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The enforcement of foreign judgments under Brussels I *bis*: false alarms and real concerns

Philippe Hovaguimian*

This article reviews the recognition and enforcement procedure adopted in the Brussels I *bis* Regulation, including the much-debated abolition of intermediary *exequatur* proceedings. It examines the new responsibilities of enforcement organs and discusses some of the doctrinal concerns in this regard. The article then underlines the new regime's potential flaws with respect to both the debtor's and the creditor's rights during enforcement. Such shortcomings include the problematic discretion of Member States either to delay the satisfaction of the creditor's claim well beyond the time limits formerly set in Brussels I, or to impose irreversible enforcement measures much sooner than the debtor's rights of defence previously allowed. Overall, this analysis seeks to show that the optimistic goals of the Brussels I reform – some of them based on questionable assumptions – are hardly fulfilled by the final Recast.

Keywords: Brussels I Regulation; Brussels I *bis* Regulation; enforcement procedure; *exequatur*; foreign judgments; judgments regulation; Recast; recognition and enforcement; Regulation (EU) No 1215/2012

A. Introduction

Over the past decades, judicial cooperation in Europe has allowed for the increasingly free movement of judgments between Member States. In the latest iteration of this trend, the vastly influential "Brussels I" regime in civil and commercial matters[1] has undergone a long-debated reform which further accelerates the cross-border circulation of judgments.

The extent of the Brussels I reform in the context of recognition and enforcement is first examined in broad outline (B). This article then considers the impact

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[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, [2001] OJ L12/1 (hereinafter "Brussels I" or "BR_I"). This article cites commentaries on both the Brussels I Regulation and the parallel Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, [2009] OJ L147/5 (hereinafter "Lugano Convention" or "LC").

of the new regime (C) and whether the new Regulation did fulfil the optimistic goals that prompted its revision (D). The penultimate section shortly reviews the alternative systems suggested for the cross-border circulation of judgments (E).

B. Recognition and enforcement under Brussels I *bis*: an overview

The Brussels I Recast[2] was adopted on 6 December 2012 and applies from 10 January 2015[3] across the EU,[4] though only to legal proceedings instituted after 10 January 2015.[5] The application of Brussels I is maintained for proceedings instituted before 10 January 2015, including the recognition and enforcement of the resulting judgments,[6] even if handed down after that date.

While it discards some of the bolder amendments proposed in the 2010 Commission draft,[7] the Recast did fulfil the commitment of abolishing the

[2]Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1 (hereinafter "the Recast", "Brussels I *bis*", or "$BR_{I\text{-}bis}$"). On the Recast in general: JP Beraudo, "Regards sur le nouveau règlement Bruxelles I sur la compétence judiciaire, la reconaissance et l'exécution des décisions en matière civile et commercial" (2013) 140 *Journal du Droit international (Clunet)* 741–63; F Cadet, "Main features of the revised Brussels I Regulation" [2013] *Europäische Zeitschrift für Wirtschaftsrecht* 218–22; EB Crawford and JM Carruthers, "Brussels I *bis*– the Brussels Regulation recast: closure (for the foreseeable future)", [2013] *Scots Law Times* 89–95; L d'Avout, "La refonte du règlement Bruxelles I" [2013] *Recueil Dalloz* 1014–25; A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press, 1st edn, 2015); T Domej, "Die Neufassung der EuGVVO: Quantensprünge im europäischen Zivilprozessrecht" (2014) 78 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 508–50; H Gaudemet-Tallon and C Kessedjian, "La refonte du règlement Bruxelles I" [2013] *Revue trimestrielle de droit européen* 435–54; P Hay, "Notes on the European Union's Brussels-I 'Recast' Regulation: An American Perspective", (2013) 13 *The European Legal Forum* 1–8; A Markus, "Die revidierte europäische Gerichtsstandsverordnung" [2014] *Aktuelle Juristische Praxis* 800–19; PA Nielsen, "The new Brussels I Regulation" (2013) 50 *Common Market Law Review* 503–28; A Nuyts, "Bruxelles I*bis*: présentation des nouvelles règles sur la compétence et l'exécution des décisions en matière civile et commerciale", in A Nuyt (ed), *Actualités en droit international privé* (Brussels, Bruylant, 2013), 77–134; M Pohl, "Die Neufassung der EuGVVO im Spannungsfeld zwischen Vertrauen und Kontrolle" [2013] *Praxis des Internationalen Verfahrensrechts* (IPRax) 109–14; J von Hein, "Die Neufassung der Europäischen Gerichtsstands- und Vollstreckungsverordnung (EuGVVO)" [2013] *Recht der internationalen Wirtschaft* 97–111.

[3]Art 81 $BR_{I\text{-}bis}$.

[4]Including Denmark, which has become bound by the changes made in the Recast through an international agreement (see [2014] OJ L240/1 and [2013] OJ L79/4).

[5]Art 66(1) $BR_{I\text{-}bis}$.

[6]*Ibid*, Art 66(2).

[7]European Commission, "Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)", COM(2010) 748 final (hereinafter "Commission proposal" or "CP").

intermediate procedure known as *exequatur*, through which the state addressed declares a foreign judgment enforceable within its territory.[8] The Recast provides that enforceable judgments of a Member State shall be enforceable in another Member State "without any declaration of enforceability being required".[9] The enforcement of a foreign ruling is then subject to the same conditions as those of a domestic one.[10]

Without a declaration of enforceability, the "competent enforcement authority" petitioned for enforcement under Article 42 $BR_{I\text{-}bis}$ is the first authority confronted with the foreign judgment in the state addressed. The creditor[11] must provide the authority with a copy of the judgment[12] and the now vastly more elaborate certificate of Annex I $BR_{I\text{-}bis}$,[13] issued upon request of any

[8]Brussels I *bis* follows the trend of other EU Regulations that abolished intermediary procedures as per the commitments of the 1999 Tampere European Council meeting (Presidency Conclusions, No 200/1/99, 15 and 16 October 1999, paras 33–34); see the *exequatur*-free circulation of judgments and orders provided under Arts 41–42 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, [2003] OJ L338/1, 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, [2004] OJ L143/15 (hereinafter "EEO Reg"), Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, [2006] OJ L399/1 (hereinafter "Payment Procedure Reg"), Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, [2007] OJ L199/1 (hereinafter "Small Claims Reg"), Arts 17–22 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, [2009] OJ L7/1 (hereinafter "Maintenance Reg"), and Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, [2013] OJ L181/4. For an administrative law perspective, compare Art 13 of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, [2010] OJ L84/1, providing that claims of the requesting Member State "be treated as if it was a claim of the requested Member State". For a recent succinct overview of the new system of recognition and enforcement see P Beaumont and L Walker, "Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project" (2015) 11 *Journal of Private International Law* 31, 37–42.

[9]Art 39 $BR_{I\text{-}bis}$. This includes the removal of *registration* requirements for enforceable judgments: see eg Rule 74.3(1) of the English Civil Procedure Rules 1998 (CPR), as amended by the Civil Procedure (Amendment No. 7) Rules 2014 (SI 2014 No 2948 (L 32)).

[10]Art 41(1) *in fine* $BR_{I\text{-}bis}$.

[11]For the sake of simplicity, this article uses – even in potentially non-monetary contexts – "the creditor" and "the debtor" to designate the parties on either side of the enforcement procedure. "The debtor" is thus interchangeable with "the person against whom enforcement is sought" frequently used in the Recast, or with "the judgment debtor".

[12]Art 42(1)(a) $BR_{I\text{-}bis}$.

[13]*Ibid*, Art 42(1)(b).

interested party.[14] The 2007 Heidelberg Report[15] had rightly criticised the EU-wide practice of requiring the creditor to provide the full translation of a judgment when applying for *exequatur*.[16] The Recast accordingly allows a court or enforcement authority to require a translation of the full judgment only "where necessary" or when otherwise "unable to proceed".[17] The Recast further abolishes the requirement for the creditor to have a postal address or a representative *ad litem* in the state of enforcement,[18] which the Heidelberg Report also criticised[19] for creating a factual requirement of (costly) legal representation.

Under Brussels I, the declaration of enforceability was served upon the debtor, accompanied by the original judgment.[20] Either party could file an appeal against the *exequatur* decision within one month of service thereof – two if the debtor was domiciled outside the state of enforcement.[21] The appeal decision could in turn be challenged by a second appeal under Article 44 BR_I. Both appellate courts were competent to review the grounds for refusal of Articles 34 and 35 BR_I.[22]

Since the lack of *exequatur* and service thereof would otherwise leave the debtor unaware of an impending enforcement, the Recast now provides that the court of origin's *certificate* be served on the debtor prior to the first enforcement measure,[23] accompanied by the judgment, if not already

[14] *Ibid*, Art 53.
[15] B Hess, T Pfeiffer and PF Schlosser, "Report on the Application of Regulation Brussels I in the Member States" (Study JLS/C4/2005/03, Final Version September 2007), hereinafter the "Heidelberg Report".
[16] Heidelberg Report, para 515, stating that a translation of the *operative part* of the judgment, complemented by the certificate, is sufficient for the purpose of the first-instance review.
[17] Namely in the following contexts: Art 37(2) (recognition), Art 42(4) (enforcement), Art 47(3) (refusal application), and Art 54(3) $BR_{I\text{-}bis}$ (judgment adaptation).
[18] Art 41(3) $BR_{I\text{-}bis}$, formerly required in Art 40(2) BR_I. Art 47(4) $BR_{I\text{-}bis}$ dispenses of this requirement for the debtor as well.
[19] Heidelberg Report, para 517.
[20] Art 42(2) BR_I.
[21] *Ibid*, Art 43(1), (5).
[22] *Ibid*, Art 45(1). According to these provisions, the recognition of a judgment shall be refused if it were rendered in violation of the special or exclusive jurisdictions pursuant to Sections 3, 4 and 6 of the Regulation's Chapter II (Art 35 BR_I), if it is manifestly contrary to the public policy of the requested state, if the judgment was given in default of appearance and the defendant was not given the occasion to arrange his or her defence appropriately, or if the recognition conflicts either with a foreign judgment rendered earlier and subject to recognition, or with a domestic judgment (Art 34 BR_I).
[23] A reasonable improvement over the Commission proposal, which acknowledged that the moment where the debtor is first acquainted with the foreign judgment and "able to react" could well be "the date of the first enforcement measure having the effect of making his property non-disposable in whole or in part" (Art 45(4) CP). Critical of the CP in that regard: A Dickinson, "Surveying the Proposed Brussels I *bis* Regulation: Solid Foundations

served.[24] A protective measure however does not require prior service of the certificate.[25]

Having no formal *exequatur* decision to challenge in the new regime, the debtor can now submit a special application for refusal of enforcement[26] requiring a court to examine the grounds for refusal provided under Article 45 $BR_{I\text{-}bis}$.[27] In a departure from Brussels I,[28] the Recast also explicitly allows the debtor to submit a *preventive* application for refusal of *recognition*.[29] The grounds for refusal under review in either case are essentially identical to those available in the previous regime.[30] To the extent possible and in accordance with the legal system of the state addressed, the Recast prescribes that the debtor be also able to invoke, in the same procedure, the grounds for refusal (or suspension[31]) of enforcement available under *national law*[32] (eg prior compliance with the judgment) as long as they do not conflict with the Regulation's own grounds for refusal.[33] The procedure for the refusal application is otherwise governed by national law.[34] The decision may then be appealed by either party.[35] A second appeal is available if the Member State has designated a corresponding court.[36]

Under Brussels I, interim protection of the creditor's interests was guaranteed through Article 47 BR_I. The creditor could apply for provisional measures regardless of a declaration of enforceability,[37] although such request was subject to the requirements and conditions of the state addressed – and, according to some, a review of the Regulation's grounds for refusal.[38] When in possession of a

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but Renovation Needed" (2010) 12 *Yearbook of Private International Law* 247, 267; Gaudemet-Tallon and Kessedjian, *supra* n 2, 452 para 59; P Kiesselbach, "The Brussels I Review Proposal – an Overview", in E Lein (ed), *The Brussels I Review Proposal Uncovered* (London, British Institute of International and Comparative Law, 2012), 1, 18.

[24] Art 43(1) $BR_{I\text{-}bis}$.

[25] *Ibid*, Art 43(3).

[26] Art 46 $BR_{I\text{-}bis}$.

[27] The competent court is designated by the respective Member States pursuant to Art 75(a) $BR_{I\text{-}bis}$.

[28] See *infra* text to n 175.

[29] Art 45(1), (4) $BR_{I\text{-}bis}$.

[30] Two amendments can nonetheless be noted in Art 45(1)(e) $BR_{I\text{-}bis}$: first, the violation of Section 5 jurisdictions, ie in matters of employment, is now explicitly included as a ground for refusal. Secondly, the violation of all such special jurisdictions is only covered insofar as the defendant was the weaker, protected party.

[31] Art 41(2) $BR_{I\text{-}bis}$.

[32] *Ibid*, Recital 30.

[33] *Ibid*, Art 41(2).

[34] *Ibid*, Art 47(2).

[35] *Ibid*, Art 49.

[36] *Ibid*, Art 50.

[37] Art 47(1) BR_I.

[38] See eg P Oberhammer, in F Stein and M Jonas (eds), *Kommentar zur Zivilprozessordnung*, *Band 10: EuGVVO*, *GVG* (Tübingen, Mohr Siebeck, 22nd edn, 2011), Art 47 BR_I para 6 fn 8, with references on the doctrinal divide.

declaration of enforceability, however, the creditor gained *direct and unconditional access*[39] to the protective measures of the enforcement state.[40]

The Recast's *exequatur*-free regime accordingly provides for protective measures immediately available to the creditor pursuant to Article 40 $BR_{I\text{-}bis}$ – akin to Article 47(2) BR_I, yet without the need to obtain a declaration of enforceability beforehand.

The debtor, in turn, benefits from Article 51 $BR_{I\text{-}bis}$, which gives both appellate courts discretion, under the same conditions as Article 46 BR_I, to stay their proceedings while an appeal in the state of origin is pending. Article 44 $BR_{I\text{-}bis}$[41] provides further protection: while Article 47(3) BR_I limited enforcement proceedings to protective measures until the appeal of Article 43 BR_I had been determined or the deadline to file such appeal has passed, the substance of this provision can be partly found in the new Article 44(1) $BR_{I\text{-}bis}$, which allows the court addressed by a refusal application (or the subsequent appeals[42]) to limit the enforcement proceedings to protective measures, to condition enforcement on the provision of a security, or to suspend, either wholly or in part, the enforcement proceedings. By explicitly granting such discretion to the appellate courts, the Recast incidentally codifies a disputed power under Brussels I: the doctrine is namely divided as to whether the second appellate court may extend, *upon request,*[43] the protection of Article 47(3) BR_I beyond the first appeal, either by a suspension of enforcement[44] or by a limitation to protective measures.[45] Article 44(2) $BR_{I\text{-}bis}$ further compels

[39]Proceeding to such measures after *exequatur* must be guaranteed without any further judicial authorisation, even if ordinarily required under national law (Case 119/84 *P Capelloni and F Aquilini v JCJ Pelkmans* [1985] ECR 3147, paras 24, 26). This however does not affect the content and general availability of such measures under national law (see eg *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2007] EWCA Civ 662, [2007] ILPr 51 [44] (Tuckey LJ), and *infra* text to n 73).

