*Prof. dr. Xandra E. Kramer**

Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights

Published in Netherlands International Law Review (NILR) 2013, Vol. 60 Issue 3, p. 343-373. Published by Cambridge University Press, http://journals.cambridge.org, DOI http://dx.doi.org/10.1017/S0165070X12001295.
The original page numbers are indicated in this text by [xx].

[344]

Abstract

The most important political priority of the European Commission in the recast of the Brussels I Regulation has been the abolition of exequatur. The policy to gradually abolish intermediate measures for the enforcement of judgments within the EU flows from the desire to enhance the free movement of judgments and the establishment of a genuine European area of justice. Whilst fundamental debate remained absent from the abolition of exequatur in several specific instruments, the abolition of exequatur including the grounds of refusal met with resistance during the negotiations on the recast of Brussels I. As a result of these negotiations, the new Brussels I Regulation – Brussels I-bis – will abolish the requirement to obtain a declaration of enforceability prior to enforcement, but will preserve the grounds of refusal at the enforcement stage. This paper evaluates the discussions regarding the abolition of exequatur in the broad context of the EU regulatory and legislative framework, and analyses and assesses the new rules on cross-border enforcement in the Brussels I-bis Regulation. It seeks an answer to the questions (a) whether the new Regulation strikes the right balance between the premise of mutual trust and the need for national control over fundamental rights, (b) to what extent the new regime increases the rights of the judgment debtor while protecting those of the judgment creditor, and (c) whether the outcome of the Brussels I recast will or should have further repercussions for other instruments on cross-border enforcement.

Keywords

Cross-border enforcement – Brussels I Regulation – mutual trust – fundamental rights

1. Introduction

Exequatur has traditionally played an important role in the cross-border enforcement of civil judgments. It entails intermediate measures for the purpose of enforcing a judgment rendered by the courts of another country. The function of the exequatur procedure is to grant permission for enforcement and to review the requirements and/or grounds of refusal for such enforcement. Within the European Union, the free movement of judgments has been promoted since the founding of the Community. In more recent times it has become one of the priorities to enhance the European judicial area and it has been put forward, particularly since the financial crisis, as a policy measure to promote business. The Brussels I Regulation (No. 44/2001) is the key regulation in European

Electronic copy available at: http://ssrn.com/abstract=2372701

civil litigation.[1] It combines a simple exequatur procedure with an exhaustive system to allocate jurisdiction in the EU. The current Brussels I regime provides for a uniform exequatur procedure in two stages: the *ex parte* declaration of enforceability and the eventual challenge procedure.[2] The first stage is a formal procedure merely *[345]* requiring the production of the judgment that satisfies the conditions to establish its authenticity. In the second stage, where an interested person challenges the declaration of enforceability, limited grounds of refusal may be invoked relating to public policy, proper service of documents, irreconcilability of judgments, and the violation of certain designated protective and exclusive jurisdiction rules.

At the end of the 1990s, the policy was established to gradually abolish exequatur with the principle of mutual recognition and trust as the cornerstone. This policy was followed by legislative action, particularly by the establishment of instruments on the enforcement of judgments applicable to specific matters or types of cases, including maintenance cases, uncontested claims and small claims. When the Brussels I Regulation was evaluated, the European Commission concluded that the time was ripe to abolish exequatur in this instrument as well.[3] In 2010, the Commission adopted its proposal on the Recast of the Brussels I Regulation that fully abolished exequatur for all but two types of judgments covered by this Regulation.[4] However, the abolition of the grounds of refusal, including the public policy exception, proved to be controversial. On 12 December 2012, the new Brussels I Regulation – Brussels I-bis – was adopted.[5] This instrument abolishes the exequatur as a formal approval procedure. However, it preserves the grounds of refusal at the enforcement stage.

This article deliberates on the abolition of exequatur in the EU against the policy background and the legislative framework. In particular it will analyse and evaluate the rules of the Brussels I-bis Regulation as regards the enforcement of judgments. It seeks to answer three questions in particular. The first question is to what extent the new regime strikes the correct balance between mutual trust on the one hand, and the need or desire to control and guarantee fundamental rights on the national level, on the other. The second question is whether and how, on the one hand, the judgment creditor's interests to access to justice can be served, whilst the rights of the judgment creditor are protected on the other. The third question to be addressed is whether the outcome of the Brussels I recast will or should have policy and legislative repercussions for other existing and future instruments on cross-border enforcement.

In the following, attention will be paid to policy considerations and legislative developments concerning the free movement of judgments and the abolition of exequatur (Section 2) and the abolition of exequatur in the Brussels I regime (Section 3). Thereafter, the new rules under the Brussels I-bis Regulation will be *[346]* analysed (Section 4) and evaluated, including an assessment of their further impact (Section 5).

---

* Professor at Erasmus School of Law, Erasmus University Rotterdam, the Netherlands; visiting professor (TPR chair) and Global Law School professor Catholic University of Leuven, Belgium 2013-2014. This contribution has been made possible with the support of the Netherlands Organisation for Scientific Research (NWO) within its Innovational Research Incentives Scheme (VIDI).

[1] Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001, L 12/1 (Brussels I).
[2] See Arts. 38 and further Brussels I Regulation.
[3] See particularly the 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, p. 2-3.
[4] Proposal for a Regulation of the European Parliament and of the Council on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final.
[5] Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012, L 351/1.

Electronic copy available at: http://ssrn.com/abstract=2372701

2. Free movement of judgments and abolition of exequatur

2.1 Prologue: exequatur and the unguided debate on its abolition

The discussion on the abolition of exequatur was already simmering in the 1990s. However, it was only during the discussions on the recast of Brussels I commencing 2009 that it appeared that the concept of 'exequatur' and the abolition thereof was not entirely self-evident.

Generally, the term exequatur (from the Latin: 'he may exercise'), or declaration of enforceability[6] refers to a formal approval by the State where enforcement of a court decision rendered in another State is sought. It may be seen as an exponent of national sovereignty and the exercise of State power in the area of forced execution. Some countries also require court interference before embarking on enforcement of a court judgment in domestic cases.[7] Two functions can be attributed to the exequatur procedure. The first function is to enable the enforcement of foreign judgments. The declaration of enforceability – rather than the foreign decision – is then the basis for enforcement. In legal literature, this is designated as the 'title import function'.[8] The second function is to marginally review a foreign judgment as to its compatibility with the legal order of the State of enforcement. This review is limited to specified grounds of approval or refusal. This may be called the 'title inspection function'.[9] In the current Brussels I Regulation, both functions are represented. As discussed in the introduction, the first stage towards enforcement in another Member State is to obtain a declaration of enforceability in that Member State (i.e., title import), whereas in the second stage a marginal review of the judgment may be performed (i.e., title inspection).

From the outset, the discussion on the abolition of exequatur has been blurred by mixed arguments on formalities and on review mechanisms. From earlier policy documents and the 2009 Green Paper on the revision of Brussels I,[10] it was *[347]* not immediately clear what the abolition of the exequatur would entail. Did it only refer to the abolition of the formal requirement to obtain a declaration in the court of the Member State where enforcement was sought, or did it also refer to the review mechanism (i.e., grounds of refusal)? The reasoning in the Green Paper focused on the burdens (e.g., costs, duration, formalities etc.) of the 'intermediate measures' and the abolition of these obstacles to enhance the free movement of judgments. These factors would suggest that the main aim was the abolition of the formality to obtain a declaration of enforceability. However, at the same time mutual trust and the fact that only a small percentage of the exequatur proceedings were unsuccessful were invoked as reasons to abolish the exequatur; a reasoning that suggests perhaps a slightly different aim. This lack of clarity in policy resulted in unguided debates between proponents and opponents of abolition of exequatur mixing arguments on mere formalities with the protection of fundamental rights. However, that the Commission intended more than to do away with formalities was clear from its 2010 proposal in which the existing grounds of refusal were also excluded. This rightfully led to criticism from the Member States, the European Parliament, and the academic world, as will be elaborated below.

---

[6] The Brussels I Regulation does not use the term 'exequatur', but declaration of enforceability (see Art. 33). The use of this term was uncommon in several Member States, especially in the United Kingdom, until the discussions on the objective to abolish it in the EU started.

[7] For example Germany requires a *Vollstreckungklausel*; see § 725 of the German Code of Civil Procedure (*Zivilprozessordnung, ZPO*). See on this aspect of German law P. Oberhammer, 'The Abolition of Exequatur', *IPRax* 2010, p. 199.

[8] Oberhammer 2010, *supra* n. 7, p. 197-199. See also on the functions of the exequatur G. Cuniberti and I. Rueda, 'Abolition of Exequatur. Addressing the Commission's Concerns', *Rabels Zeitschrift* 2011, p. 303.

[9] Oberhammer 2010, *supra* n. 7, p. 199.

[10] See *supra* n. 3.

2.2 Background and policy considerations

The mutual recognition and enforcement of judgments has been recognised as important for the internal market since the establishment of the European Community.[11] The free movement of judgments is sometimes regarded as an independent − and fifth − freedom along with the traditional four freedoms that promote the functioning of the internal market. A note to the Member States of 1959 stated: 'A true internal market between the six States will be achieved only if adequate legal protection can be secured'.[12] It was added that economic life would be disturbed if it were not ensured that various rights arising out of a multiplicity of relationships could be recognised and enforced. The establishment of rules on recognition and enforcement was primarily triggered by economic objectives. This resulted in the Brussels Convention of 1968, the predecessor of the Brussels I Regulation, which introduced a simple harmonised intermediate procedure: namely, that of exequatur.[13] This procedure was further simplified when the current Brussels I Regulation replaced the Brussels Convention in 2002. Under *[348]* this Regulation the grounds of refusal are not reviewed during the initial stage, but can be invoked by the party against whom enforcement is sought to revoke the judgment granting the declaration of enforceability.

