

The Abolition of *Exequatur* in the Proposal for the Review of the Brussels I Regulation

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ABSTRACT The paper discusses the European Commission's proposal of December 2010 for the abolition of the *exequatur* procedure in the Brussels I Regulation. The comparison between the currently applicable and the proposed new wording shows that the abolition of *exequatur* does not encompass the abolition of (all) grounds for refusal of enforcement in other Member States. The author analyses the differences between the current and the proposed text of the Regulation regarding the available legal remedies, as well as the grounds for refusal of enforcement that can be invoked by these remedies. Special attention is drawn to the difficult relationship between the minimizing of the obstacles to the "free movement of judgments" and the protection of human rights in cross-border enforcement.

KEYWORDS: • *Exequatur* • enforcement of foreign judgments, • recognition of foreign judgments • cross-border enforcement • Brussels I Regulation • Regulation No. 44/2001 • review of Brussels I Regulation • foreign judgments • judgments from other Member States

1 Introduction

The review of the Brussels I Regulation¹ started with great ambition.² Even though many important modifications of the provisions of the Regulation are being proposed, it is possible to state that the abolition of *exequatur* (the declaration of enforceability), for all judgments in civil and commercial matters was the most important goal of this reform.³ It was, however, questionable whether the abolition of *exequatur* would also entail the abolition of the grounds for refusal of enforcement, or, on the contrary, such grounds should remain and the possibility of invoking them be moved to the actual enforcement stage. In other words, should the Brussels I Regulation follow the pattern of the regulations of “the second generation”, i.e. the regulations on the European Enforcement Order, the Small Claims Procedure, the Order for Payment, and Maintenance Obligations⁴ and (almost)⁵ completely abolish the verification of the judgment in the state of enforcement?⁶ The European Union (hereinafter: the EU) was thus surely headed towards a more facilitated circulation of judgments in civil and commercial matters among the Member States, but was it to be a “free movement of judgments”?

The consultation process⁷ revealed that it was (for the moment) too ambitious to try to achieve such “free movement”, i.e. that judgments from other Member States would be enforced under the same conditions as domestic judgments. The authors emphasised that the abolition of every possibility of verification in the state where enforcement is sought (hereinafter: the state of enforcement) of a judgment issued in another Member State could cause problems, above all from the point of view of the protection of human rights and the protection of so-called weaker parties, i.e. consumers, employees, and the insured (See, e.g., Beaumont, Johnston, 2010: 249-279; Galič in: Galič, Betetto, 2011: 32-33; Oberhammer, 2010: 197-203; Schlosser, 2010: 101-104. *Contra* (under certain conditions): Schilling, 2011, 31-40, esp. p. 40).

In its proposition for the amended Regulation (hereinafter: the Brussels I bis Regulation)⁸ the European Commission therefore proposed that a legal remedy be available in the state of enforcement enabling the defendant to invoke the violations of fundamental procedural rights (the so-called procedural public policy) that occurred in the process of issuing the judgment.⁹ The public policy defence in the Brussels I Regulation has namely almost exclusively been applied to violations of fundamental procedural rights¹⁰ which do and surely will occur also in the future.¹¹ It is also true that, at least for the time being, Member States do not always have the same view of the content of the fundamental procedural guarantees (See, e.g., CJEU, *Zarraga v. Pelz*, C-491/10 PPU, 22 December 2010).¹²

Following the Commission’s proposal, *exequatur* proceedings should nevertheless be abolished. In this way, the term “abolition of *exequatur*” has gained a broad and a narrow sense, which have been, up to now and with regard to the above mentioned regulations, identical.¹³ The broad sense encompasses the abolition of every verification of the judgment in the state of enforcement; the narrow sense describes only the abolition of the current obligatory proceedings of the declaration of enforceability, whereas the defendant can still demand the (limited) control of the judgment in the state of enforcement.

If the majority of judgments are encompassed by the mentioned proposition, the Commission proposes the preservation of *exequatur*, with a minor limitation of the grounds for refusal that can be invoked, for two groups of judgments: first, for judgments on non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, and second, for judgments in proceedings which concern the compensation for harm caused by unlawful business practices to a multitude of injured parties and which are brought by a state body, a non-profit making organisation, or a group of more than twelve claimants.¹⁴ This exclusion is supposed to only be temporary.¹⁵

At the time of writing of this paper, the Commission’s proposal is awaiting a first reading in the European Parliament (hereinafter: the EP), one of the two European legislatures, which is scheduled for February 2012.¹⁶ In June 2011, the Committee on Legal Affairs of the EP delivered a Draft Report on the Commission’s Proposal.¹⁷ The Committee’s vote is scheduled for January 2012. Additional amendments by members of Parliament were made publicly accessible in October 2011.¹⁸ The Draft Report of the Committee for Legal Affairs and the later amendments show that the Commission’s proposal will most probably be subject to extensive modifications. Concerning the abolition of *exequatur*, it is no exaggeration to state that these modifications go in the direction of minimizing the changes proposed by the Commission.

In the following chapters, we will deal with the following issues regarding the Commission’s proposal for the abolition of *exequatur* in Brussels I bis Regulation: legal remedies in the state of origin of the judgment

(hereinafter: the state of origin), legal remedies in the state of enforcement, the grounds for refusal of enforcement that can be invoked, the exceptional maintenance of *exequatur* regarding the two groups of judgments, the recognition of judgments from other Member States, the enforcement of judgments on provisional measures, the enforcement of authentic instruments and court settlements, as well as the difficult relationship between the abolition of *exequatur* and the protection of human rights, and, lastly, the impact of the “dogma” of mutual trust within the EU on the abolition of *exequatur*.

2 Legal Remedies in the State of Origin

Similarly as the Regulation on the European Enforcement Order and other regulations of the “second generation”,¹⁹ the proposal for the Brussels I bis Regulation provides the possibility for defendants to prevent the judgment from taking effect in other Member States if there were problems regarding the service of the instrument instituting the proceedings (a lack of service or insufficient time to prepare a defence) or if the defendant was unable to defend him/herself for reasons outside his/her control.²⁰

However, the abolition of *exequatur* is not accompanied by the determination of minimum standards for service of the initial document in the proceedings, as is the case in the above mentioned regulations. It is true that a legal remedy able to sanction violations of common procedural standards is available in the state of enforcement; it would nevertheless be wise to prescribe unified rules regarding service as the crucial point in civil procedure so as to prevent violations of fundamental rights in an earlier stage of the procedure and not only in the enforcement state (Hess, 2011: 129).

