article 45(2) of the 2010 Proposal would have it—in the Member State of enforcement. The division of tasks between courts in the Member State of origin and that in the Member State of enforcement as originally proposed, which was so severely criticized, has therefore been abandoned.

2.3.4 Complete Free Movement of Judgments: The Maintenance Regulation

The Maintenance Regulation demonstrates the simplest approach towards the abolition of exequatur. This Regulation, which is of great practical importance, has abolished exequatur for decisions concerning maintenance obligations[159] for states that have adopted the 2007 Hague Protocol to the Maintenance Convention.[160] This means that for the enforcement of judgments that fall within the remit of this Regulation, declaration of enforceability is required.[161] There are also no possibilities of opposing recognition or enforcement of such judgments, except in the case of irreconcilability.[162] It does, however, provide for a review procedure in case the defendant was not served with the document instituting the proceedings in such a manner as to allow him to prepare for his defence, or when he was prevented from doing so by reason of *force majeure* or other extraordinary circumstances without any fault on his part, unless he forewent his opportunity to challenge the decision (Article 19(1)). Unlike the second-generation instruments, however, the Regulation does not contain minimum standards as to the way in which service is to be effected.

The Regulation does not, as the Brussels II bis Regulation does, require that a judgment be certified in its state of origin before it can be enforced. According to Articles 20(1) and (2) of the Maintenance Regulation, all the creditor needs to do in order to enforce a maintenance order is to submit a copy of the judgment and an extract from it which is provided by the court of origin (Annex A to the Regulation). There is therefore no control of compliance with any standards regarding service of documents or otherwise.

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[159] Council Regulation (EC) 4/2009 of 18 December 2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L7/1 (the 'Maintenance Regulation'). According to the Proposal, the reasons for proposing abolition of exequatur were (1) simplifying the citizen's life, (2) strengthening legal certainty, and (3) ensuring effectiveness and continuity of recovery. See Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2005) 649 final, pp. 4–6.

[160] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, concluded in the framework of The Hague Conference on Private International Law. All EU Member States and Serbia have ratified this Protocol.

[161] Article 17 Maintenance Regulation.

[162] Article 21(2) Maintenance Regulation.

The Maintenance Regulation thus allows for complete free movement of decisions pertaining to maintenance. It is remarkable that all refusal grounds have been abolished for these decisions, because as Chap. 3 discusses, practice shows that the public policy exception was invoked in maintenance cases many times when these cases still fell within the remit of the Brussels I Regulation, at least once successfully.[163]

2.3.5 Automatic Enforcement with Minimum Standards Under the Brussels II bis Regulation

The Brussels II bis Regulation governs the recognition and enforcement of judgments concerning parental responsibility and those concerning divorce, legal separation or parental responsibility. Under this Regulation, recognition also does not require any special procedure (Article 21(1)). It is, however, possible to oppose recognition under Brussels II bis (Article 21(3)). The reason why this is possible is that recognition of the judgments that fall within the material scope of this Regulation may have far-reaching legal effects. For example, automatic recognition of a judgment granting divorce would enable an interested party to claim maintenance on the basis of that judgment. Article 28(1) requires a declaration of enforceability for judgments concerning parental responsibility. As under the Brussels I Regulation, neither the party against whom enforcement is sought, nor the child concerned, may make submissions at this stage (Article 31(1)). Since judgments concerning divorce, separation or annulment do not require enforcement, no exequatur exists for these judgments. Finally, it should be pointed out that Brussels II bis does not contain an exequatur procedure for judgments concerning access rights (Article 41(1)) and ordering the return of a child (Article 42(1)). Chapter 3 discusses the practical consequences of this arrangement.

