Mutual Trust and Cross-Border Enforcement of Judgments in Civil Matters in the EU: Does the Step-by-Step Approach Work?

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Abstract Mutual trust is one of the cornerstones of cooperation in the field of European Union private international law. Based on this principle the rules on the cross-border recognition and enforcement of judgments in the European Union are still subject to simplification. The step-by-step approach of the implementation of this principle led to the abolition of the *exequatur*, often accompanied by a partial harmonization of enforcement law to improve and support the smooth working of cross-border enforcement without *exequatur*. In this regard, it seems that the Member States still want to have control over the ‘import’ of judgments which results in maintaining the ground for non-recognition and the possibility of relying on them in the Member State of enforcement. This article considers the implementation of the principle of mutual recognition in three areas of justice: civil and commercial matters, family law and maintenance. In these areas the European Union legislator has chosen three different approaches for the implementation of this principle.

Keywords Mutual trust · Mutual recognition · Judgment · Regulation 1215/2012 · Abolition · *Exequatur* · Regulation 2201/2003 · Regulation 4/2009 · Recognition · Enforcement

1 Introduction

One of the cornerstones of European Union (hereinafter the EU) private international law, especially EU international procedural law, is mutual trust. Mutual trust in the law systems of the Member States of the the EU also forms a premise for the recognition and enforcement rules which were introduced in the

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EU. The 1968 Brussels Convention on Jurisdiction and Enforcement¹ already made the automatic recognition of judgments falling under the scope of this Convention possible. It had also introduced an easy system for the enforcement of judgments as well as a system of rules of international jurisdiction. Even though it had simplified the cross-border enforcement of judgments in civil and commercial matters, enforcement was still ‘checked at the entrance’ into the Member States. In the course of time, the system of recognition and enforcement became more simplified and was also made possible in the fields of law falling outside the material scope of this Convention.² One may wonder whether mutual trust really does exist or whether it is only a postulate, a kind of myth, introduced within the EU to create a basis for automatic recognition and for an easy cross-border enforcement of judgments rendered by the courts of the Member States. What does the principle of mutual trust really mean? Who does one trust and in what respects? There are no explanations and no answers to these questions. The legal basis for judicial cooperation in civil and criminal matters in the EU is laid down in Articles 81 and 82 Treaty on the Functioning of the European Union (TFEU) and, according to these provisions, is ‘based on the principle of mutual recognition’.³ Despite the existence of this principle the EU started only very recently to monitor the existence of mutual trust in the EU.⁴

It is not the goal of this article to provide a definition of mutual trust or to list the requirements for its existence. Nor does it provide any details as to between which participants of the internal market of the EU mutual trust exists as a cornerstone of

¹ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32. The 1968 Brussels Convention was concluded on 27 September 1968 between the original six founding Member States of the European Economic Community (EEC). Each time the EEC was enlarged a revision of the Convention took place. Every new Member State of the EEC was to accede to this Convention. See more on the historical background of the 1968 Brussels Convention Magnus (2016) Introduction, Notes 17–20.

² According to Art. 1 of the 1968 Brussels Convention it applies to civil and commercial matters. The same system of cross-border enforcement was also introduced in family matters in the 2000 Brussels II Regulation (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 [2000] OJ L 160/19). This Regulation was replaced by the Brussels IIbis Regulation. See more on the latter Regulation in Sect. 3.2.

³ Even though EU law postulates that mutual trust is a cornerstone of a judicial cooperation in civil and criminal matters, the effect of this principle is limited by the special position of Denmark, the United Kingdom and Ireland. These Member States do not participate in all instruments based on Arts. 81 and 82 TFEU. See for more details Arts. 1 and 2 of the Protocol on the position of Denmark ([2004] OJ C 310/356) as well as Arts. 1 and 2 of the Protocol on the position of the United Kingdom and Ireland ([2004] OJ C 310/353). According to Arts. 3 to 5 of the Protocol, the United Kingdom and Ireland may ‘opt in’ for the adoption of an instrument based on Arts. 81 and 82 TFEU. Denmark, in principle, does not participate in the adoption and application of such an instrument. However, Denmark concluded an agreement with the EU under which certain instruments (Regulations) do apply in Denmark.

⁴ See more on mutual trust as one of leading principles of EU private international law in Weller (2015), pp. 64 et seq. Weller points out that in particular mutual trust exists only to a limited degree. The EU was built as such ‘on the myth of mutual trust in the past’. As regards the judicial cooperation in civil and criminal matters this fundamental principle has its legal basis in Arts. 81 and 82 TFEU.

cross-border recognition and enforcement.⁵ Mutual trust is accepted as a common postulate introduced by the EU. This article focuses on the recognition and enforcement rules laid down in the instruments of the EU which are based on this postulate. In Sect. 2, a general overview of systems of recognition and enforcement in different Regulations in the field of European private international law is given.⁶ The goal of this section is to make clear that even though mutual trust as a basic principle of the judicial cooperation in civil and criminal matters exists, there are different ways as to how it can be—or actually, how it was—introduced in secondary EU law. In Sect. 3, three Regulations concerning the recognition and enforcement of judgments in the EU are discussed. Firstly, attention is paid to the rules of recognition and enforcement under the 2012 Brussels I Regulation (Recast).⁷ This Regulation became applicable on 10 January 2015 and simplifies the circulation of judgments in civil and commercial matters even more in comparison to its predecessors, the 2001 Brussels I Regulation⁸ and the 1968 Brussels Convention. Secondly, the rules on recognition and enforcement under the Brussels IIbis Regulation are discussed.⁹ This Regulation made possible the automatic recognition of judgments in certain family matters. As regards the enforcement of such judgments, this Regulation introduced different systems of enforcement depending on the subject matter of the judgment whose cross-border enforcement is sought. The third instrument on the recognition and enforcement of judgments to be discussed is the 2008 Maintenance Regulation.¹⁰ This Regulation makes the automatic recognition of judgments relating to maintenance obligations possible. It introduced two different systems for the cross-border enforcement of such judgments in the EU, depending on whether a judgment is rendered in a Member State which is party to the 2007 Hague Protocol.¹¹ Finally, the similarities and differences in the above-mentioned instruments are pointed out. Also the general effects of recognition and enforcement in cross-border cases are discussed.

⁵ See more in Weller (2015), pp. 64 et seq. See also the different declarations published by the EU starting with the Conclusions of the Tampere European Council of 15 and 16 October 1999 and the Hague Programme of 10 May 2005 (COM (2005) 184 final) and more recently ‘The EU Justice Agenda for 2020—Strengthening Trust, Mobility and Growth within the Union’ (COM (2014) 144 final) and ‘A New EU Framework to Strengthen the Rule of Law’ (COM (2014) 158 final).

⁶ See more on the different enforcement regimes in the EU, Kruger (2016).

⁷ Regulation (EU) No. 1215/2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

⁸ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

⁹ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 [2003] OJ L 338/1.

¹⁰ Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1.

¹¹ Protocol on the law applicable to maintenance obligations, The Hague, 23 November 2007 [2009] OJ L 331/19.

2 Recognition and Enforcement in EU Regulations

As regards the cross-border enforcement of judgments one could say that there are two concepts which can be applied between states.¹² The first one is cooperation where a judgment from one state can be recognized and enforced in another state after a formal check in the state of enforcement. Under this regime, a procedure is created with regard to how to obtain leave to enforce a judgment in the state of enforcement and how to oppose that leave in that state. The other form of cooperation between states in a case of the cross-border enforcement of judgments is by giving direct effect to judgments from one state in the state of enforcement as if it were a judgment rendered in the latter state. Looking at the different instruments on cross-border enforcement in the EU, one could say that, historically, the EU took a position somewhere in between.

2.1 Exequatur Proceedings in the Member State of Enforcement

Given the fact that the procedural and enforcement law systems of the Member States of the EU are not harmonized, the possibility of a cross-border enforcement of a judgment rendered by a court of a Member State in another Member State was dependent on the national law of the Member State of enforcement. In order to make the free circulation of judgments in the EU possible, the 1968 Brussels Convention was introduced. According to Article 26 of the Convention, a judgment rendered by a court of a Member State is to be automatically recognized in another Member State without any special procedure being required.¹³ For the cross-border enforcement of a judgment intermediate proceedings in the Member State of enforcement are to be followed. At the request of an interested party, a judgment can be declared enforceable in the Member State of enforcement. These exequatur proceedings are so-called *ex parte (inaudita parte)* unilateral proceedings where the party against whom the enforcement is sought is not heard by the seized court. The court verifies—based on the request and on its own motion—whether the requirements for leave to enforce (exequatur) have been fulfilled. It also assesses whether the recognition and enforcement of the judgment may be refused because of the existence of one of the grounds for refusal mentioned in the Convention. However, the court is not allowed to review the jurisdiction of the court rendering the judgment, nor may it review the judgment as to its substance.