In the EP Committee’s June 2011 Draft Report, the inclusion of the proposed provisions on legal remedies in the state of origin of the judgment is judged to be redundant.²¹ It is true that it would barely be compatible with the European Convention on Human Rights (hereinafter: the ECHR) if such a remedy did not already exist in the national law of each Member State. Nevertheless, given the importance of the right of the defendant to be able to defend him/herself effectively, such provision could have a declaratory and preventive effect, i.e. it could, even though redundant, accentuate the importance of appropriate provisions in national procedural laws, as well as protect such provisions from any national discussion on the narrowing of their protection.

A proposal by Andrew Dickinson should also be mentioned in this regard, according to which the enforcement proceedings in other Member States should be stayed if an application under Article 45 is filed in the state of origin (Dickinson, 2011: 8).

3 Legal Remedies in the State of Enforcement

Under the Brussels I bis Regulation, *exequatur* proceedings should be abolished. This means that a declaration of enforceability of a judgment issued in another Member State would no longer be necessary. The enforcement procedure under the national law of the state of enforcement can start immediately. However, the defendant can file an appeal in this state if he/she deems that his/her fundamental procedural rights have been violated in the proceedings in the state of origin. It is possible to contest the court decision on this appeal by filing a second appeal.²² The Commission thus opted for a different solution than in the regulations of “the second generation” which concentrate all legal remedies in the state of origin and, therefore, regulate some procedural questions, namely the service of the introductory document in the proceedings, in much detail.

Under the current version of the Regulation, the party seeking enforcement must first apply for a declaration of enforceability, which is a purely formal *ex parte* procedure,²³ consisting of establishing the existence of the necessary certificates. The decision on this application is served on both parties.²⁴ In the vast majority of cases (around 95%), the declaration of enforceability is granted.²⁵ Both parties can, however, file an appeal if they are not satisfied with the result.²⁶ The defendant can appeal if he/she deems that one or several grounds for refusal of the declaration exist.²⁷ The court will then decide, after hearing both parties, whether to uphold or annul the decision of the first instance court. A second appeal is possible against the decision on the appeal.²⁸

The only substantial procedural difference between the text currently in force and the proposed new one is thus the abolition of the first phase of the proceedings, i.e. the assessment of the formalities, in which the defendant does not participate. Both (possible) appeals, i.e. the current (possible) second and third stages of the proceedings, namely are preserved.

The grounds given by the Commission for the abolition of the current first phase of *exequatur* proceedings is the fact that, in some Member states, such proceedings take quite a long time (the maximum duration was established to be four months) and can be quite expensive (up to EUR 4,000 in the United Kingdom).²⁹ It is impossible to deny that these problems would be solved if the declaration of enforceability were to be abolished. However, they could also be solved by encouraging Member states to shorten the proceedings by imposing a time-limit (and a sanction for not respecting it), as well as by imposing a limit on the cost of *exequatur*

proceedings, if not even establishing a unified (relatively low) tariff on the EU level. For example, in Slovenia, the cost of the procedure following the application for *exequatur* is 25 EUR.³⁰

However, the fact that the defendant can still file an application for the refusal of recognition or enforcement in the state of enforcement raises questions regarding the actual reach of the proposed reform and possibly generates problems. This application will namely have to be incorporated in the national enforcement procedures (Hess speaks about a “renationalization” of the verification of the judgment) (Hess, 2011:129), while national rules regulating the enforcement proceeding differ greatly. Some Member States, such as Slovenia and Austria, require a court decision “allowing” the enforcement to be carried out.³¹ In Slovenia, the enforcement section at the local court allows enforcement on the basis of a final and enforceable court decision. The defendant can oppose the enforcement on several grounds;³² typically he/she will assert that the claim has already been satisfied. The new appeal under the proposed Brussels I bis Regulation would most likely be filed in the scope of such proceedings. Contrary to the current system where the *exequatur* procedure is an autonomous procedure separated from the enforcement and conducted by the district courts, the local court competent for enforcement would thus assess the existence of the grounds for refusal of enforcement.

This is already an option under the Slovenian national rules regarding the enforcement of foreign judgments where the assessment of the grounds for refusal of enforcement can take place in the phase of the “allowing” of enforcement if the creditor does not need the judgment to acquire *res iudicata* status in Slovenia (the so-called incidental recognition of a foreign judgment).³³ Nevertheless, this solution can be criticized: the difficult role of assessing the grounds for refusal of enforcement of a foreign judgment is namely scattered among the numerous lower courts, predominantly occupied by judges with lesser experience.³⁴ Regarding the new remedy under the proposed Brussels I bis which should protect (at least) procedural public policy, it is, however, of utmost importance that a uniform interpretation of this legal standard be achieved, not only within each Member State, but also within the EU as a whole (Cf. Hess, 2011: 129).

Furthermore, some Member States, e.g. Germany, do not provide for this preliminary stage of enforcement proceedings and enforcement starts directly, without a court decision allowing such.³⁵ The problem is that, in such states, the defendant will not be aware that the enforcement of a foreign judgment is being sought until the enforcement has actually already started. In the October 2011 EP amendments it was proposed that the “surprise effect” in such cases be mitigated by the obligation of the party seeking enforcement to serve on the debtor the certificate enabling the judgment to “circulate” among Member States at least fourteen days before the actual commencement of the enforcement (“before the date upon which the enforcement measure is sought”).³⁶ This would certainly be a welcome novelty. To ensure the desired effect, such service should be conducted according to the so-called Service Regulation.³⁷ Such service should not be necessary only in cases where it would turn out that the certificate cannot be served, e.g. because the debtor has disappeared³⁸ (See also Dickinson, 2011: 7). Such cases are rare, but very problematic to deal with.³⁹

4 Grounds for Refusal of Enforcement

It has already been emphasised that the abolition of *exequatur* in the Brussels I bis Regulation does not entail that it would be impossible to invoke certain grounds for refusal of enforcement in the state of enforcement. These are, however, more restricted than in the current version of the Regulation.

