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Področje uporabe prava EU v sodnih postopkih za izterjavo dolgov v civilnih in gospodarskih zadevah

MIKAEL BERGLUND

Povzetek

Namen tega prispevka je prikazati, da interes učinkovitejšega in sorazmernejšega dostopa do sodnega varstva pravic v civilnih zadevah zahteva nekaj sprememb zakonodaje prava EU. Avtor navaja, da bi bilo treba odpraviti postopek eksekvature in omogočiti zasebnemu upniku kot ukrep v njegovo prid, da vloži zahtevo za razglasitev izvršljivosti neposredno v državi članici izvora izvršilnega naslova, namesto da o tem odloči država članica dejanske izvršbe. Prav tako naj bi se odločitve o izdanih začasnih ukrepih priznale v drugi državi članici, četudi so izdani v *ex parte* postopku, izboljšati pa bi bilo treba tudi dostopnost do informacij za namene izvršbe, potem ko je izvršilni naslov izdan, tako v čezmejnem kot nacionalnem kontekstu.

Ključne besede: • priznavanje • izvršljivost • vzajemnost • razlogi za zavrnitev • začasni ukrepi • odškodnina • dostop do informacij iz razloga izvršbe

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Scope of Application of EU Law in the Judicial Procedures of Debt Collection in Civil and Commercial Matters

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Abstract

The aim of this paper is to demonstrate, that the interest of a more efficient, and proportionate access to civil justice in EU law requires some changes. Motivated changes are the abolishment of exequatur proceedings, the private creditor shall, as a service measure to him, be able to file an application for enforcement directly to the Member State of origin of the title of execution, instead of to the Member State of actual enforcement, decisions, on interim measures in *ex parte* proceedings shall be recognized, and access to information for enforcement purposes shall, after a title of execution, be improved in both the cross-border and national contexts.

Keywords: • recognition • enforceability • mutuality • grounds for refusal • interim measures • damages • access to information for enforcement purposes

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1. Introduction

The topic of this article is the scope of application of European Union (EU) law in the judicial procedures of debt collection in civil and commercial matters. The treatment is limited to some aspects of recognition and enforceability, interim measures, grounds for refusal, and access to information for enforcement purposes after a title of execution in the cross-border context and departures from my legal thesis cross-border Enforcement of Claims in the EU-History, Present Time and Future, published in 2009 (Berglund, 2009). However, frequent references are also made to other works and sources, including later legal developments.

The subject is treated by comparing the European Enforcement Order for uncontested claims,[1] the European Order for payment procedure,[2] the European Small Claims Procedure,[3] in particular the Brussels I regulation,[4] to conventions in the civil law area and EU law in the public law area, mainly to the Recovery directive, its implementing regulation, and the new Recovery directive.[5]

The purpose is to draw some conclusions about possible future ideas of developments and improvements in EU law in the judicial procedures of debt collection in civil and commercial matters.

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[1] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30.4.2004, p. 15–39). The regulation originates from the initiative and proposal of the French union of *Huissier de Justice* at a meeting in Paris during 3 and 4 June 1993, arranged by *l'Union Internationale des Huissiers de Justice et Officiers Judiciaires*, to create a *Titre Exécutoire Européen* for uncontested claims and is mainly based on features close to some national proceedings of injunction to pay (see Berglund, 2009: 70).

[2] Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for payment procedure (OJ L 399, 30.12.2006, p. 1–32).

[3] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007, p. 1–22).

[4] Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1–23).

[5] Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (codified version; OJ L 150, 10.6.2008, p. 28–38), (Recovery directive) and the Commission Regulation (EC) No 1179/2008 of 28 November 2008 laying down detailed rules for implementing certain provisions of Council Directive 2008/55/EC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (Implementing recovery regulation; OJ L 319, 29.11.2008, p. 21–43). The present Recovery directive is replaced by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (new Recovery directive; OJ L 84, 31.3.2010, p. 1–12). The new directive enters into force on 1 January 2012 and provides for an even more advanced cooperation than the present directive.

2. EU–regulations and conventions in civil and commercial matters

The establishment of new European States and their increasing interdependency in different areas during the 19 and 20th centuries gave rise to the need to increase the level of mutual co–operation through conventions, i.e. in the area of recognition and enforcement of foreign civil law judgments.[6]

After the establishment of the European Community, particularly during recent years, developments in the European cross-border context have been strongly affected by new EU law. This has meant a development of simplification in the sense that EU regulations have replaced a number of conventions in the area of recognition and enforcement of foreign contractual claims.[7]

2.1. Recognition and enforceability

A more recent development trend aiming at simplification and increased efficiency in the judicial procedures of debt collection in the cross-border context is that specific regulations have been created as options of application to the Brussels I regulation. These regulations in the area of commercial matters, which provide for automatic recognition and enforceability, are the Regulation creating European Enforcement Order for uncontested claims,[8] the Regulation creating European Order for payment procedure,[9] and the Regulation establishing European Small Claims Procedure.[10]