As will be discussed later on, the same system of recognition and enforcement also applies in general to judgments in matters of parental responsibilities under the Brussels IIbis Regulation. This Regulation makes the free circulation of certain judgments in family matters possible. However, it still requires a formal check of a foreign judgment prior to its enforcement in another Member State.

¹² Pfeiffer (2015), p. 187.

¹³ According to Art. 25 a judgment means any judgment rendered by a court or tribunal of a Member State, whatever the judgment may be called. A judgment only qualifies as a judgment within the meaning of the Convention if it is given in a civil and commercial matter (Art. 1 of the Convention).

2.2 Simplified Exequatur Proceedings in the Member State of Enforcement

The second regime of recognition and enforcement is the regime introduced by the 2001 Brussels I Regulation. This regime is also based on the automatic recognition of judgments. As regards cross-border enforcement, a procedure to obtain an exequatur in the Member State of enforcement is to be followed. However, these proceedings, compared to the exequatur proceedings under the 1968 Brussels Convention, are more simplified. Enforcement is still only possible at the request of an interested party. The court seized is only allowed to carry out a formal ‘check’. It may not assess whether recognition is to be refused because of the existence of a ground for refusal. This may only be verified in a procedure against the leave for enforcement at the request of the party against whom the enforcement is sought. This party is to specify in its request what ground for refusal exists. The court seized may not assess, on its own motion, whether there is another ground for refusal within the meaning of the Regulation according to which the recognition of the judgment is to be refused.

This regime for the recognition and enforcement of judgments also applies under the 2012 Succession Regulation¹⁴ and partially under the 2008 Maintenance Regulation.

2.3 No Exequatur Necessary in the Member State of Enforcement: Abolition of Exequatur in the Member State of Enforcement

As regards the decisions on access rights and decisions to return abducted children after an initial non-return order, the Brussels IIbis Regulation abolished the exequatur. This is also the case under the 2008 Maintenance Regulation and the 2012 Brussels I Regulation (Recast).¹⁵ However, these Regulations differ as regards the possibilities to oppose the enforcement or the recognition. As under the Brussels IIbis Regulation in the aforementioned matters and also under the 2008 Maintenance Regulation the recognition cannot be opposed, under the 2012 Brussels I Regulation (Recast) any interested party may still oppose the recognition and enforcement of the judgment in the Member State of enforcement.¹⁶

¹⁴ 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 [2012] OJ L 201/107.

¹⁵ *Contra* Kruger. According to Kruger (Kruger (2016), p. 13) under the 2012 Brussels I Regulation (Recast) one can only speak of the partial abolition of exequatur. The party against whom the enforcement is sought may initiate a procedure to halt the exequatur. As will be elaborated later on, it is not the exequatur that can be stopped but the enforcement of the judgment which falls under the scope of the Regulation. For the enforcement of a judgment from a Member State court in another Member State there is no longer any need for an exequatur.

¹⁶ Under the Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (COM (2016) 411/2) the European Commission has proposed to abolish the different treatment of decisions under the Brussels IIbis Regulation and to introduce one system for the recognition and enforcement of judgments falling under the scope of this Regulation.

The *exequatur* has also been abolished under the European instruments introducing harmonized procedures in the national law of the Member States. This is the case under the Regulation on the European Payment Order¹⁷ and the Regulation on Small Claims.¹⁸ Under these Regulations new procedures in the national law systems of the Member States are introduced. Because of the fact that these procedures are the same—or more or less should be—in all the Members States concerned,¹⁹ there is no need for a ‘check’ in the case of cross-border enforcement.

A hybrid regime for the cross-border enforcement of judgments was introduced in the Regulation on the European Enforcement Order.²⁰ Even though this Regulation did not harmonize the national law of the Member States, it abolished the *exequatur* in the Member State of enforcement and introduced certification proceedings in the Member State of origin of the judgment.²¹ However, as a kind of residue of the *exequatur* proceedings, the enforcement debtor can oppose the enforcement of a judgment falling under the scope of the regulation (but only) in the case of the irreconcilability of this judgment with another earlier judgment rendered in a Member State or in a third state.²² It also makes it possible that enforcement proceedings are stayed if the certification in the Member State of origin is challenged.

2.4 Preliminary Observations

Given the above-mentioned brief overview of different regimes of recognition and enforcement in the EU, it is interesting to observe that the developments in the simplification of the cross-border enforcement of judgments in the EU are connected not only to the political will of the Member States, but they also depend, in a certain way, on the character of the instrument. As the 1968 Brussels Convention was based on Article 220 EC, the Member States were obliged to enter into negotiations to secure the simplification of formalities related to the cross-border enforcement of judgments for the benefit of their nationals.²³ Thus, the

¹⁷ Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L 339/1.

¹⁸ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1.

¹⁹ Denmark does not apply these Regulations.

²⁰ 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 [2004] OJ L 143/15. This Regulation has a limited scope of application. It only applies to judgments rendered in uncontested claims within the meaning of the Regulation. See more on the background of this Regulation and on the definition of an uncontested claim ECJ 16 June 2016, Case C-511/14 *Pebros Servizi/Aston Martin Lagonda* ECLI:EU:C:2016:448.

²¹ The regime under this Regulation is a kind of a middle course between the *exequatur* and its abolition. The Regulation is to be seen as a ‘build up’ to the abolition of the *exequatur*. However, the future of this Regulation seems to be unclear as its application remains limited to judgments which do not fall under the scope of application of the 2012 Brussels I Regulation (Recast) which abolished the *exequatur* entirely and does not require a formal ‘check’ of the judgment in the Member State of origin.

²² See Art. 22 of this Regulation.

²³ Later Art. 293 EC Treaty. This article was omitted from the TFEU.

Member States were to simplify the national regimes of cross-border enforcement, but they still had the possibility to control the judgment rendered abroad. The 1968 Brussels Convention is just an international agreement between Member States which is ‘coloured’ by EU law. Under the legal grounds of the latest instruments on the cross-border enforcement of judgments (Article 67 paragraph 1 TFEU), such as the 2012 Brussels I Regulation (Recast), one of the goals of the EU is to create ‘an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States’. For this purpose, the EU is to facilitate, according to Article 67 paragraph 4 TFEU, ‘access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters’. Even though an area of freedom, security and justice would presuppose a full faith and credit clause, meaning that a judgment rendered in one Member State would have the same effect in all Member States and could be enforced throughout the whole area of the EU in the same way, Article 67 paragraph 4 TFEU only strengthens the cooperation principle. This principle needs to be elaborated in special instruments which are discussed in the next section of this article.

3 Mutual Trust Principle Under the 2012 Brussels I Regulation, the Brussels IIbis Regulation and the Maintenance Regulation

3.1 Brussels I Regulation (Recast)

3.1.1 Definition of a ‘Judgment’

Under the 2012 Brussels I Regulation (Recast) the free circulation of judgments applies not only to judgments rendered in main procedures (as to the substance of the matter) but also to judgments containing provisional or protective measures. According to Article 2(a), such a judgment only qualifies as a recognizable—and thus, enforceable—judgment under the Regulation if the judgment is served on the defendant prior to enforcement and if granted by a court of the Member State having jurisdiction as to the substance of the matter. Provisional or protective orders not fulfilling these requirements are excluded from the free circulation of judgments based on the Regulation.²⁴ The Regulation extends the benefits of the free circulation of judgments also to judgments awarded in *ex parte* (*inaudita parte*) unilateral proceedings.²⁵ The effect of a judgment on provisional and protective

²⁴ Under the 2001 Brussels I Regulation also a judgment rendered by a court not having jurisdiction as to the substance of the matter, thus based on the national law of the court seized, could profit from the cross-border enforcement under that Regulation. ECJ 27 April 1999, Case C-99/96 *Mietz/Intership Yachting* ECLI:EU:C:1999:202, [1999] ECR I-02277. See also Kramer (2013), p. 361.