[40]Art 47(2) BR_I.

[41]Inspired by Art 21(3) Maintenance Reg.

[42]Recital 31 $BR_{I\text{-}bis}$.

[43]On the even more controversial *ex lege* extension of Art 47(3) up until the *exequatur* decision becomes *final* (ie potentially at the conclusion of a second appeal) pursuant to § 84a(2) Austrian Enforcement Regulation (*Exekutionsordnung*), see JCT Rassi, in HW Fasching and A Konecny (eds), *Kommentar zu den Zivilprozessgesetzen* (Vienna, Manz, 2nd edn, 2011), Art 47 BR_I para 14.

[44]As per eg Art 103(2) Swiss Federal Supreme Court Act (*Bundesgerichtsgesetz*); supportive of the provision's applicability: DA Hofmann and OM Kunz, in C Oetiker and T Weibel (eds), *Basler Kommentar*, *Lugano-Übereinkommen (LugÜ)* (Basel, Helbing Lichtenhahn, 1st edn, 2011), Art 47 LC paras 243–44; D Staehelin, in F Dasser and P Oberhammer (eds), *Kommentar zum Lugano-Übereinkommen* (Bern, Stämpfli, 2nd edn, 2011), Art 47 LC para 45; *contra* G Walter and T Domej, *Internationales Zivilprozessrecht der Schweiz* (Bern, Haupt, 5th edn, 2012), 508–9 fn 188.

[45]As per eg § 22(3) German Recognition and Enforcement Implementation Law (*Anerkennungs- und Vollstreckungsausführungsgesetz*); supportive of the provision's applicability: C Althammer, in T Simons and R Hausmann (eds), *Brüssel I-Verordnung:*

the competent authority[46] to suspend the enforcement of a judgment upon request when its enforceability has been suspended in the state of origin.

Apart from the debtor's preventive application for refusal of recognition mentioned above, the Regulation's procedure for recognition is mostly unchanged. As under Brussels I, a judgment can still be incidentally recognised without special procedure if the outcome of the proceedings depends on said recognition.[47] Such incidental recognition may be suspended if the judgment is challenged in the state of origin[48] or if an application under Articles 46–51 has been submitted.[49] The *standalone* procedure for recognition, formerly requested through the same procedure as for *exequatur*, now consists in a reversed form of the application for refusal of enforcement: pursuant to Article 36(2) $BR_{I\text{-}bis}$, any interested party can request the court to establish that there are no grounds for refusal of recognition in accordance with the procedure of Articles 46–51 $BR_{I\text{-}bis}$. The Recast now requires the production of the certificate when seeking recognition[50] whereas Brussels I did not.[51]

Finally, Article 54(1) $BR_{I\text{-}bis}$ provides that unknown measures or orders contained in judgments be adapted to their closest equivalent under the law of the state addressed. While the questions of how and by whom the adaptation should be carried out are left to national law,[52] the adaptation must be challengeable by any party before a court.[53]

Kommentar zur VO (EG) 44/2001 und zum Übereinkommen von Lugano (Munich, IPR, 1st edn, 2012), Art 47 BR_I para 10; G Mäsch, in J Kindl, C Meller-Hannich and HJ Wolf (eds), *Gesamtes Recht der Zwangsvollstreckung: Handkommentar* (Baden-Baden, Nomos, 2nd edn, 2013), Art 47 BR_I para 13; *contra* P Mankowski, in T Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht*, *EuZPR / EuIPR: Kommentar* (Munich, Sellier European Law, 2010–2011), Art 47 BR_I para 21; Oberhammer, *supra* n 38, Art 47 BR_I para 23; K Pörnbacher, in R Geimer and RA Schütze (eds), *Der internationale Rechtsverkehr in Zivil- und Handelssachen* (Munich, Beck, 40th supplement, 2011), Art 47 BR_I para 19.

[46] Although Art 44(2) $BR_{I\text{-}bis}$ was modelled after Art 21(3) *in fine* Maintenance Reg, the Recast fails to include a provision similar to Art 71(1)(f) Maintenance Reg for Member States to designate said "competent authority" (ie whether the debtor is meant to invoke Art 44(2) before the court addressed by a refusal application or directly to the enforcement authority – or even both). One can however expect Member States to use the very same procedure and authorities, with respect to Art 44(2) $BR_{I\text{-}bis}$, as under the Maintenance Reg.

[47] Art 36(1), (3) $BR_{I\text{-}bis}$.

[48] *Ibid*, Art 38(a). The condition of a mere "challenge" appears broader than that of an "ordinary appeal" under the previous regime.

[49] *Ibid*, Art 38(b).

[50] *Ibid*, Art 37(1)(b).

[51] Art 53(2) BR_I.

[52] Recital 28 $BR_{I\text{-}bis}$.

[53] Art 54(2) of the Recast.

C. The impact of the Recast on cross-border enforcement

As has been outlined above, the procedure for the enforcement of foreign judgments has undergone several changes, the chief amendment being the abolition of the intermediate *exequatur* procedure. The following sections address specific consequences of the revised procedure under Brussels I *bis* in more detail. The assessment follows different segments of the enforcement procedure: (1) the *judgment import* phase, concentrating on the moment where authorities are first confronted with the foreign judgment; (2) the closely related but optional phase of *judgment adaptation and concretisation*, where authorities may adapt otherwise unenforceable measures to national law and its requirements; and finally (3) the phase of *judgment enforcement and inspection*, covering every step taken immediately thereafter, namely the enforcement of the judgment and the remedies provided against it.[54]

1. *Judgment import*

(a) *Judgment import as a "recognition of enforceability": a problem of addressee*

Authorities in the state of enforcement must first be confronted with the foreign judgment. The *exequatur* here fulfils a *judgment import* function:[55] Under the Brussels I regime, the first-instance court seized for *exequatur*[56] reviewed a limited set of mostly formal requirements before declaring the foreign judgment domestically enforceable: Article 41 BR_I provided for an *ex parte* procedure where the court inspected the documents provided by the creditor, namely a copy of the judgment and the standardised certificate of Annex V BR_I[57]which the state of origin issued upon request of any interested party.[58] The *exequatur* court further examined *ex officio* whether the matter fell within the Regulation's scope of application, whether the judgment qualified as such under Article 32 BR_I, and whether it was enforceable in the state of origin pursuant to Article 38(1) BR_I.[59]

The question is whether this function justified the need for *exequatur*. Indeed, a special procedure giving effect to the enforceability of a foreign judgment

[54]This delineation is loosely based on the set of *purposes* attributed to the *exequatur* by P Oberhammer, "The Abolition of Exequatur" [2010] *Praxis des Internationalen Verfahrensrechts* (IPRax) 197, mentioning a "title import" and "title inspection" function. D Schramm, "Abolition of Exequatur", in A Bonomi and C Schmid (eds), *La révision du Règlement 44/2001 (Bruxelles I). Quelles conséquences pour la Convention de Lugano? – Revision der Verordnung 44/2001 (Brüssel I). Welche Folgen für das Lugano-Übereinkommen?*, *Actes de la 23e Journée du droit international privé du 8 avril 2011 à Lausanne* (Geneva, Schulthess, 2011), 59, 63–64, further refines the former by suggesting the function of "title supplementation" and "title transformation".

[55]Oberhammer, *ibid* ("title import" in the original terminology).

[56]Referred to as "*exequatur* court" in this article, as opposed to the higher "appeal courts".

[57]Art 53 BR_I.

[58]*Ibid*, Art 54.

[59]See eg Mankowski, *supra* n 45, Art 41 BR_I para 1.

might seem a counter-intuitive requirement in light of other aspects of the Brussels regime: allowing a judgment's foreign enforceability to be *incidentally* recognised during domestic enforcement proceedings would only match the recognition of all *other* effects of a judgment under Article 33(1) BR_I, where no special procedure is required.[60] Article 47(1) BR_I even allowed the creditor to obtain provisional measures under national law and thereby (temporarily) produce a foreign judgment's enforceable effects without the need for prior *exequatur*.[61]

Yet the requirement of a special procedure can be partly explained through the difference in the *addressed authorities*. Courts were the addressee of pre-*exequatur* requests for protective measures[62] and are typically addressed with the recognition of a judgment's non-enforceable effects.[63] The initiation of enforcement, on the other hand, is handled by either judicial or non-judicial authorities depending on the state's legal system. Providing for the review of judgment import requirements by the enforcement-initiating authorities thus entails shifting a set of duties usually carried out by courts – whether as *exequatur* courts, courts ordering provisional measures, or courts ruling upon the recognition of non-enforceable effects as a preliminary matter – onto a (potentially) non-judicial organ.

[60]R Arenas García, "Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea" (2010) 12 *Yearbook of Private International Law* 351, 358; A Markus, "Probleme der EuGVVO-Revision: Begriff der Entscheidung und Abschaffung des Exequaturverfahrens", in F Lorandi and D Staehelin (eds), *Innovatives Recht: Festschrift für Ivo Schwander* (Zurich, Dike, 2011), 747, 760–61; Oberhammer, *supra* n 54, 199, who points out the lack of "customs office" for judgment effects subject to recognition.

[61]Although whether the authority incidentally recognising the foreign judgment for the purpose of Art 47(1) BR_I must accordingly review the grounds for refusal of Arts 34–35 BR_I is starkly disputed (*supra* n 38).

[62]Such measures are subject to the conditions of national law (Art 47(1) BR_I) which by nature require some degree of judicial appreciation, eg as to the credibility of the claim or the threat of its impeding frustration – though parts of the doctrine regard Art 47(1) BR_I as attenuating these requirements (see Oberhammer, *supra* n 38, Art 47 BR_I paras 6–7). See further *infra* text to nn 70–73 regarding interim measures requested *unconditionally* post-*exequatur*, potentially to the enforcement organs themselves.

[63]Non-enforceable effects subject to recognition can be divided into procedural effects (such as *res judicata*) and the effects of a declaratory or a constitutive judgment (eg declaring the invalidity of a contract or the dissolution of a company). Procedural effects may only be recognised in court proceedings as they have by definition no influence beyond such proceedings. Declaratory or constitutive effects are usually recognised by a court, though the judgment may also by handled by eg an administrative authority having to determine a preliminary issue of private law.

(b) *Involvement of judicial and non-judicial authorities during enforcement*

Non-judicial authorities initiate enforcement proceedings in the majority of EU Member States. Four types of systems can be differentiated:[64] *bailiff-oriented* systems are used in eg France, Belgium, the Netherlands, Luxembourg, Scotland, and many Eastern European countries, which all empower a state-appointed agent outside the court system to carry out the enforcement upon request of the creditor; the *administrative* system is in force both in Sweden and in Finland, where the enforcement is entrusted to a government agency (eg under the supervision of the Ministry of Finance) entirely separated from the courts; only Austria, Spain and Denmark use the *court-oriented* system, where enforcement is carried out by judicial authorities; *mixed* systems are known to Germany and England, where the enforcement is partly carried out by courts and partly by bailiffs.

Bailiff-oriented or administrative systems of enforcement do not exclude a judicial intervention at the outset per se.[65] However, the non-judicial authorities of such systems tend to be the first confronted with a request for enforcement, with the court intervening only when the debtor subsequently contests the enforcement.[66]

Therefore, following the abolition of *exequatur*, only in a minority of cases do courts remain the first authorities to be confronted with the foreign judgment – namely in Austria, Spain, Denmark, and for specific measures in other jurisdictions. In these cases, the judicial authorities involved at the outset can simply assume the duties of the former *exequatur* court and carry out the review of requirements for judgment import. The view that the judgment import function of *exequatur* fulfils no important role[67] is thus accurate, albeit only in that context.

The remaining cases – which provide for a mere *optional judicial involvement*[68] upon contestation by the debtor – do however leave bailiffs and administrative bodies as the first authorities confronted with the judgment and its import requirements.[69]

[64]B Hess, "Comparative Analysis of the National Reports", in M Andenas, B Hess and P Oberhammer (eds), *Enforcement Agency Practice in Europe* (London, British Institute of International and Comparative Law, 2005), 25, 34–36; see also the European e-Justice Portal's state-by-state profiles on enforcement procedure, available at https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-en.do (accessed on 18 June 2015).

[65]For instance, courts may need to handle requests for specific enforcement measures like the attachment of earnings.

[66]See G Cuniberti and I Rueda, "Abolition of Exequatur. Addressing the Commission's Concerns" (2011) 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 286, 309, differentiating between systems with "required" and "optional" judicial involvement.

[67]Oberhammer, *supra* n 54, 198; Schramm, *supra* n 54, 63.

[68]See *supra* n 66.

[69]The case of Germany was initially unclear due to its particular procedure: German law had always required that a judgment, *whether foreign or domestic*, be granted a so-called

While general enforcement proceedings are initiated by the authorities mentioned above, it should be noted that the creditor's direct access to *protective measures* under Article 40 $BR_{I\text{-}bis}$ may also confront non-judicial authorities with a foreign judgment. Indeed, while the creditor's pre-*exequatur* access to provisional measures under Article 47(1) BR_I typically involved a judicial organ,[70] the authority addressed under Article 40 $BR_{I\text{-}bis}$ is now the first confronted to the foreign judgment. If the immediate and unconditional access to protective measures under Article 47(2) BR_I[71] entails that the creditor should be able to address his or her request for protective measures directly to a non-judicial enforcement agent rather than a court,[72] said enforcement agent would now be the creditor's first stop under Article 40 $BR_{I\text{-}bis}$. However, compelling the creditor to address a court for the purpose of requesting protective measures, even under Article 47(2) BR_I, is ultimately a matter of national law and does not frustrate the Regulation.[73] It follows that, depending on the law of the enforcement state, Article 40 $BR_{I\text{-}bis}$ may entail that non-judicial authorities are the first confronted with a foreign judgment in the context of protective measures.