Regarding the Commission’s proposal as regards the **public policy defense**, only violations of the procedural public policy could be sanctioned by a refusal of enforcement. In the current version of the Regulation, those are contained in Article 34/2 (a lack of service on a defendant who did not enter an appearance in the proceedings) and Article 34/1 (the “general” public policy protection clause)⁴⁰. Attention must nevertheless be drawn to the fact that, contrary to the current version of the Regulation, the Commission’s wording does not contain the word “**manifest**” regarding **breaches of fundamental procedural rights**, which can be sanctioned in the state of enforcement. It is possible to conclude therefrom that if the Commission’s wording was adopted, the renewed Regulation would provide for greater protection of fundamental procedural rights than the current version. Such could also be the conclusion based on the fact that this new wording does not contain the term public policy, which implicitly entails that only very serious violations should be sanctioned. It is, however, true that also the mention of the “fundamental principles underlying the right to a fair trial” entails that only the most serious deficiencies will be sanctioned by the refusal of enforcement. In the October 2011 amendments, the Members of EP propose the reintroduction of the wording “manifestly contrary to public policy (*ordre public*)”.⁴¹

Violations of the fundamental values of the state of enforcement arising from the substance of the judgment (the so-called substantive public policy) should, according to the Commission, no longer be protected, with the exception of judgments in privacy, defamation and collective redress cases. The Commission further proposes to eradicate all possibility of sanctioning violations of the rules on **jurisdiction** under the Regulation.⁴² It should, however, remain possible, same as in the current version of the Regulation, to invoke the **irreconcilability** of the judgment with another judgment which has been issued in the state of enforcement or, under certain conditions, in another Member State or a third State.⁴³

It seems that the EP will not uphold such restriction. In its June 2011 Draft Report, the EP Committee on Legal Affairs proposed an extension of the grounds for refusal of enforcement which could be invoked in the state of enforcement.

In the opinion of the EP Committee, the defendant should thus be able to invoke almost all grounds for refusal determined in the current version of the Regulation, except for violations of the rules on **jurisdiction**, which should be sanctionable only if they occur regarding the rules protecting consumers.⁴⁴ However, in the amendments from October 2011, the Members of EP proposed a further extension: judgments should not be enforced if there were violations of rules on exclusive jurisdiction, as well as on the protection of consumers, the insured, and employees.⁴⁵ It must be mentioned that this is even broader than the current version of the Regulation, which does not allow enforcement to be refused in the event of a violation of the jurisdiction rules protecting employees.⁴⁶

Perhaps most importantly, the EP Committee proposes that the **substantive public policy** defence be reintroduced among the grounds for refusal.⁴⁷ The justification given for this amendment is short – the Committee considers that “a party should be able to challenge a decision in the Member State of recognition/enforcement, not only on fair trial grounds, but also on the grounds that recognition/enforcement would be manifestly incompatible with the public policy of that Member State”. As will be shown in the chapter dealing with the protection of human rights and the abolition of *exequatur*, the substantive public policy contains (substantive) human rights and the (substantive) public policy defence is the most appropriate means for their protection in cross-border enforcement. It would also be remarkable that the Member States could not apply the public policy defence to prevent the “free movement” of judgments which are problematic from the point of view of their fundamental values, whereas they are entitled to do so in the case of the four fundamental freedoms, which undoubtedly hold the most eminent place in the EU legal order (See, e.g., Dickinson, 2011: 9). It is true that the contents of the public policy of each Member State are to a large extent the same, however, the CJEU authorises the states to include their proper fundamental values, if this does not contradict the common ones.⁴⁸

5 The Exceptional Maintenance of *Exequatur*: Privacy, Defamation, Collective Redress

In the Commission’s proposal, the procedural issues for the two groups of judgments which should be temporarily excluded from the general rule of the abolished *exequatur* proceedings are regulated the same as under the currently applicable Brussels I Regulation. Regarding the grounds for refusal of enforcement, it should, however, no longer be possible to invoke violations of the rules on the jurisdiction of the court of origin.

The consultation process namely showed that the Member States have different views regarding balancing between, on one hand, personality rights and the right to privacy and, on the other hand, the right of expression.⁴⁹ Therefore, the needed mutual trust does not yet exist and *exequatur* proceedings should temporarily be maintained, including the (substantive) public policy defence, which enables the refusal of enforcement if one of the cited human rights is considered to be violated.

Also, the regulation of the so-called class actions differs greatly between the Member States. Legal acts which enable class-actions are relatively new in some Member States and the law applicable thereto is not unified.⁵⁰ Especially, they have different regimes as to the effects of judgments issued following a so-called class action regarding the individual members of the represented group.⁵¹ In Sweden and Italy such judgment only binds the individuals who have expressed their willingness to participate (the so-called “opt-in” system), whereas in Portugal, Denmark, and the Netherlands the judgment is binding on all members of the group, except for those who have expressed their will not to participate (“opt-out”).⁵² *Exequatur* proceedings should therefore still be necessary. It should nevertheless be noted that the problems regarding the binding nature of such judgment could

also be addressed by the legal remedy in the state of enforcement which the Commission proposes as a general rule for all judgments, i.e. the remedy enabling violations of fundamental procedural rights to be invoked.

There is, however, great doubt as to whether the final text of the Brussels I bis will differentiate judgments on the grounds of the object of these judgments. In its Draft Report, the EP Committee on Legal Affairs has already expressed its dissent regarding such differentiation.⁵³ This dissent must, nevertheless, not be interpreted as a rejection of the aforementioned concerns regarding these two groups of judgments. It should be understood in light of the other propositions of the Committee which aim at broadening the protection of the defendant for all judgments.

We agree with the opinion that all judgments should be subject to the same regime (Same also Dickinson, 2011: 6), under the condition that this common regime enables the rejection of judgments violating fundamental substantive and procedural (including jurisdiction) rules. There is, furthermore, one important additional reason for a unified regime: in both groups of judgments which should still be subject to *exequatur*, the protection of specific human rights is at issue, i.e. the different views of the Member States on these human rights. But important differences in the interpretation of the human rights protected by common European acts – the ECHR and the EU Charter on Fundamental Rights⁵⁴ – which form a part of the so-called European public policy (See, e.g., Kramberger Škerl, 2011c: 461-490), is surely not welcome and should be overcome rather than accepted. Other important argument supporting the rejection of a different regime for the two groups of judgments is that there are other legal fields where considerable differences in the assessment in different Member States occur, as, e.g., the punitive damages in torts and many others (A. Dickinson, 2011: 8, 9). To recognize a special status only to two of these “delicate” fields is thus inappropriate.

6 Recognition

It must be emphasised that the term *exequatur*, despite its original meaning relating only to enforcement,⁵⁵ has come to be used for the recognition and enforcement of judgments alike. Under the current version of the Brussels I Regulation, judgments are recognized *ipso iure*, i.e. without special intermediary proceedings. However, if the question of recognition is raised as a principal or incidental question in proceedings, an interested party can apply for the judgment to be recognised under the same conditions and following the same procedure as those regarding enforcement.⁵⁶ It can therefore be questioned what the practical importance of *ipso iure* recognition is if a special procedure is always needed when a party wishes to avail him/herself of the judgment, or in other words, whether the recognition really occurs *ipso iure*. The situation is similar under the proposed Brussels I bis Regulation. The legal remedies available to the party opposing the enforcement are also available to the party opposing recognition.⁵⁷ The wording of the Commission’s proposal is somewhat unclear regarding the irreconcilability of judgments. The possibility of invoking this ground for refusal is namely placed in the subsection concerning enforcement and not in the subsection containing the “Common Provisions” on legal remedies.