²⁵ In such proceedings a defendant is not heard and there is no possibility for him/her to appear in the proceedings. Judgments in these proceedings are to be distinguished from judgments rendered in default of the appearance of the defendant. Such judgments still qualify as a judgment within the meaning of Art. 2 para. a of the 2012 Brussels I Regulation (Recast) and are still capable of recognition and enforcement under the Regulation.

measures not falling under the definition of a judgment is limited to the territory of the Member State where it was rendered.²⁶

The Regulation only applies to a judgment based on the merits of the dispute. This does not include judgments which make judgments from a non-Member state enforceable. In these judgments, a court of a Member State does not decide on the dispute between the parties; it only makes the enforcement of such a judgment possible given the fact that the national requirements of that State have been met. Such a decision by a court of a Member State relies on the national rules of enforcement law and only has local effect (its effect is limited to the territory of the Member State).²⁷

3.1.2 Recognition

According to Article 36, a judgment delivered in a Member State will be recognized in the other Member States. No special proceedings are necessary in this respect. Article 36 does not provide any definition of the term ‘recognition’. However, according to the Jenard Report on the 1968 Brussels Convention, the recognition of a judgment rendered in one Member State must have the same effect in the other Member States.²⁸ As a consequence of this approach, first of all substantive effects are to be recognized. This means that a judgment recognises the *status quo* of the legal relationship between the parties. In addition to these effects also the procedural effects of a judgment, such as *res judicata*, are to be accepted. The *res judicata* of a judgment or a judgment itself can serve as evidence.

A problem may arise if in the Member State of origin, i.e. in the Member State where the judgment was rendered, effect is given to a judgment which is unknown in the Member State of recognition. Which law determines the effects of a foreign judgment? The Regulation, as well as its predecessors, is unclear in this respect. Based on the Jenard Report, the European Court of Justice (ECJ) seems to accept that the law of the Member State where the judgment was rendered decides on the effects of the judgment. This means that the ECJ adopts the approach of the extension of effects (*Wirkungserstreckung*).²⁹ As under the 2001 Brussels I

²⁶ Recital 33. Even though such judgments should have a limited effect, Recital 33 does not exclude them from recognition and enforcement under the rules of national law. Merret (2016), Art. 2 Note 29.

²⁷ ECJ 20 January 1994, Case C-129/92 *Owens Bank/Bracco* ECLI:EU:C:1994:13, [1994] ECR I-117. This also applies to judgments declaring an arbitral award enforceable within a certain Member State. As regards such judgments the question may even arise whether these judgments fall within the material scope of the Regulation (civil and commercial matters), as Art. 1 para. 2(d) excludes matters concerning arbitration from the material scope of the Regulation. The proceedings on the enforcement of an arbitral award are ancillary to the arbitration proceedings. See also Recital 12. ECJ 25 July 1991, Case C-190/89 *Marc Rich/Società Italiana Impianti* ECLI:EU:C:1991:391, [1991] ECR I-3855 and more recently ECJ 13 May 2015, Case C-536/13 *Gazprom/Lietuvos Respublika* ECLI:EU:C:2015:316.

²⁸ Jenard (1979), p. 43. Even though this report relates to the mentioned Convention, it is still of a great value when interpreting the provisions of the Regulation as according to Recital 34 of the 2012 Brussels I Regulation (Recast) continuity between the Convention and its successors is to be ensured.

²⁹ ECJ 4 February 1988, Case 145/86 *Hoffmann/Krieg* ECLI:EU:C:1988:61, [1988] ECR 645 and more recently ECJ 28 April 2009, Case C-420/07 *Apostolides/Orams* ECLI:EU:C:2009:271, [2009] ECR I-03571. See also Pfeiffer (2015), p. 191.

Regulation an exequatur was necessary for the enforcement of a judgment from a Member State court in another Member State, the free circulation of judgments was limited. A foreign judgment was not treated in the same way as a judgment of a national court. The approach of ‘*Wirkungserstreckung*’ under the 2012 Brussels I Regulation (Recast) is supported by Article 54.³⁰ This provision provides that if a judgment contains a measure which is unknown in the law of the Member State of recognition, the measure is to be adapted to a measure having equivalent effect to it and which pursues similar aims and interests.³¹ Such an adaptation may not result in effects going beyond those provided in the Member State of origin. On the one hand, such effects are extended to the Member State of recognition while, on the other, this State could still have the possibility of a partial limitation of those effects if they are unknown. However, Article 54 precludes this approach by ordering that State to adapt measures which guarantee the intended purpose. An adaptation without extending the effects of the foreign judgment does not make any sense, however.³² It is also unclear whether the effects of a judgment could be based on a European principle of recognition. In its *De Wolf/Cox* judgment the ECJ ruled that, based on the 1968 Brussels Convention, a judgment falling under the scope of this Convention has preclusive effect. Such a judgment precludes a plaintiff from starting new proceedings as to the substance of the matter in the Member State of enforcement, even though this new procedure is cheaper than the enforcement of the judgment rendered by a court of another Member State.³³

As regards the automatic recognition of a judgment under the 2012 Brussels I Regulation (Recast), it should be pointed out that in the case of a cross-border recognition a judgment rendered in a Member State is treated as a judgment rendered in the Member State of recognition. This principle does not only apply to judgments which can be enforced under the regime of the Regulation, but also to judgments which are not capable of enforcement (e.g. declaratory judgments). A recognizable judgment still needs to fulfil certain requirements, however. According to Article 37, a party invoking recognition needs to produce a copy of the judgment satisfying the conditions necessary for establishing its authenticity and it also needs to produce the special certificate pursuant to Article 53 which is to be issued by the court of the Member State of origin. Even though Article 36 paragraph 1 states that a judgment from a Member State will be recognized in other Member States without

³⁰ Wautelet (2016), Art. 36 Notes 7–8.

³¹ The question may arise whether Art. 54 only applies in the case of a judgment which is to be enforced, containing a measure or an order which is unknown in the Member State of enforcement or whether it may also be used for the optimization of a foreign judgment, e.g. if the judgment does not sufficiently specify the way in which it is to be enforced (Pfeiffer (2015), p. 192). This approach could basically be opposed by Art. 52. A judgment falling under the scope of the Regulation may not—under any circumstances—be reviewed as to its substance in the Member State of enforcement. See also Leible (2016), p. 1158. The existence of the certificate which is to accompany the judgment and is to be filled in by the court in the Member State of origin might solve the problems relating to the adaptation of a measure which was ordered by that court. However, in the case of the application of Art. 54 there is a potential risk of inaccuracy when adapting a measure in the system of the Member State of enforcement. Hovaguimian (2015), p. 231.

³² Pfeiffer (2015), p. 192.

³³ ECJ 30 November 1976, Case 42/76 *De Wolf/Cox* ECLI:EU:C:1976:168, [1976] ECR 1759.

any special proceedings being required in the Member State of recognition, under paragraphs 2 and 3 of this Article reference is made to other proceedings which can be used in the case of the recognition of such a judgment. First of all, under paragraph 2 any interested party may start a procedure to obtain a declaratory judgment. This possibility might be necessary if a judgment only has a constitutive effect, i.e. no enforcement of the judgment is possible, and the party against whom it is invoked refuses to accept (the outcome of) the judgment. Also in the case where it is unclear whether the grounds for refusal, to which reference is made in Article 36 paragraph 2, are met, a special procedure might be commenced in the Member State of recognition in order to access the possibilities for a refusal of the recognition.³⁴ Article 36 paragraph 3 creates a possibility for an incidental recognition of a foreign judgment if the recognition of a judgment from another Member State is invoked in the course of the proceedings.³⁵ This might be necessary if the outcome of the proceedings depends on the determination of the incidental question of recognition. Article 36 still does not provide for the procedural rules to be followed. It only creates the possibility for this.

3.1.3 Enforcement

The central provision of the enforcement regime under the 2012 Brussels I Regulation (Recast) is Article 39. A judgment within the meaning of the Regulation which is enforceable in the Member State of origin is to be enforced in the other Member States without any declaration of enforceability being necessary in the Member State of enforcement. Under the Regulation, there is no need for any approval by any authority in the Member State of enforcement. Article 39 abolishes the *exequatur* and intends to make possible the free circulation of judgments falling under the scope of the Regulation.³⁶ The abolition of the *exequatur* is one of the most criticized innovations of the Regulation, even though this principle had already been implemented in other, earlier instruments, such as the Brussels Ibis Regulation or the 2010 Maintenance Regulation. One of the arguments against abolishing the *exequatur* which was often used was the decision of the European Court of Human Rights (ECtHR) in the *Pellegrini/Italy* case.³⁷ The ECtHR ruled that the Contracting States to the European Convention on Human Rights (ECHR) have an obligation to verify whether a foreign judgment complies with the requirements of the provisions of the ECHR. In the context of the Brussels Ibis

³⁴ The grounds for refusal are listed in Art. 45 of the 2012 Brussels I Regulation (Recast). They can be invoked to stop the enforcement of a judgment under the Regulation. Wautelet points out that as a consequence of the automatic recognition of a judgment the declaratory proceedings of Art. 36 para. 2 are rarely used in legal practice. It is often the party against whom the recognition of a judgment is invoked who starts these proceedings. Wautelet (2016), Art. 36 Note 18.