(c) *The extent of the first-instance review then and now*

Having non-judicial authorities carry out the judgment import function of *exequatur* is potentially problematic: it was said that such authorities may be faced with

"execution clause" by a court (*Vollstreckungsklausel*) as the first step towards enforcement. Whether the abolition of *exequatur* under Brussels I *bis* entailed the abolition of the execution clause was thus disputed. The matter seems now settled by the legislative implementation of the Recast (*Gesetz vom 8. Juli 2014 zur Durchführung der Verordnung (EU) Nr. 1215/2012 sowie zur Änderung sonstiger Vorschriften)*, which removes the execution clause requirement for Brussels I *bis* judgments and thus leaves the German bailiffs as the first authorities confronted with the foreign judgment – that is, for enforcement measures within their purview (see eg §§ 808 and 883 German Code of Civil Procedure).

[70] See *supra* n 62.

[71] See *supra* n 39.

[72] As suggested by Walter and Domej, *supra* n 44, 519.

[73] R Geimer and RA Schütze, *Europäisches Zivilverfahrensrecht. Kommentar zur EuGVVO*, *EuEheVO*, *EuZustellungsVO*, *EuInsVO*, *EuVTVO*, *zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht* (Munich, Beck, 3rd edn, 2010), Art 47 BR_I para 2; Hofmann and Kunz, *supra* n 44, Art 47 LC para 103; J Kropholler and J von Hein, *Europäisches Zivilprozessrecht*, *Kommentar – Internationale Zuständigkeit*, *Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen* (Frankfurt am Main, Recht und Wirtschaft, 9th edn, 2011), Art 47 BR_I para 12; Mankowski, *supra* n 45, Art 47 BR_I para 9; MH Plutschow, in AK Schnyder, *Lugano-Übereinkommen (LugÜ) zum internationalen Zivilverfahrensrecht: Kommentar* (Zurich, Dike, 2011), Art 47 LC para 12; Staehelin, *supra* n 44, Art 47 LC para 50.See also *Banco Nacional*, *supra* n 39, [45]: "In *Capelloni* it seems that the judgment creditor was able to arrange for protective sequestration of the judgment debtor's property without a court order. *There is no equivalent right here. The applicant must apply to the court for a freezing order* . . ." (emphasis added).

legal issues of international procedure they are neither familiar with nor sufficiently trained for.[74] If true, this could defeat the purposes of efficiency and cost reduction sought by the Recast. One should therefore examine the extent of the *exequatur* court's review under Brussels I and its transfer to the enforcement authority in the new Regulation.

While the *exequatur* court under Brussels I *must* ensure that the aforementioned judgment import requirements are fulfilled, the review was a mostly formal one:[75] as the proceedings took place *ex parte*, the court examined the compliance of the judgment only on the basis of the available documents[76] and relied on the presumed accuracy of the accompanying certificate.[77] Indeed, while the presumption of the certificate's accuracy was ultimately refutable,[78] overturning said presumption is regarded as a matter of the *appeal* procedure,[79] but *not* the

[74]All referring *inter alia* to the limited training of the German bailiff (*Gerichtsvollzieher*): Althammer, *supra* n 45, introduction to Arts 38–52 BR_I para 7, Art 38 BR_I para 14; German Bundesrat response to the Commission proposal, Drucksache 833/10(B) of 18 March 2011 (hereinafter "Bundesrat response"), para 4; R Wagner and M Beckmann, "Beibehaltung oder Abschaffung des Vollstreckbarerklärungsverfahrens in der EuGVVO?" [2011] *Recht der internationalen Wirtschaft* 44, 48; M Weller, "Der Kommissionsentwurf zur Reform der Brüssel I-VO" [2012] *Zeitschrift für Gemeinschaftsprivatrecht* 34, 36; see on the enforcement authorities' similar lack of jurisdiction or legal qualifications in the context of *judgment adaptation and concretisation* (discussed in section 2 below): C Althammer, "Unvereinbare Entscheidungen, drohende Rechtsverwirrung und Zweifel an der Kernpunkttheorie –Webfehler im Kommissionsvorschlag für eine Neufassung der Brüssel I-VO?", in R Geimer and RA Schütze (eds), *Recht ohne Grenzen: Festschrift für Athanassios Kaissis zum 65. Geburtstag* (Munich, De Gruyter, 2012), 23, 27; Althammer, *supra* n 45, Art 38 BR_I para 22; Bundesrat reponse, *ibid*; Dickinson, *supra* n 23, 267; J Fitchen, in Dickinson and Lein, *supra* n 2, para 13.487; XE Kramer, "Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards A New Balance Between Mutual Trust and National Control over Fundamental Rights" (2013) 60 *Netherlands International Law Review* 343, 356; Schramm, *supra* n 54, 64; LJE Timmer, "Abolition of Exequatur under the Brussels I Regulation: Ill Conceived and Premature?" (2013) 9 *Journal of Private International Law* 129, 137; Wagner and Beckmann, *ibid*; see further A Stadler, "Kollektiver Rechtsschutz und Revision der Brüssel I-Verordnung", in Geimer and Schütze, *ibid*, 951, 953–54, on the same qualification issues in the context of *identifying conflicting judgments* under the Commission proposal.

[75]Recital 17 BR_I.

[76]Geimer and Schütze, *supra* n 73, Art 54 BR_I para 4; Hofmann and Kunz, *supra* n 44, Art 41 LC para 22; Rassi, *supra* n 43, Art 40 BR_I para 11; D Staehelin and L Bopp, in Dasser and Oberhammer, *supra* n 44, Art 38 LC para 30.

[77]Hofmann and Kunz, *supra* n 44, Art 41 LC para 28.

[78]Geimer and Schütze, *supra* n 73, Art 54 BR_I para 3; P Gottwald, in W Krüger and T Rauscher (eds), *Münchener Kommentar zur Zivilprozessordnung: mit Gerichtsverfassungsgesetz und Nebengesetzen* (Munich, Beck, 4th edn, 2013), Art 53 BR_I para 1; Hofmann and Kunz, *supra* n 44, Art 41 LC para 29; G Naegeli, in Dasser and Oberhammer, *supra* n 44, Art 54 LC para 11; H Tschauner, in Geimer and Schütze, *supra* n 45, Art 54 BR_I para 6.

[79]See eg Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* [2012] ECR I-(6 September), paras 34–38, freeing the *appeal court*, in its review of the grounds for refusal, from any binding effect created by the certificate as to a point of fact it contained.

first-instance *exequatur*.[80] The question thus arises: which *exequatur* conditions is the certificate meant to certify? Which element benefits from such a binding presumption until overturned in the appeal procedure?

The judgment's *enforceability in its state of origin* was an explicit content of the certificate pursuant to Annex V BR_I: a binding effect on the *exequatur* court was thus acknowledged in this context.[81] The Recast's more complex certificate[82] remains equally binding with regard to the judgment's enforceability in the state of origin,[83] thereby exempting the enforcement authority from further investigation.

The next *exequatur* condition, the Regulation's very applicability to the foreign judgment (*ratione materiae*), can sometimes prove complex and is subject to extensive case law: this is where an enforcement authority's unfamiliarity with the matter or lack of legal training has been considered a potential obstacle.[84]

In this context, some argue that the Brussels I certificate *implicitly* indicated, as a necessary precondition for its issuance, that the court of origin deemed the matter a valid judgment falling within the scope of the Regulation for the purpose of recognition and enforcement in another Member State.[85] That this fact created a binding presumption of Brussels I's application for the *exequatur*

On the application of *Trade Agency* in the Recast's appeal procedure, see Fitchen, *supra* n 74, para 13.481.

[80]Explicitly mentioning the *conditions for exequatur* as an appeal-only examination: Naegeli, *supra* n 78, introduction to Arts 53–56 LC para 6; Oberhammer, *supra* n 38, Art 54 BR_I para 14; more generally referring to the *facts* contained in the certificate: Geimer and Schütze, *supra* n 73, Art 54 BR_I para 4; Rassi, *supra* n 43, Art 54 BR_I para 12.

[81]Althammer, *supra* n 45, Art 38 BR_I para 24; Hofmann and Kunz, *supra* n 44, Art 41 LC para 33; W Jennissen, in W Schuschke and W Walker (eds), *Vollstreckung und vorläufiger Rechtsschutz: nach dem achten und elften Buch der ZPO einschliesslich der europarechtlichen Regelungen: Kommentar* (Köln, Heymann, 5th edn, 2011), Art 38 BR_I para 2a; Kropholler and von Hein, *supra* n 73, Art 38 BR_I para 9; Mankowski, *supra* n 45, Art 38 BR_I para 19.

[82]Providing for eg partial enforceability (Annex I Pt 4.4.2.–4.4.3. $BR_{I\text{-}bis}$).

[83]B Hess, "The Brussels I Regulation: Recent case law of the Court of Justice and the Commission's proposed recast" (2012) 49 *Common Market Law Review* 1075, 1102; Pohl, *supra* n 2, 113 fn 64 *in fine*; see also U Magnus and P Mankowski, "Brussels I on the Verge of Reform – A Response to the Green Paper on the Review of the Brussels I Regulation" (2010) 109 *Zeitschrift für Vergleichende Rechtswissenschaft* 1, 3.

[84]Althammer, *supra* n 45, introduction to Arts 38–52 BR_I para 7, Art 38 BR_I para 14; Timmer, *supra* n 74, 140; Wagner and Beckmann, *supra* n 74, 48; Weller, *supra* n 74, 36.

[85]F Pocar, "Explanatory Report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007", [2009] OJ C319/1, Pt 149: "The fact that the court of origin has issued the certificate provided for in Annex V certifies that the judgment does fall within the scope of the [Lugano] Convention. To verify the correctness of the certificate would be contrary to the principle that the first stage of the procedure should be confined to a formal examination. Verifying the correctness of the certificate would require a legal assessment of the judgment, and should be reserved for the second stage of the proceedings"; supportive: A Bucher, *Loi sur le droit international privé, Convention de Lugano* (Basel, Helbing Lichtenhahn, 1st edn, 2011), Art 41 LC para 2.

court is however questionable: arguably, such a presumption should only pertain to the material contents of the certificate and not to the very prerequisites for its consideration. This is why the scope of application of Brussels I is generally considered freely reviewable by the first-instance *exequatur* court, without binding effect through the original court's determination on the matter.[86]

Transposing this cognition into the new regime, most agree that the revised Regulation also allows the competent enforcement authority to review its applicability.[87] A minority[88] still regards the new certificate as a sufficient attestation that the judgment falls within the Regulation's scope, which should accordingly not be examined any further.[89] Amongst the reasons invoked is the fact that most authors view the similar *EEO certification* as preventing the state of enforcement from reviewing the scope of application of the EEO Regulation.[90] The similarity

[86]Specifically addressing the cognition of the *exequatur* court: Althammer, *supra* n 45, Art 38 BR_I para 14, Art 41 BR_I para 2; Jennissen, *supra* n 81, Art 32 BR_I para 5; P Stone, *EU Private International Law* (Cheltenham, Edward Elgar, 3rd edn, 2014), 251 ("probably"); R Wagner, "Vom Brüsseler Übereinkommen über die Brüssel I-VO zum Europäischen Vollstreckungstitel" [2002] *Praxis des Internationalen Verfahrensrechts* (IPRax) 75, 83; in the more general context of recognition and enforcement: Geimer and Schütze, *supra* n 73, Art 32 BR_I paras 9–14; Hofmann and Kunz, *supra* n 44, Art 32 LC para 8; GE Kodek, in D Czernich, S Tiefenthaler and GE Kodek (eds), *Europäisches Gerichtsstands- und Vollstreckungsrecht: EuGVVO*, *Lugano Übereinkommen*, *VO Zuständigkeit in Ehesachen ("Brüssel IIa-VO"): Kurzkommentar* (Vienna, LexisNexis, 3rd edn, 2009), Art 32 BR_I para 1; Kropholler and von Hein, *supra* n 73, Art 32 BR_I para 3; Oberhammer, *supra* n 38, introduction to Arts 32–56 BR_I para 7; F Walther, in Dasser and Oberhammer, *supra* n 44, Art 32 LC para 2; P Wautelet, in U Magnus and P Mankowski (eds), *Brussels I Regulation* (Munich, Sellier European Law, 2nd edn, 2012), Art 32 BR_I para 6. It should be noted that the majority opinion, in earlier times, did view the court of origin's application of the Brussels Regulation as binding for the enforcement state (Kropholler and von Hein, *ibid*).

[87]Pohl, *supra* n 2, 113 fn 62; implied when voicing their concerns over the enforcement organ's ability to conduct such a review: Althammer, *supra* n 45, introduction to Arts 38–52 BR_I para 7, Art 38 BR_I para 14; Timmer, *supra* n 74, 140; Wagner and Beckmann, *supra* n 74, 48; Weller, *supra* n 74, 36.

[88]D Müller, "Die Abschaffung des Exequaturverfahrens nach dem EuGVVO-Reformentwurf – Wegfall überflüssiger Gläubigerblockaden oder Abschied vom effektiven Rechtsschutz für den Schuldner?" (2012) 15 *Zeitschrift für Europarechtliche Studien* 329, 344–45, invoking *inter alia* the need to apply the mutual trust principle, if not to the content of the judgment itself, at least to the certificate attesting the applicability of the Regulation; Schramm, *supra* n 54, 67–68.

[89]The Heidelberg Report, paras 634–35, also envisioned as a future legislative improvement the binding force of the certificate with regard to the applicability of the Regulation – specifically mentioning the corresponding advantage of delegating the judgment import review to a non-judicial authority.

[90]Müller, *supra* n 88, 345; supporting this limited review under the EEO Reg: Geimer and Schütze, *supra* n 73, Art 20 EEO Reg para 5; Kropholler and von Hein, *supra* n 73, Art 21 EEO Reg para 8; T Rauscher and S Pabst, in Rauscher, *supra* n 45, Art 20 EEO Reg paras 20–21; R Wagner, "Die neue EG Verordnung zum Europäischen Vollstreckungstitel" [2005] *Praxis des Internationalen Verfahrensrechts* (IPRax) 189, 199; K Hilbig, in Geimer and Schütze, *supra* n 45, Art 5 EEO Reg paras 14–19, with extensive arguments; *contra* WH

appears however unconvincing, as the EEO certification itself is a formal decision explicitly excluded from review by the enforcement state under Article 21(2) EEO Regulation, unlike the merely *informational* issuance of the Brussels certificate.[91] The *Maintenance Regulation*, arguably the more closely related instrument to the Brussels Recast, requires the enforcement authorities to examine *ex officio* the applicability of the Regulation, unbound by the court of origin's determination on the matter.[92] The more compelling view thus suggests that the competent enforcement authority can examine the Recast's scope of application, just as the first-instance authority did in the previous regime.