After the Treaty of Amsterdam entered into force, the attention shifted from economic motives to the objective of creating an area of freedom, security and justice (currently expressed in Art. 67 of the Treaty on the Function of the European Union, TFEU).[14] Despite the fact that the Commission considered the full abolition of exequatur inconceivable in 1997[15], if only because of the differences in procedural law regarding enforcement, two years later the abolition of exequatur became the policy objective.[16] Since the Tampere Council conclusions of 1999, mutual recognition has clearly been pinpointed as the cornerstone of judicial cooperation. This is also expressed in Articles 67(4) TFEU and 81 TFEU where the principle of mutual recognition is used in the context of access to justice and as the basis of judicial cooperation. The gradual abolition of exequatur, starting with uncontested claims, small claims, and maintenance, and eventually covering all areas, was further outlined in the 2000 Joint Programme of the Commission and the Council.[17] In the Hague Programme,[18] and even more markedly in the Stockholm Programme,[19] the needs of European citizens were placed at the forefront. The rights of access to justice and effective

---

[11] See Article 220 of the founding EEC Treaty, later included in Article 293 EC Treaty, which called for Member States to enter into negotiations with each other, with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgment.

[12] Quoted by P. Jenard, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Signed at Brussels, 27 September 1968*), OJ* 1979, C 59/2.

[13] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1972, L 299/32.

[14] Formerly Art. 61 within Title IV of the EC Treaty, in which the judicial cooperation was embedded.

[15] Tampere European Council, 15 and 16 October 1999, Presidency conclusions, no. 33. See more *in extenso* on the principle of mutual trust X.E. Kramer, 'Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure, *IJPL* 2011(2), p. 202 at p. 209-210 and p. 217-219.

[16] 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, p. 60 where it was stated that 'full abolition of the registration (exequatur) procedure is inconceivable, if only because of the wide procedural divergences between Member States as regards enforcement'.

[17] Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ 2011, C12/1.

[18] The Hague Programme: strengthening freedom, security and justice in the European Union, 13 December 2004, OJ 2005, C 53/1.

[19] The Stockholm Programme – An open and secure Europe serving and protecting the citizen, 11 December 2009, OJ 2010, C 115/01.

enforcement (*effet utile*) became to be regarded as fundamental rights.[20] More importantly, policy was translated into impressive legislative activities leading to the abolition of exequatur in specific instruments and eventually in the new Brussels I-bis Regulation.[21]

In the Stockholm Action Plan, the Commission promoted 'cutting red tape for business' and concluded that therefore 'the cumbersome and costly exequatur process … should systematically be consigned to history'.[22] In the context of the *[349]* recast of the Brussels I Regulation, the abolition of exequatur is primarily based on economic and practical considerations, while referring to the principle of mutual trust. In the Green Paper, the Commission refers to the Heidelberg evaluation report, where it was concluded that the exequatur procedure generally functions well.[23] On the basis of (relatively limited) empirical evidence, it was concluded that in over 90% of the cases the application for the exequatur is successful and unproblematic. Only 1-5% of the cases in which exequatur is granted are ultimately appealed; those appeals – usually based on the alleged violation of public policy or defect service – are rarely successful. In the 2009 Green Paper, the Commission argued that it is difficult to justify that in an internal market, citizens and businesses have to incur expenses to enforce their rights in other Member States, referring to the costs and time incurred in the exequatur procedure.[24] In the explanatory memorandum to its 2010 recast proposal, the Commission further underpinned the abolition of exequatur by commemorating the 'degree of maturity' that 'judicial cooperation and the level of trust among Member States has reached'.[25]

2.3 Legislative developments and different cross-border enforcement models

Several EU instruments, including recently adopted regulations, still require an exequatur for the purpose of cross-border enforcement. To date, the abolition of exequatur has been realised in six instruments, including the new Brussels I-bis Regulation.[26] The actual implementation, however, takes different shapes and forms. Several instruments require the fulfilment of certain procedural conditions or minimum standards – most of which are supported by a review procedure. Other instruments depend upon other prerequisites. It is notable that during the discussions leading to the new Brussels I-bis Regulation, the Commission emphasised that the abolition of exequatur should be accompanied by safeguards. However, a general policy as to which safeguards are needed is lacking and the safeguards that were put forward in the Commission proposal were not adopted. Though the precise requirements and rules differ per instrument, an attempt will be made to categorise the existing cross-border enforcement models.

[350] The classical model of cross-border enforcement was, and to a certain degree still is, comprised of those instruments entailing an exequatur (i.e., declaration of enforceability) based upon formalities. This declaration can be appealed by the party against whom enforcement is sought by invoking limited grounds of refusal. This category consists of (a) the Insolvency Regulation (as

[20] See also in this regard M. Tulibacka, 'Europeanization of civil procedures: in search of a coherent approach', *Common Market Law Review* 2009, p. 1533-1535.
[21] See *infra* section 2.3.
[22] European Commission, Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, p. 5.
[23] B. Hess, T. Pfeiffer and P. Schlosser, *The Brussels I Regulation 44/2001. The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03)*, Munich: Verlag C.H. Beck 2008, p. 126-152. See also Report from the Commission on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 174 final, p. 4.
[24] Green paper, *supra* n. 3, p. 2.
[25] Commission proposal, *supra* n. 4, p. 6.
[26] See for an overview *inter alia* J. Balcarczyk, 'Development of the exequatur in the civil procedural law of the European Union in the area of commercial law – its current abolishment', in: B.C. Díaz *et al.*, *Latest developments in EU private international law*, Cambridge-Antwerp-Portland: Intersentia 2011, p. 1-21.

well as the 2012 proposal to amend this Regulation)[27], (b) the Brussels II-bis Regulation for enforceable decisions regarding parental responsibility, apart from those on rights of access to and return of the child,[28] (c) the Succession Regulation,[29] as well as (d) the proposals on matrimonial property and property consequences of registered partnerships.[30] These instruments are in essence based on the current Brussels I scheme, though the grounds of refusal differ slightly per instrument in view of the subject-matter.

A second model that may be distinguished is that of the Brussels II-bis Regulation as far as decisions regarding the right of access to and the return of the child are concerned.[31] This was the first instrument to abolish exequatur for particular decisions. For these decisions, the court of origin will certify the judgment as enforceable, provided that certain requirements are fulfilled. These relate to the proper service, the hearing of the parties involved, including the child where appropriate, and – specifically for return orders – compliance with Article 13 of the Hague Child Abduction Convention.

A third category comprises the second-generation instruments regarding specific types of litigation; as to date in relation to uncontested claims and small claims. The Regulation creating a European Enforcement Order for uncontested claims (EEO Regulation)[32] abolishes the traditional grounds of refusal, including public policy, and replaces these with particular minimum standards to be reviewed by the court of *origin*. Upon application of the interested party, the court of origin may certify the judgment as a European title that is enforceable in the other Member States. The minimum procedural requirements relate to the service of documents, the provision of due information to the debtor about the claim, and the availability of a review mechanism for default judgments in the Member State *[351]* of origin. The next step was the creation of two uniform procedures, the European Order for Payment Procedure[33] and the European Small Claims Procedure.[34] A third procedure, on a European Account Preservation Order is currently being negotiated.[35] These harmonised procedures automatically result in a European title that is enforceable throughout the EU. These regulations do not only aim to facilitate the abolition of exequatur: they also, and primarily, serve the self-standing goal of furthering access to justice by creating a uniform entrance to and conduct of proceedings in cross-border cases. As the European Enforcement Order, these Regulations introduce a review possibility in the Member State of origin, primarily in the situation wherein the defendant was not able to defend his case due to improper service or *force majeure*.

---

[27] Council Regulation No 1346/2000 on insolvency proceedings, OJ 2000, L 160/1, Art. 25 (which refers to the Brussels scheme); proposal to amend the Insolvency Regulation, COM(2012) 744 final.

[28] Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 2003, L 338/1. See Arts. 28 and 40-45 Brussels II-bis Regulation.

[29] Regulation (EU) No 650/2012 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, OJ 2012, L 201/107, Art. 43.

[30] COM(2011) 126 final (matrimonial property) and COM(2011) 127 final (property registered partnerships).

[31] See Arts. 40-45 Brussels II-bis Regulation.

[32] Regulation No. 805/2004 creating a European Enforcement Order for Uncontested Claims, OJ 2004, L 143/15.

[33] Regulation No. 1896/2006 creating a European Order for Payment Procedure, OJ 2006, L 399/1.

Regulation No. 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, OJ 2009, L 7/1.

[34] Regulation No. 861/2007 establishing a European Small Claims Procedure, OJ 2007, L 199/1.

[35] Proposal for a Regulation Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters, COM(2011) 445.

A fourth model is introduced by the Maintenance Regulation.[36] In a similar way as the second-generation instruments, it provides for a review mechanism in case the defendant did not enter an appearance in the situation of default service or *force majeure*. However, it does not as such provide for specific uniform procedural rules. A peculiarity is that abolition of exequatur is dependent upon the adoption by the Member State in question of the 2007 Hague Protocol to the Maintenance Convention.[37] Apart from Denmark and the United Kingdom, all Member States are bound by the Hague Protocol. For the Member States that are not bound by this Protocol, the Brussels I exequatur model is followed.