³⁵ Even though Art. 36 para. 3 only refers to the incidental question of the refusal of recognition, there is no reason not to apply it in a case where the recognition of a judgment is sought. Wautelet (2016), Art. 36 Note 27.

³⁶ A special reference is to be made to Recital 26: 'Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognized in all Member States without the need for any special procedure.'

³⁷ ECtHR 20 July 2001, Appl. No. 30882/96.

Regulation the ECtHR upheld the *Pellegrini/Italy* judgment, but it ruled that it had not been able to ‘find any dysfunction in the control mechanisms for the observance of the Convention rights’.³⁸ This means that there must be a possibility in the Member State of enforcement to interrupt the enforcement of a foreign judgment if it is requested to do so.³⁹ However, this system does not prescribe that the Member State of enforcement is obliged to ‘check’ the judgment rendered abroad. The obligation for the Member State to enforce a judgment without exequatur is indeed based on EU law.⁴⁰ The Member States, as Contracting States to the ECHR, have the obligation to guarantee the fair trial principle under Article 6 ECHR. This obligation does not require a Member State where the enforcement of a judgment from another Member State is sought to ‘check’ whether the rights under Article 6 ECHR have been observed, unless the judgment originates from a non-contracting State of the ECHR. As all the Member States are contracting States of the ECHR, a double control of the fair trial principle is not necessary.⁴¹ There is a guarantee of equivalent protection in all Member States, in so far as this presumption can be rebutted if the protection of rights laid down in the ECHR was manifestly deficient.⁴² This was also recognized by the ECtHR, which ‘is mindful of the importance of the mutual recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require’. This principle may still not infringe any fundamental rights, such as the fair trial principle.⁴³

Article 39 abolishes the exequatur; however, it does not introduce a full faith credit clause for all judgments. Under the conditions laid down in the Regulation, Article 39 makes the free circulation of judgments in the EU possible, without any barriers. For a judgment to enjoy free circulation it is necessary that certain requirements are fulfilled. Only an enforceable judgment within the meaning of Article 2(a) of the 2012 Brussels I Regulation (Recast) qualifies as such a judgment. If a judgment is to be enforced in another Member State, it is necessary that the court in the Member State of origin issues a certificate on the basis of Article 53. Even though it seems to be a rather theoretical, academic problem, the question may arise whether the newly introduced enforcement without exequatur has an exclusive character. It is the settled case law of the ECJ that national regimes of cross-border enforcement do not apply once a judgment falls under the scope of the Regulation.⁴⁴ The application of the national law of a Member State is precluded, even though it might be more favourable.⁴⁵ The national law may only be

³⁸ ECtHR 18 June 2013, Appl. No. 3890/11 *Povse/Austria*.

³⁹ The possibility of initializing a procedure to stop the enforcement of a foreign judgment because a ground for refusal is met meets the requirements addressed by the ECtHR.

⁴⁰ See also ECJ 1 July 2010, Case C-211/10 PPU *Povse/Alpago* ECLI:EU:C:2010:400, [2010] ECR I-06673.

⁴¹ Thöne (2016), p. 125.

⁴² See ECtHR 25 February 2014, Appl. No. 17502/07 *Avotins/Latvia*. This case concerned the enforcement of a judgment by a court from Cyprus in Latvia under the 2001 Brussels I Regulation.

⁴³ See ECtHR *Avotins/Latvia*.

⁴⁴ See ECJ *De Wolf/Cox*.

⁴⁵ Mankowski (2016a), p. 960.

applied to those judgments which are not covered by the Regulation. In this respect attention is also to be paid to Recital 33. Provisional, including protective, measures rendered by a court of a Member State are covered by the regime of the Regulation, unless this court does not have jurisdiction as to the substance of the matter and the judgment containing the measure is not served on a defendant prior to enforcement. In a case where the court has based its jurisdiction on the national law or if the defendant is not summoned to appear, the recognition and enforcement of such a measure is not possible under the Regulation. However, as follows from Recital 33, the Regulation does not preclude the application of the national law of the Member States in this respect. The same applies to other judgments.⁴⁶ As regards the free circulation of provisional and protective measures under the Regulation, the question may arise whether the Regulation departs from the approach of the ECJ concerning the cross-border enforcement of provisional measures. In its *Denilauler/Couchet Frères* decision, the ECJ stated that judgments containing provisional or protective measures, which are rendered without a party against which these measures are directed having been summoned to appear and which are to be enforced without prior service, do fall within the enforcement system of the 1968 Brussels Convention.⁴⁷ In view of the definition of the term ‘judgment’ within the meaning of Article 2(a), the approach of the 2012 Brussels I Regulation (Recast) remains unchanged. Provisional or protective measures can only benefit from free circulation if they were rendered by a court having jurisdiction as to the substance of the matter and which were served on the defendant prior to their enforcement. The verification of the first condition is facilitated by the certificate. According to Article 42 paragraph 2(b) under (i) the court in the Member State of origin is to declare whether it has jurisdiction as to the substance of the matter. Letter c of this provision requires the creditor to hand in proof of the service of the judgment containing the provisional or protective measure if the measure was rendered without the defendant being summoned to appear. Article 2(a) does not require the defendant to be aware of the fact that proceedings have been initiated. However, the defendant still has to have the possibility to object against the rendered measure. The goal of the service of the judgment prior to enforcement is to fulfil the criteria of a fair trial. The service of a judgment makes it possible for the measure to be the subject of an inquiry in adversary proceedings in the Member State of origin.⁴⁸

Parallel to Article 36 making the automatic recognition of a judgment possible, Article 39 introduces the possibility of automatic enforcement. A basis for the

⁴⁶ According to Cuniberti and Rueda the application of Recital 33 should be interpreted as meaning that a more favourable national regime for recognition and enforcement should prevail over the Regulation. After all, the goal of the Regulation (Arts. 39 et seq.) is the free circulation of judgments. Cuniberti and Rueda (2016), Art. 40 Note 14. *Contra* Mankowski (2016a), p. 960. The situation is to be distinguished from the one where a judgment is not enforceable under the regime of the Regulation because a ground for refusal has been met. This judgment cannot—even if the approach of Cuniberti and Rueda were acceptable—be enforced under a more favourable national system, as it falls within the scope of the Regulation.

⁴⁷ ECJ 21 May 1980, Case 125/79 *Denilauler/Couchet Frères* ECLI:EU:C:1980:130, [1980] ECR 01533.

⁴⁸ See ECJ *Denilauler/Couchet Frères* and ECJ 14 October 2004, Case C-39/02 *Maersk Olie/De Haan* ECLI:EU:C:2004:615, [2004] ECR I-09657. See for a more negative view on the possibility of the cross-border enforcement of provisional and protective measures under the Regulation, Garcimartín (2016), p. 182.

abolition of any control in the Member State of enforcement prior to the enforcement is mutual trust in each other's legal systems within the EU.⁴⁹ This decision by the policy makers is politically motivated and grounded on a fictive postulate of the existence of mutual trust in the legal systems of the Member States.⁵⁰ In a certain way Article 39 introduces an autonomous characteristic of a judgment rendered by a court of a Member State. A judgment is enforceable not only in the Member State of origin, but also in other Member States. It precludes the Member States, other than the Member State of origin, from introducing requirements which would restrict the free circulation of judgments.