Still, the Brussels I regulation provides for exequatur proceedings, even if that may be changed in future as a consequence of the recent European Council's reform programme, »the Stockholm Programme« – An open and secure Europe serving and protecting the citizens (Stockholm Programme). It emphasizes the importance of mutual trust and a further developed cooperation through i.e. the abolishment of exequatur proceedings.[11]

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[6] See, about an overview of the development of conventions and the earlier historical impact of common European influences on national laws in the enforcement– and insolvency areas under the periods of Roman law, the Middle Ages and 1500–1806 (Berglund, 2009: 43–69).
[7] Article 69 of the Brussels I regulation.
[8] Article 5 of the Regulation creating European Enforcement Order for uncontested claims.
[9] Article 19 of the Regulation creating European Order for payment procedure.
[10] Article 20 of the Regulation establishing European Small Claims Procedure.
[11] Section 1.2.1. Mutual trust compared to section 3.1.2. Civil law of the Stockholm Programme.

In contrast to the Brussels I regulation, the regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance regulation) provides for automatic recognition and enforceability.[12] Also, in contrast to the Brussels I regulation and the more recent regulations in commercial matters, there exists in the Maintenance regulation a practical and efficient matter of service to a private creditor. A creditor may file an application for enforcement, by the use of a multilingual officially approved form, to the competent enforcement authorities in the Member State of origin of the title of execution, instead of filing it directly to the corresponding authorities in another Member State. The Member State of origin should, according to the Maintenance regulation, then be obliged to transfer the application to the competent body of actual enforcement in the other Member State.[13]

An early example of developed mutual trust and advanced simplification in the enforcement area of comparative interest is the still in force 1962 Nordic convention regarding the enforcement of maintenance claims.[14] The convention provides an example of recognition without any demand for a declaration of enforceability: it only requires an application by the creditor in an ex parte proceeding for the actual enforcement of the original title of execution and, if necessary, completed with a certificate of its enforceability issued in the contracting State of origin of the title.[15] As a practical matter of service to a private creditor, a possibility exists for him to file an application for enforcement under the convention to the competent authorities of enforcement in the State of origin of the title of execution, instead of filing it directly to the corresponding authorities of actual enforcement in another State.[16]

Another early example of developed mutual trust and advanced simplification in the enforcement area of comparative interest is the still partially valid

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[12] Article 17 of 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 L 7, 10.1.2009, p. 1–79).

[13] Articles 51(1)(a) and 55 of the Maintenance regulation.

[14] Convention between Denmark, Finland, Iceland, Norway and Sweden regarding the enforcement of maintenance claims, done in Oslo on 22 March 1962, as amended on 25 February 2000.

[15] Article 1(1) of the 1962 Nordic convention, stipulates that the relevant titles of execution, which are enforceable in one contracting State shall, upon request, be enforced forthwith in any of the other contracting States. The authority, which is to effect recovery, may, according to Article 3(1), if it appears necessary to do so, request a certificate to the effect that the judgment, decision, ruling or undertaking meets the conditions for enforcement laid down in Article 1(1).

[16] Article 2(2) of the 1962 Nordic convention, as amended in 2000.

Nordic framework convention on recognition and the enforcement of judgments in civil matters from 1977,[17] which refers most issues, like for instance the enumeration of titles of execution included under its scope of application, to be determined through similar enacted laws in the Nordic States.[18] It constitutes an example of recognition without any demand of declaration of enforceability in the co-operation of Nordic States. The convention only requires an application from the creditor in an ex parte proceeding for the actual enforcement of the original title of execution. A judgment, another decision and a settlement in a matter of private law, which have been given, or entered into, in a contacting State shall, according to the Nordic convention, with some exceptions,[19] be recognized and enforced in another contracting State according to the legislation of that State.[20]

2.2. Grounds for refusal

The grounds for refusal of enforcement, which the debtor is entitled to raise upon application to the competent court in the Member State of enforcement, exist in the Regulation creating European Enforcement Order for uncontested claims,[21] in the Regulation creating European Order for Payment Procedure,[22] and in the Regulation establishing European Small Claims Procedure.[23] There exist grounds for non-recognition of a judgment in the Brussels I regulation.[24] A ground of non-recognition of a judgment, which is only to be used in exceptional situations, is if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.[25]

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[17] Convention between Sweden, Denmark, Finland, Iceland and Norway on recognition and the enforcement of judgments in civil matter, done at Copenhagen on 11 October 1977. The convention is now only partially valid between the Nordic States and in relation to the remaining scope of claims in their quality of titles of execution not covered by the Brussels I regulation, the Brussels convention and the Old Lugano convention. See *Berglund*, 2009: 146–147, where this is further developed in more details, and about examples of recognized and enforceable titles of execution in the remaining areas of application from the Norwegian and Swedish enacted legislations related to the convention.

[18] Article 1 compared to Article 2(2) of the 1977 Nordic convention. See also *Berglund*, 2009: 74 about information concerning the national legislations of the Nordic States and about the Co–operation agreement between these States from 1962.