It can be concluded that different methodological approaches are taken regarding the abolition of the exequatur in the various instruments. Different conditions to warrant the abolition of exequatur are included, varying from procedural conditions, minimum standards, and common procedures, to requirements regarding the rules on the applicable law. A common denominator is that review mechanisms are conducted in the Member State of origin and, contrary to the classical grounds of refusal, no longer in the Member State of enforcement. The way in which the abolition of exequatur is shaped in the new Brussels I-bis Regulation is yet a different model, though it proceeds from the foundations of the current regulation, as will be discussed in the next section.

[352]

3. Abolition of exequatur in the Brussels I Regulation

3.1 The Commission proposal and criticism

In the Commission's recast proposal, the abolition of exequatur featured as the most prominent amendment.[38] The pursuit of this goal became one of the political objectives during the negotiations and led to intensive debates between the Commission, Parliament and Council and heated discussions in legal literature. These ranged from fundamental questions on the actual degree of mutual trust in relation to public policy and human rights to detailed deliberations on technical issues surrounding the cross-border enforcement of judgments and extrajudicial documents.

In principle, the Commission intended to abolish exequatur for all civil and commercial matters covered by this Regulation. However, two exceptions were made primarily for political reasons and by way of compromise.[39] These concerned the non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, and particular collective redress proceedings.[40] The first topic had already proven to be sensitive during the negotiations on the Rome II Regulation,[41] whereas the second at the time was the object of other heavily debated policy initiatives.[42] For these matters, the Commission found abolition of exequatur

[36] Regulation No. 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, OJ 2009, L 7/1.
[37] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.
[38] Commission proposal, *supra* n. 4, Explanatory Memorandum, p. 2-3. The abolition of exequatur is mentioned as the first item of the proposal.
[39] See Article 37(3) Commission proposal, and Explanatory memorandum, p. 7.
[40] The latter exception was described as 'proceedings that concern the compensation of harm caused by unlawful business practices to a multitude of injured parties, and which are brought by either a State, a non-profit organisation whose main purpose and activity is to represent the group, or a group of more than twelve claimants'.
[41] Regulation No. 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II), OJ 2007, L 199/40, Art. 1(2)(f).
[42] See *inter alia* the Commission staff working document, 'Public Consultation: Towards a Coherent European Approach to Collective Redress Brussels', SEC(2011) 173 final, of 4 February 2011. Meanwhile this has resulted in a Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms

premature and it proposed to retain the existing rules. It is submitted that these exceptions were rather random and arbitrary.[43] In areas other than privacy and personality rights, substantive law also *[353]* differs substantially in the Member States, such as in specific contracts, tort law, company law and immovable property. The same goes for divergences in procedural law other than collective redress.[44]

In the Commission proposal, the abolition of exequatur proceedings as an intermediate measure was coupled with the abolition of the existing grounds of refusal, including the public policy exception. To balance the abolition of exequatur and the existing grounds of refusal, the proposal included procedural safeguards to ensure the defendant's rights as guaranteed by Article 47 of the EU Charter on Fundamental Rights, as the Commission underlined. The proposal included a rather complex and rightfully criticised system of three possible review grounds that could be invoked at the stage of enforcement, either in the Member State of enforcement or the Member State of origin.[45] Apart from the systemic inadequacy of this three-headed review mechanism, the proposed abolition of the existing grounds of refusal would also have resulted in a loss of protection. For example, the violation of the protective jurisdiction rules for consumer contracts by the court of origin, could no longer be invoked.[46] However, most concerns were raised by the abolition of the general public policy exception.[47] This was only partially compensated by the proposed review mechanisms. Most notably, the Commission proposal contained a review possibility where the enforcement would not be permitted by the fundamental principles underlying the right to a fair trial.[48] However, *[354]* the European Parliament rightfully argued that a general substantive and procedural public policy exception was still necessary, and that this exception may

in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3. See also X.E. Kramer, 'Enforcing mass settlements in the European Judicial Area: EU policy and the strange case of Dutch collective settlements (WCAM)', in: C. Hodges & A. Stadler, *Resolving Mass Disputes. ADR and Settlement of Mass Claims*, Cheltenham, UK/Northampton, MA, USA: Edward Elgar 2013, p. 63-90 at p. 70-74 and p. 82-83.

[43] See also, *inter alia*, Cuniberti and Rueda 2011, *supra* n. 8, p. 313-314; A. Dickinson, 'The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) ("Brussels I bis" Regulation)', Note for the European Parliament, 2011, available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930712, p. 8-9. See in relation to collective redress A. Stadler, 'Kollektiver Rechtsschutz und Revision der Brüssel I-Verordnung', in: R. Geimer and R.A. Schütze (eds), *Recht ohne Grenzen, Festschrift Kaissis*, Sellier 2012, p. 951-964.

[44] Dickinson 2011, *supra* n. 43, *inter alia* refers the enforcement of contracts relating to internet gaming or prostitution that maybe regarded as illegal or immoral by certain Member States but not by others, tort actions relating to 'wrongful life', the use of gene technology or the granting of punitive damages.

[45] See for a more detailed discussion and criticism *inter alia* P. Baviati, 'Judicial cooperation in Europe: is exequatur still necessary?', *IJPL* 2011, p. 403-432, in particular p. 422-423; X.E. Kramer, 'Abolition of Exequatur Under the Brussels I Regulation: Effecting and Protecting Rights in the European Judicial Area', *NIPR* 2011, p. 637-639; A. Dickinson, 'Free Movement of Judgments in the EU: Knock Down the Walls but Mind the Ceiling', in: E. Lein, *The Brussels I Review Proposal Uncovered*, London: British Institute for International and Comparative Law, 2012, p. 135 at p. 139-139; M. Zilinsky, 'Afschaffing van het exequatur onder het voorstel tot herschikking van de EEX-Verordening: een hybride tussenvorm?' (*Abolition of exequatur under the recast proposal of the Brussels I Regulation: a hybrid intermediate system?*), *WPNR* 2011, p. 544-546. For a positive appraisal see M. de Christofaro, 'The abolition of exequatur proceedings: speeding up the free movement of judgments while preserving the rights of the defense', *IJPL* 2011, p. 432-456.

[46] In the current Brussels I Regulation, Art. 34(1) contains the ground of refusal relating to the violation of the jurisdiction rules on *inter alia* consumer and insurance contracts.

[47] See literature in the previous footnote. See in relation to the Green Paper *inter alia* Oberhammer 2010, *supra* n. 8, p. 197-203; P. Schlosser, 'The abolition of exequatur proceedings – including public policy review?', *IPRax* 2010, p. 101-104; P. Beaumont and E. Johnston, 'Can exequatur be abolished in Brussels I whilst retaining a public policy defence?', *JPIL* 2010, p. 249-279.

[48] Art. 46 Commission proposal, *supra* n. 4.

also result from international obligations of the Member States.[49] It stated that a 'Member State before which proceedings are brought is entitled to preserve its fundamental values'. The Parliament further referred to the inconsistency as compared to the Rome I and II Regulations on the law applicable to contracts and torts respectively, which both contain a public policy exception in relation to foreign law. The vast majority of the Member States supported this view. The abolition of other grounds of refusal, particularly those relating to the violation of consumer and property jurisdiction rules was also opposed.

3.2 The Brussels I-bis Regulation

Following a two-year period of negotiations, public hearings and the formulation of revisions to the Commission proposal, the Brussels I-bis Regulation (No. 1215/2012) was adopted in December 2012.[50] It will apply as of 10 January 2015 in all Member States.[51] The compromise package substantially amended and mitigated the rather ambitious Commission proposal on both the jurisdiction and enforcement regime. Both the European Parliament and the Council supported the Commission proposal to abolish exequatur as an intermediate measure to enforcement in another Member State.[52] The new Brussels I-bis Regulation will consequently no longer require that a declaration of enforceability be obtained in the Member State of enforcement. The exceptions for privacy and personality rights and collective redress proposed by the Commission were abandoned, as these were regarded as undermining the principle of legal certainty. Consequently, the exequatur procedure will be abolished for all civil and commercial matters covered by the Brussels I Regulation.

However, the criticism on the abolition of the grounds of refusal in Brussels I resulted in a rejection of the safeguards system as proposed by the Commission and the re-introduction of the existing grounds of refusal with only minimum amendment to its contents. The use of the term 'grounds of refusal' is continued. This is at first sight rather odd, since these grounds no longer relate to the refusal (or withdrawal) to grant exequatur, but they must be viewed as grounds to refuse *[355]* the actual execution of the judgment. The grounds of refusal can be invoked in the enforcement stage in the Member State of enforcement by initiating a procedure in accordance with national law. This new Brussels I-bis enforcement model is the most straightforward and preserving model of cross-border enforcement thus far; it meets the demands to abolish formalities while retaining a marginal debtor protection through the well-established grounds of refusal. As will be discussed in the following sections, the straightforwardness of this new model does not necessarily mean that its practical operation will be without difficulties or that level of debtor protection afforded remains the same.

4. The new cross-border enforcement regime

4.1 The basic premises and rules

[49] European Parliament, Committee on Legal Affairs, Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 15 October 2012, Explanatory Statement, no. 1.

[50] See *supra* n. 5.

[51] See Art. 81 Brussels I-bis. This is with the exception of Arts. 75 and 76 of the Regulation, which will apply from 10 January 2014. These provisions relate to communications of the Member States to the Commission on the national implementation of certain provisions and notification of specified information. The Regulation will also apply to Denmark as a result of the parallel agreement of 2005.

[52] See in relation to the Member States also P.A. Nielsen, 'The new Brussels I Regulation', *CMLRev.* 2013, p. 525.