As a consequence of the free circulation afforded to a judgment within the meaning of the 2012 Brussels I Regulation (Recast), according to Article 40 such a judgment has the power to proceed towards the adoption of any protective measures which exist under the law of the Member State of enforcement. The mere existence of an enforceable judgment creates this creditor's right. The question may arise whether the existence of this right is necessary, as under Article 39 the creditor may proceed to enforce a judgment without any proceedings being required. It should be pointed out that Article 40 is limited to enforcement measures. Even though Article 40 refers to the national law of the Member State of enforcement, it implicitly 'overrules' the requirements of that law which may contravene this right awarded to the judgment creditor.⁵¹ As there is still a possibility for the defendant to object against the enforcement of the judgment, it is necessary for the creditor to swiftly freeze any assets which are capable of enforcement.⁵²

3.1.4 Preliminary Observations

From a practical point of view, the abolition of the exequatur is very favourable for a judgment creditor. He can directly address the enforcement authority in the Member State in order to proceed with the enforcement of a foreign judgment. It is up to the judgment debtor to object to the enforcement in proceedings under the

⁴⁹ Mutual trust can only exist if fundamental rights are guaranteed within the EU. Only a judgment which meets certain requirements can 'enjoy' free circulation based on mutual trust. The grounds for the refusal of recognition which are still retained in the 2012 Brussels I Regulation (Recast) are guarantees as to the observation of fundamental rights. However, by retaining public policy the Member States seem to preserve a certain 'control' of mutual trust. See also Kramer (2013), p. 367. It might also be seen as an element undermining mutual trust in each other's law systems. Weller (2015), p. 98.

⁵⁰ One of the reasons for abolishing the exequatur were the costs of the exequatur proceedings under the 2001 Brussels I Regulation. In theory, the costs of enforcement under the 2012 Brussels I Regulation (Recast) should be reduced compared to the costs in a case of exequatur proceedings. However, it was borne in mind that the enforcement authorities might increase their fees due to the assessment of the foreign judgment and of the foreign certificate. Kramer (2013), p. 368; Mankowski (2016b), p. 1005. It was also pointed out that the will of the Member States to abolish the exequatur indicates that the Member States wanted 'to waive their procedural sovereignty to a certain extent in order to facilitate the free circulation of judgments in the European Union' (Pfeiffer (2015), p. 194). It is likely that the practical reasons 'triumphed' over the more or less dogmatic-conceptual reasons.

⁵¹ Cuniberti and Rueda (2016), Art. 40 Notes 10–13.

⁵² Mankowski (2016c), p. 1020.

national law of the Member State of enforcement.⁵³ The judgment debtor cannot be deprived of his right to do so. This right is given to him in general by, for example, the ECHR and by Article 47 of the EU Human Rights Charter. One could still claim that there is no unconditional free circulation of judgments. If requested to do so every Member State can control a foreign judgment. However, a Member State is not allowed to exercise this state power of its own motion. The 2012 Brussels I Regulation (Recast) does not adopt the regime of, for example, the Regulation on the European Enforcement Order, where there is almost no possibility to oppose the recognition of enforcement in the Member State of enforcement.⁵⁴ Under that regime the judgment debtor has to take an active role and object to the judgment in the Member State of origin. Only if the judgment is set aside is there no possibility of enforcement in another Member State. Under the 2012 Brussels I Regulation (Recast) it is possible under certain circumstances that a judgment is enforceable in the Member State of origin, but if a ground for refusal is met, this judgment cannot be enforced in another Member State. The abolition of the *exequatur* proceedings also has a practical advantage for the judgment debtor. The judgment debtor is not obliged to battle ‘on different fronts’. Under the 2001 Brussels I Regulation he could only object to the recognition of the judgment in the proceedings granting the *exequatur*. In order to object against the enforcement of the judgment the debtor needed to start a new procedure under the national law of the Member State of enforcement.⁵⁵ Under the 2012 Brussels I Regulation (Recast) all objections against the recognition and enforcement of the judgment are concentrated in one procedure in the Member State of enforcement. Unless the Regulation provides otherwise, those proceedings are governed, according to Article 41, by the law of that State. The possibility of opposing the enforcement of a judgment from another Member State and invoking the grounds for refusal listed in the Regulation is a residue of the *exequatur* proceedings.⁵⁶ There are no proceedings as regards the ‘importation’ of a foreign judgment; there are only grounds for refusal which can be invoked; however, these are to be effectuated under the national law of the Member State of enforcement.

⁵³ The judgment debtor may also challenge the judgment as such in the Member State of origin and request that the enforcement in the Member State of enforcement be stayed.

⁵⁴ It can only be challenged in the Member State of enforcement if the judgment which is to be enforced and which was certified as a European Enforcement Order is irreconcilable with an earlier judgment between the same parties and involving the same cause of action from a court of the Member State of enforcement or from a court of a third state subject to the condition that this latter judgment is capable of recognition in the Member State of enforcement. See Art. 22 of the Regulation on the European Enforcement Order.

⁵⁵ E.g. ‘*executiegeschil*’ in the Netherlands or ‘*Zwangsvollstreckungsverfahren*’ in Germany. Kramer points out that the judgment debtor depends on the national law. As the national enforcement laws of the Member States still differ, there is a possibility of inadequate protection being given to the judgment debtor’s rights. According to Kramer also the fact that the judgment debtor can rely on the grounds for refusal against recognition at the enforcement stage might result in a violation of his fundamental rights (Kramer (2013), p. 369). One may doubt whether this problem could be resolved by the (partial) harmonization of the enforcement measures (Hovaguimian (2015), p. 248).

⁵⁶ Based on this fact, according to Kruger, under the 2012 Brussels I Regulation (Recast) there is only a partial abolition of the *exequatur*. Kruger (2016), p. 14.

The grounds for refusal are not assessed by a court of the Member State of enforcement *ex officio*. Any interested party is to request that the recognition, and thus the enforcement, is to be refused based on the grounds for refusal listed in the Regulation. As a consequence of this approach,⁵⁷ a judgment from a Member State may be enforced in another Member State even though it is contrary to the public policy of the Member State of enforcement.⁵⁸

3.2 Brussels Ibis Regulation

As family matters are excluded from the scope of the 2012 Brussels I Regulation (Recast) as well as being excluded from its predecessor, the 2001 Brussels I Regulation,⁵⁹ the Brussels Ibis Regulation was introduced, especially in the field of the recognition and enforcement of judgments concerning family matters.⁶⁰ This Regulation facilitates the free circulation of judgments, authentic documents and agreements within the EU. It created a set of unified rules for the recognition and enforcement of a judgment rendered by a court in a Member State.

3.2.1 Recognition

As one of the main goals of this Regulation is to facilitate the free circulation of judgments, the starting point is the automatic recognition of judgments falling within the Regulation's scope of application. According to Article 21 paragraph 1, a judgment rendered by a court in a Member State is to be recognized in the other Member States without any special procedure being required. As is the case under the 2012 Brussels I Regulation (Recast), even though a judgment is to be recognized automatically, any interested party may apply for a decision for the recognition of a judgment given in another Member State.

The recognition of a judgment may be denied under certain circumstances which are laid down in Article 22, dealing with the grounds for the non-recognition of judgments relating to divorce, legal separation of the annulment of a marriage, and in Article 23, dealing with the grounds for the non-recognition of judgments relating to parental responsibility. It goes beyond the scope of my contribution to discuss all of these grounds. One could say that these grounds are intended to guarantee that the principle of fair trial is observed in the Member State of origin of the judgment as

⁵⁷ Also under the 2001 Brussels I Regulation a court of a Member State of enforcement may not assess the existence of a ground for refusal *ex officio*. Pfeiffer (2015), p. 190.

⁵⁸ According to Pfeiffer a residual power of a Member State of enforcement to assess the public policy *ex officio* is to be recognized. He also points out that a Member State may invoke public policy if it is necessary for the protection of its interests (Pfeiffer (2015), p. 191). In my opinion it is not the court but the enforcement authority which should prevent enforcement in such a case. The enforcement authority is often a public official who has limited powers. In my opinion there is no possibility for a court to interrupt the enforcement of a judgment on its own motion.

⁵⁹ Until the entry into force of the 2008 Maintenance Regulation the 2001 Brussels I Regulation covered maintenance matters. From 18 June 2011 onwards these matters have been excluded from the scope of application of the latter Regulation. See also Art. 1 para. 2(e) of the 2012 Brussels I Regulation (Recast). Other family matters were not—and are still not—covered by the latter Regulation.