[19] Article 2 of the 1977 Nordic convention.

[20] Article 1 of the 1977 Nordic convention.

[21] Article 21 of the Regulation creating European Enforcement Order for uncontested claims.

[22] Article 22 of the Regulation creating European Order for Payment Procedure.

[23] Article 22 of the Regulation establishing European Small Claims Procedure.

[24] Articles 34–35 of the Brussels I regulation.

[25] Article 34(1) of the Brussels I regulation.

2.3. Interim measures

A judgment may, under the Brussels I regulation, relate both to the judgment terminating the proceeding and orders made by a court in a proceeding *inter partes* on interim measures,[26] which in national laws have the purpose to provide the plaintiff a provisional legal protection, often within the narrow sense and with the aim to preserve the actual and legal *status quo* positions during the time before a final judgment, expressed as provisional and protective measures, or sequestration.

The existence and concept of such interim measures differ between Member States, as evident from the Brussels I regulation, which refers to provisional, including protective, measures as available under the law of a State.[27] In some Member States such measures are not available, whereas in other Member States they are, but sometimes under different conditions.

The finality, *res iudicata*, of a judgment is not a prerequisite for its recognition in other Member States. Therefore, provisionally enforceable instruments are recognized under the Brussels I regulation.[28] However, as long as an exequatur proceeding has not been terminated, the enforcement of a foreign judgment is restricted to protective measures which do not allow any realization of the claim.[29]

2.4. Access to information for enforcement purposes in the cross-border context

There exists no sufficiently efficient EU regulation in force in commercial matters, which provides possibilities for an international exchange of information related to contractual claims in enforcement matters by means of communication between the regulated enforcement agents in the Member States of the EU for the benefit of the contractual and commercial creditor.

An interesting solution of comparative interest exists in the Maintenance regulation, which includes some rather advanced provisions on a co–operation between central authorities, as representatives for a creditor, for an exchange of information for the purpose to recover efficiently a maintenance

[26] Article 33(1) of the Brussels I regulation.
[27] Articles 31–32 of the Brussels I regulation.
[28] Articles 47(1) and (2) compared to Article 31 of the Brussels I regulation.
[29] Article 47(3) of the Brussels I regulation.

claim, on the access to information and on the notification of information to the debtor.[30]

Also, some ideas and proposals for a solution on this issue exist in commercial matters. These are a draft proposal on an »International legal instrument on the mutual co-operation between European enforcement authorities in the EU for the exchange of information for enforcement purposes related to private and public claims« (a Euro- Information Assistance System for the exchange of information regarding the enforcement of claims),[31] a report Nordic co-operation in recovery matters to the Nordic Council of Ministers, including a proposed Nordic agreement on the exchange of information in recovery matters (see TemaNord 2002: 549), a proposal for a European Asset Declaration,[32] and a proposal for a European Garnishee's Declaration.[33]

3. EU law in the public area

The Recovery directive, its implementing regulation, and to some extent the new Recovery directive, are here treated.

3.1. Recognition and enforceability

The instrument permitting enforcement of the claim shall, according to the Recovery directive, be directly recognised and automatically treated as an

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[30] Articles 50(1)(a), 51(1)(c) and 61–62 of the Maintenance regulation.

[31] This idea was originally proposed in 1997 by Berglund in a presentation (see Berglund, 1997) at the seminar in Helsinki 17–18 March 1997 held by the Finnish Ministry of Justice.

[32] The proposal of establishing a European Assets Declaration is intended to achieve that debtors would be obliged to disclose their assets throughout the European Judicial area (»cross–border« disclosure). The declaration would be made on a standard form available in all EU languages. The minimum standards would be set for the Declarations conditions, content and related sanctions in order to encourage uniformity across Member States and, as a result, creditors would have equal access to information about assets within the European Judicial Area, while debtors within the internal market would receive equal protection. In addition, the present practice of information shopping within the European Judicial Area would be reduced, see for further details European Community Study JAI/02/03/2002, B, V, 5 and E, III, 1.

[33] A European Garnishee's Declaration has been proposed to oblige third–party debtors to give information on the assets seized on the basis of a proposed European Garnishment Order for Bank Accounts, see European Community Study JAI/02/03/2002, E, III, 3. Also compare Green paper Effective enforcement of judgments in the European Union: Transparency of Debtors' assets, Commission of the European communities, COM (2008) 128 final about a discussion on what measures could help to ensure that the creditor obtains reliable information on the debtor's assets within a reasonable period of time.

instrument permitting its enforcement of a claim of the applicant Member State.[34] The requested Member States have, however, an option, where appropriate and in accordance with their domestic legislation, to supplement, or replace, this instrument by an instrument of their own, which authorises the enforcement of an instrument from other Member States.[35] However, according to the new Recovery directive, the instrument permitting enforcement of the claim shall be directly recognised and automatically treated as an instrument permitting enforcement of a claim of the applicant Member State, without the possibility of any further national formalities.[36]