The basic premise of the Brussels I-bis regime, as expressed in Article 39, is 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. In relation to automatic recognition, the preamble refers to the principle of mutual trust.[53] As to enforcement, it adds that the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability. The same recital further states that judgments given by the courts of a Member State should be treated as if they had been given in the Member State addressed. It is expected that this last statement will be the guiding principle in the case law of the Court of Justice of the European Union (CJEU). At the same time, this statement is somewhat at odds with the availability of the grounds of refusal at the stage of enforcement in the Regulation, where these grounds are likely to be non-existent in national enforcement law of the Member States. The grounds of refusal are laid down in Articles 45 and 46 Brussels I-bis Regulation.[54]

The abolition of exequatur also entails the power to proceed to any protective measures which exist under the law of the Member State addressed.[55] This immediately provides access to local measures that secure enforcement, such as seizure of assets.[56] The current Brussels I Regulation requires an exequatur to that end.[57] Another novel provision that aims to facilitate the cross-border enforcement process is the 'equivalence' provision. If a judgment contains a measure or order *[356]* which is not known in the law of the Member State addressed, it shall to the extent possible be adapted to a measure or order known in that Member State, which has equivalent effects attached to it and which pursues similar aims and interests.[58] It is stated that such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin. This provision is particularly relevant for provisional and protective measures that are specific for a certain Member State, for example particular seizure measures. The question is, who is to decide what an equivalent measure is. Since there is no court involvement, it will be the enforcement authority that is requested to enforce the foreign judgment that has to judge upon this. In view of the wide variety of provisional and protective measures, this will certainly not be an easy task and one may wonder whether enforcement authorities are generally well-equipped for this task.[59]

Lastly, it should be mentioned that the abolition of exequatur not only regards judicial decisions[60], but extends to authentic instruments (for example notarial deeds) and court settlements within the meaning of Article 58 and 59 Brussels I-bis.[61] In line with the rules of the current Brussels I Regulation in relation to exequatur, the enforcement may only be refused if such

[53] Recital no. 26. In line with the (current) Brussels I Regulation, Art. 36 Brussels I-bis provides that a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required. This is referred to as a system of automatic recognition.
[54] See *infra* section 4.3.
[55] Art. 40 Brussels I-bis Regulation.
[56] This may, one adopted, also be achieved by the European Account Preservation Order, *supra* n. 35.
[57] Art. 47 Brussels I Regulation.
[58] Art. 54 Brussels I-bis Regulation.
[59] See also Zilinsky 2011, *supra* n. 45, p. 546.
[60] These are judgments within the meaning of Art. 2(a) Brussels I-bis, *i.e.* 'any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.' It also includes certain provisional measures, see *infra* section 4.5.
[61] Authentic instruments are defined in Art. 2(c) as 'a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which: (i) relates to the signature and the content of the instrument; and (ii) has been established by a public authority or other authority empowered for that purpose'. According to Art. 2(b) a court settlement means 'a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings'.

enforcement is manifestly contrary to public policy.[62] Though this will further facilitate the free circulation of authentic instruments, the fact that it regards documents that are generally not subject to judicial review, the abolition of the exequatur has understandably been criticised.[63] In view of the scope of this paper the specific issues regarding authentic instruments will not be discussed further.

4.2 Concrete steps towards enforcement in another Member State

In the new Brussels enforcement regime, a party seeking enforcement can immediately address the competent enforcement authority in the Member State of enforcement; this may be a bailiff, court officer or other enforcement agency. In accordance with Article 42 Brussels I-bis, the applicant shall provide the enforcement *[357]* authority with: (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

The certificate mentioned in sub (b), the 'certificate concerning a judgment in civil and commercial matters' is a standard form, attached as Annex I to the Regulation.[64] It will play a crucial role in the new enforcement regime. It is issued by the court of origin at the request of an interested party.[65] This certificate includes all relevant data with regard to the court of origin, the parties and the judgment.[66] The information with regard to the judgment relates to whether the judgment was given in default of appearance, the enforceability of the judgment, the date and language of service of the judgment and contains a short description of the subject-matter of the case, as well as details on monetary claims and other types of judgments and the costs. This should enable the enforcement agency to identify all relevant issues for the purpose of enforcement, though he may also resort to the judgment itself.

As a rule, the court of origin will fill out the certificate in its own language. The enforcement agency may, where necessary, request a translation or transliteration in (one of) the official language(s) of the Member State of enforcement, or any other official EU language that this Member State has indicated to accept.[67] A translation of the judgment itself may only be required if the enforcement authority is unable to proceed without such a translation.[68] These language rules are included to minimize the costs of litigation and possible delays incurred by translations. They are in line with those included in other instruments, notably the European Small Claims Regulation and the Maintenance Regulation.[69]

An important prerequisite for the actual enforcement is that the judgment certificate is served on the person against whom enforcement is sought prior to the first enforcement measure, pursuant of Article 43 Brussels I-bis. The certificate shall be accompanied by the judgment if it had not

[62] See Arts. 57(1) and 58 Brussels I.

[63] See *inter alia* J. Fitchen, 'Authentic instruments and European private international law in civil and commercial matters: is now the time to break new ground?', *JPIL* 2011, p. 33; Dickinson 2012, *supra* n. 45, p. 160.

[64] A similar certificate should also be used for the enforcement of authentic instruments and court settlements. This standard form is attached as Annex II of the Regulation.

[65] Art. 53 Brussels I-bis Regulation.

[66] See items 1 (court of origin), 2 (claimant), 3 (defendant) and 4 (judgment) of Annex I.

[67] Art. 42(3) in conjunction with Art. 57(2) and 75 sub (d) Brussels I-bis Regulation.

[68] Article 42(4) Brussels I-bis Regulation.

[69] See in particular on the first instrument E.A. Ontanu & E. Pannebakker, 'Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach', *Erasmus Law Review* 2012, p. 169-186.

already been served; the certificate should contain information as to the service of the judgment for the attention of the enforcement authority.[70] This should guarantee that this party is aware that a judgment has been rendered and inform him of the upcoming enforcement for the purpose of an eventual challenge of the enforcement on the basis of *[358]* the grounds of refusal. Recital 32 explains that the certificate and, if necessary, the judgment, should be served in 'reasonable time' before the first enforcement measure. There are no uniform EU rules as to what a reasonable time is. Member States may have domestic rules on the period between the service of a judgment or payment order and the execution, e.g., the seizure of property.[71] However, these may not be appropriate for the cross-border context, particularly not in cases where the judgment was rendered in default of appearance, and the party against whom enforcement is sought (the judgment debtor) may not be aware of the contents of the judgment. Additionally, great differences between national enforcement laws and periods do not increase transparency and legal certainty. A uniform interpretation would, therefore, be desirable.

Similar to the rules of the Service Regulation[72], the Brussels I-bis Regulation provides that the person against whom enforcement is sought may request the translation of the judgment in a language that he understands, or in the official language of his Member State or place of domicile.[73] This rule may necessitate translation also where the enforcement authority does not require a translation, or require translation in another language. Translation of the documents is vital to debtor protection.[74] The Brussels I-bis Regulation does not mention the possibility to request translation of the judgment certificate; only a translation of the judgment itself. This is remarkable since the Service Regulation applies to all documents to be served. Though the information certificate should be in compliance with the details of the judgment, a lapse of time or mistakes in filling in the forms by the court administration may create frictions. A party should be able to assess the document upon which the enforcement authority primarily bases the enforcement measures.

4.3 Invoking the grounds of refusal

Under the new Brussels I-bis Regulation the grounds of refusal can be invoked in separate proceedings to prevent the actual enforcement.[75] It is for this purpose that the service of the judgment certificate as discussed in the previous sub-section is a prerequisite to initiate enforcement.

The application for refusal of enforcement shall be submitted to the court that has been designated by the Member State of enforcement as the competent *[359]* court, in accordance with Article 47 Brussels I-bis Regulation.[76] Apart from the rules laid down in the Regulation, the procedure to invoke the grounds of refusal will be governed by the law of the Member State addressed.[77] The party shall provide a copy of the judgment and, where necessary, a translation

[70] See point 4.5 of the judgment certificate (Annex I).
[71] *E.g.* Art. 439(1) of the Dutch Code of Civil Procedure provides that prior to the attachment of movable property an order to pay within two days should be served (this takes place after the service of the judgment itself).
[72] Art. 8 Service Regulation.
[73] Art. 43(2) Brussels I-bis Regulation.
[74] See in regard to the Service Regulation A. Stadler, 'Practical obstacles in cross-border litigation and communication between (EU) courts', *Erasmus Law Review* 2012, p. 154-160. Stadler criticises this Regulation since it shifts the burden of language to the defendant that must actively refuse the document in order to request a translated document. The Brussels I-bis Regulation also requires a request from the person against whom enforcement is sought.
[75] See also Nielsen 2013, *supra* n. 53, p. 525.
[76] Art. 47(1) and Art. 75 sub a Brussels I-bis Regulation. It is likely that Member States will refer to the same court as the court having competence in relation to the exequatur procedure under the Brussels I Regulation.
[77] This is in line with the exequatur procedure and the application of the grounds of refusal pursuant of Art. 40 Brussels I Regulation.

thereof, unless the court already has the relevant documents or considers it unreasonable for the applicant to provide these. The applicant is neither required to have a postal address in that Member State nor to have an authorised representative in that State, unless such a representative is mandatory in that Member State regardless of nationality or domicile. This provision is intended to enhance easy access to court for the party wishing to object to the enforcement. However, in reality most Member States require legal representation and particularly consumers and SMEs will need legal support to have their rights adequately addressed. The court shall decide upon the application for refusal without delay.[78] In line with the current regime, the decision on the application for refusal may be appealed against by either party, and the decision on appeal may be further contested in accordance with the law of the Member State concerned.[79]