To understand the changes brought about by the Brussels II bis Regulation, it must be considered in comparison with the 1980 Hague Convention on the Civil Aspects of International Child Abduction[164] (hereinafter: the 1980 Convention), which applies in the EU alongside Brussels II bis.[165] The 1980 Convention provides a uniform rule on the conditions governing the return of an abducted child. Article 12 of the 1980 Convention requires the state to which the child was abducted to order the return of the child ‘forthwith’. Article 13(1) provides that state may refuse to order the return of the child if:

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[163] See Sect. 3.2.6.1.

[164] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[165] Because the 1980 Convention remains in force within the EU, the following discussion on the child abduction regime in the EU refers where relevant also to that Convention. See also Article 62(2) of Brussels II bis that provides that “The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto” unless the Brussels II bis Regulation takes precedence.

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or,
(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The rule is therefore that an abducted child should be returned to its state of habitual residence without any delay, unless one of the grounds for refusal applies. The defences, especially the 'grave risk defence', should be interpreted restrictively,[166] in order to discourage abductors from claiming it too freely simply to gain time.

The most important innovation when compared to the 1980 Convention is the reform of the enforcement regime of judgments requiring the return of a child. As explained above, under the 1980 Convention it was the court in the state to where the child was abducted which was obliged to order the child's return (Article 12), retaining the possibility to refuse such an order on the grounds of Article 13. Under the Brussels II bis Regulation, this system is replaced with one where the court of the Member State where the child was habitually resident should order his or her return; the Member State to where the child was abducted should then, on the basis of mutual recognition, enforce this order, without any possibility of refusing its enforcement.[167] Any discretionary powers to decide on the return of the child lie with the Member State where the child was habitually resident prior to the abduction.

There are therefore no grounds in the Regulation on which the court in the Member State to where the child was abducted may refuse enforcement of a return order. It is important to note that the procedure of Articles 12 and 13 of the 1980 Convention remains applicable within the EU, but that a number of rules within Brussels II bis curtail its application. Article 11(4) of Brussels II bis provides that return may not be refused on the basis of Article 13(b) of the 1980 Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. Furthermore, a court cannot refuse to return a child unless the party that requested his or her return has been heard (Article 11(5)). Finally, and vitally, Article 11(8) of Brussels II bis provides that a refusal by a state on the basis of Article 13 1980 Convention can be trumped by a subsequent judgment requiring the return of a child from the Member State with jurisdiction (i.e., the state of habitual residence of the child prior to the abduction). Such a subsequent judgment is immediately enforceable throughout the EU pursuant to Article 42(1) of the Regulation once it has been certified by the court that ordered it. To safeguard the rights of the parties involved, as well as those of the child, the court is required to check whether they were given an opportunity to be heard prior to issuing the certificate. With this arrangement, the possibilities for

166 Pérez-Vera (1982) para 34.

167 Articles 41(1) and 42(1) Brussels II bis Regulation. Note that this only applies to those States that have ratified the 2007 Protocol to the Hague Convention on the law applicable to maintenance obligations: Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

Member States to where a child has been abducted to refuse return are therefore severely curtailed when compared to the 1980 Convention.

According to the Explanatory Memorandum to the Proposal for this Regulation,[168] the decision to abolish exequatur for return orders was made on the basis of a French initiative.[169] This initiative stated as reasons that the right of a child to maintain contact with both parents after a separation must be protected, while the parent with custody must also be guaranteed that the child will return.[170] While the French proposal only proposed abolition of exequatur for judgments concerning rights of access,[171] the Regulation abolished it for both these judgments and those ordering the return of a child. For these judgments, no declaration of enforceability is needed: such a judgment may be enforced immediately once it has been certified as being enforceable by the judge of origin. It has rightly been pointed out that because it was only achieved for these two categories of decisions, abolition of exequatur in family law has a very limited scope,[172] but as already mentioned, it is seen as a step along the way.