Finally, one must turn to the *exequatur* requirement of a foreign decision qualifying as a valid "judgment" under the Regulation. This condition's complexity mainly arose in cases of judgments ordering interim measures, as the CJEU had developed different criteria to determine whether such measures fall within the Regulation's recognition and enforcement regime: the *Denilauler* ruling excluded *ex parte* interim measures when such measures are intended to be enforced without prior service on the debtor.[93] The *Mietz* ruling laid out special conditions for the enforcement of interim measures ordered by a court that did not have jurisdiction over the substance of the

Rechberger, in Fasching and Konecny, *supra* n 43, Art 21 EEO Reg para 9; M Stürner, in Kindl, Meller-Hannich and Wolf, *supra* n 45, Art 21 EEO Reg para 9.

[91]On that differentiation: I Bach, "Drei Entwicklungsschritte im europäischen Zivilprozessrecht" [2011] *Zeitschrift für Rechtspolitik* 97, 98. An extrapolation of the *Small Claims Reg* onto the Brussels framework would be unfruitful as well: since the debtor is fully aware that the proceedings in the state of origin are subjected to the Small Claims procedure, he or she is free to contest therein the Regulation's applicability, which should therefore not be reviewed subsequently in the state of enforcement (U Scheuer, in Fasching and Konecny, *supra* n 43, Art 22 Small Claims Reg para 5; also supporting this limited review: I Varga, in Rauscher, *supra* n 45, Art 22 Small Claims Reg para 10; PF Schlosser, *EU-Zivilprozessrecht*, *EuGVVO*, *MahnVO*, *BagatellVO*, *EuZVO*, *EuBVO*, *Kommentar* (Munich, Beck, 3rd edn, 2009), Art 20 Small Claims Reg para 8). This consideration cannot be extended to Brussels I since the Regulation does not provide a special procedure for the state of origin: a judgment enforceable under Brussels I may have been rendered without any involvement of the Brussels Regulation in original proceedings – and thus without any earlier occasion for the debtor to contend the inapplicability of Brussels I on the dispute.

[92]M Andrae and M Schimrick, in Rauscher, *supra* n 45, Art 16 Maintenance Reg paras 9–10; R Fucik, in Fasching and Konecny, *supra* n 43, Art 16 Maintenance Reg para 3; T Garber, in Kindl, Meller-Hannich and Wolf, *supra* n 45, Art 16 Maintenance Reg para 11; more restrictive: V Lipp, in Krüger and Rauscher, *supra* n 78, Art 16 Maintenance Reg para 5, positing that the enforcement authorities may only carry out a limited review akin to that of the EEO Reg, and thus refuse enforcement only if the documents alone show the *obvious* inapplicability of the Regulation – whereas a subsequent appeal may freely overturn the presumption of its correct application; also requiring *obvious* inapplicability: Hilbig, *supra* n 90, Art 17 Maintenance Reg para 44.

[93]Case 125/79 *Bernard Denilauler v SNC Couchet Frères* [1980] ECR 1553, para 17.

matter.[94] In both cases, a judgment that did not comply with the CJEU criteria could not be subject to the Regulation's recognition and enforcement regime to begin with.

Whether a judgment fulfils said criteria could not be established through the documents submitted under Brussels I, hence the necessity for the *exequatur* court to determine their observance despite the restricted review of Article 41 BR_I.[95] Accordingly, some initially feared that the corresponding review under the Recast – eg establishing whether the special conditions of *Mietz* are fulfilled, or ensuring that an ex parte measure has been served on the debtor pursuant to *Denilauler* – would burden the enforcement authorities there as well.[96] However, this concern is now essentially moot: Article 2(a) $BR_{I\text{-}bis}$ has codified both CJEU cases by limiting[97] the scope of recognition and enforcement to interim measures "ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter"[98] and explicitly excluding *ex parte* interim measures "unless the judgment containing the measure is served on the defendant prior to enforcement".[99] Accordingly, the Recast explicitly requires that a creditor seeking to enforce interim measures provide certification that the measure was ordered by a court having jurisdiction over the substance of the matter[100] and, should the measure have been ordered *ex parte*, the proof of service.[101]

[94]Case C-99/96 *Hans-Hermann Mietz v Intership Yachting Sneek BV* [1999] ECR 2277, paras 53, 56.

[95]See eg the Swiss cantonal judgment in *Journal des Tribunaux* [2012] III 71, 74, explicitly entrusting the first-instance court with the review of the *Denilauler* criteria, superseding the pure formality of the review under Art 41 LC: "Cette ordonnance [*ex parte*] ne saurait donc bénéficier de la procédure du titre III . . . ce qui exclut l'application de la règle de l'art. 41 CLrév, prévoyant un examen restreint des conditions de l'exequatur . . . Cet élément . . . doit donc être examiné par le juge de l'exécution saisi d'un requête selon les art. 39 ss CLrév".

[96]Wagner and Beckmann, *supra* n 74, 48; Weller, *supra* n 74, 36; *contra* for the reasons cited above: Müller, *supra* n 88, 345.

[97]The limiting effect of the article comes from its interpretation *e contrario* (T Domej, "Rechtshängigkeit und in Zusammenhang stehende Verfahren, Gerichtsstandsvereinbarungen, einstweilige Massnahmen", in Bonomi and Schmid, *supra* n 54, 105, 127; see similarly Markus, *supra* n 2, 813).

[98]The *Mietz* criteria thus do not come into question since measures ordered by a court not having substantial jurisdiction are excluded altogether.

[99]Member States remain free to recognise and enforce either type of excluded measure by applying the recognition regime of their national laws (Recital 33 $BR_{I\text{-}bis}$). It should be noted that, as a possibly unintended consequence, the general exclusion of the entire Chapter III (and thereby Art 53 $BR_{I\text{-}bis}$) for non-compliant *ex parte* measures would incidentally prevent the court of origin from even *issuing* a certificate until the judgment has been served upon the debtor; this arguably overshoots the CJEU's original ruling, which predates the issuance of harmonised certificates under Brussels I. See as a further overshoot issue the incidentally excluded *recognition* of measures infringing on *Mietz*, noted by Domej, *supra* n 97, 128.

[100]Art 42(2)(b)(i) $BR_{I\text{-}bis}$, referring to Annex I Pt 4.6.2.2., a yes-only tick box.

[101]*Ibid*, Art 42(2)(c).

Thus while the certificate submitted under Brussels I failed to provide any indication on the judgment's compliance with the CJEU criteria – and prompted a review by the *exequatur* court accordingly – this information is now either provided in the certificate or submitted by the creditor. Like the judgment's enforceability in the state of origin (and unlike the Regulation's applicability *ratione materiae*), the criteria to qualify as a "judgment" under CJEU case law can now be directly ascertained through the documents submitted, removing the need for a corresponding investigation by the enforcement organs.[102] Nonetheless, the authority still has to identify whether an interim measure was ordered *ex parte* at all,[103] so as to ascertain the *necessity* to require proof of service under Article 42(2)(c) $BR_{I\text{-}bis}$.

Save for this minor clarification in the context of *ex parte* measures, it seems therefore that the extent of the enforcement authority's cognition on judgment import requirements essentially consists in the question of the Recast's applicability *ratione materiae.* The next section examines whether this duty of review presents an actual challenge for (non-judicial) enforcement authorities in the new regime.

(d) *Assessing the potential issues of judgment import*

Overall, one can appreciate to some extent the concerns over enforcement authorities being confronted with a foreign judgment and thereby unknown issues of international procedure. Nonetheless, these concerns may have been overstated given both the scarcity of cases where questions of scope would actually warrant a review,[104] and the freedom of Member States to implement better-trained centralised organs which the enforcement authorities can promptly turn to whenever the complexity of such questions requires it.[105]

More importantly, the enforcement authorities' purported lack of legal qualifications, which would delay the procedure and cause additional costs, is a woefully German-centric concern: the *bailiff-oriented* systems mentioned above

[102]Nuyts, *supra* n 2, 123, even considers that the certification of the original court's competence as to the substance of the matter would not only bind the enforcement authorities, but also the court addressed with the application for refusal – neither of which would then be allowed to call the attestation into question; it seems however somewhat excessive to bar the very court reviewing the grounds for refusal from freely assessing whether a foreign decision even qualifies as a valid judgment under the Regulation.

[103]Since there is no such indication in the certificate, as opposed to judgments ordered in *default* of a duly summoned defendant.

[104]Not to mention the added safeguard of having the (arguably more informed) court of origin itself, rather than a potentially secondary authority, issue the certificate under the new regime (see Mankowski, *supra* n 45, Art 41 BR_I para 2).

[105]Weller, *supra* n 74, 36, mentioning the bailiff's duty under German law to stay the enforcement and await further instructions by the superior authority in cases of eg potential exemptions from German jurisdiction.

(like France and the Netherlands) benefit from highly qualified, university-educated enforcement agents with a status akin to that of notaries and judges.[106] In *administrative* systems, most enforcement agents are specialised lawyers with university degrees.[107] This should immediately alleviate the apprehensions over enforcement authorities being confronted with legal issues beyond their qualifications, at least for a major part of the EU.[108] Issues of private international law at the outset of the judgment import phase are examined in court-oriented systems by a court, and in bailiff-oriented and administrative systems by a highly qualified, university-educated agent or even a specialised lawyer. There is thus little reason to assume that the amended procedure defeats the purpose of the Recast by systematically causing additional delays – at least in this regard.

A valid concern remains, namely the vulnerability to fraud: beyond the material import requirements discussed in detail above, the competent enforcement authority must examine the documents submitted and their authenticity. The lack of judicial scrutiny could increase the risk of fraud and forgeries,[109] which non-judicial authorities may be ill-equipped to detect.[110] In that regard, some have rightly criticised the abolition of *exequatur* for authentic instruments,[111] which are even more vulnerable than judicial rulings.[112] Nonetheless, the right of the debtor to contest inaccurately certified claims in the state of enforcement – as opposed to eg certified judgments under Article 21(2) EEO Reg[113] – should help to mitigate these risks.

[106]Hess, *supra* n 64, 37.
[107]*Ibid*.
[108]Wagner and Beckmann, *supra* n 74, 48, do admit to basing their argument solely on the German system; see also MC Peiffer, *Grenzüberschreitende Titelgeltung in der Europäischen Union: die Wirkungen der Anerkennung, Vollstreckbarerklärung und Vollstreckbarkeit ausländischer Entscheidungen und gemeinschaftsweiter Titel* (Berlin, Duncker & Humblot, 2012), 327–28 fn 23, stating that the *exequatur* procedure is only essential from a German perspective, but not in the French and English systems which benefit from highly qualified enforcement agents.
[109]Dickinson, *supra* n 23, 267–68.
[110]Timmer, *supra* n 74, 140.
[111]Adopted in Art 58 $BR_{I\text{-}bis}$.
[112]Dickinson, *supra* n 23, 268; Kramer, *supra* n 74, 356; Timmer, *supra* n 74, 140; see PF Schlosser, "The Abolition of Exequatur Proceedings – Including Public Policy Review?" [2010] *Praxis des Internationalen Verfahrensrechts* (IPRax) 101, 104, on a further issue exacerbated by the free circulation of authentic instruments, namely the "abstract authentic instruments" (*nicht valutierte Notarurkunden)* issued in Germany, where the debtor acknowledges an amount much higher than the actual debt while German enforcement law provides a "very sophisticated system of rules" to balance the interests of both parties: the free circulation of such instruments would render the debtor more easily liable to undue amounts abroad.
[113]Arenas García, *supra* n 60, 372, mentions cases (though possibly "an urban (legal) legend") of *contested* claims being falsely certified as EEO and shielded from opposition in the state of enforcement.

2. *Judgment adaptation and concretisation*

If the judgment import stage establishes *whether* authorities in the enforcement state should act on the basis of the foreign judgment, the phase of judgment adaptation and concretisation may be necessary to determine *how* the enforcement authorities should act.[114] As with the review of judgment import requirements, this duty fell within the purview of the *exequatur* court under Brussels I and would now be carried out by potentially non-judicial authorities – whose purported lack of training in the context of judgment adaptation and concretisation also prompted concern.[115]

Judgment *adaptation* occurs when the foreign judgment contains measures or orders unknown to the law of the enforcement state, particularly in non-monetary cases.[116] The need for judgment *concretisation* arises when the judgment as such – or rather its operative part – fails to provide sufficient information for its enforcement, eg when lacking indication on an applicable statutory interest rate.[117]

As the Heidelberg Report noted, the issue of *concretisation* in Brussels I can be alleviated through the provision of harmonised certificates,[118] supplementing a fragmentary judgment with additional information. However, breaking down the operative part of a judgment into harmonised certificate segments[119] does not entirely remove the need for judgment concretisation, especially for non-monetary judgments.[120] Even in monetary cases, certificates have their limitations.[121]

The Recast's refined certificate should however solve a number of judgment concretisation issues.[122] Any remaining need for judgment concretisation

[114]See Schramm, *supra* n 54, 63.

[115]Althammer, *supra* n 74, 27; Althammer, *supra* n 45, introduction to Arts 38–52 BR_I para 7, Art 38 BR_I para 22; Bundesrat response, para 4; Dickinson, *supra* n 23, 267; Fitchen, *supra* n 74, para 13.487; Kramer, *supra* n 74, 356; Schramm, *supra* n 54, 64; Timmer, *supra* n 74, 137; Wagner and Beckmann, *supra* n 74, 49; *contra* Oberhammer, *supra* n 54, 198, who suggests that the certificate of Brussels I already provides sufficient guidance for national enforcement authorities in that context.

[116]Examples cited are specific search orders (Schramm, *supra* n 54, 64), or measures to gather evidence for expert reports (Wagner and Beckmann, *ibid*, fn 77).

[117]See eg Oberhammer, *supra* n 38, Art 41 BR_I para 19, with extensive case law.

[118]Heidelberg Report, para 511.

[119]As suggested by B Hess, *Europäisches Zivilprozessrecht* (Heidelberg, Müller, 2010), § 3 para 25.

[120]Wagner and Beckmann, *supra* n 74, 49; see also S Seidl, *Ausländische Vollstreckungstitel und inländischer Bestimmtheitsgrundsatz: eine Untersuchung zum autonomen und europäischen Exequaturrecht und zur Abschaffung des Exequaturverfahrens* (Jena, JWV, 2010), 252.

[121]For instance, some sections of the current EEO certificate are ambiguously formulated, fail to mention key points such as the capitalisation of interest, or allow the certificate to refer to undefined factors like the "statutory interest rate" (see Seidl, *ibid*, 239–40).