De lege ferenda, it would be envisageable, following the example of Article 21/3 of the Brussels II bis Regulation,⁵⁸ to provide for proceedings for the non-recognition of a judgment, so as to enable the party which deems that the judgment cannot take effect in other Member States to attain legal certainty regarding this issue.

7 The Provisional, Including Protective Measures

Under the Brussels I Regulation, provisional measures can be ordered by the court which has jurisdiction as to the substance of the dispute, but also by the courts in other Member States if these states are sufficiently connected to the dispute.⁵⁹ However, by the judgment in the famous *Denilauler*⁶⁰ case, the (now) Court of Justice of the European Union (hereinafter: the CJEU) excluded the measures ordered in non-contradictory (*ex parte*) proceedings from the system of facilitated cross-border enforcement under the Brussels I Regulation, so that the national rules apply, which, as a rule, do not allow the enforcement of such measures if ordered by a foreign court. In the *Maersk* case of 2004, the CJEU extenuated the condition regarding the contradictory nature of the provisional measure: the judgment ordering a provisional measure can circulate between Member States even if it was delivered *ex parte* if the defendant could appeal against the judgment before the application for *exequatur* was filed.⁶¹

Numerous (and the most efficient) provisional measures are ordered without the defendant's participation. Furthermore, time is of the utmost importance regarding such measures. If such decisions cannot “circulate” and

a special provisional measure must be applied for in each Member State where the effects of such measure are sought, the time in which the object of the measure could still be protected can expire and the claim remain unsecured. On the other hand, it is true that Member States provide for very different provisional and security measures so that the cross-border enforcement of such measures can present important difficulties. Despite the condition of the close link between the Member State where the measure is sought and the dispute, the danger of abuse persists, namely in the event the party applies for a measure in another Member State for the sole reason that such measure could not be ordered in the Member State where the proceedings as to the substance are being conducted, and afterwards demands the enforcement of the determined measure in the latter Member State.

The Commission's proposal contains a solution which restrains the currently applicable regime. The Brussels regime of facilitated enforcement should namely only be applicable to the measures ordered by the court which also has jurisdiction as to the substance of the dispute; the criterion of the real connection between the Member State and the dispute thus becomes irrelevant. Similar as in *Maersk*, automatic enforcement should also be possible for "the measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant, if the defendant has the right to challenge the measure subsequently under the national law of the Member State of origin".⁶²

This rule does not affect the jurisdiction of the courts not having jurisdiction as to the substance of the matter to order provisional measures, under the condition of the real connecting link between the Member State and the dispute. Article 36 of the Proposal even broadens this jurisdiction to the disputes where the courts of any other state or arbitral tribunals have jurisdiction as to the substance.⁶³ However, such measures will not have any cross-border effects under the Regulation.

The proposed Article 66 must also be mentioned in this regard. It namely authorises the competent authority in the state of enforcement to adapt the measure which is not known in this state "to one known under its own law which has equivalent effects attached to it and pursues similar aims and interests".

8 Authentic Instruments and Court Settlements

The Commission proposes the abolition of *exequatur* also for authentic instruments and court settlements, which should be subject to the same regime as the judgments. For the time being, the EP Committee on Legal Affairs has not made any comment on this matter.

Part of the doctrine, however, is critical about the extension of the regime applicable to judgments also to authentic instruments, being that the current regime under the Brussels I Regulation is already deemed too liberal (Dickinson, 2011: 8). It is true that, since the court is not involved in making an authentic instrument, it might be too generous to let these instruments take effect automatically in all Member States, without any prior verification by the court in the state of enforcement. However, it is interesting to note that even the existence of an *exequatur* procedure does not guarantee the intervention of a court in the state of enforcement. This is the case in Germany, where notaries are competent for issuing declarations of enforceability for authentic instruments.⁶⁴

The situation is surely different regarding court settlements where, by definition, a court is implicated already in the state of origin. Therefore, we have no reservations regarding court settlements being subject to the same regime as judgments.

9 The Abolition of *Exequatur* and the Protection of Human Rights

The abolition of the verification of a foreign judgment before its recognition or enforcement in another Member State is problematic from the point of view of the protection of human rights. As such judgments do not actually produce effects at the moment when they are issued, but rather at the moment when they are enforced or recognized in view of obtaining some rights, that is also the moment when the consequences of violations of human rights occur. This is true regarding substantive and procedural human rights alike.

For more than a decade, the European Court of Human Rights (hereinafter: the ECtHR) has firmly taken the standpoint that states are liable for violations of human rights committed by a foreign state in the process of issuing a judgment if they give effect to such judgment, i.e. if they recognize or enforce such judgment.⁶⁵ States

thus have to prevent such judgments from becoming effective on their territory and the application of the public policy exception is the most common means to fulfil this obligation.

All EU Member States are parties to the ECHR and the EU itself, on the basis of the Lisbon Treaty, is to soon accede to the ECHR. EU legal acts will then be subject to the scrutiny of the ECtHR. The Lisbon Treaty also elevated the EU Charter on Human Rights to the EU primary law level. The CJEU will thus have jurisdiction to determine whether the regulations abolishing *exequatur* are compatible with the human rights guaranteed by the Charter.⁶⁶

Both organisations, the Council of Europe and the EU, are thus devoted to the protection of human rights, it is true, however, that the fundamental values of these two organisations are not always identical. Among other things, the EU places much greater importance on the cross-border “movement of judgments” than the Council of Europe.⁶⁷ Problems arising from these differences can occur already in applying the current Brussels I Regulation, since the Regulation’s requirement of a “manifest” breach of public policy can be interpreted as a lower standard of protection than the one instituted by the ECtHR in the *Pellegrini*⁶⁸ case. Additionally, weighing between the protection of human rights and the protection of (other) fundamental principles of the EU law can lead a judge from an EU Member State to be less eager to refuse (or enable) the enforcement of a judgment from another Member State than he/she would be had he/she not had to consider the latter (For more on this question, see Kramberger Škerl, 2011c: 475 et seq).⁶⁹

Naturally, even bigger problems than regarding the Brussels I Regulation can arise from the application of the regulations abolishing *exequatur* without providing for any remedy for the protection of human rights in the state of enforcement. In the *Zarraga* case⁷⁰, the CJEU had to balance between the right to be heard of a child in a child abduction case and the free movement of judgments on the return of the child, guaranteed by Article 42 of the Brussels II bis Regulation. The Court could not decide differently but to let the latter prevail, since the obligatory power of the Regulation’s provision would otherwise be at stake in all future cases, but we can sense from the motives of the Court’s ruling that the Spanish court had not actually protected the child’s rights adequately. The CJEU deemed that the existence of remedies in the state of origin suffices. It would be interesting to obtain the opinion of the ECtHR on this question.