The certification of the judgment by the judge of origin has thus replaced the role of the declaration of enforceability for these judgments. Articles 41(2) and 42(2) contain certain minimum requirements that must be fulfilled before the judge of origin may issue a certificate. For judgments concerning rights of access, the judge must make sure that (a) if the judgment was given in default, the person defaulting was given sufficient opportunity to defend him or herself, or accepted the decision unequivocally; (b) that all parties were given the opportunity to be heard; and (c) the child was given an opportunity to be heard, unless such a hearing was considered inappropriate due to the child's age or degree of maturity. For judgments ordering the return of a child, the Regulation also requires that the child and parents were given an opportunity to be heard (Articles 42(2)(a) and (b)) and that the court has taken into account in issuing its judgment the reasons for and evidence underlying the order pursuant to Article 13 of the 1980 Hague Convention on Child Abduction.

Certification is done using standardized forms that are attached to the Regulation by way of Annexes (Annex III and IV). These certificates are very simple in that they only require the court to fill out some information such as the names and addresses of the parties concerned, and check some boxes saying that the minimum requirements have been observed.

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168 Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters an in matters of parental responsibility repealing Regulation (EC) No 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance, COM (2002) 222 final/2, p. 2.

169 Initiative of the French Republic with the view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, OJ C 234/7.

170 Initiative of the French Republic with the view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, OJ C 234/7, recitals 3 and 13.

171 In order to ensure the return of a child to its state of residence, the initiative proposed that the authorities in the state where the child is staying order the prompt return on the application of the parent with custody. Articles 10 and 11.

172 Boele-Woelki and Gonzàlez Beilfuss (2007) p. 7.

It is therefore not the case that a judgment can be enforced immediately once it has been delivered: it is still necessary to request a certificate from the court that rendered the judgment. However, the certification mechanism differs considerably from the procedure for obtaining a declaration of enforceability. The most significant difference is of course that a certificate is issued by the court of origin. This not only removes the cross-border element of the exequatur procedure, but by leaving this responsibility with the court of origin, also the opportunity of control by a court which was not involved in the original proceedings.

Second of all, while the court of origin is required to check that the minimum requirements have been satisfied, there is no possibility for appeal if these requirements are thought to have been violated. It is thus entirely the court of origin's responsibility and prerogative to check whether they have been complied with (Article 43(2) of the Regulation). That this arrangement should be observed strictly was confirmed by the CJEU in its judgment in *Zarraga*,[173] which is discussed in the following chapter.

It can be concluded that since the Regulation contains no requirement of a declaration of enforceability and no possibility to oppose enforcement in the Member State of enforcement the Brussels II bis Regulation allows for nearly complete free movement of judgments concerning rights of access and those ordering the return of a child. By introducing minimum standards that are checked by the court of origin, it has however retained some of its inspection function. The approach taken in this Regulation is therefore less radical than that chosen in the Maintenance Regulation. As Sect. 2.2.4.2 discussed, in its 2014 Report on Brussels II bis, the Commission recommended extending the abolition of exequatur, in combination with the appropriate safeguards to take the place of refusal grounds.

2.3.6 *Automatic Enforcement with Minimum Standards Under the European Enforcement Order*

The Regulation creating the EEO was introduced in 2004.[174] This Regulation seeks to facilitate the cross-border enforcement of uncontested claims. If a claim is uncontested within the meaning of this Regulation,[175] the court of origin may

[173] CJEU Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* ECLI:EU:C:2010:828.

[174] See for a discussion of the instrument Bittman (2008), Zilinsky (2005, 2006).