[122]Its detailed sections avoid most of the weaknesses mentioned *supra* in n 121: the capitalisation of interest may be indicated (Annex I Pt 4.6.1.5.3. $BR_{I\text{-}bis}$); interest may not be set according to external factors like the European Central Bank's rate; it may still generally

despite the harmonised certificate could be solved through judgment *adaptation*,[123] examined hereafter.

The Recast provides that unknown measures or orders be adapted to their closest equivalent.[124] The questions of *how* and *by whom*[125] the judgment adaptation should be carried out are explicitly left to national law,[126] though the adaptation must be subject to challenge before a court:[127] Member States are therefore free to entrust the adaptation to a court in the first place[128] or to a non-judicial enforcement organ with the subsequent safeguard of judicial review upon request. In the former case, enforcement authorities would initiate the enforcement as usual and, when unable to apply domestic law, request the adaptation by the court.[129] Compared with the adaptation by the *exequatur* court under Brussels I, this entails the potential drawback of an enforcement authority inaccurately assessing the need for judicial adaptation.[130] Whichever system is elected by the Member States, however, the concerns over delays caused by judgment adaptation must be placed in context here as well: complex issues of adaptation remain a rare occurrence[131] and non-judicial enforcement organs are highly qualified in virtually all Member States.[132]

3. *Judgment enforcement and inspection*

Under Brussels I *bis*, once the judgment is in the hands of the enforcement authorities and, when necessary, adapted or concretised, the enforcement is initiated against the debtor using the ordinary enforcement procedure governed by national

refer to the country of origin's statutory interest (Annex I Pt 4.6.1.5.2. $BR_{I\text{-}bis}$), in which case the relevant statute must nonetheless be specified, arguably simplifying the task of the enforcement authorities; while the certificate does not provide for a differentiated interest rate per period (although the multiple periods definable in Annex I Pt 4.6.1.5.1.2.3. $BR_{I\text{-}bis}$ could be used for this purpose), the Recast does address the issue of payment in multiple instalments (Annex I Pt 4.6.1.4.2. $BR_{I\text{-}bis}$; compare Heidelberg Report, para 509).

[123]Von Hein, *supra* n 2, 110; Markus, *supra* n 2, 815; Müller, *supra* n 88, 345–46; more reluctant: R Geimer, "Bemerkungen zur Brüssel I-Reform", in R Geimer, RA Schütze and T Garber (eds), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta* (Vienna, LexisNexis, 2012), 163, 179.

[124]Art 54(1) $BR_{I\text{-}bis}$.

[125]And presumably *on whose request.*

[126]Recital 28 $BR_{I\text{-}bis}$.

[127]Art 54(2) $BR_{I\text{-}bis}$.

[128]Seemingly *contra* Kramer, *supra* n 74, 356.

[129]Müller, *supra* n 88, 345–6; *contra* Timmer, *supra* n 74, 138, who assumes that the *creditor* will be burdened with finding out whether the measure is known to domestic law, and subsequently submit an application to the competent court under Art 54(1) $BR_{I\text{-}bis}$.

[130]Either by making needless requests for judicial adaptations or by overlooking the need for such an adaptation,

[131]Schramm, *supra* n 54, 64; *contra* Wagner and Beckmann, *supra* n 74, 49.

[132]*Supra* nn 106–7.

law.[133] The rules of domestic enforcement are individually complemented or superseded by the Regulation, which integrates the review of the grounds for refusal in a special remedy available during the enforcement procedure itself.[134]

(a) *Application for refusal: additional grounds and designated courts*

The harmonised remedy provided in Articles 46–51 $BR_{I\text{-}bis}$ allows a court to review whether the enforcement should be denied on one of the grounds for refusal. Recital 30 prescribes that the debtor should be allowed to invoke any ground for refusal of enforcement available under *national law* during that same procedure,[135] to the extent permitted by the Member State's legal system and within the time limits to invoke such grounds under national law.[136] These grounds for refusal under national law may only be invoked to contest enforcement (not recognition)[137] and are limited by the Recast insofar as they are incompatible with the harmonised grounds of Article 45 $BR_{I\text{-}bis}$[138] or infringe on the general exclusion of judgment review as to its substance.[139] The Regulation misses the opportunity to identify such grounds[140] or harmonise the way they can be invoked.[141]

[133]Art 41(1) $BR_{I\text{-}bis}$.
[134]Arts 46–51 $BR_{I\text{-}bis}$.
[135]This amendment incidentally overturns the *Prism Investments* ruling: the CJEU deemed the concentration of pleas within the Regulation's appeal procedure, combining both the grounds for refusal under Brussels I and under national law (such as the debtor's compliance with the judgment by the time of the appeal), to be irreconcilable with the "objectives of efficiency and rapidity" pursued by the Regulation (Case C-139/10 *Prism Investments BV v Jaap Anne van der Meer* [2011] ECR I-9511, para 42). These objectives are however arguably uncompromised by the Recast's concentration of pleas, given both the immediate availability of protective measures and the lack of (automatic) enforcement limitation pending an appeal as was provided under Art 47(3) BR_I (see however *infra* section (c) on the potential obstructions to enforcement).
[136]Compare *infra* text to nn 180–81 on the time limits to invoke the grounds for refusal *of the Regulation.*
[137]Recital 30 *in fine* $BR_{I\text{-}bis}$.
[138]*Ibid*, Art 41(2); ie should they overlap with the subject matter of these grounds (XE Kramer, in Dickinson and Lein, *supra* n 2, para 13.216; von Hein, *supra* n 2, 110); Domej, *supra* n 2, 514, more generally excludes the applicability of grounds for refusal under national law – whether overlapping with the Recast or not – should they be confined to the refusal of *foreign* judgments only.
[139]Art 52 $BR_{I\text{-}bis}$. An actual delineation between substantive and procedural grounds would have been welcome (Hay, *supra* n 2, 6).
[140]As per eg Recital 30 Maintenance Reg, listing "the debtor's discharge of his debt at the time of enforcement or the unattachable nature of certain assets".
[141]As per eg Art 21 Maintenance Reg, allowing for a refusal of enforcement if the action is time-barred "either under the law of the Member State of origin or under the law of the Member State of enforcement, whichever provides for the longer limitation period"; compare Magnus and Mankowski, *supra* n 83, 3–4.

The procedure for the refusal application is otherwise governed by national law.[142] Member States had the obligation to designate the competent court under Article 75(a) $BR_{I\text{-}bis}$ by 10 January 2014,[143] and predominantly opted for entrusting the review of the Regulation's grounds for refusal to first-instance courts which ordinarily address actions against enforcement under national law. This solution was advocated by parts of the literature,[144] suggesting that the functional and temporal *proximity* of such courts to the enforcement procedure would provide for a more efficient remedy.[145] The argument of proximity to enforcement is however not particularly supported by the Recast, which provides that the procedure of the application for refusal of enforcement be also used for the refusal of *recognition*[146] or, with reversed pleas, for the *standalone recognition* of a judgment,[147] both of which may very well involve judgments that have no enforceable content or for which no enforcement is (yet) sought.[148] This is why, despite the recognition provisions generally referring to the procedure for refusal of enforcement, some Member States have allocated separate jurisdictions for the purpose of standalone recognition or refusal thereof on the one hand, and refusal of enforcement on the other.[149]

An alternative solution would have been to lodge the application at the higher court that ruled on an *exequatur* appeal under Article 43 BR_I[150] and thereby partly maintain the system established under Brussels I: proponents of this option invoked the expertise and case law quality of higher courts in issues of

[142]Art 47(2) $BR_{I\text{-}bis}$.
[143]The designated courts can be found in the European Judicial Atlas in civil matters: https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do (accessed on 18 June 2015).
[144]Cuniberti and Rueda, *ibid*, 309–10; C Kessedjian, "Le Règlement « Bruxelles I révisé »: Much ado about . . . what?" (2013) 23(3) *Europe* 5, 9 para 32; Markus, *supra* n 60, 766; Nuyts, *supra* n 2, 89.
[145]Markus, *supra* n 60, 762–63, 766–67, who advocates the competence of lower courts for *all available* grounds for refusal, though in the context of the Commission proposal, where more delicate grounds like public policy were not yet reintegrated.
[146]Art 45(4) $BR_{I\text{-}bis}$.
[147]*Ibid*, Art 36(2).
[148]See Geimer and Schütze, *supra* n 73, Art 33 BR_I para 101, and Geimer, *supra* n 123, 179 on the inadequacy of the "place of enforcement" as local jurisdiction for recognition matters.
[149]Eg in England (*infra* n 174), Finland, France, Greece, Latvia, and Poland. However, both applications on recognition (standalone recognition under Art 45(4) $BR_{I\text{-}bis}$ and refusal of recognition under Art 36(2) $BR_{I\text{-}bis}$) must be lodged at the same court due to the identity of the matter in dispute (R Geimer, "Das Anerkennungsregime der neuen Brüssel I-Verordnung (EU) Nr 1215/2012", in H Fitz and others (eds), *Festschrift für Hellwig Torggler* (Vienna, Österreich, 2013), 311, 322).
[150]The Commission proposal specifically granted jurisdiction to these higher courts for the remedy against enforcement pursuant to Art 46 CP (Annex III CP).

international law.[151] While this solution was in principle compatible with the Recast,[152] the possibility to invoke national grounds for refusal both at the higher *and* lower courts[153] would have created, compared with the challenge of a purely domestic judgment, an additional jurisdiction to invoke such grounds, and thus potentially infringe on the EU's principle of equivalence.[154]

(b) *Changes in the debtor's rights*

In the context of the debtor's right of defence and asset protection, some amendments are directly set out by the Recast. This includes the new requirement that a debtor domiciled outside the state of origin be additionally provided a translation of the judgment – upon request and if not already served – into either a language he or she understands or an official language of his or her domicile, pending which no enforcement measures beyond protective measures may be taken.[155] The Recast also accelerates the enforcement procedure by making the (unconditionally

[151]Domej, *supra* n 2, 513–14; Hess, *supra* n 119, § 3 para 30 fn 148; *id*, "Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts" [2011] *Praxis des Internationalen Verfahrensrechts* (IPRax) 125, 129; Schlosser, *supra* n 112, 104; generally supportive: von Hein, *supra* n 2, 110 fn 237; *contra* Markus, *supra* n 60, 765. It should be noted that the review of grounds for refusal is not an exclusive competence of higher courts: any court can do so within a procedure of *incidental recognition*.

[152]Albeit depriving Art 47(3)(2) $BR_{I\text{-}bis}$ of its practical meaning, since the (higher) court addressed by the application could then never be the court that, as the case may be, initiated enforcement and thereby dispenses with providing the documents it already possessed.

[153]Assuming that ordinary actions against the enforcement of a foreign judgment (eg on the grounds of prior compliance or unattachable assets) may still be submitted to lower courts, since (a) the higher courts would otherwise become congested with all the actions formerly handled at the lower level, and (b) should the creditor have already successfully applied for standalone recognition, the debtor would be otherwise barred from using the refusal application again, precluding any procedure to contest eg a subsequent compliance with the judgment.

[154]Hess, *supra* n 119, § 6 para 231; *id*, "Die Zulässigkeit materiellrechtlicher Einwendungen im Vollstreckbarerklärungsverfahren nach Art. 43 ff. EuGVO" [2008] *Praxis des Internationalen Verfahrensrechts* (IPRax) 25, 28.

[155]Art 43(2) $BR_{I\text{-}bis}$, a provision inspired by Art 8 of the Small Claims Reg. Noting that this will likely lead to dilatory tactics by the debtor: M Ángeles Rodríguez Vázquez, "Una nueva fórmula para la supresión del exequátur en la reforma del reglamento Bruselas I" (2014) 6 *Cuadernos de Derecho Transnacional* 330, 345; J Fitchen, "Enforcement of Civil and Commercial Judgments under the New Brussels Ia Regulation (Regulation 1215/2012)" (2015) 26(4) *International Company and Commercial Law Review* 145, 148 (also emphasising the lack of clarity as to which of the debtor or creditor is required to arrange and pay for such translation, with unsatisfactory results in either case); Nielsen, *supra* n 2, 526. Also critical: Kramer, *supra* n 138, para 13.241, on the lack of debtor's right to request the translation of the *certificate*. The question of whether the debtor understands the language in question should be appreciable by the competent enforcement authority itself (Nuyts, *supra* n 2, 87).

guaranteed[156]) measures of Article 40 $BR_{I\text{-}bis}$ much sooner available than under Brussels I.[157]

On the other hand, the Recast now refers to national law or to the court's discretion on matters previously set in the Regulation itself, decreasing the uniformity of cross-border enforcement conditions between Member States. The Recast namely fails to mention *how long* prior to the first enforcement measure the court of origin's certificate should be served on the debtor, ie how long the grace period between service and (definitive) enforcement pursuant to Article 43(1) $BR_{I\text{-}bis}$ should be.[158] Recital 32 refers to "a reasonable time before the first enforcement measure" without further elaboration.[159] Incidentally, the root of Article 43(1) $BR_{I\text{-}bis}$ can be traced to Professor Dickinson's review of the Commission draft, where he suggested adding the requirement of prior service 7 or 14 days before enforcement[160] – an amendment that was integrated verbatim in the parliamentary Draft Report[161] but ultimately reduced to its current wording. The grace period thus reverts to national enforcement provisions on prior notice, which may initiate enforcement proceedings too early for the debtor to prepare an adequate defence and prevent irreversible enforcement measures being taken against his or her property.[162] And where Brussels I required service of the *exequatur* decision, which typically indicated the available remedies

[156]Art 40 $BR_{I\text{-}bis}$ even reinforces the wording of Art 47(2) BR_I by adding that the creditor's power of direct access arises "by operation of law". The idea that the Recast "retains the essence" of Art 47 (Pålsson, in Magnus and Mankowski, *supra* n 86, Art 47 BR_I para 3) is thus accurate, but only with regard to said Art 47(2): the essence of Art 47(3), on the other hand, is not necessarily maintained (see *infra* text to nn 159–66).

[157]A reasonable trade-off given the reversibility of protective measures and the necessity to ensure that the debtor does not take actions to frustrate the effects of protective measures after being warned.

[158]See also the lack of such indication in eg the English CPR 74.9(1), which merely refers back to Art 43 $BR_{I\text{-}bis}$.

[159]Nuyts, *supra* n 2, 85, considers that this period depends on both the type of measures requested and the "circumstances" in question.

[160]Dickinson, *supra* n 23, 268, later fleshed out as follows: "no measures of enforcement shall be taken unless either: (a) the applicant has, not less than [7 or 14] days before the date upon which the enforcement measure is sought, served on the party against whom the enforcement measures is sought a copy of the certificate referred to in Article 42(1) or (2) in accordance with the requirements of Regulation (EC) No 1393/2007, where applicable; or (b) it is impracticable to serve judicial documents on the party against whom enforcement measures are sought, and the applicant has taken reasonable steps to notify the contents of the judgment to the party against whom enforcement measures are sought", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930712 (accessed 18 June 2015).