3.2. Grounds for refusal

There are several grounds for refusal in the Recovery directive and in the Implementing recovery regulation.[37] A ground for refusal is that Member State, which was requested, is not obliged, under the Recovery directive, to supply information, which would be contrary to the public policy.[38] Another ground for refusal is that a requested Member State is not obliged to recover a tax liability to the extent that the recovery of such a claim would, because of the situation of the debtor, create serious economic or social difficulties in the requested State as long as the requested State's legislation allows such action for similar national claims.[39] Yet another ground for refusal, according to this directive, is that Member States are not obliged to recover tax claims of other Member States which are more than five years old.[40]

3.3. Interim measures

The existence and concept of a decision on interim measures, such as precautionary measures, differ in comparison between the Member States of the EU in relation to tax claims, as is evident from the Recovery directive which states that the requested authority shall take precautionary measures to ensure recovery of a claim if the laws or regulations in force in the Member States in which it is situated so permit.[41]

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[34] Article 8(1) of the Recovery directive.
[35] Article 8(2) of the Recovery directive.
[36] Article 10 compared to Article 12 of the new Recovery directive.
[37] Articles 4 and 14 of the Recovery directive and Articles 25–26 of the Implementing recovery regulation.
[38] Article 4(3)(c) of the Recovery directive.
[39] Article 14 compared to Article 6 of the Recovery directive.
[40] Article 14(b), first part of the Recovery directive.
[41] Article 13 of the Recovery directive.

A decision of precautionary measures from an applicant Member State shall, according to the new Recovery directive, be directly recognized and automatically treated as an instrument permitting enforcement of a claim of the Member State in which the requested authority is situated, i.e. without the possibility of any further national formalities.[42]

3.4. Access to information for enforcement purposes in the cross-border context

The Recovery directive stipulates that, at the request of the applicant Member State, the requested Member State shall provide any information, which could be useful to the applicant authority in the recovery of its claim and the requested authority shall, in order to obtain this information, make use of the powers provided under the laws, regulations, or administrative provisions, applying to the recovery of similar claims arising in the Member State where the authority is situated.[43]

Consequently, the Recovery directive requires that a request for information shall be treated as if a similar claim of recovery existed in the requested State, although such a recoverable claim against a debtor, based on a title of execution from another Member State, has not yet been subject to recognition in the requested State, meaning that there exists no formal debtor in this sense in the requested State.

A request, or several requests in parallel,[44] for information from an applicant State, under the Recovery directive, shall indicate some basic facts in relation to the person concerned,[45] and may relate to the debtor, the co–debtor, any third party holding assets belonging to the debtor and the co-debtor.[46] It may moreover sometimes not oblige a requested State to supply information,[47] and shall in case for the refusal be notified to the applicant State with a statement of the reasons for refusal.[48] Information sent to the requested authority under the Recovery directive may only be further communicated by that authority to the person mentioned in the request, persons and authorities

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[42] Article 10 compared to Article 12 of the new Recovery directive.
[43] Article 4(1) of the Recovery directive.
[44] Article 3 of the Implementing recovery regulation.
[45] Article 4(2) of the Recovery directive. Also see Article 3 of the Implementing recovery regulation.
[46] Article 4 of the Implementing recovery regulation.
[47] Article 4(3) of the Recovery directive.
[48] Article 4(4) of the Recovery directive and Article 7 of the Implementing recovery regulation.

responsible for the recovery of the claims, and solely for that purpose, and the judicial authorities dealing with matters concerning the recovery of the claims.[49]

4. Conclusions

4.1. Recognition and enforceability

Provisions, which have become closer than before to an automatic recognition and enforceability of foreign titles of execution, i.e. without any, or few, requirements that special procedures, or further formalities, have to be fulfilled, have in recent years been entered into parts of EU law in the private and public law areas.

Examples include the European Enforcement Order for uncontested claims,[50] the European Order for payment procedure,[51] the European Small Claims Procedure,[52] the new Social security regulation,[53] and the Insolvency regulation.[54] In contrast to the Brussels I regulation, both the Maintenance regulation,[55] and the new Recovery directive,[56] provide for automatic recognition and enforceability.

The provisions of mutual recognition in both the Brussels I regulation and in the Recovery directive are aimed at providing a developed and high degree of efficiency in the cross-border context. However, a mandatory provision for the declaration of the enforceability still exists in this regulation for exequatur proceeding. It decreases the level of efficiency in the cross-border context even if it is aimed at safeguarding other interests, e.g. privacy, proportionality and legal certainty.

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[49] Article 16 of the Recovery directive.
[50] Article 5 of the European Enforcement Order for uncontested claims.
[51] Article 19 of the European Order for payment procedure.
[52] Article 20 of the European Small Claims Procedure.
[53] Article 84(2) of the Regulation 883/2004/EC of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1–123). The regulation entered into force on 20 May 2004, and applies from 1 May 2010, the date of entry into force of its implementing regulation, Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems. The implementing regulation includes similar recovery provisions (OJ L 284, 30.10.2009, p. 1–42), see Articles 75–85, as compared to the Recovery directive.
[54] Articles 16, 1 and 17, 1 of Council Regulation 1346/2000/EC of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1–18).
[55] Article 17 of Maintenance regulation.
[56] See section 3.1.