The grounds of refusal for *recognition* are laid down in Article 45 Brussels I-bis and declared applicable to *enforcement* (Article 46). As is the case in the current Brussels I Regulation, under no circumstances may a judgment be reviewed as to its substance and the review will be strictly limited to the grounds of refusal (Article 52).[80] Article 45 sub (a) to (d) have been copied word-for-word from the current Brussels I Regulation grounds of refusal regarding public policy, default of appearance and irreconcilability of judgments.[81] Sub (e) concerns the violation of particular rules of jurisdiction by the court of origin, i.e., those related to weaker party contracts and exclusive jurisdiction. It contains minor amendments to the corresponding provision in the Brussels I Regulation.[82] Firstly, this provision not only covers insurance and consumer contracts, but also employment contracts. The current rules do not refer to employment contracts and it has always been doubtful why these protective rules were not included in the grounds of refusal. The new rules now explicitly offer employees jurisdictional protection at the enforcement stage. Secondly, the Brussels I-bis Regulation specifies that only the weaker party can invoke a violation of the jurisdiction rules by the court of origin. This is in line with the rationale of these protective rules.[83]

[360] In relation to *recognition* it should be noted that the Brussels I-bis Regulation offers any interested party the possibility to apply for a decision that there are no grounds for refusal of recognition.[84] This provision aims to secure the status of a judgment. It prevents that a party relying on its recognition or enforcement is confronted later on with an application of the other party for the refusal of such recognition or enforcement.[85]

4.4 Enforcement in accordance with national law

Enforcement laws and practice differ substantially per Member State and the new Regulation will not change this. In line with the provisions of the Regulations on the European Enforcement Order, the Order for Payment Procedure and the Small Claims Procedure, Article 41 Brussels I-bis Regulation provides that the procedure for the enforcement of judgments shall be governed by the law of the Member State addressed. As is the situation under the Brussels I Regulation pursuant to the leading case of *Hoffman* v. *Krieg*, an enforceable judgment shall be enforced under the same conditions as a judgment given in that Member State.[86]

---

[78] Art. 48 Brussels I-bis Regulation.
[79] Arts. 49 and 50 Brussels I-bis Regulation.
[80] Art. 52 Brussels I-bis Regulation.
[81] See Art. 34 Brussels I Regulation.
[82] See Art. 35 Brussels I Regulation.
[83] See also Nielsen 2013, *supra* n. 52, p. 528.
[84] Art. 36(2) Brussels I-bis Regulation.
[85] This provision replaces Art. 33(2) Brussels I Regulation that enables any interested party to apply for a decision that the judgment is recognize in accordance with the exequatur procedure.
[86] ECJ 4 February 1988, Case 145/86, *ECR* 1988, p. 645 (*Hoffman* v. *Krieg*).

In the case of *Prism Investments*, the Court of Justice ruled that domestic grounds of refusal at the stage of enforcement relating to set-off cannot be raised to set aside a declaration of enforceability and serve as a ground to refuse the exequatur under the Brussels I Regulation.[87] However, in a later stage, such an issue may be dealt with in the Member State of enforcement since national enforcement rules apply in the same way as to judgments delivered by national courts.[88] The same will hold true with regard to refusing enforcement under the Brussels I-bis Regulation. Article 41(2) provides that the grounds for refusal or suspension of enforcement under the law of the Member State addressed shall apply as far as they are not incompatible with the grounds of refusal laid down in Article 45, as discussed above. This means that domestic grounds relating to for example disproportionality of enforcement means, prohibitions to seize certain (primary) goods or abuse of rights, or indeed set-off, may generally be allowed. However, for example disputes on service of documents or violation of jurisdiction rules beyond those set out in the Regulation, or a re-examination of the facts or the applicable law is not allowed.

[361] Recital 30 clarifies that a party challenging enforcement of a judgment should, to the extent possible under the national law, be able to invoke additional grounds for refusal available under that law.[89] This merging of the application of the grounds of refusal according to the Brussels I-bis Regulation and national enforcement disputes in a single procedure will favour efficiency and does not follow the case law of the Court of Justice.[90] However, it is submitted that in spite of the abolition of the exequatur, the actual enforcement and the effectiveness will to a large degree be dependent upon the national law and practice of the Member States.

4.5 Special rules for provisional and protective measures

Provisional and protective measures are of great importance in cross-border litigation. In practice they are considered complex in view of their specific nature and the great diversity of available measures in the Member States. In the context of Brussels I, particularly the concept of provisional and protective measures, the open-ended jurisdiction rule included in Article 31 of the Brussels I Regulation[91] and its relation to jurisdiction on the merits as well as the cross-border enforcement have been considered problematic. In a series of cases the Court of Justice clarified some of the issues, albeit not satisfactorily.[92] Most notably in *Van Uden* v. *Deco-Line*[93] and *Mietz* v. *Intership Yachting*[94], the Court of Justice curtailed the effect of Article 31 Brussels I Regulation which allows a court to order provisional and protective measures even where the courts of another Member State have jurisdiction on the substance. In the first case, the Court ruled that a court not having jurisdiction on the substance, may order provisional or protective measures only where there is a real connecting link between the measure and its territory. In the second case, it ruled that such

---

[87] CJEU 13 October 2011, Case C-139/10, *NIPR* 2011, 472 (*Prism Investments/Van der Meer*).

[88] The court refers in this context to ECJ 2 July 1985, Case 148/84, *ECR* 1985, p. 1981, para. 18 (*Deutsche Genossenschaftsbank* v. *SA Brasserie du Pêcheur*); 3 October 1985, Case 119/84, *ECR* 1985, p. 3147, para. 16 (*Capelloni and Aquilini* v. *Pelkmans*); *Hoffmann*, para. 27 (*supra* n. 85).

[89] It adds that the *recognition* of a judgment should, however, be only refused on the basis of the grounds of refusal.

[90] See also M. Pohl, 'Die Neufassing der EuGVVO – im Spannungsfeld zwischen Vertrauen und Kontrolle', *IPRax* 2013, p. 109 at p. 114.

[91] This article reads 'Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.'.

[92] See for an analysis of all the case law on provisional and protective measures A. Dickinson, 'Provisional measures in the "Brussels I" review: disturbing the status quo?', *JPIL* 2010, p. 519, 522-530.

[93] ECJ 17 November 1998, C-391/95, ECR 1998, I-7091 (*Van Uden* v. *Deco*-Line).

[94] ECJ 27 April 1999, C-99/96, ECR 1999, I-2277 (*Mietz* v. *Intership Yachting*).

measures are capable of recognition and enforcement, provided that the court granting them did not go beyond the limits of the jurisdiction rule of Article 31.

The Brussels I-bis Regulation adopts several new rules. Recital 25 provides some further information as to what the notion of provisional and protective measures entails. It states that it includes, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of *[362]* the Intellectual Property Enforcement Directive.[95] The permissive jurisdiction rule of Article 31 of the current Regulation is without amendment transposed to Article 35 of the Brussels I-bis Regulation. This means that the 'real connecting link', as introduced in *Van Uden* v. *Deco-Line* will continue to be important to fill in this open rule. A provision proposed by the Commission to better coordinate eventual proceedings on the merits and provisional measures was not adopted.[96]

The most important amendment regards the recognition and enforcement of these measures, as is apparent from Article 2 sub (a) of the Brussels I-bis Regulation. It provides that the term 'judgment' for the purpose of the recognition and enforcement regime includes provisional and protective measures ordered by a court or tribunal that by virtue of this Regulation has jurisdiction as to the substance of the matter. However, it does not include measures ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measures is served on the defendant prior to enforcement. This last phrase excludes the cross-border enforcement of 'surprise' measures, and is in line with the case law of the Court of Justice, starting with the *Denilauler* v. *Chouchet* case.[97] The Commission proposal to diverge from this case law and further ban the limit on *ex parte* measures was not adopted.[98] It should be noted that once the proposal for a Regulation on a European Account Preservation Order (EAPO) is adopted, measures to preserve bank accounts can be based on that Regulation.[99]

The new provision diverges from the aforementioned *Mietz* ruling, since it strictly limits the circulation of provisional and protective measures to courts having jurisdiction on the substance. Where a Member State court lacks jurisdiction on the substance and, therefore, founds its jurisdiction on Article 35 of the Brussels I-bis Regulation, the effect of the measures will be limited to the territory of that Member State. The Commission justifies this limitation by referring to the wide divergence of national laws on this issue, and thus aims to avoid the risk of abusive forum shopping.[100] Though this limitation may affect the practical use of these types of measures, it is to be welcomed in view of the variety of measures and domestic jurisdiction rules upon which these are based. This new rule is expected to limit forum shopping, but not end it completely. Firstly, the alternative jurisdiction rules will, subject to an exclusive jurisdiction clause, provide *[363]* some room to find a favourable forum. Secondly, the new rule does not require that the court seized for provisional measures actually does handle the case on the substance, only that it would have jurisdiction to do so on the basis of the Regulation.

---

[95] Directive 2004/48/EC on the enforcement of intellectual property rights, OJ 2004, L 157/45 and L 195/16 (corrigendum). The recital adds that it does not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This is in accordance with ECJ 28 April 2005, C-104/03, ECR 2005, I-3481, NJ 2006, 363 (*St. Paul Dairy* v. *Unibel Exser*).

[96] See Article 31 Commission proposal, *supra* n. 4. The required cooperation between courts raised substantial practical issues.