[161]European Parliament Committee on Legal Affairs, "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)" (2010/0383 (COD)), amendment 114.

[162]See Kramer, *supra* n 138, para 13.238, noting that domestic provisions on prior notice may be ill-suited in a cross-border context, especially in case of eg default judgments.

and time limits under domestic law, the Recast merely requires the creditor to evidence the (one-time) service of the court of origin's *certificate*: Article 43(1) $BR_{I\text{-}bis}$ therefore still leaves the debtor unaware of where in the EU the creditor will seek enforcement,[163] let alone how to object.[164]

Moreover, even if the debtor does contest the enforcement before the end of such grace period, the mandatory limitation to protective measures *by law* under Article 47(3) BR_I has been replaced by a *discretionary* stay or limitation of enforcement proceedings by the court addressed with the refusal application or the subsequent appeals.[165] This further lack of uniformity leaves the debtor's assets in different levels of vulnerability depending on each state's judicial practice. Overall, an unacceptable judgment would be able to trigger irreversible enforcement measures against a debtor's property mere days after service of the certificate in some states – and only at the end of a third-instance appeal in others.[166]

The debtor's inability to obtain a stay of enforcement (or a decision on the grounds for refusal) early enough due to a short grace period could be partly alleviated if the debtor is able to file an application for refusal *preventively*, ie before the creditor starts to seek enforcement and trigger the service of the certificate. The wording of Article 46 $BR_{I\text{-}bis}$ does not appear to support such an option *prima facie*. The Commission proposal mentioned a remedy to lodge at the "court of the Member State of enforcement",[167] which could have included an abstract, prospective Member State where enforcement *will be* sought, thereby allowing preventive applications.[168] The final wording of Article 46 $BR_{I\text{-}bis}$ however designates as legitimated party the "person against whom enforcement is sought",[169] supporting the requirement of *current* enforcement. Nevertheless, applications for *refusal of recognition*,[170] while referring to the procedure of Articles 46–51 $BR_{I\text{-}bis}$,[171] designate "any interested party" as legitimated:[172] this would

[163] *Ibid*.
[164] Kramer, *supra* n 74, 369.
[165] Art 44(1) and Recital 31 $BR_{I\text{-}bis}$; a departure from the 2010 parliamentary resolution (European Parliament, "Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI))", [2011] OJ C308E/06, Pt 4), calling upon the Commission to ensure that no irreversible enforcement step may be taken "until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded".
[166] *Infra* text to nn 176–79.
[167] Art 46(2) CP.
[168] Schramm, *supra* n 54, 86.
[169] With equivalent wording in virtually all other languages (usually "the person against whom enforcement is requested"). Only the German wording confines itself to "the debtor".
[170] Art 45(1) $BR_{I\text{-}bis}$.
[171] *Ibid*, Art 45(4).
[172] See Fitchen, *supra* n 74, paras 13.259–67, on the potentially broad meaning of "any interested party".

allow the debtor to fend off an impending enforcement procedure through the (virtually equivalent) preventive application for refusal of recognition under Article 45 $BR_{I\text{-}bis}$.[173] However, the Regulation thereby enables an overzealous debtor to file such applications in every state where assets are at risk, even where the creditor never intended to enforce his or her claims.[174] Such needless proceedings were less likely to be initiated under the previous regime, as the admissibility of a preventive *negative declaratory action* under Brussels I was starkly disputed – namely as to whether such action could be lodged using the procedure of Articles 38–52 BR_I or, if at all, under the conditions set out by national law.[175]

(c) *Changes in the creditor's rights*

The divergences in debtor protection across Member States entail corresponding divergences in enforcement efficiency: depending on the state addressed, the creditor may be burdened by particularly long grace periods under Article 43 $BR_{I\text{-}bis}$[176] (besides those extended by dilatory translation requests[177]) and limitations of enforcement proceedings by any court addressed with the refusal application.[178] While

[173]Cadet, *supra* n 2, 222.

[174]See eg the English CPR 74.7A(1)(b), providing that an application for refusal of recognition or enforcement be submitted "to the court in which the judgment is being enforced *or*, *if the judgment debtor is not aware of any proceedings relating to enforcement*, the High Court" (emphasis added).

[175]Supporting an action under the Brussels Regulation: H Dörner, in I Saenger (ed), *Zivilprozessordnung: FamFG*, *Europäisches Verfahrensrecht: Handkommentar* (Baden-Baden, Nomos, 5th edn, 2013), Art 33 BR_I para 12; Geimer and Schütze, *supra* n 73, Art 38 BR_I para 34, Art 33 BR_I para 85; Mäsch, *supra* n 45, Art 33 BR_I para 17; Schlosser, *supra* n 91, Art 33 BR_I para 4; supporting an action only under national law: Bucher, *supra* n 85, Art 33 LC para 4; Gottwald, *supra* n 78, Art 33 BR_I para 13; Jennissen, *supra* n 81, Art 33 BR_I para 3; Kodek, *supra* n 86, Art 33 BR_I paras 11–13; Kropholler and von Hein, *supra* n 73, Art 33 BR_I para 7; S Leible, in Rauscher, *supra* n 45, Art 33 BR_I para 13; Staehelin and Bopp, *supra* n 76, Art 38 LC para 43; Tschauner, *supra* n 78, Art 33 BR_I para 18; Walther, *supra* n 86, Art 33 LC para 17; rejecting all such actions: Oberhammer, *supra* n 38, Art 33 BR_I para 6. If allowed under national law only, the action would be more constrained, since it may in principle only be lodged at the creditor's domicile pursuant to Art 2 BR_I (Mankowski, *supra* n 45, Art 38 BR_I para 35; less restrictive: Hofmann and Kunz, *supra* n 44, Art 38 LC para 399) and may be subject to stricter requirements of legitimated interest than under Brussels I (see eg Gottwald, *supra* n 78, Art 33 BR_I para 12).

[176]Such grace periods preclude all enforcement measures except protective ones (Art 43(3) $BR_{I\text{-}bis}$). Thus provisional *non-protective* enforcement measures (eg the French *référé-provision*), previously foreseen under Art 47(1) BR_I and available regardless of the grace period (Staehelin, *supra* n 44, Art 47 LC para 14; *contra* Hofmann and Kunz, *supra* n 44, Art 47 LC para 31), would appear now to be precluded as well.

[177]See *supra* n 155.

[178]In the absence of additional guidance, some are concerned that individual states will use such stay of proceedings almost automatically (Cuniberti and Rueda, *supra* n 66, 315) or even impose a suspension of enforcement *de lege* (Timmer, *supra* n 74, 140). The

some Member States already (controversially[179]) allowed their second appeal courts to limit enforcement proceedings under Brussels I, this discretion is now *explicitly* granted to all courts addressed – a limitation that may even stretch for the length of *three contradictory* proceedings, should a Member State designate a court for the purpose of Article 50 $BR_{I\text{-}bis}$. Any combination of such obstacles may postpone the satisfaction of the creditor's claim well beyond the ordinary delay that was inherent to the debtor's protection under Brussels I.

Beyond the limitation or stay of enforcement, the Recast also leaves out any indication on the *time limit* to invoke the grounds for refusal provided in the Regulation – unlike grounds for refusal under national law, which may only be invoked within the time limits laid down in that law.[180] Brussels I was straightforward in that context, as the debtor simply cannot file his or her appeal past the one or two-month time period set out in Article 43(5) BR_I. The time limit for the refusal application in Brussels I *bis* is thus determined by national law,[181] leaving the ultimate fate of a claim undetermined for potentially much longer than the previous regime allowed.

Finally, the abrogation of Article 47(3) BR_I, may have unintended consequences for the creditor's right to protective measures under the Recast. Article 47(3) BR_I prescribes a limitation of enforcement proceedings during the time period allotted to file an appeal under Article 43(5) BR_I or until such appeal has been determined. As mentioned,[182] the CJEU stated in its *Capelloni* ruling that national law must not frustrate the "power to proceed to any protective measures" prescribed in Article 47(2) BR_I,[183] thus prohibiting any post-*exequatur* requirement of judicial authorisation for protective measures. Interestingly, the CJEU further stated that the time period specified to file an appeal, during which "no measures of enforcement may be taken other than protective measures",[184] entailed not only the limitation of enforcement to such measures, but also the *availability* of such measures *during that time*, thus superseding any provision of national law setting shorter time limits for the creditor to enforce protective

former authors consider that the Recast should have removed any such discretion altogether and subject limitations of enforcement to a strict test for the debtor to show eg unsustainable harm if the enforcement was maintained – akin to the exceptional suspension of provisional enforceability under Art 524 French Code of Civil Procedure. Fitchen, *supra* n 155, 150, suggests that the Recast's pro-enforcement policy will nonetheless lead enforcement authorities to require particularly compelling arguments before granting a stay.

[179] *Supra* text to nn 43–45.

[180] Recital 30 $BR_{I\text{-}bis}$.

[181] Art 47(2) $BR_{I\text{-}bis}$. Critical on the resulting lack of transparency for the debtor: Domej, *supra* n 2, 518.

[182] *Supra* n 39.

[183] Or rather in its predecessor, Art 39(2) Brussels Convention 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [1972] OJ L299/32.

[184] *Ibid*, Art 39(1), transferred to Art 47(3) BR_I.

measures.[185] In other words, the exclusion of national law to guarantee the availability of protective measures *during a certain time* hinges on the wording of Article 47(3) BR_I, not Article 47(2).[186] Article 40 $BR_{I\text{-}bis}$ only inherited the content of Article 47(2), while Article 47(3) finds no equivalent provision. It appears therefore that, as the guarantee of protective measures *during a specified period* has no more legal basis in the Recast, Member States may now freely impose shorter time limits for a creditor to enforce protective measures than was ensured under Brussels I.

D. Mission accomplished? A look back on the reform's objectives

Proposals to reform the Brussels regime have been regarded critically given the success of its well-functioning system and an unparalleled influence on the legal practice.[187] As the *exequatur* procedure was presented as the main shortcoming of the Brussels I Regulation in the context of recognition and enforcement,[188] the following sections review the different rationales invoked in support of its abolition – sometimes based on questionable premises – and whether these objectives are ultimately fulfilled by the Recast.

1. *Costs and efficiency in the EU single market*

(a) *Basis*

The abolition of *exequatur* was first based on an economic rationale: the Commission stated that "it is difficult to justify, in an internal market without frontiers, that citizens and businesses have to undergo the expenses in terms of

[185]Case 119/84, *supra* n 39, paras 27–28: "It must be stated . . . that the reply to that question is to be inferred from the very wording of the first paragraph of Article 39. Since the Convention provides that 'during the time specified for an appeal pursuant to Article 36 and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures', the right to proceed with the measures in question cannot be restricted in time by the application of national measures prescribing a shorter period."

[186]Also referring to Art 47(3) as superseding shorter availability under national law: Althammer, *supra* n 45, Art 47 BR_I para 13; Kropholler and von Hein, *supra* n 73, Art 47 BR_I para 11; Plutschow, *supra* n 73, Art 47 LC para 10; Mankowski, *supra* n 45, Art 47 BR_I para 17; Pörnbacher, *supra* n 45, Art 47 BR_I para 18; citing *Capelloni* but referring to 47(2) rather than 47(3) in that context: Gottwald, *supra* n 78, Art 47 BR_I para 6; Mäsch, *supra* n 45, Art 47 BR_I para 8.

[187]Dickinson, *supra* n 23, 248; P Mankowski, "Die Brüssel I-VO vor der Reform" (2010) 1 *Interdisziplinäre Studien zur Komparatistik und zum Kollisionsrecht* 31; Magnus and Mankowski, *supra* n 83, 2. Its influence should however be put into perspective, as an estimated 50% of formerly Brussels I cases now fall under the 2009 Maintenance Regulation (Hess, *supra* n 151, 127 fn 36).

[188]CP, 3.

costs and time to assert their rights abroad".[189] Those expenses appear particularly burdensome considering how "applications for declarations of enforceability are almost always successful and recognition and enforcement of foreign judgments is very rarely refused".[190] Indeed, the Commission proposal relied *inter alia* on two studies pertaining to the costs, duration and success rate of *exequatur* proceedings:[191] the CSES Report[192] and the Heidelberg Report.

According to the Heidelberg Report, while *exequatur* proceedings across Member States last two weeks on average (excluding the preparation time to collect the necessary documents), their maximum duration may span from mere days or even hours (Luxembourg, Hungary) to as long as six or seven months (Estonia, Greece).[193] Further, the study found that declarations of enforceability are appealed in only 1% to 5% of the cases.[194]

The CSES Report documented 9,922 *exequatur* cases across Member States in 2009, of which 93% were ultimately successful.[195] The CSES then estimated the average total costs of a straightforward *exequatur* case – ie without appeal – at €2,208 (for eg court fees, legal fees, service and translation expenses)[196] and €12,791 in the complex, appealed cases.[197] Setting the ratio of simple-to-complex cases at 75%, the CSES thus estimated a total cost for all *exequatur* proceedings of nearly €48 million.[198]

The CSES Report further surveyed business and consumer organisations on the impact of an abolition of *exequatur*. It found that a total of 66.1% of respondents were generally more inclined[199] to engage in (more) cross-border activities if the enforcement of a judgment from one Member State to the other did not require additional procedures.[200]

[189]European Commission, "Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters", COM(2009) 175 final, 2.
[190]*Ibid*.
[191]European Commission, "Impact Assessment accompanying the Commission Proposal" (SEC(2010) 1547 final), 6–7.
[192]Centre for Strategy & Evaluation Services (CSES), Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Final Report (December 2010), available at http://ec.europa.eu/justice/civil/files/study_cses_brussels_i_final_17_12_10_en.pdf (accessed 18 June 2015), hereinafter "CSES Report".
[193]Heidelberg Report, para 514.
[194]*Ibid*, para 506.
[195]CSES Report, 37.
[196]*Ibid*, 43.
[197]*Ibid*, 45.
[198]*Ibid*.
[199]39.4% are "a lot more inclined" and 26.7% "slightly more inclined".
[200]CSES Report, 63.

High costs and long waits associated with *exequatur* proceedings are likely to deter creditors from cross-border enforcement.[201] Some even see it as a "contradiction in itself if in an internal market and in a single area of law judgments could not circulate freely as within one member state".[202] Yet the reasoning of abolishing *exequatur* to encourage a more cost-efficient circulation of judgments in the EU's single market, as proposed by the Commission, was nonetheless subject to criticism, for two reasons.