⁶⁰ See Recital 23 of the Brussels Ibis Regulation.

well as that any possible conflict with other judgments is limited. As the free circulation of judgments is based on mutual trust in the law systems of the Member States, a review of the jurisdiction⁶¹ of the court of the Member State of origin and a review of the judgment as to the substance of its matter are prohibited.⁶²

3.2.2 Enforcement

As regards the enforcement of judgments, the Brussels IIbis Regulation introduced two different tracks. In two particular cases there is a ‘fast’ track. According to Article 41 the rights of access granted in an enforceable judgment given by a court of a Member State are recognized and enforced in another Member State without any need for a declaration of enforceability and without any possibility of opposing the judgment in the Member State of enforcement. This is also the case with regard to enforceable judgments concerning the return of a child in child abduction cases. According to Article 42 these judgments may not be opposed in the Member State of enforcement, nor is a declaration of enforceability required. In these situations, the *exequatur* has been abolished. Decisions not falling under the aforementioned articles can also benefit from the free circulation of judgments. However, they do fall under the ‘general’ track. According to Article 28, an enforceable judgment on the exercise of parental responsibility in respect of a child is to be enforced in another Member State on the application of an interested party.⁶³ It is therefore necessary to obtain a declaration of enforceability in the Member State of enforcement. However, it must be borne in mind that the court in the Member State of enforcement which has jurisdiction to deal with a request for this declaration is to give its decision without delay. The person against whom enforcement is sought and the child concerned are not heard at that point. Nor are they entitled to oppose the application in the first phase.⁶⁴ Besides the formal requirements which are to be verified,

⁶¹ Even though the court in the Member State of recognition may not review jurisdiction in a case where the judgment which is to be recognized contains a provisional, including protective, measure, and where the court in the Member State of origin has based its jurisdiction on Art. 20 of the Regulation (provisional and protective matters), the judgment cannot profit from the principle of the free circulation of judgments. It may still be recognized and, if necessary, enforced in another Member State under the national law of that State. See ECJ 15 July 2010, Case C-256/09 *Purrucker* I ECLI:EU:C:2010:437, [2010] ECR I-07353. However, it should be pointed out that the assessment of the jurisdiction by the court of the Member State of enforcement in the case of a decision containing a provisional measure is not contrary to the prohibition of reviewing the jurisdiction. Before issuing the declaration of enforceability the court seized still needs to verify whether the judgment falls under the scope of application of the Regulation.

⁶² According to Art. 25 the recognition of a judgment relating to divorce, a legal separation or a marriage annulment may not even be refused in the Member State of recognition, even though a divorce, a legal separation or a marriage annulment would not be allowed in that State.

⁶³ Art. 28 is limited to judgments on parental responsibility. No mention is made of decisions relating to divorce, legal separation and marriage annulment, as these decisions are not to be enforced. They only determine a *status quo* between the partners. No enforcement is necessary. These decisions are only to be recognized.

⁶⁴ Art. 31 para. 1. The ECJ has held that Art. 31 does not apply to a request for the non-recognition of a judgment. The reason for the exclusion of such a request from the scope of Art. 31 is that in such a procedure the applicant is the person against whom the application for a declaration of enforceability might have been brought. Since the purpose of the non-recognition procedure is to seek a negative assessment, it calls for an adversarial procedure. See ECJ 11 July 2008, Case C-195/08 PPU *Rinau* ECLI:EU:C:2008:406, [2008] ECR I-05271.

such as whether the decision is to be considered a judgment within the meaning of the Regulation, whether the judgment falls within the scope of the Regulation and whether the application for the declaration is ‘accompanied’ by the certificate issued by the court in the Member State of origin, the court is to assess the existence of the grounds of non-recognition.⁶⁵

Both systems require, however, that a court in a Member State of origin issues a certificate before a judgment can benefit from the free circulation guaranteed by the Regulation. As regards the proceedings related to the issuing of the certificate, each of the tracks has its own approach. As in the case of a decision concerning the right of access or the return of a child in a child abduction case, the certificate is issued *ex officio*; in other situations the certificate is issued at the request of an interested party.⁶⁶

It is also to be pointed out that this ‘two-track’ approach with its differences as regards the treatment of a foreign judgment may cause problems in actual practice. If a judgment on parental responsibility also contains measures on the right of access, only the latter can benefit from enforcement without a declaration of enforceability, as for this measure this declaration has been abolished according to Article 41. However, as regards the other part of the judgment, for example a measure by which custody rights are granted, a declaration of enforceability is required. As already mentioned above, there is a possibility in the Member State of enforcement to oppose the recognition of judgments falling under the ‘general’ track. A situation is thus created whereby a right of access is recognized and enforced without the possibility of opposing the recognition thereof in the Member State of enforcement, whereas the legal ground for the existence of the right of access, namely the custody right, may be opposed and, in a worst case scenario, the recognition thereof may be denied.⁶⁷

The Brussels IIbis Regulation leaves the enforcement proceedings as such untouched. According to Article 47 of the Regulation the enforcement procedure is governed by the law of the Member State of enforcement. That law also determines whether an act is to be considered as an enforcement act. This may cause some problems in practice as well.⁶⁸

⁶⁵ Art. 31 para. 2. At first sight, this may lead to a delay. However, as the practice under the 1968 Brussels Convention has shown, the courts deciding on the request do not have enough information and facts to assess the existence of the grounds of non-recognition. There is very little chance that a court can obtain the necessary information on its own motion. This was also one of the reasons why under the 2001 Brussels I Regulation courts in the Member State of enforcement, when dealing with a *exequatur* request, no longer assessed the grounds of non-recognition.

⁶⁶ Arts. 41 and 42 and Art. 39. According to Art. 41 para. 3 in the case of a decision on rights of access the required certificate is issued *ex officio* in a cross-border situation. If the situation gains an international character because of the change of the constellation of facts, one of the parties may request this certificate.

⁶⁷ This possible contradiction is also acknowledged by the European legislator. See COM (2014) 225 final, p. 10.

⁶⁸ COM (2014) 225 final, p. 10. There are for example inconsistencies in the enforcement law in the Member States as regards the question of whether a request for the delivery of a passport for a child by its guardian is to be considered as an enforcement act. If the latter is the case, the person appointed as a guardian has to apply for a declaration of enforceability in the Member State where he or she wants to request the delivery of a passport. This may cause some delay as the application may be opposed by any interested party. An application for a passport being issued in the child’s name is a matter which falls within the scope of application of the Brussels IIbis Regulation. See ECJ 21 October 2015, Case C-215/15 *Gogova/Pliev* ECLI:EU:C:2015:710.

The Regulation does not contain a provision under which in the Member State of enforcement the measure ordered in a Member State of origin's judgment could be adapted to suit the legal system of the State of enforcement.⁶⁹ This may under certain circumstances cause problems in legal practice, as in the Member State of enforcement the effects which are granted to the judgment are the same as those awarded under the law of the Member State of origin. Even though the Regulation is only intended to harmonize the rules of private international law and leaves the rules of international procedural law untouched, the second sentence of Article 41 para. 1 and Article 42 para. 1 states that the court of the Member State of origin may in the circumstance of Articles 41 and 42 declare a judgment enforceable even if national law does not provide for enforceability by operation of law, notwithstanding any appeal.⁷⁰ The main goal of this provision is the swift and efficient cross-border enforcement of measures concerning children. The effect of 'provisional enforceability' is to be recognized in the Member State of enforcement and cannot be denied due to Articles 41 and 42.⁷¹ All objections against the judgment are to be dealt with by the courts of the Member State of origin. As there are no possibilities to oppose the recognition of judgments falling under Articles 41 and 42, irreparable damage may occur, especially in the case of an order for the return of a child within the meaning of Article 42. However, as the enforcement proceedings are governed by the national law of the Member State of enforcement, the enforcement might be suspended under the application of the national law of the latter State.⁷²

3.2.3 Proposed Changes

As far as the European Commission is concerned, the two-tracks approach is to be abolished. According to the 2016 Proposal for a Recast of the Brussels Ibis Regulation, the *exequatur* is to be abolished for all decisions falling under the scope of application of the Regulation.⁷³ Still, the 2016 Proposal introduces a new enforcement procedure which is to be started in the Member State of enforcement by the person seeking the enforcement of a decision.⁷⁴ The abolition of the *exequatur* is to be accompanied by the introduction of procedural safeguards. With these safeguards, the defendant is to be able to apply for an effective remedy and his right to a fair trial is guaranteed as well. Still, the factual enforcement of an

⁶⁹ Cf. Art. 54 of the 2012 Brussels I Regulation (Recast).

⁷⁰ By the second sentence of Arts. 41 para. 1 and 42 para. 1, a rule of harmonized enforcement law is introduced in the Member States. This applies even if the national law of the Member State concerned does not make enforceability by operation of law possible.

⁷¹ ECJ 1 July 2010, Case C-211/10 PPU *Povse/Alpago* ECLI:EU:C:2010:400, [2010] ECR I-06673 and ECJ 22 December 2010, C-491/10 PPU *Zarraga/Pelz* ECLI:EU:C:2010:828, [2010] ECR I-14247.