[97] ECJ 21 May 1980, Case 125/79, ECR 1980, 1553 (*Denilauler v. Couchet*); ECJ 14 October 2004, C-39/02, ECR 2004, I-9657 (*Maersk v. De Haan*); ECJ 18 October 2011, C-406/09 (*Realchemie Nederland v. Bayer CropScience*).

[98] See Article 2 Commission proposal. See also M. Bogdan, 'The proposed recast of the rules on provisional measures, in: E. Lein, *The Brussels I Review Proposal Uncovered*, London: British Institute for International and Comparative Law, 2012, p. 125, 133.

[99] See *supra* n. 35.

[100] Commission proposal, *supra* n. 4, Explanatory memorandum, p. 10.

To accommodate the free circulation of provisional and protective measures and to protect the debtor, Article 42(2) Brussels I-bis Regulation and the judgment certificate (Annex I) contain further requirements. It is required that the certificate contains a description of the measures and certifies that (i) the court has jurisdiction as to the substance of the matter; (ii) the judgment is enforceable in the Member State of origin; and (iii) where the measure was ordered without the defendant being summoned to appear, proof of service of the judgment.[101]

5. Assessment and future prospects of cross-border enforcement

5.1 A first appraisal of the new framework

The basic concept of the Brussels I-bis Regulation is simple: a declaration of enforcement is not required, but the grounds of refusal can be invoked in the enforcement stage. This was the political outcome of negotiations where all parties agreed on the objective to reduce formalities, but where the system of safeguards proposed by the Commission to replace the existing grounds of refusal was not acceptable. It is acknowledged that the carefully drawn up grounds of refusal in the original Brussels Convention 1968 and how these have been developed and applied in practice have proven to be valuable and largely time proof.[102] The three-folded review mechanism as proposed by the Commission was unnecessarily complex, would have undermined debtor-protection and would have led to new questions of interpretation.

It is further submitted that leaving the uniform approach to all judgments covered by the Regulation intact is also desirable. As discussed, the Commission proposed to keep the exequatur procedure for judgments relating to privacy and personality rights as well as certain types of collective redress. This resulted in the co-existence of two regimes, a large increase of the number of provisions and would undoubtedly have resulted in all sorts of demarcation questions. However, it is a pity that the jurisdiction and the recognition and enforcement in relation to collective redress, including particular mass settlements, is not resolved by the Brussels I-bis Regulation.[103] Though collective redress was mentioned in the Green *[364]* Paper, it was not further considered in the recast process. The Commission Recommendation on collective redress as adopted in June 2013, do not solve the matter either.[104]

Though in general the outcome of the negotiations is considered a viable solution given the policy objective to abolish the exequatur, several fundamental and practical questions remain. Firstly, does this new approach strike the correct balance between mutual trust and the necessary or desired national control of fundamental rights? Secondly, will it in practice sufficiently facilitate creditor's needs whilst providing the necessary protection to the debtor? Thirdly, does or should the outcome of the negotiations on the Brussels I-bis Regulation have further policy or legislative consequences? These questions will be addressed in the following sub-sections.

5.2 Balancing mutual trust and national control over fundamental rights

The driving force behind the abolition of exequatur is the principle of mutual trust. The principle of mutual trust is also already mentioned in Recital 16 of the Brussels I Regulation, to underpin

[101] See point 4.6.2 of the Annex for the corresponding questions; a separate question on the prior service of the judgment however is lacking.
[102] These grounds of refusal have been slightly amended and one ground of refusal was considered abundant when the Convention was replaced by the Regulation.
[103] See Kramer 2013, *supra* n. 42, p. 82-86.
[104] See *supra* n. 42.

automatic recognition and the semi-automatic enforcement through a low-threshold exequatur procedure. It is consistently mentioned in all policy documents on the abolition of exequatur and, as was mentioned earlier, specifically in relation to the recast of the Brussels I Regulation. Though mutual trust has been adopted as the pillar for judicial cooperation both in civil and criminal matters this concept is not clearly defined, particularly not in relation to civil matters.[105] Primary EU law does not make reference to the principle of mutual trust, though in Article 4(3) of the Treaty on the European Union (TEU) the notion of mutual respect in the cooperation and application of EU law is embedded. Mutual trust may be regarded as the confidence that Member States should have in each other's legal system and courts in the application of EU law, which results in the prohibition to review what other States and their judiciaries are doing.[106] In the area of civil justice, the Court of Justice has in a series of cases underpinned its judgment by referring to mutual trust. As to the Brussels I Regulation, this has *inter alia* resulted in a strict interpretation of the *lis pendens* rules and a prohibition of anti-suit injunctions in relation to litigation in another Member State.[107]

The principle of mutual trust was also positioned to justify the abolition of the grounds of refusal and in particular the extensively debated public policy *[365]* exception. From a practical perspective, the Commission also justified the general abolition of the public policy exception by affirming that substantive protection is no longer needed. A recent study performed by the University of Heidelberg indeed reveals that substantive public policy is of little relevance in practice.[108] Procedural public policy, for example the violation of procedural rights that are often litigated in the European Court of Human Rights (ECtHR) under Article 6 of the European Convention on Human Rights (ECHR) would be sufficiently covered by the proposed special review clause on the violation of fair trial.[109] However, the fact that violation of substantive public policy is very infrequent is not a good reason to abandon it altogether. The protection of public policy is to be regarded as a matter of the rule of law and has always been regarded as a necessary safety valve in private international law.[110] In addition, substantive issues are often closely interwoven with procedural rules and cannot be easily separated.

As a matter of principle, as Dickinson has rightfully argued, mutual trust can also only relate to the application of EU law, and not to the application of national law.[111] Though the use of the public policy exception in Brussels I, referring to the public policy of the Member State of enforcement has been restricted by the European Court of Justice, in essence it is still national law. Every Member State has the right and the obligation to protect public policy. Though all Member States are bound by the EU Charter on Fundamental Rights and the ECHR, the extensive case law of the ECtHR shows that particularly the implementation of fair trial principles is not self-evident. Within the Brussels I context, the famous cases of *Krombach* v. *Bamberski*[112] and *Gambazzi*[113] of the

[105] In criminal law literature, more attention is paid to the concept and concretisation of mutual trust than in literature on judicial cooperation in civil matters.

[106] See more extensively Kramer 2011, *supra* n. 16, p. 217-218.

[107] See in relation to lis pendens CJEU 9 December 2003, Case C-116/02, ECR I-14693 (*Gasser* v. *MISAT*) and to the anti-suit injunction (prohibition to litigate in a foreign court) CJEU 27 April 2004, Case C-159/02, ECR I-3565 (*Turner* v. *Grovit*).

[108] B. Hess and T. Pfeiffer, 'Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International and Procedural Law', study PE 453.189 (September 2011).

[109] See *supra* section 3.1.

[110] See Dickinson 2012, *supra* n. 45, p. 143, referring to and quoting Sir Hersch Lauterpacht, former judge of the International Court of Justice, in *Guardianship of Infants (The Netherlands* v. *Sweden*), judgment of 28 October 1958, available at http://www.icj-cij.org/docket/files/33/2269.pdf.

[111] Dickinson 2012, *supra* n. 45, p. 144-145.

[112] ECJ 28 March 2000, Case C-7/98, ECR 2000, p. I-1935 (*Dieter Krombach* v. *André Bamberski*).

[113] ECJ 2 April 2009, Case C-394/7, ECR 2009, p. I-2563 (*Marco Gambazzi* v. *DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*).

European Court of Justice evidence that violations of the rights to be heard also occur as between Member States. As is clear from the principled *Bosphorus* case of the ECtHR[114], Member States can, under certain circumstances, transfer sovereign powers to apply the ECHR to the EU.

Further reference can be made to the *Pellegrini* ruling, where the ECtHR required the Italian court under reference to Article 6 ECHR to review whether a Vatican judgment complied with the principles of fair trial before authorising enforcement.[115] This case may, however, be regarded a-typical since it concerned *[366]* a judgment rendered in a State that is not a party to the ECHR. That mutual trust has its boundaries has also been affirmed by several rulings in asylum cases where the Dublin II Regulation relies on mutual trust.[116] The ECtHR has held that Member States still retain their own responsibility under the ECHR.[117] It ruled that a Member State cannot fully rely on another Member State if it is evidenced that in that state an asylum seeker faces maltreatment. This decision was followed by a ruling of the Court of Justice that converted to the decision of the ECtHR, also resorting to the EU Charter on Fundamental Rights.[118] Mutual trust cannot be blind trust. It finds its limits in fundamental rights, which should also be adequately protected by secondary EU law.[119]

Interestingly, in the recent ECtHR decision in the *Povse* v. *Austria* case, dealing with the abolition of exequatur under the Brussels II-bis Regulation, this Court judged that it did not find a dysfunction in the control mechanisms for the observance of the ECHR's rights.[120] Applying the *Bosphorus* test, the ECtHR reiterated that the fundamental rights protection in EU law is in principle equivalent to the protection provided by the ECHR. It continued that under Article 42 Brussels II-bis the (Austrian) court of enforcement did not have discretion as to whether or not to enforce the order given by the (Italian) court of origin. The Austrian court only fulfilled the strict obligations flowing from its membership of the European Union. The ECtHR explained that this is different under the Dublin II Regulation where the 'souvereignity clause' enables to assess whether a refugee should be returned to the Member State where he had entered the EU. What was also important in *Povse* case is that the CJEU had already given a preliminary ruling on application of the Austrian court, confirming that the Brussels II-bis Regulation does not leave any room for the court of enforcement to review the merits.[121] Additionally, in the court of origin a case on the basis of changed circumstances could be made, or eventually an application to the ECtHR could be made against Italy (the court of origin). The ECtHR therefore concluded that the Austrian court had not violated the Convention. Though their might occasionally *[367]* be room for exceptions[122], one