First, invoking the EU's single market to justify the free circulation of judgments was rightly questioned in light of other jurisdictions benefiting from arguably more integrated markets – such as the US or Canada – whose laws provide no such unconditional recognition of judgments between sister states.[203] Besides, the EU could hardly justify abrogating controls to guarantee the free movement of judgments within its single market when even the circulation of goods, persons, services and capital are all potentially subject to unilateral controls and limitations by the Member States.[204]

The second and more important reservation pertains to the interpretation and methodology of the material invoked in support of the reform, and the conclusions drawn from it by the Commission.

Indeed, some rightly called into question the numbers resulting from the evaluation of *exequatur* cases and costs in the CSES Report,[205] in part due to the study's extrapolation of the data collected in eight Member States onto the remaining 19 – since the CSES was unable to access *exequatur* records in most surveyed countries.[206] The determination of costs, in particular, was subject to criticism for its arbitrary parameters or the substantial number of estimates based on

[201]Müller, *supra* n 88, 341; somewhat *contra* Schlosser, *supra* n 112, 104, and Wagner and Beckmann, *supra* n 74, 46, who suggest that the *exequatur* costs, at least in Germany, were no deterrent for a creditor seeking relief in matters worth €50,000 on average.
[202]Magnus and Mankowski, *supra* n 83, 2.
[203]Schlosser, *supra* n 112, 102–3; Schramm, *supra* n 54, 65; see also M De Cristofaro, "The Abolition of Exequatur Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of the Defense", in F Pocar, I Viarengo and F Villata (eds), *Recasting Brussels I: proceedings of the conference held at the University of Milan on November 25–26 2011* (Padua, CEDAM, 2012), 353, 355.
[204]Dickinson, *supra* n 23, 264, and H Gaudemet-Tallon, "La refonte du règlement Bruxelles I", in M Douchy-Oudot and E Guinchard (eds), *La justice civile européenne en marche* (Paris, Dalloz, 2012), 21, 28, both mentioning public policy exceptions under the TFEU.
[205]Dickinson, *supra* n 23, 254 fn 52; XE Kramer, "Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure" (2011) 2 *International Journal of Procedural Law* 202, 216; Stadler, *supra* n 74, 952 fn 5.
[206]CSES Report, 145–6; critical on said extrapolation: Dickinson, *supra* n 23, 254 fn 52; Schramm, *supra* n 54, 62. On a similar note, the Heidelberg Report is treated with caution for its lack of data from new Member States (XE Kramer, "Harmonisation of Civil Procedure and the Interaction with Private International Law", in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (The Hague, Asser, 2012), 121, 135 fn 69 *in fine*).

arguably vague data samples, if any.[207] As for the inclination of business and consumer organisations to engage in more cross-border activities, it hardly constituted a meaningful endorsement for the abolition of *exequatur* given both the small amount of businesses surveyed[208] and the fact that these organisations answered even *more favourably* to the option of using written or online procedures that would dispense with litigating abroad in the first place.[209]

Beyond the interpretation and methodology of the studies that supported the Commission's impact assessment, many voiced their reservations on choosing the abolition of *exequatur* as the most appropriate measure to solve the problems invoked by the Commission. Given that the Heidelberg Report itself considers *exequatur* proceedings across the EU to show "a considerable efficiency" overall[210] – with overlong waits being exceptional – one wonders whether the residual issues of expenses and delays could not have been remedied by other measures. Long delays could have been solved by EU-wide *exequatur* deadlines,[211] and high expenses for the creditor through harmonised caps on costs[212] or a loser-pays rule.[213]

(b) *Implementation in Brussels I* bis

As shown above, the Recast opens the door to increased divergences across the EU with regard to the balance between the party's opposing interests.[214] The apprehension[215] that the abolition of *exequatur* would lead to 27 enforcement procedures instead of a (partly) harmonised one is thus reasonably grounded, though it should be noted that *in practice*, the previous regime already showed stark divergences across Member States despite – and to some extent against the wording of – the Regulation's harmonised requirements, eg the reported practice of some *exequatur* courts to serve the creditor's application upon the debtor

[207]Timmer, *supra* n 74, 143, who further cites cases where, even when data *were* available, the CSES used the highest rate in a spectrum of fees rather than the average (although Dickinson, *supra* n 23, 254 fn 52, suggests that the fee estimates were already conservative).
[208]Timmer, *supra* n 74, 144–45.
[209]Dickinson, *supra* n 23, 255 fn 53, referring to the results in the CSES Report, Appendix E Pt 10.
[210]Heidelberg Report, para 506.
[211]Kramer, *supra* n 205, 216; Timmer, *supra* n 74, 145; Wagner and Beckmann, *supra* n 74, 46, who also cite the more flexible solution of Art 11(3) Council Regulation (EC) No 2201/2003, [2003] OJ L338/1.
[212]Kramer, *ibid*; Wagner and Beckmann, *ibid*.
[213]As was laid down in Art 46(8) CP, although ultimately discarded. The rule was welcomed by Cuniberti and Rueda, *supra* n 66, 314–15; more reserved: De Cristofaro, *supra* n 203, 380 fn 71, who considers that the rule should have been suspended when the (losing) debtor gave the opportunity for a serious issue to be tried and clarified by case law.
[214]*Supra*, sections C.3.(b)–(c).
[215]Kramer, *supra* n 206, 136.

before rendering its judgment,[216] or the legislative extension of the protection under Article 47(3) BR_I beyond the first appeal.[217]

More generally, the new Regulation allows Member States to hinder enforcement past the maximum protection afforded to the debtor in the previous regime.[218] This does not uphold the increase in efficiency advanced in support of the reform. On the other hand, the concerns over additional delays at the stage of judgment import or adaptation due to untrained enforcement agents are now largely moot.[219]

Finally, the estimated impact on costs previously associated with *exequatur* proceedings must be considered in light of the amendments examined above. For the sake of the argument, this section uses the CSES estimations, flawed as they may be.[220] The CSES sets the ratio of simple-to-complex cases at 75%. Therefore, of the €48 million of total *exequatur* costs in the EU, only a third (€16 million) accounts for the costs of simple cases.[221] The remaining €32 million are caused by the complex, appealed cases.[222]

According to the CSES,[223] the average €2,208 costs of simple cases consist in €53 in court fees, €1,205 in lawyer fees, and €850 in translation fees. The new Brussels regime would eliminate the (*exequatur*) court fees, which merely account for €53 out of €2,208. Regarding the translation fees, while the courts can now only require a translation of the judgment in absolute necessity, the debtor must nonetheless have been served – in some circumstances – a translated version before proper enforcement can proceed.[224] The lack of domicile or representative *ad litem* in the enforcement state is no longer an obstacle for the creditor, who may then dispense with legal counsel and directly submit his or her claim. While this would potentially decrease legal fees, most creditors are hardly willing to renounce legal services in order to carry out by themselves the investigation of competent authorities, appropriate documents to submit, and intricacies of procedural law in a state they are not domiciled in.[225] Overall, one could arguably expect at least half of the total costs of simple cases to remain in place in the new regime – amounting, for this section's purpose, to €1,104.

[216]Oberhammer, *supra* n 54, 198.
[217]As it can result from eg § 84a(2) Austrian Enforcement Regulation (*Exekutionsordnung*). See *supra* n 43 on the surrounding controversy. The limitation of enforcement *upon request* by the second appeal court is also disputed (*supra* text to nn 44–45).
[218]*Supra* text to nn 178–79.
[219]*Supra* text to nn 104–8 and 131–32.
[220]*Supra* text to nn 205–7.
[221]0.75 × 9,922 × € 2,208.
[222]0.25 × 9,922 × € 12,791.
[223]CSES Report, 147.
[224]See *supra* n 155 on the potential for dilatory tactics.
[225]Kramer, *supra* n 74, 368.

As for the complex cases, the CSES Report[226] breaks down its €12,791 costs into €3,000 in translation costs, and the remaining €9,791 in court and legal fees. The complex cases account for an appeal by the debtor – corresponding to an application for refusal of enforcement and its subsequent appeals under the Recast – which would then require the very same expenses in court fees, legal fees, and possibly translation of the judgment – either for the court to review the grounds for refusal or, even in uncontested cases, for the debtor to be served with. The average costs of complex cases would thus hardly change.[227]

Using the CSES methodology – and even disregarding *additional* costs caused by the Recast's amendments[228] – the new Brussels regime would therefore appear to entail a total "*exequatur* cost" of nearly €40 million.[229] This is an improvement over the estimated €48 million of the previous regime. However, it stands to reason that the Commission's original forecast, stating that the abolition of *exequatur* would "[allow] EU companies and citizens to save a *major part* of the current costs of almost €48 Mio/year",[230] has hardly been fulfilled by the reform of the Brussels regime.

2. *The "mutual trust" rationale*

(a) *Basis*

The second incentive for the abolition of *exequatur* was political: the Commission's explanatory memorandum stated[231] that "[t]oday, judicial cooperation and the level of trust among Member States has reached a degree of maturity which permits the move towards a simpler, less costly, and more automatic system of circulation of judgments, removing the existing formalities among Member States." The Recast itself further provides that "[m]utual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any

[226]CSES Report, 147.
[227]Cuniberti and Rueda, *supra* n 66, 311; Kramer, *supra* n 205, 216.
[228]Eg higher fees imposed by the court of origin for the issuance of the more complex certificate (Kessedjian, *supra* n 144, 8 para 21; see also Beraudo, *supra* n 2, 758, on the increased workload of the court's staff) or increased fees of enforcement authorities caused by the additional work previously carried out by the *exequatur* court (Kramer, *supra* n 74, 368; Timmer, *supra* n 74, 145), for example in reviewing and authenticating the judgment as well as its complex certificate, examining whether the judgment falls within the scope of the Regulation, adapting measures if necessary, etc.
[229]0.75×9, 922 x €1, 104 + 0.25×9, 922 x €12, 791.
[230]European Commission, "Summary of the Impact Assessment accompanying the Commission Proposal" (SEC(2010) 1548 final), Pt 2.1.4. (emphasis added). The CSES Report, 61, even predicted that abolishing *exequatur* would create potential savings of "€22m to €126m", on the somewhat dubious assumption that all possible costs of both straightforward and complex cases would then simply vanish in their entirety.
[231]CP, 6.

special procedure".[232] Indeed, the legislator even refrains from designating such judgments as "foreign" throughout the Recast.

It should be noted that the case for mutual trust was partly undermined in the original Commission proposal, which upheld the entire *exequatur* procedure, along with all grounds for refusal, for cases of personality rights or violation of privacy[233] and for collective redress cases.[234] The Commission justified both exceptions stating that "[t]hese cases are particularly sensitive and Member States have adopted diverging approaches on how to ensure compliance with the various fundamental rights affected".[235] Not only were those justifications hardly reconcilable with the Commission's pleading of mutual trust,[236] but having the proposal draw the line only at defamation, privacy and collective redress issues also seemed highly arbitrary,[237] considering the many other cases where sensitive policy considerations or diverging national approaches could equally support maintaining the *exequatur* and its grounds for refusal in such matters.[238]

More broadly, the "mutual trust" rationale was heavily criticised during the early drafts of the new regime, as many considered that further harmonisation and safeguards in civil law and procedure within the EU were necessary for the premise of mutual trust to become a reality.[239] The EU's continuous emphasis on trusting the administration of justice in other Member States was especially challenged in light of cases showing judicial corruption[240] and other

[232]Recital 26 $BR_{I\text{-}bis}$.
[233]Art 37(3)(a) CP.
[234]*Ibid*, Art 37(3)(b).
[235]*Ibid*, 6–7.
[236]U Magnus and P Mankowski, "The Proposal for the Reform of Brussels I – Brussels Ibis ante portas" (2011) 110 *Zeitschrift für Vergleichende Rechtswissenschaft* 252, 295.
[237]Cuniberti and Rueda, *supra* n 66, 313–4; Dickinson, *supra* n 23, 261–4; XE Kramer, "Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area" (2011) 4 *Nederlands Internationaal Privaatrecht* 633, 636.
[238]The defamation and privacy cases could thus have been supplemented by the equally sensitive matters of eg medical ethics or punitive damages (Dickinson, *ibid*, 261–2) while the collective redress cases could have been supplemented by virtually all aspects of civil procedure, which are just as divergent in their national approaches (*ibid*, 263–64).
[239]Arenas García, *supra* n 60, 373; Gaudemet-Tallon, *supra* n 204, 29; Kramer, *supra* n 205, 230; Oberhammer, *supra* n 54, 201; noting the lack of EU harmonisation but more optimistic: B Hess, "Mutual Recognition in the European Law of Civil Procedure" (2012) 111 *Zeitschrift für Vergleichende Rechtswissenschaft* 21, 30. See also further the reservations of C Althammer and M Löhnig, "Zwischen Realität und Utopie: Der Vertrauensgrundsatz in der Rechtsprechung des EuGH zum europäischen Zivilprozessrecht" [2004] *Zeitschrift für Zivilprozess International* 23, 35–36, in the context of earlier CJEU decisions grounded in the alleged mutual trust between Member States.
[240]Magnus and Mankowski, *supra* n 83, 3; Mankowski, *supra* n 187, 34–35; H Schack, "Die Entwicklung des europäischen internationalen Zivilverfahrensrechts – aktuelle Bestandsaufnahme und Kritik", in R Stürner and others (eds), *Festschrift für Dieter Leipold zum 70. Geburtstag* (Tübingen, Mohr Siebeck, 2009), 317, 333. See especially the figures published in the Commission's *EU Justice Scoreboard* on perceived judicial

gross infringements of fundamental rights across those very states.[241] Indeed, the numerous violations of human rights within the EU should indicate that the subscription to the European Convention on Human Rights by Member States does not render a review of their administration of justice redundant.[242] If the creditor's right to judicial enforcement can derive from Article 6 of said Convention,[243] it is generally accepted that such right is not immune to restrictions through other fundamental rights, particularly the debtor's right of defence.[244] Abrogating all controls of a foreign judgment can even amount to a violation of the Convention.[245]

One quickly notices that the scepticism towards the mutual trust principle does not pertain to the procedure of *exequatur* itself as much as to the *grounds for refusal* available to the debtor. Indeed, the Commission proposal originally threatened to abolish not only the procedure of *exequatur*, but also some of the grounds for refusal, including (substantive[246]) public policy.[247] This prompted many to address the public policy issue[248] by condemning

independence across Member States (COM(2013) 160 final; COM(2014) 155 final; COM (2015) 116 final).

[241]Cuniberti and Rueda, *supra* n 66, 296; Magnus and Mankowski, *ibid*; Schack, *ibid*; Schlosser, *supra* n 112, 104; Timmer, *supra* n 74, 136; Wagner and Beckmann, *supra* n 74, 46, further citing *cum grano salis* the 2,400 violations of Art 6 of the European Convention on Human Rights filed from 2006 to 2008.