As has already been indicated, the lack of protection of “substantive”, i.e. non-procedural, human rights is problematic in the Commission’s proposal for the Brussels I bis Regulation. Without a general public policy defence it is namely impossible to sanction breaches of fundamental human rights which are not of a procedural nature.

Logically, the next question is the following: could a Member State be convicted by the ECtHR for violating human rights if it recognised or enforced, on the basis of the above mentioned EU acts, a foreign judgment flawed by violations of human rights? The situation is problematic since, on one hand, for the time being, the EU is not yet party to the ECHR, so the victim can only start proceedings before the ECtHR against the states (both of origin and of enforcement) – and not against the EU – which adopted the disputable act, and, on the other hand, the state of enforcement *must* apply EU law to determine whether the judgment from another Member State must be enforced or not and can therefore not avoid the recognition/enforcement of such judgment if the conditions from these acts are fulfilled.

The famous ECtHR *Bosphorus*⁷¹ case must be mentioned in this regard. In this case, the Court held that states are not liable for violations of the ECHR arising out of their obligations as members of international organisations, if, first, they had no discretion in fulfilling this obligation, and second, the organisation in question generally ensures the protection of human rights equal to that of the ECHR. As to the second condition, the ECtHR held that the EU does meet the required standard of protection of human rights. Given the condition of a lack of discretion in fulfilling the obligations under the EU acts, the “Bosphorus test” only applies to regulations which do not provide for a remedy able to prevent enforcement in the event of a violation of the human right at issue. Such is the case with regulations that do not provide for any verification in the state of enforcement, as well as regulations whereunder the allowed verification does not encompass violations of the human right at issue. This would be the case in the event of a violation of substantive human rights if the Commission’s proposal for the Brussels I bis Regulation is adopted. Furthermore, in *Bosphorus*, the ECtHR determined an important exception to the mentioned “amnesty”: it namely does not apply if there was a manifest deficiency in the protection of human rights in the case at issue. This criterion will have to be determined on a case-by-case or

at least state-by-state basis.⁷² If, e.g., the *Zarraga* case clearly fulfils the first two criteria, it is not certain whether we could discard “the exception of a manifest deficiency”.

10 The Abolition of *Exequatur* and Mutual Trust between Member States

In addressing the abolition of *exequatur* one cannot avoid some thoughts on mutual trust, which is supposed to be the basis for the planned abolition of *exequatur* and for the rapid (some say “hyperactive”) (Galič in: Galič, Betetto, 2011: 27, 31) progress on the path to the free movement of judgments.⁷³

It is true that each different treatment of foreign judgments in comparison with domestic ones entails a certain distrust towards the former. If the verification of foreign judgments includes the possibility to invoke the indefinable public policy defence, this brings with it also a certain unpredictability.⁷⁴ However, there is, in our opinion, a lack of a causal link between the possible verification of judgments from other Member States and the existence of mutual trust between these states: the entire abolition of the verification of judgments from other Member States would not achieve rapprochement and mutual trust between states, the same as the maintenance of this verification would not ruin this trust if it currently existed.⁷⁵ Perhaps even the contrary is true: the more safeguards there are, the more courageous steps we are willing to take. Mutual trust should furthermore also include the trust that courts of other Member States will not abuse of their powers within the verification process and will, on the contrary, help the state of origin to fully protect the common fundamental values. The proposed remedy in the state of enforcement is therefore a step in the right direction.

Mutual trust should grow naturally, on the basis of actual respect for the common values of all the Member States. The fear that the preservation of the possibility of the verification of judgments coming from other Member States would permit or even encourage Member States to protect their special, partial interests is unnecessary since the use of the mechanisms provided for in EU acts is supervised by the CJEU and, to some extent, by the ECtHR, which both keep a vigilant eye on the harmonious, if not unified, practice in this field.

It must also be mentioned that, to the best of our knowledge, no international organisation facilitates the cross-border effects of judgments to the extent of abolishing every possible verification in the state of recognition and enforcement. Even federal states such as the U.S. and Canada allow for a judgment originating in another federal unit to be refused effect on the grounds of the public policy defence (Schlosser, 2010: 102, 103). This can probably not be interpreted as a sign of a lack of mutual trust between the federal units, but more as a necessary precaution in the process of a judgment taking effects in another legal environment.

The steps towards the “free movement of judgments” in the EU should therefore be taken slowly and with much precaution. Mutual trust should not be presupposed, but encouraged by political, legal and practical measures on an everyday basis.

11 Conclusion

The idea of abolishing *exequatur* is not new and has already been incorporated in several EU acts. They have often been presented as a first step towards the general abolition of *exequatur*. However, it is impossible to deny that in each of the fields where *exequatur* is abolished and no legal remedy (except that of the irreconcilability of judgments) is available in the state of enforcement, such shrinking of the debtor’s rights is justified by the special characteristics of each of those fields: in child abduction cases, by the need to proceed as rapidly as possible; in payment orders, by the fact that there is very little possibility that the judgment would be successfully objected to (as well as the fact that the unified procedural rules have to be applied in issuing the judgment); in small claims procedures, by the smaller importance of the claim (and again the unified proceedings); in maintenance, by the need for rapid action and the weaker position of the maintained person. These specifics outweigh, to some extent, the special protection of the debtor in the state of enforcement.

There are, however, no such special reasons to deny the debtor all legal remedies in the state of enforcement when dealing with “normal” judgments in civil and commercial matters. Thus, the Commission’s proposal for a legal remedy in the state of enforcement can only be welcomed, although it is, in our opinion, too narrow in allowing only fair trial considerations to be invoked. It seems that the EP will demand the inclusion of at least several other grounds for refusal of enforcement, if not all of those existing in the current text of the Regulation.