[114] ECtHR 30 June 2005, Appl.no. 45036/98 (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* v. *Ireland*).
[115] ECtHR 20 July 2001, appl. No. 30882/96 (*Pellegrini* v. *Italy*).
[116] Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003, L 50/1. See also on this matter *inter alia* See also H. Raulus, *Fundamental Rights in the Area of Freedom, Security and Justice*, in: S. Wolff, F.A.N.J. Goudappel & J. de Zwaan (eds.), *Security and Justice after Lisbon and Stockholm*, Asser Press: The Hague, 2011, p. 233.
[117] ECtHR 21 Jan. 2011, Appl. no. 30696/09 (*M.S.S.* v. *Belgium and Greece*).
[118] CJEU 21 Dec. 2011 joined cases C-411/10 (*N.S.* v. *Secretary of State for the Home Department*) and C-493/10 (*M.E. and Others* v. *Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*).
[119] See also H. Raulus, 'Fundamental Rights in the Area of Freedom, Security and Justice', in S. Wolff et al. (eds.), *Security and Justice after Lisbon and Stockholm*, Asser Press 2011, p. 233. See for a report in the area of asylum, migration and criminal law H. Battjes, E. Brouwer, P. de Morree & J. Ouwerkerk, The Principle of Mutual Trust in European Asylum, Migration, and Criminal law. Reconciling Trust and Fundamental Rights (report Meijers Committee (standing committee of experts on international immigration, refugee and criminal law), Utrecht, Forum: 2011.
[120] ECtHR 18 June 2013, appl. No. 3890/11 (*Povse* v. *Austria*).
[121] CJEU 1 July 2010, Case C-211/10 PPU, ECR 2010, I-6673 (*Povse* v. *Alpago*).
[122] Additionally, it should be noted that this case was not rendered by the Grand Chamber, and generally the case law of the ECtHR is very casuistic.

could conclude from this case that the abolition of exequatur as such does not violate the ECHR provided that the system as a whole does not undermine human rights protection.

Nevertheless, it is submitted that retaining the public policy exception, as well as the other grounds of refusal in relation to default judgments and jurisdictional protection of (primarily) weaker parties is to be welcomed. Retaining these exceptions only strengthens the idea that the Union is based on respect for fundamental rights, including both procedural and substantive rights, such as the right to respect for private and family life, as well as the right to freedom of expression, religion and to property.[123] However, to a greater extent than the current Regulation does, the Brussels I-bis Regulation shifts the burden to protect fundamental rights to the defendant. The question is also in how far the new system will really make it easier for a plaintiff to effect his right to enforcement. These issues will be addressed in the following sub-section.

5.3 Creditor's ease and debtor protection: some practical concerns

The abolition of exequatur has also been justified by the desire to enhance access to justice and the right to an effective remedy, as guaranteed by Article 47 of the EU Charter and Articles 6 and 13 of the ECHR. In general, Recital 38 to the Brussels I-bis Regulation states that this Regulation respects fundamental rights and observes the right to a fair trial and an effective remedy.

From the perspective of the judgment creditor, the interests evidently are to enforce his rights as a result of the judgment in an efficient way. Normally, the parties have already had the opportunity to present all arguments in the court of the Member State of origin; having to obtain a declaration of enforceability in the Member State of enforcement is in that regard an extra hurdle. In future, the judgment creditor can skip the court and immediately address the enforcement authority in the Member State of enforcement. This will save time and costs. How much time it will save depends on the Member State involved. The Heidelberg report concluded that, in general, exequatur proceedings are conducted extremely efficiently, and the declaration can usually be obtained within a few weeks or even a few days.[124] The time savings will in general probably not be substantial in view of the total amount of time spent on average cross-border litigations. However, in some Member States and in incidental cases exequatur proceedings can take longer and in those situations abolition of exequatur will be clearly advantageous. It has to be borne in mind that the new regime does require the judgment creditor to request the judgment certificate for the purpose of cross-border enforcement from the court of origin. Generally, this request will be filed during proceedings. Nevertheless, issuance of the judgment certificate might incur extra time.

[368] As to the costs, the Impact Assessment accompanying the Brussels I-bis Regulation claims that on average the costs of exequatur proceedings are €2,208.[125] However, this report seems to be based on very rough estimates and is not entirely convincing.[126] The amount is also misleading, since a substantial part of the costs seems to be attributable to service of documents and translation costs.[127] The costs – and time, for that matter – involved with the service of documents will not generally be reduced. Both the judgment itself and the judgment certificate need to be

---

[123] See in response to the Commission proposal Dickinson 2011, *supra* n. 43, p. 9.

[124] *Supra* n. 27.

[125] European Commission, Impact assessment, SEC(2010) 1547 final and CSES report 'Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels I')', December 2010, available at http://ec.europa.eu/justice/civil/files/study_cses_brussels_i_final_17_12_10_en.pdf.

[126] As one author remarked, the report mentions the word 'estimate' 142 times and lacks supportive data, see L.J.E. Timmer, 'Abolition of exequatur under the Brussels I Regulation: ill conceived and premature?', *JPIL* 2013, p. 142.

[127] See also M.E. Hazelhorst & X.E. Kramer, 'Afschaffing van het exequatur in Brussel I: daadwerkelijke verbetering of politiek gebaar?' (Abolition of exequatur in Brussels I: actual improvement or political gesture?), *TCR* 2013, p. 46.

served. As discussed above, the new Regulation contains several rules to reduce the need of translations, most notably by the introduction of the judgment certificate.[128] However, in cases where cross-border enforcement is needed, the judgment debtor will be domiciled in the Member State of enforcement rather than in the Member State where the judgment was rendered. This will generally mean that translation of the judgment in accordance with the Brussels I-bis Regulation is needed. In any case, court fees will be saved, though this will usually only be a relatively small amount of money. Additionally, the enforcing party potentially saves the money of (compulsory) legal representation to file the request for an exequatur. However, it may be expected that enforcing parties also need legal aid in finding their way to a foreign enforcement agency. It goes without saying that there will be no cost-savings as regards the enforcement authorities. It might even be that costs will increase since the enforcement authorities have more responsibilities in assessing the judgment certificate and the foreign judgment. The foreign judgment is no longer 'filtered' in the national judicial system, but is truly foreign.[129]

The Brussels I-bis Regulation further paves the way to enforcement by enabling immediate access to provisional measures.[130] Additionally, in case the judgment creditor invokes the grounds of refusal this does not automatically limit the enforcement to protective measures, as is the case under the current Regulation.[131] The efficiency of the new regime in practice will largely depend upon a good implementation in the Member States and a proper use of the judgment certificate. The court *[369]* of origin will have the additional burden to fill in the certificate and the enforcement authority will have the duty to assess the certificate and enforcement requirements and, where necessary, the underlying judgment. It is also important for the proper functioning of the European judicial area that information on the actual enforcement and access to enforcement authorities is improved. A problem that the new regime will evidently not tackle is the general bottleneck of getting a judgment enforced inherent to flaws in national execution law, inadequate institutions or simply untraceable assets.

From the perspective of the judgment debtor access to justice and the right to an effective remedy requires that in case of a violation of specific rules of the Regulation itself or of fundamental rights, remedies are available. This may be done by appealing the judgment in the Member State where the judgment was rendered. However, appeal may not always be available or in the case of inadequate cross-border service, the judgment debtor may only become aware of the judgment once enforcement is sought. It is submitted that the preservation of the grounds of refusal on the contents generally provides sufficient protection.

The difference with the Brussels I Regulation is evidently that the grounds of refusal will only come into play at the enforcement stage and are no longer grounds to appeal the declaration of enforceability. The requirement that the certificate and the judgment are served prior to the first measure of enforcement guarantees that the judgment debtor is aware of the judgment and enables him to invoke the grounds of refusal. As discussed earlier, the Brussels I-bis Regulation, in line with the Service Regulation, allows a party to refuse the service where the document is not in a language that he understands or in the official language of his domicile.[132] The initiative is on the side of the addressee, in this case the judgment debtor, as there is no obligation as such to translate

---

[128] See *supra* section 4.2.
[129] See in this regard also Dickinson 2012, *supra* n. 45, p. 158 who refers to the assimilation of the foreign judgment in the national legal order through the exequatur procedure.
[130] Article 40 Brussels I-bis Regulation, see supra section 4.1.
[131] See Article 47(3) Brussels I Regulation.
[132] Art. 43(2) Brussels I-bis Regulation, see *supra* section 4.2.

the documents.[133] In relation to the judgment certificate the Regulation does not specify that it has to be translated.

Practically, the burden to seek protection against violation of fundamental rights is wholly on the side of the judgment debtor. Whereas the declaration of enforceability is served upon him and may refer to appeal possibilities within the same court system as the court that granted the declaration, under the Brussels I-bis Regulation a new procedure should be initiated. The judgment certificate provided by the court of origin obviously does not have any reference to appeal possibilities in the Member State of enforcement. The Regulation relieves the burden by not requiring a postal address in the Member State of enforcement for the purpose of invoking the grounds of refusal and neither an authorised representative legal representative unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.[134] As argued earlier, many Member States will require legal representation in order to initiate proceedings, and in the absence of such a *[370]* requirement, adequately invoking the grounds of refusal will not be realistic without a local lawyer.[135]

A possible backlash of the new regime and of abolition of exequatur procedures in general is that a uniform exequatur procedure is being replaced by a national procedure to invoke the grounds of refusal. This may create additional problems at the enforcement level.[136] A particular strength of the introduction of a simple exequatur procedure in the Brussels Convention and Regulation was that it established a uniform procedure for obtaining the exequatur and for challenging the granting of the exequatur. National procedural laws and enforcement laws in particular, differ considerably between the Member States. It is to be feared that since the procedure to invoke the grounds of refusal is fully governed by the national law of the State of enforcement, there will be a multitude of different procedures in the Member States instead of a single exequatur procedure. This will not enhance efficiency and transparency.