[242]Cuniberti and Rueda, *ibid*; De Cristofaro, *supra* n 203, 375–76

[243]ECHR, *Hornsby v Greece*, Application No 18357/91, 19 March 1997, para 45. That this ruling implicitly protects the free circulation of judgments across States is however far from self-evident (see in particular the critical analysis of M López de Tejada, *La disparition de l'exequatur dans l'espace judiciaire européen* (Paris, LGDJ, 2013), 125–41).

[244]Cuniberti and Rueda, *supra* n 66, 294, with further references.

[245]Dickinson, *supra* n 23, 260, on the basis of ECHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, Application No 45036/98, 30 June 2005, which prescribes that the presumption of compliance with the Convention within an international organisation can (and must) "be rebutted if . . . the protection of Convention rights was manifestly deficient" since "the interest of international cooperation would be outweighed by the Convention" (para 156). Schack, *supra* n 240, 333, deems the Convention violated even when such controls are effected by the court of origin; see however Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I-14247 paras 69–70, 74, where mutual trust allows for an abrogation of controls of fundamental rights in the state of enforcement if remedies are available in the state of origin. Such state-of-origin-only remedies let the *Bosphorus* assumption of compliance with the Convention stand unchallenged (T Schilling, "Das Exequatur und die EMRK" [2011] *Praxis des Internationalen Verfahrensrechts* (IPRax) 31, 35). The Court ultimately confirmed, in the context of Council Reg (EC) No 2201/2003, the lack of Convention infringement by the enforcement state when remedies are (only) available in the state of origin (ECHR, *Povse v Austria*, Application No 3890/11, 18 June 2013, paras 86–87).

[246]Whereas a form of "procedural" public policy was maintained through Art 46 CP.

[247]An amendment that was already proposed by the Commission when drafting Brussels I (Art 37a(1) of the Commission's 1997 proposal, OJ C 33/20 of 31 January 1998).

[248]For an overview of the critical literature on the abolition of this ground for refusal see eg von Hein, *supra* n 2, 109 fn 218.

the "abolition of *exequatur*" in a somewhat sweeping sense, as if said ground of refusal was inextricable from the *exequatur* procedure itself. However, as has been shown in the new Regulation, the intermediate procedure of *exequatur can* be abolished while allowing the debtor to invoke grounds for refusal in other remedies, such as the application for refusal of enforcement provided in the Recast.[249]

(b) *Implementation in Brussels I* bis

Now that the grounds for refusal have all been fully maintained (if not strengthened[250]) in the Recast, concerns over a flawed premise of mutual trust may seem groundless: critics of the abolition did conceive that very few unacceptable judgments do not justify maintaining a general *exequatur* requirement as long as the free circulation of such judgments *can* be hindered at the later stage of enforcement.[251] Since the enforcement state under the Recast is no less able to reject judgments violating eg public policy than it was under Brussels I, the Recast does not appear to relinquish essential controls for the sake of mutual trust.

However, the abolition of *exequatur* did shift the review of such grounds for refusal further down the chain of events ultimately leading to definitive enforcement. As mentioned above, an estimated 93% of 9,922 *exequatur* cases in 2009 were ultimately successful: since the main reasons cited for the 7% *exequatur* rejection rate all pertain to the existence of *grounds for refusal*[252] it appears that at least the major part of the nearly 700 rejected *exequatur* cases of 2009 were unacceptable judgments pursuant to Brussels I. As such, the original apprehensions over a questionable presumption of trust overriding the barriers against unacceptable judgments must now be framed in terms of *how far* into the enforcement procedure such judgments should be allowed to circulate in the name of mutual trust.

The Commission stated that the abolition of the *exequatur* procedure "will be accompanied by procedural safeguards which ensure that the defendant's right to a fair trial and his rights of defence . . . are adequately protected."[253] Yet contrary to the view that the final Recast offers no noticeable change in debtor protection,[254] this principle is only partly upheld by the revised Regulation: the issue

[249]The general confusion around this differentiation also stemmed from the Commission somewhat blurring the lines in its documents and consultations (Kramer, *supra* n 74, 346–47).
[250]See *supra* n 30.
[251]P Beaumont and E Johnston, "Can Exequatur be Abolished in Brussels I Whilst Retaining a Public Policy Defence?" (2010) 6 *Journal of Private International Law* 249, 273; Cuniberti and Rueda, *supra* n 66, 312; Magnus and Mankowski, *supra* n 83, 3.
[252]CSES Report, 39–40.
[253]CP, 6; compare similarly European Council, "The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens", [2010] OJ C115/13, Pt 3.1.2.
[254]Held by eg Crawford and Carruthers, *supra* n 2, 94; d'Avout, *supra* n 2, 1016–7; U Ernst "Brussels I *bis* & Co" (2012) 1 *Journal of European Consumer and Market Law* 189, 191; von Hein, *supra* n 2, 111.

of uniformity described above has shown that in some cases, the debtor may suffer irreversible enforcement measures against his or her assets mere days after becoming aware of an impending enforcement procedure in that State. The enforcement proceedings may even persist throughout the duration of the remedies against enforcement or at least until the court addressed decides to suspend or limit them. Even where there is potentially strong evidence that the judgment should not be enforced, which should prompt at least a limitation of enforcement, the debtor may have had his or her assets already seized and auctioned by the time a court is finally able to review the contents of the translated judgment and determine the likelihood of grounds for refusal.

Of course, an unacceptable judgment will eventually be declared without effect in the enforcement state and the corresponding enforcement measures thereby repealed, their damages compensated, or paid amounts reclaimed. The question is whether several hundred unacceptable judgments per year should, even with the safeguard of ultimate compensation, be allowed to circulate and produce irreversible enforcement measures to an unprecedented extent across Member States in the name of mutual trust.[255] It is submitted here that until additional harmonisation has reduced the occurrence of such judgments to a truly negligible amount, the Recast should have guaranteed the suspension of definitive enforcement measures until a court had at the very least the opportunity to consider the likelihood of an unacceptable judgment.

E. Alternative models and proposed enhancements

The Commission and the legal literature proposed alternative or improved systems for the cross-border circulation of judgments. This section reviews them shortly.

The Commission's original plan consisted in providing the debtor with remedies submitted to three different authorities, two of them in the state of enforcement and one in the state of origin. The competent authority would review any irreconcilability between judgments,[256] the court of the enforcement state would review infringements on the so-called "fundamental principles underlying the right to a fair trial",[257] and the competent court in the state of origin would review default judgments where the defendant could not appropriately arrange his or her defence.[258] This three-pronged system was almost universally criticised

[255]See also Dickinson, *supra* n 23, 266: while the Member States' national systems of property ownership are unprejudiced by the EU Treaties (Art 345 TFEU), the newly automatic enforcement of judgments on eg land titles situated in the enforcing state may already "cross the line drawn by this Article".

[256]Art 43 CP; compare the similar Art 21 EEO Reg, Art 22 Small Claims Reg, Art 22 Payment Procedure Reg, and Art 21 Maintenance Reg.

[257]Art 46 CP.

[258]*Ibid*, Art 45; compare the similar Art 19 EEO Reg, Art 18 Small Claims Reg, Art 20 Payment Procedure Reg, and Art 19 Maintenance Reg.

for its needless complexity,[259] and for shifting one of the remedies into a country of origin unlikely to overturn its own ruling.[260]

The proposal's exclusion of certain subjects from the abolition of *exequatur* proved to be arbitrary, as the Commission's rationale behind the specifically excluded cases could equally be used to exclude many more.[261] Professor von Hein rather suggested a differential application of the *exequatur* abolition, not for delicate subject matters, but for judgments originating from "watch-listed" Member States known to provide a lower level of legal protection.[262] While tempting when considering the issues of irreversible enforcement measures discussed above, the implementation of such a list seems, as its proponent himself acknowledges, hardly realistic – if only for political reasons.

EU authorities could be involved at the stage of judgment certification[263] – which could, if anything, grant the foreign judgment the legitimacy it needs to dispense with *judgment import* controls in the state of enforcement.[264] With regard to *judgment inspection*, the need to maintain controls in the state of enforcement, especially for fundamental procedural guarantees, could be partly alleviated by allowing an appellate review of such rights through a common, supranational court at the EU level.[265] This, along with other means of harmonisation of the grounds for refusal, could pave the way to implement the suggestion[266] that a Member State's final decision on the existence of (specific) grounds for refusal should be able to circulate freely under the new regime and bind enforcement

[259]Dickinson, *supra* n 23, 268; Gaudemet-Tallon, *supra* n 204, 33; K Kerameus, in Magnus and Mankowski, *supra* n 86, introduction to Arts 38–52 BR_I para 23; Kramer, *supra* n 74, 353; S Leutheusser-Schnarrenberger, "Europäisches Zivilrecht – die nächsten Etappen" [2011] *Zeitschrift für Europäisches Privatrecht* 451, 457; Markus, *supra* n 60, 765–66; *id*, *supra* n 2, 814; Pohl, *supra* n 2, 113; Schramm, *supra* n 54, 82; Staehelin and Bopp, *supra* n 76, Art 38 LC para 49; Wagner and Beckmann, *supra* n 74, 53; *contra* Hess, *supra* n 83, 1104.

[260]Cuniberti and Rueda, *supra* n 66, 301; De Cristofaro, *supra* n 203, 376; Markus, *supra* n 60, 763–64; PA Nielsen, "The Recast of the Brussels I Regulation", in MJ Bonell, ML Holle and PA Nielsen (eds), *Liber Amicorum Ole Lando* (Copenhagen, Djøf Publishing, 2012), 257, 265; Schack, *supra* n 240, 333.

[261]*Supra* n 238.

[262]J von Hein, "Die Abschaffung des Exequaturverfahrens durch die Revision der Europäischen Gerichtsstands- und Vollstreckungsverordnung: Eine Gefährdung des Verbraucherschutzes?", in Geimer, Schütze and Garber, *supra* n 123, 645, 657.

[263]Arenas García, *supra* n 60, 373, also citing the Green Paper response of the Associació d'Estudis Jurídics Internacionals, 2.

[264]Compare the Heidelberg Report's suggestion (*supra* n 89) to amend the Regulation so as to establish a binding effect of the certificate *ex lege* as to the Regulation's applicability.

[265]Cuniberti and Rueda, *supra* n 66, 312; De Cristofaro, *supra* n 203, 377–78, who mentions a *vertical control* by the CJEU rather than the *horizontal* one effected by the state of enforcement.

[266]Advocated by Schramm, *supra* n 54, 86, for decisions on whether the judgment respected the fundamental principle of a fair trial pursuant to Art 46 CP.

authorities in other Member States on the basis of mutual trust and harmonised standards of review. The concept seems however premature in the new system,[267] and its flaws may be exacerbated by the debtor's easier access to preventive applications against recognition.[268] The free circulation of decisions on grounds for refusal would tread on the long standing prohibition of "*exequatur sur exequatur*",[269] whose rationale consists amongst others in the prevention of forum shopping: should divergent standards still exist, the debtor would then be able to bar enforcement across EU by applying preventively in a more stringent Member State and thereby bind all others with a positive decision on the existence of grounds for refusal.

As mentioned above,[270] opponents to the abolition of *exequatur* had suggested alternative measures to reduce the costs and delays associated with *exequatur* under Brussels I – namely EU-wide *exequatur* deadlines, caps on costs and a loser-pays rule. Costs and delays in the *revised* regime could further be avoided by means of a "clearing system" through which the creditor may apply for the simultaneous delivery of the certificate in several Member States, either through the court of origin or a centralised website.[271] Timmer's suggestion that such an online system would allow for computer-translated judgments may be overly optimistic, but one cannot deny that both the immediacy of electronic communication and the availability of a rudimentarily translated judgment through such a system would enable the enforcement authorities to discern the substance of its enforceable content,[272] and, one can argue, allow the court addressed with an application against enforcement to be made aware much sooner of the likely existence of grounds for refusal than the Recast currently allows.

[267] D'Avout, *supra* n 2, 1017 fn 14, and Geimer, *supra* n 149, 333, rightly reject such a binding effect in the Recast, even for grounds for refusal reviewed identically across Member States.

[268] *Supra* text to nn 173–75.

[269] Although usually invoked to prevent the double *exequatur* of third state judgments, the *exequatur* decision on a *Member State* judgment is equally excluded from cross-border recognition and enforcement (see eg Geimer, *supra* n 149, 329; Kodek, *supra* n 86, Art 32 BR_I para 9; Kropholler and von Hein, *supra* n 73, Art 32 BR_I para 15; Leible, *supra* n 175, Art 32 BR_I para 14; Rassi, *supra* n 43, Art 32 BR_I para 30).

[270] *Supra* text to nn 211–13.

[271] Dickinson, *supra* n 23, 266 fn 121; supportive: Timmer, *supra* n 74, 146. As Dickinson notes, the Commission itself considered "a system of co-operation between courts . . . which would allow EU claimants to introduce the application in their own Member State, after which the courts of the Member State of origin would transmit it to the Member State where enforcement is sought" (Impact Assessment, *supra* n 191, 14) as an alternative to the abolition of *exequatur*, but failed to reintegrate the concept in its *exequatur*-free proposal.

[272] Timmer, *supra* n 74, 146.

F. Conclusion

The final Brussels I Recast settled for lesser amendments than the overly ambitious reform proposed by the Commission. In the context of recognition and enforcement, the new regime provides for small victories here and there, including a minor decrease in costs within the EU. Some of its criticism, especially the initial apprehension towards the new responsibilities of enforcement organs, seems mostly inconclusive.

Nonetheless, one may wonder whether these modest results warranted the reform of a well-established European instrument: the revised enforcement system carries the risk of uneven domestic standards well beyond the minimum and maximum requirements set out in the previous regime. Depending on its implementation in the different Member States, Brussels I *bis* may defeat the reform's very purpose by worsening the creditor's position through overlong delays; it may conversely accelerate the procedure to allow irreversible enforcement measures being taken against a debtor's property long before any court has had the chance to consider the existence of an unacceptable judgment.

Indeed, the Recast favours a challenge procedure governed by national law and judicial discretion, discarding the rules that formerly harmonised critical issues such as the debtor's grace period, the time limits to challenge enforcement, the time limits to proceed with protective measures, or the availability of definitive enforcement measures after a failed first-instance challenge. Overall, both creditors and debtors are subject to significant uncertainties as to the ultimate extent of their respective rights in the enforcement procedure. Amidst those missed opportunities, the Brussels regime may well end up taking one step forward but two steps back.