No optional provision for the declaration of enforceability exists in the new Recovery directive, which is, however, balanced off against other provisions in the same directive. These provisions take into account the interest of privacy and proportionality, e.g. the provisions on the liability of Member States to pay damages and cost to the extent that the recovery of a claim is established to have been unfounded.

The establishment of a better developed system of mutuality in the Brussels I regulation between the Member States of the EU is required for the enforcement of the titles of execution of a private creditor of origin from one Member State in another Member State by the abolishment of the exequatur proceeding in order to provide the private creditor a more immediate equal and efficient access to justice when he applies for the enforcement of his title of execution.

This better developed system of mutuality should be based on the EU principles of mutuality and mean that Member States should not oppose titles of execution from other Member States, despite differences in substantial law and in procedural law. This would contribute to a better promotion of the free movement of judgments between the Member States of the EU. The EU principle of mutuality is in different areas developed towards the abolishment of intermediate measures and other obstacles contrary to this principle, e.g. the provisions of exequatur proceeding.

The principle of equal treatment indicates that a private creditor of one Member State, who holds a nationally enforceable title of execution from that State, should not be unequally treated, so as to be subject to special provisions of exequatur proceeding, that are not applicable to a creditor of the enforcing Member State, holding a national title of execution from that State.

The European Enforcement Order for uncontested claims, the European Order for payment procedure, and the European Small Claims Procedure are examples in the contractual law area, where provisions of exequatur proceeding have been abolished and an *ex parte* proceeding for enforcement has been introduced together with provisions of grounds for refusal of enforcement and other guarantees. Consequently, a development of these community principles would in the case of the Brussels I regulation require the abolishment of provisions of exequatur proceeding related to titles of

execution from one Member State of the EU in other Member States,[57] and the introduction of an *ex parte* proceeding for applications of enforcement of such titles of execution, together with sufficient guarantees.

An example of such a guarantee could be the posting of security by the creditor, decided upon by the regulated enforcement agent, related to enforcement proceedings of opposed claims, in order to create efficiency in the interest of the creditor, but also in the interest of the debtor's protection. This amount for security should be fixed at a level, which should be sufficient for the payment of any possible damages in compensation to the debtor, according to the legislation of the enforcing State. Such a development would result in that creditors, who are able to present a nationally enforceable judgment from one Member State under the Brussels I regulation, would come into the same position as a national creditor in another enforcing Member State. This would guarantee a more equal treatment of creditors and debtors in the European judicial area.

Such an idea of development would also correspond to the legal objectives highlighted in the recent European Council reform programme (the Stockholm Programme).[58]

As a practical and an efficient matter of service to a private creditor it should be contemplated to introduce a possibility for him to file an application for enforcement under the Brussels I regulation and the more recent regulations in commercial matters, by the use of a multilingual officially approved form, to the competent authorities of enforcement in the Member State of origin of the title of execution, instead of filing it directly to the corresponding authorities of actual enforcement in another Member State. The Member State of origin should then be obliged to transfer the application to the competent body of actual enforcement in the other Member State. Such services are already available to a creditor under the Maintenance regulation and the 1962 Nordic convention in the same area.[59]

It remains to be discussed to what extent and in what proportion private creditors, respectively the Member States, should pay for the services made available under such a service obligation under the four regulations in commercial matters, i.e. what possible fees creditors should pay, or not pay, to their national regulated enforcement agents.

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[57] The regulation already provides the possibility of an automatic recognition through its Article 33, but not for automatic enforceability.
[58] See section 2.1.
[59] See section 2.

4.2. Grounds for refusal

Grounds for refusal of recognition and enforcement exist in the four regulations of concern here in commercial matters. These provisions should be maintained as they are needed to protect the interests safeguarded by the European Convention on Human Rights Provisions, on which EU law frequently relies.

Provisions of public policy exist, although if not frequently, in the treated law areas, e.g. as a basis for non–recognition in the Brussels I regulation,[60] and as a basis for refusal of exchange of information for recovery purposes in the Recovery directive.
It may be argued that an even more developed principle of mutuality in EU law may cause provisions of public policy to become unnecessary. On the contrary it may be argued that several rulings of the ECJ, where references are made to the European Convention on Human Rights, indicate that such provisions, which respond to the requirements of this convention, are important to maintain in EU law.

Another factor, which motivates maintenance of provisions of public policy, is that the national legislations of the Member States will under a predictable time be likely to remain different and only to some extent be harmonized through EU law. It is therefore recommended to maintain such public policy provisions.