5.4 Prospects for EU cross-border enforcement

A final issue to be considered is the impact that the outcome of the Brussels I-bis Regulation may have on the future of cross-border enforcement in the European Union. The Commission in somewhat grandiloquent terms expressed the desire to commit the exequatur to legal history. Its proposal evidenced that the intention was not only to abolish the declaration of enforceability as cumbersome intermediate measure, but also the existing catalogue of grounds of refusal, including the public policy exception. The question is whether the principled debate on the protection of fundamental rights and particularly the desire to retain the public policy exception at the national level will or should have further repercussions, particularly for the other instruments that abolished exequatur.

All those five instruments, Brussels II-bis (in relation to particular orders), the European Enforcement Order, the Order for Payment Procedure, the Small Claims Procedure and the Maintenance Regulation lack a general public policy exception. Contrary to the Brussels I recast, the abolition of this ground of refusal and the introduction of other review mechanisms – some similar to those proposed by the Commission on Brussels I – has resulted in relatively little controversy. This is probably because those Regulations concerned specific matters. As to the Brussels II-bis Regulation, the abolition only regards particular orders concerning access to and the

[133] See also in relation to Art. 8 of the Service Regulation Stadler 2012, *supra* n. 77.
[134] Art. 47(4) Brussels I-bis Regulation, see *supra* section 4.2.
[135] See *supra* section 4.3
[136] See also Kramer 2011, *supra* n. 45, p. 641.

return of a child, where often urgency is required and the pressing interests of children and their parents are at stake. The European Enforcement Order and the Order for Payment Procedure regard uncontested claims. Particularly the first instrument has been criticised for abolishing exequatur and raised some discussions in Brussels, but was eventually adopted.[137] The European Small Claims *[371]* Procedure only concerns claims with a maximum value of €2,000 and excludes several more delicate matters from its scope, such as employment issues. In relation to these two harmonised procedures, discussions focused on the scope and structure of the procedure, rather than on the enforcement elements. The Maintenance Regulation is the most far-reaching instrument to abolish exequatur, and has received some criticism in this regard.[138] However, the pressing need to facilitate the problematic recovery of maintenance in cross-border cases favoured the abolition of exequatur, and it was achieved on the condition that uniform choice-of-law rules were to be applied.[139] Apart from the fact that these instruments cover a limited area and all contain certain requirements or procedural safeguards that warrant the abolition, these instruments were also newly introduced instruments.

On the contrary, the Brussels I Regulation is the key instrument in European civil litigation with a very broad scope and relying on a long-standing and successful history. Against this backdrop, the resistance that the abolition of exequatur met in the Brussels I recast does not necessarily mean that the reintroduction of the grounds of refusal in those other instruments is strictly required. It is also very unlikely that the Commission intends to turn back the time and to consider such revision. However, three points need to be made.

Firstly, all these relatively new instruments should be carefully evaluated. For example, the European Order for Payment Procedure fully depends upon proper service and not acting promptly within the strict deadlines will be fatal. In the Netherlands, case law demonstrates that if a debtor was not served in person, but does not initiate review procedures in the Netherlands within four weeks – a deadline imposed by the Dutch Implementation Act[140] – the request will be dismissed and no remedy is available whatsoever.[141] Empirical research carried out in the Netherlands further reveals that the debtor receives no substantive protection during the proceedings, since any review on the existence of the debt or the amount of legal costs claimed lacks.[142] This makes the position of the debtor in *[372]* cross-border litigation vulnerable. Empirical research on the functioning of the

[137] See for criticism *inter alia* A. Stadler, 'Das Europäische Zivilprozessrecht – Wie viel Beschleunigung verträgt Europa?', *IPRax* 2004, p. 2-10.

[138] See *inter alia* M. Hellner, 'The Maintenance Regulation: A Critical Assessment of the Commission's Proposal', in: K. Boele-Woelki and T. Sverdrup, *European Challenges in Contemporary Family Law*, Antwerp: Intersentia 2009, p. 343 at p. 362; L. Walker, 'From Brussels I and the Maintenance Convention to the Maintenance Regulation: Is the resulting Maintenance Regulation consistent with the other EU PIL instruments?', *NIPR* 2013, p. 167 at p. 169.

[139] See also I. Curry-Sumner, 'Administrative co-operation and free legal aid in international child maintenance recovery. What is the added value of the European Maintenance Regulation?', *NIPR* 2010, p. 611 at p. 620.

[140] Art. 9 Implementation Act European Order for Payment Procedure (*Uitvoeringswet verordening Europese betalingsbevelprocedure*). See on the implementation in the Netherlands X.E. Kramer, 'Enhancing Enforcement in the European Union. The European Order for Payment Procedure and Its Implementation in the Member States, Particularly in Germany, the Netherlands, and England, in C.H. van Rhee and A. Uzelac (eds), *Enforcement and Enforceability. Tradition and Reform*, Antwerp-Oxford-Portland, Intersentia: 2010, p. 17 at p. 32-33.

[141] See *inter alia* District Court The Hague, 30 September 2010, ECLI:NL:RBSGR:2010:BN9635 (review requested after two months); District Court The Hague, 3 November 2010, ECLI:NL:RBSGR:2010:BO3259 (review requested after one month and four days).

[142] X.E. Kramer, M.L. Tuil and I. Tillema *et al* , *Verkrijging van een executoriale titel in incassozaken* (WODC report), p. 110-120, particularly at p. 116. Summary available in English, Obtaining an Enforceable Title in Debt Collection Cases, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2259557.

European Small Claims Procedure conducted in the Netherlands also exposes problems in the cross-border service of documents, in some instances undermining the rights of the defendant.[143]

Secondly, the Brussels I-bis Regulation experience should trigger the Commission to reconsider the value of the public policy exception as a necessary or desired safety valve. At any rate, fundamental rights should be guaranteed and Member States should be able to exercise a certain control at request of a party.[144] The consequence of the abolition of exequatur for the protection of fundamental rights was clearly revealed in the disputed ruling of the Court of Justice in *Aguirre* v. *Pelz*.[145] This case dealt with a return order under the Brussels II-bis Regulation. The facts of the case were as follows. After the divorce of the parents, the father was vested with parental authority over the child. Father and child resided in Spain. After a holiday visit to her mother in Germany, the child did not return. The Spanish court ordered the return of the child, without hearing the mother and child in accordance with Article 42 of the Brussels II-bis Regulation. On this ground, the mother objected to the enforcement in the German court. The German court then referred to the Court of Justice the question as to whether in the situation of a serious infringement of fundamental rights the enforcing court exceptionally still had the power of review the judgment, pursuant to Article 42 Brussels II-bis and the Charter on Fundamental Rights. After all, the court of origin violated the requirements of this Regulation itself and denied the right to be heard as protected by Article 47 of the Charter. However, the Court of Justice answered in the negative, referring to the principle of mutual trust. It stated that the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin. As discussed earlier, the ECtHR generally does not seem to find this system falling short of control mechanisms.[146] Nevertheless, it is clear that the Member States are not in all cases willing to give up the power to exercise control over what is to be enforced on their territory.

Thirdly, the mishmash of different cross-border enforcement regimes, resulting in a fragmented and incoherent European civil procedure, requires reconsideration of the most appropriate regime for the cross-border enforcement of judgments in the EU. Access to justice will benefit from a certain degree of uniformity and legal certainty. The Brussels I-bis Regulation is not a one size fits all, *[373]* but can be used as a model to rethink the fundamentals and practicality of EU cross-border enforcement.

6. Concluding remarks

The adoption of the Brussels I-bis Regulation brought the ideal of the full free circulation of judgments within the EU a step closer. The policy objective articulated some fifteen years ago to abolish exequatur is now firmly implemented in legislation. Following the piecemeal abolition of exequatur in specific instruments, this key Regulation will dispose of the declaration of enforceability for a wide variety of judgments. Though the case for abolition of exequatur was maybe not very strong to start with and alternative solutions relating to improvement of the exequatur procedures were plausible, the outcome of the debate is on the whole satisfactory. The preservation of the grounds of refusal guarantees a minimum of protection, though the judgment debtor is put at a procedural disadvantage. Whether the new regime will considerably improve current practice remains to be seen and is highly dependent upon the actual application of the rules

[143] X.E. Kramer and E.A. Ontanu, 'The functioning of the European small claims procedure in the Netherlands: normative and empirical reflections', *NIPR* 2013, p. 319-328.

[144] See *supra* section 5.2 for the discussion in relation to the Brussels I recast.

[145] CJEU 10 December 2010, Case C-491/10PPU, ECR 2010, I-14247 (*Joseba Andoni Aguirre Zarraga* v. *Simone Pelz*).

[146] See *supra* section 5.2.

and the use of the judgment certificate by the enforcement authorities involved. The discussions on the recast and the upcoming evaluations of the specific instruments should also inspire the European legislature to reconsider the full range of instruments on cross-border enforcement. Though the hybrid Brussels I-bis model was the result of a compromise, it may prove to be the most acceptable model for EU cross-border enforcement for future legislation.