The only important procedural difference in comparison to the text currently in force will be the abolition of the *ex parte* proceedings for the assessment of formal requirements for the enforcement of judgments. Being that a legal remedy in the state of enforcement will exist, judgments will not “circulate freely”, i.e. judgments issued in other Member States will still (possibly) receive different treatment than domestic ones. In light of the statistics⁷⁶ which show that a large number of proceedings for the declaration of enforceability end in this first phase, i.e. the defendant does not oppose the enforcement, this is a positive change.⁷⁷

Regarding the grounds for refusal of enforcement, violations of fair trial guarantees are sure to be sanctioned (upon the defendant’s application), but it would, in the opinion of many (See, Beaumont, Johnston, 2010: 262-264, 276-278; Schlosser, 2010: 101-104; Oberhammer, 2010: 201-202), to which we also adhere, be better to guard the public policy defense covering procedural and substantive public policies alike. The substantive public policy exception is namely the (only) means for the protection of substantive human rights under the ECHR and the EU Charter of Fundamental Rights as well as of the EU (and national) mandatory rules. Even though the violations of the substantive public policy have not often been invoked and even more rarely actually sanctioned by a refusal of enforcement,⁷⁸ this is not a reason to abolish this ground for refusal. The rare use of this notion is more proof of the correct approach of the judges who reserve this “last weapon” for the most serious cases. And such cases will also occur in the future; it would be unrealistic to think the opposite. That the states parties to the ECHR violate this Convention is being proved on a daily basis in the case-law of the ECtHR. The possibility to sanction violations of the substantive public policy enables judges to intercept thoroughly unacceptable judgments, and, as has been pointed out (See, e.g., Pabst in: Rauscher (ed.), 2010: 71; Galič in: Galič, Betetto, 2011: 33), can also play a preventive role. Furthermore, the public policy exception has, in the times of European integration, become more of a promoter of the common values than a legal institution that divides, especially since the two European courts keep an eye on the correct application of this notion (Muir Watt, 2001: 539, 543, 544; Basedow, in: Jobard-Bachelier and Mayer (eds), 2005: 65; Poillot Peruzzetto, 2002: 7; Kramberger Škerl, 2011c: 489 et seq). Forcing Member States into awkward situations (*mutatis mutandis*, see the *Zarraga* case), and shifting the burden of sanctioning such violations to the ECtHR does not seem appropriate.

Similar is true regarding the most important rules on jurisdiction: the rules on exclusive jurisdictions and the rules protecting the weaker parties. Excluding even those in the Brussels I bis Regulation could prove to be counterproductive, as these rules are important also outside the concrete legal relationship between litigants, namely for the development of the common market, the effectiveness of proceedings, and state interests. Even if the practical importance of grounds for refusal concerning violations of the rules on jurisdiction has been considered minor,⁷⁹ the preventive role of such provisions should not be neglected.⁸⁰

Studying the Commission’s proposal regarding the cross-border effects of judgments and considering the currently available echoes from the EP, the step towards the “free movement of judgments” will be much smaller than might have been thought at the beginning of the review process. In light of this it is not negligible that much effort has been invested in the preparation of the reviewing process, and much effort will have to be invested in the actual application of the modified rules, first by national legislators (the incorporation of the new legal remedy in the state of enforcement) and then by practitioners, desperate in the face of the constant flow of novelties in the field of European civil procedure. The advice given by Professor Oberhammer: “If it ain’t broke, don’t fix it!” (Oberhammer, 2010: 200) should probably be followed more often by the authors of the new legislation. It is, however, undoubtedly positive that a wide debate has been conducted, not only on the political level, but above all among the legal scholars who have contributed many important findings, views, and ideas regarding the possible regulation of this complex legal field. These are as important now as they will be in any future reforming processes.

Notes

¹ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 , 16 January 2001, pp. 0001 – 0023.

² For an overview of the conducted studies, see the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21 April 2009, COM(2009) 174 final (hereinafter: the EC Report), pp. 2-3.

³ See, e.g., Hess, Pfeiffer, Schlosser, *Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States*, September 2007, <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf>, accessed on 30 December 2011, No. 630 et seq.; the Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens, OJ C115, 4 May 2010, No. 3.1.2.; 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, Brussels, 21 April 2009, COM(2009) 175 final, p. 2 et seq.; For an overview of the political processes and acts which were at the basis of the reviewing of the provisions of the Brussels I Regulation on the cross-border effects of judgments, see, e.g., A. Galič in: A. Galič, N. Betetto, *Evropsko civilno procesno pravo* [European Civil Procedure], GV Založba, 2011 (hereinafter: Galič, Betetto), pp. 17-23.

⁴ Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L143, 30 April 2004, pp. 0015-0039; Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L199, 31 July 2007, pp. 0001-0022; Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L399, 30 December 2006, pp. 0001-0032; Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L007, 10 January 2009, pp. 0001-0079. The latter abolishes the *exequatur* for the judgments issued in Member States bound by the Hague Protocol (Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations) <http://www.hcch.net/index_en.php?act=conventions.text&cid=133>, accessed on 30 December 2011, which was adopted by the Hague Conference on Private International Law and was first ratified by the EU on 8 April 2010. For these judgments, a special review in the state of origin is possible on the basis of Article 19; however, no such legal remedy is available in the state of enforcement.

⁵ Under the mentioned regulations it is still possible to invoke, in the state of enforcement, the irreconcilability of judgments. See Article 21/1 of the Regulation on the European Enforcement Order, Article 22 of the Regulation on the European Order for Payment, Article 22/1 of the Regulation on the European Small Claims Procedure, and Article 21/2 of the Maintenance Regulation, all cited *supra* No. 4.

⁶ It should be emphasised that the procedural guarantees regarding the service of the initial document in the proceedings are of particularly great importance in these regulations, only the verification of compliance to the EU standards is left to the state of origin, leaving the state of enforcement with the sole role of an “enforcement assistant” without any controlling competences. (See, e.g., Pabst in: Rauscher (ed.), 2010, No. 14 and authors cited there).

⁷ For an overview of the consultation process, see the Impact Assessment, Accompanying document to 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, 14 December 2010, SEC(2010) 1547 final (hereinafter: the Impact Assessment), No. 1.4.

⁸ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition of judgments in civil and commercial matters, COM(2010) 748 final, Brussels, 14 December 2010 (hereinafter: the Proposal). For an overview (in Slovenian) of the proposed novelties, see Kramberger Škerl, 2011a: 17-19.

⁹ This is in line with the predominant importance of the right to be heard in the EU human rights context (For more on this, see Storskrubb, 2008: 87-91).

¹⁰ The EC Report, No. 3.1.