4.3. Interim measures

Both the Brussels I regulation and the Recovery directive include provisions on interim measures. The regulation requires for its application the establishment of a title of execution in a proceeding *inter partes* on interim measures to be applicable, while this requirement has no counterpart in the directive. This lack in the Recovery directive is, however, balanced off by other provisions in the same directive, which take the interest of privacy and proportionality into account, e.g. the provisions on the liability of Member States to pay damages and cost, to the extent that the precautionary measures taken were unfounded. It may be possible to introduce some principal ideas of solutions from the Recovery directive into the works of reforming the

[60] See Hess, Pfeiffer, Schlosser, 2007: 241–252, where the public policy provision of the Brussels I regulation, Article 34(1), is discussed. The study concludes at p. 250 that the application of substantive public policy has been proved to be a rare exception under Article 34(1), but it can nevertheless not be excluded that a substantive policy exception will still be needed in unavoidable and extreme situations.

provisions of interim measures in the Brussels I regulation. However, several other considerations have also to be taken into account, discussed and be subject to a more profound analysis, in this law area, which concern a two party relationship governed by civil law.

An idea, to further discuss, is the introduction of a requirement for the assumed private creditor of posting security at a sufficiently high level to compensate his private counter party if he finally looses the dispute. The aim would be to obtain an order on interim measures in an *ex parte* proceeding, which is recognized and enforceable in other Member States, to achieve an efficient subsequent enforcement of that order and at the same time secure the interest of the assumed debtor.[61] Other ideas and considerations may be found in the context of the idea of cross-border attachment of the debtor's financial holdings on accounts administered by garnishees, banks and other financial institutions. This is an issue, which has been written about in literature,[62] and also been subject to a proposal to introduce a European Garnishment Order for Bank Accounts.[63]

The debtor's freedom of transferring money from his bank accounts from one Member State to bank accounts in other Member States is a right of free movement of capital and payments based on the Treaty on the Functioning of the EU.[64] The debtor is therefore at liberty to transfer his money, several times per day, between his different bank accounts in the Member States of the EU. The debtor's exercise of this legitimate liberty may, however, be harmful to his creditors to the extent that they do not dispose of any effective

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[61] See, for a similar idea of development, Hess, Pfeiffer, Schlosser, 2007: 363, where it is suggested that Article 31 of the regulation should be supplemented by the following provisions: »(2) In the case of an order for interim measures the court shall make the enforcement of the order dependent on the providing of a bank guarantee (on conditions to be specified by the court) for repayment or damages due whenever the applicant should be finally unsuccessful in the proceedings for the substance of the matter. In order to avoid unusual hardship, however, the court may grant the applicant an exception. (3) The court vested with jurisdiction for, and seized by either party with the substance of the matter has power to discharge, to modify or to adapt to its own legal system any provisional measure granted by a court of another Member State.«

[62] See European Community Study JAI/02/03/2002, C, II and III compared to E, III, 2 (also Jeuland, pp. 395–406, Kennett, 2000: 250–285, Kerameus, 2002: 77, about a bank as garnishee, de Leval, 1998: 53, appendix II: 78–81; De Leval, Georges, 2000: 185–204).

[63] See Green paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts compared to European Community Study JAI/02/03/2002, E, III, 2.

[64] Article 63 of Treaty on the Functioning of the European Union, as last amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, consolidated version, signed at Lisbon, 13 December 2007.

interim measures, which are recognized and enforceable in other Member States.

4.4. Access to information for enforcement purposes in the cross-border context

The lack of efficient access to information for enforcement purposes in commercial matters, after a title of execution, results, not only in the national context, but also in the international context, in that the value of the title to a creditor is reduced only into a beautiful picture that he could put on his wall, while the debtor despite of the title actually still may continue undisturbed to dispose over and move his assets.

Despite the European Council's Tampere conclusions,[65] reaffirmed in the Council's Hague Programme,[66] there exists no EU law in the civil commercial law area, which provides exchange of information between Member States related to contractual claims in enforcement matters by means of communication between the regulated enforcement agents in the Member States for the benefit of the contractual and commercial creditor.[67] There exist, however, several ideas and proposals for a solution on this issue.[68]

The idea of an introduction in EU law of a European Assets Declaration, which would require the debtor to declare his assets on the initiative of a private creditor, in an affidavit, or other corresponding official document, to the enforcement agents, or in court in a matter of enforcement, aims to encourage uniformity across Member States. It is intended leading to creditors' equal access to information about assets, while debtors would receive equal protection.

This idea comes close to the concept of a general disclosure of information in insolvency proceedings, e.g. in the case of a bankruptcy. The objectives of insolvency and enforcement proceedings are, not identical, although one similar feature exists: the realization of the assets of the debtor in the interest

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[65] Presidency conclusions, European Council 15 and 16 October 1999 (visited: 20.9.2010).
[66] European Council, the Hague Programme: strengthening freedom, security and justice in the European Union.
[67] See III, 2.1 of the Hague Programme of the European Council about improving the exchange of information and III, 3.4.1 of the same Programme about facilitating civil law procedures across borders.
[68] See section 2.4 and Berglund, 2009: 227–229, 234–242 for a more detailed account of ideas and proposals and about his conclusions and evaluation.

of the creditor. Still, other important objectives and structures of insolvency are different from those of enforcement.