⁷² Curry-Sumner (2014), p. 557.

⁷³ Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM (2016) 411/2.

⁷⁴ This procedure is not required under the 2012 Brussels I Regulation (Recast). Under the latter Regulation the procedure is to be started by the party against whom the judgment is enforced. The 2016 Proposal thus introduces a new procedure which in some Member States is unknown.

enforceable decision from another Member State is governed by the national law of the Member State of enforcement. However, the 2016 Proposal states explicitly that such a decision is to be enforced in another Member State under the same conditions as a decision rendered in the Member State of enforcement. The court of that Member State may still adapt the measures or orders contained in such decisions if these measures or orders are not known in the Member State of enforcement. The new measures ordered must have equivalent effect and are to pursue similar aims and interests.

3.3 Maintenance Regulation

As already mentioned, the decisions relating to maintenance matters were covered by the Brussels I Regulation, until the Maintenance Regulation entered into force on 18 June 2011.⁷⁵ The latter Regulation introduces two different tracks for the recognition and enforcement of decisions. On the one hand, there is a procedure regarding judgments rendered by a court of a Member State which is bound by the 2007 Hague Protocol. The other procedure covers decisions rendered in Member States where the 2007 Hague Protocol does not apply.⁷⁶ In my opinion it was not mandatory to make a difference between decisions of Member States bound by the 2007 Hague Protocol and decisions of Member States where this Protocol does not apply. Enforcement without exequatur would be possible without the use of unified conflict rules. However, as this approach meets the requirements of the Stockholm Programme, the exequatur is being abolished due to the unification of the conflict rules. If the national courts or authorities have to apply the same conflict rules, compared to those cases where the Member States apply different conflict rules, there is much less possibility of forum shopping.⁷⁷ To limit the possibilities of forum shopping, decisions from Member States not applying the uniform conflict rules require an exequatur in the Member State of enforcement prior to their enforcement. In the case of cross-border enforcement there is no possibility to choose which procedure is to be initiated. Which track is to be followed depends on the question whether the Member State of origin is bound by the 2007 Hague Protocol. Therefore, the first track applies even if the judgment is rendered in a Member State where the Protocol applies, and the recognition and enforcement thereof is requested in a Member State not bound by the Protocol.⁷⁸ Article 17 does not require the recognition and enforcement to take place in a Member State bound

⁷⁵ According to Art. 68 para. 2 the Regulation on the European Enforcement Order applies only to judgments relating to maintenance matters in Member States not bound by the 2007 Hague Protocol.

⁷⁶ There are only two Member States which are not bound by the 2007 Hague Protocol: Denmark and the United Kingdom.

⁷⁷ Recital 24. The guarantees provided by the application of the same conflict rules in the Member States bound by the 2007 Hague Protocol justify the abolition of exequatur. This strengthens mutual trust. Even though one could say that whether or not the same conflict rules were applied should not have any influence on the form of recognition and enforcement, as under all EU instruments recognition and enforcement may not be refused if the court of the Member State of origin had applied different conflict rules or different governing law.

⁷⁸ See also Lipp (2013), Art. 16 Rn. 1 as well as Garber (2015), Art. 16 Rn. 6.

by the 2007 Hague Protocol.⁷⁹ In my opinion as a consequence of this interpretation a decision rendered e.g. in the Netherlands or in Germany is to be recognized and enforced in Denmark or in the UK without any proceedings being required, even though the latter States are not bound by the 2007 Hague Protocol.⁸⁰

3.3.1 Track for the 2007 Hague Protocol Decisions

According to Article 17, a judgment rendered by a court of a Member State bound by the 2007 Hague Protocol is to be recognized and enforced in another Member State without any special procedure being required in the Member State of enforcement. No declaration of enforceability is required.⁸¹ Recognition leads to an extension of those effects given to the judgment according to the law of the Member State of origin in the Member State of enforcement (the principle of effect extension; *Wirkungserstreckung*). However, compared to other existing instruments on cross-border recognition and enforcement in the EU, such as the Regulation on the European Enforcement Order, the Regulation on European Payment Order Procedure or even the Brussels Ibis Regulation, a decision falling under Article 17 does not have to meet special requirements.⁸² The recognition and enforcement of a decision in maintenance matters does not in any way imply the recognition of any family relationship between the maintenance creditor and the maintenance debtor.⁸³ Contrary to the 2012 Brussels I Regulation (Recast) there are no grounds for non-recognition. Nor can a decision be the subject of proceedings on recognition or on non-recognition in the Member State of enforcement. The consequence of abolishing the exequatur in the Member State of enforcement is that a decision relating to a maintenance matter from a Member State bound by the 2007 Hague Protocol is to be enforced in another Member State in the same way as a decision of the court of the Member State of enforcement. However, the enforcement of a decision from a Member State bound by the 2007 Hague Protocol can be refused or suspended

⁷⁹ This might be a strange consequence of the scope of application of the first track, as the abolition of the exequatur is namely based on the harmonization of the conflict rules by the 2007 Hague Protocol.

⁸⁰ Supported by ECJ 9 February 2017, Case C-283/16 *M.S./P.S.* ECLI:EU:C:2017:104 concerning the enforcement of a German maintenance decision in the UK. The facts are not clear on this point; however, in point 38 the ECJ makes a reference to Art. 17 of the 2008 Maintenance Regulation (abolition of exequatur).

⁸¹ The same applies to judgments under the 2012 Brussels I Regulation (Recast) which has abolished the exequatur in civil and commercial matters as well. The exequatur was already abolished by Art. 5 of the Regulation on the European Enforcement Order for judgments in uncontested claims. However, it should be pointed out that a judgment can only be certified as an European Enforcement Order if certain standard requirements are met. Under the 2008 Maintenance Regulation as well as under the 2012 Brussels I Regulation (Recast) no extra requirements need to be fulfilled. Nor is there a certification procedure in the Member State of origin.

⁸² Under the Regulation on the European Enforcement Order it is required for enforcement without exequatur that the writ of summons initializing the proceedings is served in the way prescribed by the Regulation. The Brussels Ibis Regulation also requires in Arts. 41 and 42 that not only the parties to the proceedings have the opportunity to be heard, but the child may have this opportunity as well.

⁸³ Art. 22. These might be subject to other existing instruments, even if the judgment concerning maintenance also deals with the relationship underlying the maintenance obligation.

in limited cases.⁸⁴ All objections against the decision which is to be enforced are addressed to a court in the Member State of origin. As under certain circumstances the defendant did not take part in the proceedings in the Member State of origin, Article 19 of the Regulation introduces an obligation for the Member State to create proceedings in which this defendant is able to apply for a review of the judgment. Article 19 creates an extraordinary remedy for a defendant in default. This defendant can still challenge the decision in the Member State of origin by using the remedies under the national law of that State. The introduction of this new right by the Regulation does not affect the possibilities given to the defendant under that law.⁸⁵ However, the right of the defendant in default to apply for a review is limited to two situations. First, in a case where the defendant was not able to enter the proceedings leading to the decision at hand because he had not been served with the document instituting this proceedings in due time and in such a way as to be able to arrange for his defence. The second possibility to apply for a review is where the defendant was not able to enter the proceedings by reason of force majeure or due to special circumstances without any fault on his part. In a case where the defendant could challenge the decision in the Member State of origin, but failed to do so, he cannot apply for a review of the decision in the Member State of origin.⁸⁶

3.3.2 *Track for Decisions Not Covered by the 2007 Hague Protocol*

If a decision relating to maintenance matters from a Member State not bound by the 2007 Hague Protocol is to be enforced in another Member State, the system of the 2001 Brussels I Regulation is to be followed. According to Article 23, such a decision is recognized without any proceedings being required.⁸⁷ However, for enforcement the interested party needs to apply under Article 26 for an exequatur in the Member State of enforcement in unilateral proceedings. In accordance with Article 30, the court seized with a request for an exequatur is to decide on this request within 30 days after the formalities are completed.⁸⁸ The party against whom the enforcement is sought is not entitled to take part in these proceedings. Even though it is contrary to the cross-border enforcement of decisions relating to

⁸⁴ A refusal is possible if the enforcement of the judgment is irreconcilable with a judgment of a court of the Member State of enforcement or with a judgment from another Member State or a third state fulfilling the requirements for its recognition in the Member State of enforcement.

⁸⁵ See also Recital 29.