¹¹ See, e.g., German BGH, 26 August 2009, XII ZB 169/07, where the enforcement of a Polish judgment on maintenance obligation was refused because the alleged father was condemned to pay maintenance for a child only on the basis of the allegations of a *hear-say* witness, the defendant’s allegations were, however, completely ignored by the court. Even though the initial document in the proceedings was duly served, there was obviously a breach of the right to be heard. Schilling argues that the maintenance obligation can be detached from the decision on paternity and thus recognized and enforced in Germany as a simple pecuniary judgment. Schilling, p. 38. In this sense also German BGH, 14 February 2007, XII ZR 163/05, and French Cour de cassation, Civ. 1^{re}, 12 July 1994, No. 92-17.461-E. The French Cour de cassation, e.g., judged that the French public policy was infringed where a default judgment contained no reasons and no additional documents were presented enabling the French court to know the reasons of the foreign judgment: Civ. 1^{re}, 28 November 2006, No. 04-19031, and Civ. 1^{re}, 22 October 2008, No. 06-15577.

¹² The application of Article 42 of the Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L 338, 23 December 2003 (the Brussels II bis Regulation) was at the centre of this affair. Interestingly, the Brussels II bis was in fact the first EU act abolishing the *exequatur* in two specific areas (return of a child and rights of access).

¹³ The abolition of *exequatur* in a broad sense of the word was probably also the goal the EU wanted to achieve regarding all judgments, before the consultation process revealed that the grounds for refusal could and should, at least to some extent, be separated from the procedure of granting the *exequatur*. See, e.g., Oberhammer, 2010: 200.

¹⁴ Article 37/3 of the Proposal.

¹⁵ Three years after the entry into force of the modified Regulation the Commission shall submit to the EP, the Council and the European Economic and Social Committee a report reviewing the continuing need to maintain the *exequatur* for these judgments. Article 37/4 of the Proposal.

¹⁶ For the progress of the legislative procedure, see EP, Legislative Observatory, <<http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=EN&procnum=COD/2010/0383>>, accessed on 29 November 2011.

¹⁷ Draft 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) (COM(2010)0748 – C7-0433/2010 – 2010/0383(COD)), Rapporteur Tadeusz Zwiefka, 2010/0383(COD), 28 June 2011 (hereinafter: EP Draft Report, June 2011).

- ¹⁸ Committee on Legal Affairs, AMENDMENTS 59 – 120, Draft report Tadeusz Zwiefka (PE467.046v01-00), 2010/0383(COD), 19 October 2011, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-473.813+04+DOC+PDF+V0//EN&language=EN>>, accessed on 5 December 2011 (hereinafter: EP Amendments, October 2011).
- ¹⁹ *Supra* No. 4.
- ²⁰ Article 45 of the Proposal. See, e.g., Article 19 of the Regulation on European Enforcement Order, cited *supra* No. 4.
- ²¹ Amendment 33 regarding Article 45 of the Proposal: EP Draft Report, June 2011.
- ²² Article 46 of the Proposal.
- ²³ Articles 38–41 of the Brussels I Regulation.
- ²⁴ Article 42 of the Brussels I Regulation.
- ²⁵ The Impact Assessment, p. 12.
- ²⁶ Article 43 of the Brussels I Regulation.
- ²⁷ It is unclear whether, deciding on appeal, the court's assessment is restricted to the grounds for refusal invoked by the defendant, or else the court can also verify the existence of other grounds, especially the contrariety to public policy (For more on this question, see Kramberger Škerl, 2008 (not published): 329–331).
- ²⁸ Article 44 of the Brussels I Regulation.
- ²⁹ The Impact Assessment, p. 13.
- ³⁰ Article 9.1.1 of Zakon o sodnih taksah (ZST-1) [Court Fees Act], Official Gazette RS (hereinafter: OG RS) No. 37/2008, with further amendments.
- ³¹ In Slovenia: *sklep o izvršbi*, Article 44 of Zakon o izvršbi in zavarovanju [Enforcement and Securing of Civil Claims Act], OG RS No. 3/2007 (consolidated version), with further amendments (hereinafter: ZIZ); in Austria: *Exekutionsbewilligung*, regulated in Articles 3–16 of Exekutionsordnung [Enforcement Act].
- ³² Article 55 of ZIZ.
- ³³ Article 108/6 of Zakon o mednarodnem zasebnem pravu in postopku [Private International Law and Procedure Act], OG RS, Nos. 56/1999, 45/2008.
- ³⁴ A similar solution can be found in the Austrian implementation of the *exequatur* procedure under the Brussels I Regulation, where the same (lower) courts decide on the *exequatur* and the application for enforcement (For details, see Ekart, Rijavec, 2010: 77).
- ³⁵ The court simply issues an “enforceable judgment”, i.e. a copy of the judgment followed by a declaration of enforceability (*Vollstreckungsklausel*). See Article 724 of the German Zivilprozessordnung [Civil Procedure Act]. The enforcement can be opposed to by an autonomous legal remedy called opposition to enforcement (*Vollstreckungsgegenklage*). For (the difficulties in) the combining of the national rules on enforcement and the ones from the Brussels I Regulation see, e.g., Ekart, Rijavec, 2010: 142–146.
- ³⁶ Amendment No. 114 regarding Article 40 of the Proposal (filed by Diana Wallis), in: EP Amendments, October 2011.
- ³⁷ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10 December 2007, pp. 0079 - 0120.
- ³⁸ Amendment No. 114 regarding Article 40 of the Proposal (filed by Diana Wallis), in: EP Amendments, October 2011.
- ³⁹ The Service Regulation namely does not apply where the domicile of the defendant is unknown (Article 1/2). Thus, national legislations apply (For more on the national rules on this matter, see, e.g., Kramberger Škerl, in: Dahlberg (ed.), 2011b: 121–145).
- ⁴⁰ For the case-law of the CJEU regarding the protection of fundamental procedural rights via the “general” public policy defense from the Brussels Convention and Brussels I Regulation, see CJEU, *Krombach*, C-7/98, and CJEU, *Gambazzi*, C-394/07 (For an analysis of this case-law, see, e.g., Kramberger Škerl, 2011c: 468–474; Beaumont, Johnston, 2010: 253 et seq). Since the judgment in *Krombach*, Article 34/2 of the Brussels I Regulation has actually become redundant (see, e.g., Pataut in: Ancel et al. (eds.), 2008: pp. 386–90).
- ⁴¹ EP Draft Report, June 2011, Amendment 34 regarding Article 46/1 of the Proposal.
- ⁴² It is interesting to mention that no review of the jurisdiction of the court in the state of origin is permitted under Article 24 of the Brussels II bis Regulation either.
- ⁴³ Article 43 of the Proposal.
- ⁴⁴ The emphasising of the consumer protection is understandable being that the “well-being” of the consumer is the final goal of the free market (see, e.g., Grilc, 2011: 120), which is historically the most important goal of the EU.
- ⁴⁵ EP Amendments, October 2011, Amendment 107 regarding Article 46/1 (filed by T. Zwiefka).
- ⁴⁶ Article 35/1 of the Brussels I Regulation. It is unclear why rules protecting the employee are not included in this article. One possible explanation is that the reference to the new Section 5 of the Regulation was omitted by mistake when transforming the text of the Brussels Convention, which did not especially protect the employees, into the Regulation.
- ⁴⁷ EP Draft Report, June 2011, Amendment 34 regarding Article 46/1 of the Proposal.
- ⁴⁸ See, e.g., CJEU, *Krombach v. Bamberski*, C-7/98, 28 March 2000, and CJEU, *Renault v. Maxicar*, C-38/98, 11 May 2000.
- ⁴⁹ The introductory text to the Proposal, pp. 6–7.
- ⁵⁰ The Impact Assessment, p. 17.
- ⁵¹ For an analysis of the regulation of collective actions in the Brussels I Regulation see: Hess, 2010: 116–121.
- ⁵² The introductory text to the Proposal, p. 7.