[175] According to Article 3(1) of the EEO Regulation, a claim shall be regarded as uncontested if (a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or (b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or (c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or (d) the debtor has expressly agreed to it in an authentic instrument.

certify its decision as an EEO provided certain minimum standards are fulfilled. The certified decision can then be enforced throughout the EU. The certification as an EEO is an administrative procedure during which the judgment debtor is not heard. By means of compensation, the Regulation contains minimum standards relating to service of documents and provision to the debtor of due information about the claim,[176] which the court of origin is required to check before issuing the certificate. In essence, the EEO thus places the responsibility for judgment inspection with the court of origin of the judgment. If these minimum standards have not been complied with, such non-compliance can be cured if it is proven that the debtor has failed to challenge the judgment even though he was able to do so (Article 18(1)). If this is not the case, the judgment certified may be reviewed in the Member State of origin if (a) the debtor was not served with the documents in such a way to allow him to arrange for his defence, or (b) he was not able to object to the claim by reason of *force majeure,* in either case provided that he acts promptly (Article 19(1)).

As a judgment certified as an EEO, or a decision resulting from one of the two autonomous procedures, is immediately enforceable in all other Member States, a court or other judicial authority in the Member State of enforcement has no authority to review it in any way. All three instruments contain an article explicitly stating that exequatur has been abolished and that the decision in question "shall be recognized and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition".[177] The regulations therefore also do not contain any of the traditional grounds for refusal such as public policy review. The only ground on which enforcement may be refused is irreconcilability with an earlier judgment in the state of enforcement, but the reason why this ground remains is less to do with ideology than with the fact that enforcing two irreconcilable judgments is a logical impossibility.

2.3.7 Automatic Enforcement on the Basis of Common Rules in the Uniform Procedures

The EEO for uncontested claims paved the way for two autonomous harmonized EU instruments, the EOP and the ESCP.

The EOP is aimed at swift and efficient recovery of outstanding debts "over which no legal controversy exists".[178] It can be characterized as a one-step procedure or as a primarily administrative nature, since all that is required from the claimant is to fill in a number of standard forms concerning information about the claim and a description of the evidence. On the basis of the information provided, a court then issues an order for payment. While there is some uncertainty as to the extent to which the court will

[176] Article 16 EEO Regulation.

[177] EOP Regulation, Article 19; ESCP Regulation, Article 20(1); EEO Regulation, Article 5.

[178] EOP Regulation, Recital 6.

review the case on the merits,[179] the possibility to have the application reviewed through an automatic procedure (Article 8) appears to preclude a thorough examination of the merits. This means that an EOP can be obtained fairly easily. It is then served on the defendant, and it becomes the defendant's responsibility to oppose the order for payment if he deems it to be wrongfully granted. If no statement of opposition is lodged, the order is declared enforceable, and since the Regulation has abolished the exequatur (Article 19), there is no possibility of opposing its enforcement in other Member States. This arrangement clearly favours the claimant, requiring the defendant to take action to oppose the Order to prevent it being enforced against him. To compensate this, the Regulation provides for a review procedure in the Member State of origin for cases in which the defendant was not served with the order in such a manner to allow him to arrange for his defence (Article 20(1)); or when the order for payment "was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances". The Regulation does not further explain what "exceptional circumstances" are or when an order may be considered to have been "clearly wrongly issued". It has been pointed out that this leaves a lot of room for interpretation,[180] but given the "exceptional" nature of the review, a limited application seems appropriate.[181]

The ESCP is the only real adversarial procedure of the three instruments and works in much the same way as corresponding procedures under national law.[182] The claimant lodges his claim with the competent court in the Member State of his choosing. The claim form, which must include a description of the evidence, is served on the defendant, who may then submit a response. After having received this response and, if necessary, after an oral hearing, the court decides on the claim. Appeal is only possible if the law of the Member State in question provides for it. As under the EOP and EEO Regulations, review is possible if the defendant can show that he was not served with the order in such a manner to allow him to arrange for his defence (Article 18(1)). In December 2015, a regulation was adopted which widened the scope of the review procedure for the ESCP Regulation.[183] This amendment is discussed in Chap. 8.[184]

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[179] Article 8 does not make clear whether the claim is to be reviewed on the merits. Recital 16 of the Regulation provides that the court reviews the claim on the basis of the information provided by the claimant, which would allow it to review *prima facie* the merits of the claim and inter alia to exclude any unfounded or unmeritorious claims, yet goes on to state that "the examination should not need to be carried out by a judge". This, combined with the provision in Article 8 that the examination may be conducted automatically, appears to rule out a thorough examination of the merits. See Kramer (2010) p. 24.