Therefore, the principle of universality, as implemented in the area of general civil execution, in bankruptcy and in the area of international insolvency proceedings does not seem to be suitable to be introduced for the search for information for enforcement purposes in the area of special execution, the enforcement area, in a European Assets Declaration.

The concept of a general disclosure of information in a European Assets Declaration also risks including more sources of information related to the assets of the debtor in the Member States than needed for the purpose of enforcing the claim of a creditor in the debtor's assets. This may consequently, from the perspective of the debtor, be disproportionate in relation to his interest of privacy. On the other hand, it satisfies a creditors' right to obtain all information in the European judicial area related to the debtors' assets in order to make a choice between them in a matter of enforcement.

There are States in which only the enforcement agent determines what measures of enforcement to undertake. There are also States where the creditor has an almost completely free choice as to the method of enforcement to be adopted (see Kennett, 2000: 89–90).[69]

The actual choice of the assets to be seized should, however, not, for reasons of efficiency and privacy, be entrusted to the creditor, even if he may express his preference of choice, but instead to the regulated enforcement agents. The reason is that these agents have the task to establish a justified and proportionate balance, in terms of access to information for enforcement purposes, in the enforcement proceeding, between conflicting interests, i.e. to make use of no more, or less, information than needed.

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[69] *Kennett* makes a distinction between jurisdictions in which one enforcement agent can undertake any of the measures of enforcement provided by the law (e.g. in Sweden and in France, where in this latter State the creditor will normally leave the choice to be exercised by the French Huissier de Justice) and those where different agents have different responsibilities (e.g. in England and Germany, where the creditor has an almost completely free choice as to the method of enforcement to be adopted). She further finds that where the choice of methods of enforcement is concentrated in the hands of one enforcement agent, and in particular an agent with good access to information about the debtor, a level of flexibility and speed of action becomes available which enhances the likelihood of effective enforcement and that traditional structures for enforcement which rely on the compartmentalizing of responsibilities and co–operation and control by the creditor look rather clumsy in comparison.

It may be argued that States, which allow an intervention by the creditor in the enforcement process by giving him a right to issue instructions to the enforcement organs, the regulated enforcement agents, about the actual choice of assets suitable for seizure, may risk that these agents violate the principle of proportionality of the European Convention on Human Rights in their activities in a non–proportional and harmful way in relation to the debtor. Such a violation may occur if they, following the instructions of indicated information from the creditor about the debtors' assets, would for instance decide to seize a debtors' real estate property for a small claim, without having first acquired alternative information, which used, might instead have produced a more proportionate and less harmful measure of enforcement in relation to the debtor, such as the attachment of the earnings from his employer.

The approach of the European Assets Declaration of a general disclosure of information by the debtor in a declaration about his assets in the European judicial area risks, anyway, even to the extent it would be possible to argue that a justified balance between the conflicting interests of the debtor and the creditor is possible to establish, to be contrary to the interest of efficiency of the creditor for several reasons. The declaration only covers obtained information from the debtor and not access to information from independent sources of information of a reliable and official status. The debtor may also, despite a threat of sanctions, refuse to declare his assets, or provide insufficient, or incorrect, information in his declaration. If the debtor disappears, a declaration becomes impossible.[70] If, in addition, the debtor repeatedly changes his domicile from one Member State to other Member States, the creditor risks having to apply for a European Assets Declaration correspondingly, that is in several Member States, before such a declaration can be obtained.

A request by a private creditor of a European Assets Declaration seems only possible if it forms part of an application for enforcement measures, based on his title of execution. Otherwise, no enforcement matter is established as the necessary legal basis for the declaration.[71] If the private creditor receives useful information from the debtor in the European Assets Declaration, he will still have to make an application for the enforcement of his claim, based on his title of execution, in one or several other requested Member States in

[70] See, about a similar opinion, European Community Study JAI/02/03/2002, B, III, 1, regarding the conclusion that the main problem with the debtor's declaration lies in the fact that the declaration must be given personally.

[71] See European Community Study JAI/02/03/2002, B, V, 5, which stipulates as a prerequisite for obtaining a declaration that the creditor must present an enforceable judgment and suggest that the declaration should be taken at the beginning of the enforcement proceeding.

parallel, where the assets of the debtor have been indicated by the debtor. The enforcement agents of these requested States would, based on the applications, also have to review and evaluate the provided information by the creditor in relation to other possible sources of information available about the debtor's assets as an integrated part of the actual enforcement proceeding. This is motivated in order to establish a justified balance in that proceeding between the interest of efficiency of the private creditor and the debtors' interest of privacy and may, or may not, result in the attachment of assets indicated by the private creditor. Consequently, the possible advantages of a European Assets Declaration are, in an over all evaluation, not of sufficient importance to counter balance its disadvantages to both the private creditor and the debtor.

A European Garnishee's Declaration has been proposed to oblige third–party debtors to give information on the assets seized. A better solution would be, when the enforcement organs have received an application for the enforcement of a judgment and before the actual seizure takes place, in order to deal with the differences in national laws, to oblige any third–party debtor, including any financial institution, in national laws to provide, at the request of the enforcement organs, to provide to information about the debtors' assets to these organs. This would also enable enforcement organs to make a choice between all assets held by this third–party, before their actual decision to seize.