⁸⁶ Compare Art. 19 of the Regulation on the European Enforcement Order and Art. 20 of the Regulation on the European Payment Order Procedure.

⁸⁷ In accordance with Art. 75 para. 2 these proceedings also apply to decisions relating to maintenance matters rendered before the date of application of the 2008 Maintenance Regulation (18 June 2011) and to such decisions given after this date in proceedings initiated before this date. In these proceedings different conflict rules to determine the applicable law for maintenance obligations were applied, as the 2007 Hague Protocol had not yet entered into force.

⁸⁸ This Article harmonizes the time periods within which the decision on an exequatur request is to be given. According to Art. 41 of the 2001 Brussels I Regulation the judgment is to be declared enforceable *immediately* after the completion of the formalities. The relevant time period differs per Member State. See more Hess et al. (2008), p. 130.

maintenance matters from Member States bound by the 2007 Hague Protocol, the Regulation contains a list of grounds for refusal and these grounds are not reviewed in the Member State of enforcement in these proceedings. The exequatur is rendered after the formal requirements of Article 28 have been met. The party against whom the enforcement is sought can appeal against the exequatur on the basis of the grounds for non-recognition laid down in the Regulation.⁸⁹

3.3.3 *Enforcement*

A decision which is enforceable can be enforced in another Member State either directly (Article 17) or after it is declared enforceable in the Member State of enforcement (Article 26). Article 41 para. 1 underlines the principle of the free circulation of judgments by stating that a decision from a court of a Member State is to be enforced in another Member State under the same conditions as a judgment rendered by a court in the State of enforcement. Whether a judgment is enforceable is to be determined under the law of the Member State of origin. As under the legal systems of some Member States judgments relating to maintenance matters cannot be declared to be provisionally enforceable, Article 39 introduces a harmonized rule of enforcement law. A court of the Member State of origin may declare a decision provisionally enforceable, even if the law of that Member State does not provide for enforceability by operation of law. The aim of this rule is to ensure the swift and efficient recovery of a maintenance obligation and to prevent the delaying of actions.⁹⁰

4 Final Observations

Depending on the area of the law concerned, the cross-border enforcement of judgments is simplified in different ways.⁹¹ Whether there is a possibility of a ‘check’—and how limited it may be—depends on the interests concerned. As the 1968 Brussels

⁸⁹ Besides the grounds for the refusal of recognition in Art. 24 this party can also object against the exequatur on the ground that the judgment does not fall within the Regulation’s scope of application.

⁹⁰ Recital 22.

⁹¹ See also Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes ([2016] OJ L 138/1) and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships ([2016] OJ L 138/30) introducing the principle of mutual trust to judgments in matrimonial property regimes as well as in matters of the property consequences of registered partnerships. Under these regulations a judgment given by a court of a Member State is recognized in another Member State without any proceedings being necessary in that respect. However, for enforcement it is required that exequatur proceedings be initiated in the Member State of enforcement which then has to evaluate the proceedings under the 2001 Brussels I Regulation. An enforceable judgment rendered by a court of a Member State with a certificate is declared enforceable without the party against whom the enforcement is sought being heard. This party has the possibility to challenge the recognition and enforcement either by using the limited grounds for non-recognition or under the grounds laid down in the law of enforcement of the latter Member State. These regulations will apply as from 29 January 2019 in the Member States participating in the enhanced cooperation.

Convention had simplified cross-border enforcement in civil and commercial matters by introducing harmonized exequatur proceedings under which the court seized with a request for an exequatur performed a limited ‘check’, the 2012 Brussels I Regulation (Recast) introduced cross-border enforcement without any ‘check’ by abolishing the exequatur at the entrance of a judgment which is to be enforced in another Member State. Other areas of law followed. However, the approach of abolishing the exequatur was not the same in all the instruments discussed. Under the 2012 Brussels I Regulation (Recast) there is still a possibility to oppose recognition and enforcement in the Member State of enforcement on the grounds mentioned in the Regulation as well as on the grounds in the national law of that Member State. Under the 2010 Maintenance Regulation this possibility does not exist. The step-by-step approach which is used in the EU legislation concerned may lead to a danger of the fragmentation of rules (*‘Gefahr der Rechtszersplitterung’*), especially given the special position of Denmark, Ireland and the United Kingdom.⁹² The sectoral abolition of the exequatur might be justified by the fact that the defendant deserves less protection. On the other hand, the existence of the principle of mutual recognition, which seems to create a ‘fifth’ freedom in the case law of the ECJ, is not unconditional, in particular it is being restricted by the provisions on the protection of the defendant.⁹³ However, the necessity for the existence of provisions on the protection of the defendant in the Member State of enforcement seems to be—sometimes—important.⁹⁴ The question may still arise whether there is a difference in approach as regards control of the grounds for non-recognition. The concentration of all objections against recognition and enforcement in one procedure, as was introduced under the 2012 Brussels I Regulation (Recast), seems to be very practical and attractive for the defendant as he has only to ‘fight one battle’. However, in my opinion it generally makes no difference compared to the previous system under the 2002 Brussels I Regulation.⁹⁵ Does the approach of the 2016 Proposal of the Recast of the Brussels IIbis Regulation bring any change? The exequatur procedure is to be replaced by a new

⁹² See also Thöne (2016), p. 127 pointing out that the different interests and possibilities of adapting an instrument are counterproductive to the creation of the area of freedom, security and justice resulting in an *‘abgestufte Integration’* (stepped integration).

⁹³ The principle of mutual recognition is a leading principle which was already mentioned by the ECJ in its *Cassis de Dijon* judgment (ECJ 20 February 1979, Case 120/78 *Cassis de Dijon* ECLI:EU:C:1979:42, [1979] ECR 649). This principle postulates equality between the national law systems of the Member States.

⁹⁴ See e.g. ECJ 28 March 2000, Case C-7/98 *Krombach/Bamberski* ECLI:EU:C:2000:164, [2000] ECR I-01935. This protection may not lead to an accumulation of the protection of the defendant. See e.g. Art. 45 para. 1(b) of the 2012 Brussels I Regulation (Recast) requiring that the defendant commenced proceedings to challenge the judgment in the Member State of origin when it was possible for him to do so. See also ECJ 16 July 2015, Case C-681/13 *Diageo Brands/Simiramida* ECLI:EU:C:2015:471 and ECJ 25 May 2016, Case C-559/14 *Recoletos/Meroni* ECLI:EU:C:2016:349. Even though Art. 34 para. 1 of the 2002 Brussels I Regulation (nowadays Art. 45 para. 1 (a) of the 2012 Brussels I regulation (Recast)) does not require the defendant to commence proceedings against the judgment in the Member State of origin before he can rely on public policy as a ground for non-recognition/enforcement in another Member State, in the latter judgments the ECJ stated that the defendant has an obligation to do so before invoking this ground for non-recognition/enforcement. The Regulation is based on the existence of mutual trust in each other’s law systems.

⁹⁵ According to Mankowski there is no *‘Perspektivwechsel’*. The grounds for non-recognition can still be invoked in the Member State of enforcement, although under the 2012 Brussels I Regulation (Recast) only the moment differs compared to the previous Regulation. Mankowski (2016b), p. 1005.

(harmonized) procedure for non-enforcement. The defendant may invoke the grounds for non-recognition in this procedure. This seems to be less effective compared to the existing system of the Brussels Ibis Regulation as the enforcement of a decision cannot be initiated without this procedure.⁹⁶

The overall abolition of exequatur within the EU presumes a full harmonization of the national law of the Member States of the EU.⁹⁷ As the exequatur has been partially abolished, this might be—however—a stimulant for the further harmonization of the national law systems to prevent differences and to support the smooth working of the area of freedom, security and justice. It should still be pointed out that the abolition of exequatur is often accompanied by a step-by-step harmonization to improve and support the smooth working of cross-border enforcement without exequatur.

The abolition of exequatur extends the effects of a judgment by a court of a Member State to another Member State. An enforceable judgment can also be enforced in another Member State in the same way as a judgment of a domestic court. An internal free market for court decisions within the EU is being created.

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⁹⁶ As the new enforcement procedure applies to all decisions falling under the scope of application of the proposed Regulation, the question is whether the enforcement of a decision on rights of access and on the return of the child will not become more complicated.

⁹⁷ See also COM (2009) 175 final, p. 3. The need for more harmonization of the rules of national civil procedure is also recognized by the European Parliament in its working document on establishing common minimum standards for civil procedure in the European Union—the legal basis (Committee on Legal Affairs, 21 December 2015, PE572.853v01-00).

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