- ⁵³ Draft Report, June 2011, Amendment 35 et seq.
- ⁵⁴ Charter of Fundamental Rights of the European Union, OJ C364/1, 18 December 2000.
- ⁵⁵ The Latin word *exequatur* means: “Let him execute.” or “He may execute.”
- ⁵⁶ Articles 33/2 and 33/3 of the Brussels I Regulation.
- ⁵⁷ Articles 45 and 46 of the Proposal.
- ⁵⁸ Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L338, 23 December 2003, pp. 0001-0029.
- ⁵⁹ Article 31 of the Brussels I Regulation. The condition of the real connecting link is found in the CJEU judgment in *Van Uden v. Deco-Line*, C-391/95, 17 November 1998.
- ⁶⁰ CJEU, *Denilauler v. SNC Couchet Frères*, 125/79, 21 May 1980. For the application of this rule to the Brussels I Regulation, see, e.g., the judgment of the German Federal Supreme Court from 21 December 2006, No. IX ZB 150/05.
- ⁶¹ CJEU, *Mærsk Olie & Gas A/S v. Firma M. de Haan en W. de Boer*, C-39/02, 14 October 2004, paras. 50-52.
- ⁶² Article 2.a) of the Proposal.
- ⁶³ For the extension to the disputes for which an arbitral tribunal has jurisdiction as to the substance of the matter, see already CJEU, *Van Uden v. Deco-Line*, C-391/95, 17 November 1998.
- ⁶⁴ Annex No. II to the Brussels I Regulation, relating to Article 39/1 of the Regulation (See also Ekart, Rijavec, 2010: 78).
- ⁶⁵ See especially ECtHR, *Pellegrini v. Italy*, 20 July 2001, Reports of Judgments and Decisions 2001-VIII (For an analysis of the ECtHR case-law on this matter, see, e.g., Kramberger Škerl, 2011c: 467 et seq).
- ⁶⁶ Article 263 of the TFEU. See also: CJEU, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 314/85, 22 October 1987. (In this sense also Pabst in: Rauscher (ed.), 2010, Nos. 41, 42; and Hess in Mansel et al. (eds.), 2004: 350, 357–58).
- ⁶⁷ One must not, however, deduce from the above mentioned that the ECtHR is insensitive to the argument of promoting judicial co-operation between states in the field of the enforcement of judicial decisions. Since the *Hornsby* judgment (ECtHR, 19 March 1997, Reports 1997-II), the right to enforcement of a judgment is, namely, a part of the right to fair trial. For the liability of states for *not* recognizing a foreign judgment, see the recent judgments in *Wagner* (ECtHR, 28 June 2007) and *Negrepontis-Giannisis* (ECtHR, 3 May 2011).
- ⁶⁸ ECtHR, *Pellegrini v. Italy*, 20 July 2001, Reports of Judgments and Decisions 2001-VIII.
- ⁶⁹ For a general analysis of the relationship between human rights and the fundamental freedoms of the EU (see Perišin, 2006: 69-98; and Grilc, 2011:117-139).
- ⁷⁰ CJEU, *Zarraga v. Pelz*, C-491/10 PPU, 22 December 2010.
- ⁷¹ ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 30 June 2005, Reports of Judgments and Decisions 2005-VI.
- ⁷² Since the ECtHR has decided that a remedy is only efficient if the body deciding on the remedy is independent from the one that issued the original decision, Schilling argues that the *Bosphorus* protection only applies if the remedies against the issuing body provided for in the regulations have a devolutive effect. Schilling, p. 40. The author specifically refers to the European Enforcement Order Regulation and the Maintenance Regulation, both cited *supra* No. 4.
- ⁷³ Thoroughly on the question of mutual trust in European Civil Procedure, see, e.g., Galič in: Galič, Betetto, 2011: 29-33.
- ⁷⁴ In spite of this fact, the authors emphasize the role of the public policy defense in diminishing or regulating inconsistencies and competition between the national legal orders (See, e.g., Picheral, 2001: 21).
- ⁷⁵ Pabst speaks of the so-called *petitio principii* (begging the question), where the goal to be achieved is supposed to exist already, so as to serve as a basis for the abolition of *exequatur* (Pabst in: Rauscher (ed.), 2010: Nos. 15 and 16).
- ⁷⁶ The Impact Assessment, p. 12.
- ⁷⁷ This change is the more positive the longer the *exequatur* proceedings take in a specific Member State and the more costly they are.
- ⁷⁸ EC Report, p. 4. Francq cites an Italian decision establishing a breach of public policy where one party was obliged to fulfil a distributorship agreement which had not been authorised under Italian law (Francq in: Magnus, Mankowski (eds.), 2007: 34).
- ⁷⁹ The EC Report, p. 4.
- ⁸⁰ The possibility of refusing the enforcement because of the violation of certain rules on jurisdiction is, lastly, in line with the Treaty on the Functioning of the European Union, consolidated version, OJ C115, 9 May 2008, pp. 47 et seq.: (Dickinson, 2011: 10). As to the possible abuses, we can, e.g., imagine the temptation of the “stronger” parties to try to circumvent the protective provisions: if they succeed in the state of origin, they will no longer be able to be sanctioned in the state of enforcement; if they fail, no real harm will occur.

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