The 1999 proposal about an »International legal instrument on the mutual co–operation between European enforcement authorities in the EU for the exchange of information for enforcement purposes related to private and public claims« and the similar idea in the proposed Nordic agreement on the exchange of information in recovery matters, are based on the idea of a co–operation between national professionals, the regulated enforcement agents, for the exchange of information for enforcement purposes also for the benefit of the private creditor. They relate to the existence of a title of execution in any of the concerned States and their equal treatment in this context. They may be further elaborated into an alternative solution adapted to the civil enforcement law area. A similar concept of cooperation is found in the Maintenance regulation to facilitate the recovery of maintenance claims through a co-operation between national central authorities for the exchange of information for recovery purposes for the benefit of maintenance creditors.

The idea of creating an improved access to information for enforcement purposes through a co–operation in the cross-border context, following the ideas of the proposal of 1999, the proposed Nordic agreement and the

Maintenance regulation, which creates an optional right for a creditor, who holds a title of execution, to make use of an exchange of information adopted to contractual and commercial claims, between the regulated enforcement agents of the Member States of the EU seems, according to an all over conclusion, to be the most attractive one.

This is for the benefit of a higher degree of service and of efficiency of the private creditor at the enforcement of his title of execution and for a proportionate treatment of exchanged information and privacy in relation to the debtor.[72] This idea would also promote a better functioning of the Common Internal Market.

Also, it may be contemplated that the creditor should have the right to file an application, related to a specific matter, in the Member State of origin of his title of execution, for a following exchange of information for enforcement purposes with another Member State. A request for information, following the private creditors' application, should, for reasons of efficiency and integrity, be transmitted electronically in a closed communication system between Member States.

This solution involving co–operation will, as any other alternative, give raise to the question about the financing of the increased costs created by the needed work. The extent and proportion remains to be discussed to what private creditors, respectively the Member States, should pay for the services made available under such a possible co–operation, and what possible fees creditors should pay, or not pay, to their national regulated enforcement agents for using their services in relation to this available option in a matter for the exchange of information for enforcement purposes. It also remains to be discussed how such a possible co–operation, which would include work in the Member States for communications between the national designated competent authorities, or contact points, and/or the national regulated enforcement agents, and the private creditors, should best be structured.

These ideas also conform with the objectives of the Council's programmes. It is furthermore recommended that these issues be further analysed in connection to the idea of the possible establishment of a European co–operation body between States in the civil execution law area, a Euroex, intended to include help to creditors and debtors, if they would like to seek

[72] See, about the importance that a disclosure of information from the perspective of the debtor does not become disproportionate in relation to his interest of privacy and the balance between the interest of efficiency of the creditor and the interest of privacy of the debtor (Berglund, 2009: 236–238, 275–279).

the assistance of the enforcement agents in another Member State of the EU,[73] and to the idea of a more developed use of the European Judicial Network in civil and commercial matters.

The establishment of a sufficiently efficient solution for access to information for enforcement purposes in the cross-border civil enforcement law area would also have to take into consideration a sufficiently harmonized level of access to information for enforcement purposes to regulated enforcement agents in national laws in order to guarantee at least some kind of mutually equal acceptable level of exchange of information, which could be used for the benefit of cross-border enforcement of a private creditor's claim within the EU.[74] This means that any attempt to improve efficiency by access to information for enforcement purposes in the cross-border context would also have to consider the establishment of a sufficiently high level of access to national information.

In order to achieve harmonization through EU law in relation to matters having cross-border implications, a detailed goal for the harmonization of national laws should be stipulated, under the option of any national system of regulated enforcement agents.

National laws should aim to provide an efficient and up-to-date access of information to enforcement organs for enforcement purposes of judgments related to civil law claims (see Berglund, 2009: 276). This goal should not be less precise than to secure access to information about the debtor's: address, or place of location, employer, or business, through corporate registers, or other sources of income, including private, or social, insurance institutions, incomes and other assets in his possession, e.g. through debtor's registers kept by such officials, assets held in the possession by any third parties, including any financial institution, e.g. bank accounts, which hold an account, or a deposit, in the name of the debtor, declaration of his assets made to the enforcement agents, and status of indebtedness or insolvency, i.e. bankruptcy or other collective insolvency procedures.[75] This access to information should preferably be achieved by/trough »electronic means«.

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[73] See Berglund, 2009: 115–118, for further information about the possible idea of the establishment of a Euroex, and of a more developed use of the European Judicial Network in civil and commercial matters.

[74] See Berglund, 2009: 269–279, where the important task of the regulated enforcement agent in this context is emphasized and developed, and about the importance of improved access to national information for enforcement purposes.

[75] This idea is to some extent more developed, as compared to Article 12(4) in the proposal from the group of European experts in the report Rapprochement du Droit Judiciaire de

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