[180] Kramer (2010) p. 26.

[181] Kramer (2007) pp. 47–49 and Kramer (2009) pp. 101–103.

[182] See for an analysis Kramer (2008a, b).

[183] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 341/1.

[184] Article 18 ESCP Regulation, as amended by Regulation 2015/2421. See Sect. 8.5.2.

By providing a—wholly European—alternative to existing national procedures and instruments, the ESCP, EOP and EEO Regulations adopt a new approach towards facilitating cross-border litigation and are therefore seen as "second-generation instruments".[185] All three result in a title which is immediately enforceable throughout the EU, and which cannot be reviewed across borders; the authority thus lies with the court of origin. Apart from irreconcilability, all grounds for refusal have been replaced with minimum requirements that are checked by the court of origin. As no declaration of enforceability is required and no cross-border check of any kind is possible, the judgment import as well as the judgment inspection function of exequatur have been truly left behind under these instruments. The abolition of exequatur and, in particular, the abandonment of public policy review under these instruments have been criticized in literature,[186] though as these objections relate more generally to the abolition of exequatur in EU legislation, they are discussed in Sect. 3.2.7 along with other criticisms on this development.

2.3.8 Interim Conclusion: The Significance of the Reforms for Fundamental Rights Protection

The previous sections have shown that it is difficult to detect a consistent approach towards the abolition of exequatur. The solutions chosen range from complete abolition of exequatur (the Maintenance Regulation) to abolition with some safeguards, checked by means of certification (Brussels II bis) to autonomous procedures, including minimum standards, which aim to replace (EEO) or circumvent (ESCP and EOP) the exequatur.

What is especially remarkable is that the EEO Regulation has as of yet still to be evaluated by the European Commission. An evaluation of the abolition of exequatur under this instrument would have provided valuable information on the practical consequences this has had. The fact that the EEO Regulation has not been evaluated is especially regrettable because this instrument was used to clear the way for the abolition of exequatur on a larger scale. The Maintenance Regulation, which achieved the most radical reforms, has also not yet been evaluated, though its evaluation is not due until 2016 (Article 74).

In conclusion, the only element all instruments have in common is the abolition of cross-border control of judicial decisions (save under certain "exceptional circumstances" under the EOP Regulation). Whether this element in itself has protective value is discussed in Chap. 3.

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185 Kramer (2011) p. 633.

186 Van der Grinten (2006), Van Bochove (2007), Cuniberti (2007–2008).

2.4 Conclusion

Free movement of judgments is essential to guaranteeing legal certainty, which is important to individual litigants, but also to the European legal order as a whole. Effective cross-border enforcement of civil judgments protects not only judgment creditor's right to enforcement but also, in the greater scheme, creates faith in the efficiency of the justice system, which in turn stimulates intra-EU trade and other types of legal relationships. However, it was shown that efficiency of cross-border enforcement needs to be, and has been, combined with effective protection of debtor's procedural rights as well. The next chapter explains in detail why such safeguards are necessary to protect debtor's rights. This chapter showed that traditionally the grounds for refusal of recognition and enforcement acted as safeguards, but that these have been progressively abolished by the EU legislature as a result of the introduction of mutual recognition. The various regulations achieved this abolition in different ways, ranging from an abolition of exequatur combined with a retention of refusal grounds (Brussels I bis) to a complete abolition of both the exequatur and the refusal grounds (the Maintenance Regulation). The adoption of uniform European procedures, the ESCP and the EOP, but also the provisional instrument of the EAPO, shows the European legislature's innovativeness and willingness to move beyond the traditional modes of cooperation in civil justice.

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