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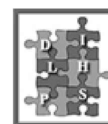

VUB
VRIJE UNIVERSITEIT BRUSSEL

4, rue Alphonse Weicker
L-2721 Luxembourg

Tel.: +352 26 94 88 0
Fax: +352 26 94 88 902

info@mpi.lu
www.mpi.lu

Report on Practices in Comparative and Cross-Border Perspective

Drafted by:

Marco Buzzoni (BI bis, EEO, EPO, and ESCP Regulations)

and

Carlos Santaló Goris (EAPO Regulation)

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I. Introduction

The present Report compares the concrete application of five European Regulations allowing for the direct cross-border enforcement of titles in civil and commercial matters (collectively referred to as '**the Regulations**')[1] in the procedural laws of the seven EU Member States covered by the EFFORTS Project[2] (namely, Belgium, Croatia, France, Germany, Italy, Lithuania, and Luxembourg). In doing so, it builds upon the deliverables[3] published by the Project partners[4] with a view to identifying general trends and highlighting recurring issues affecting the cross-border enforcement of claims within the EU.

To the extent possible, this Report also references recent legislative reforms and judicial decisions that could not be analysed in the previous deliverables but might be relevant for

[1] I.e. Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter, '**BI bis Regulation**' or '**BI bis**'); 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 (hereinafter, '**EEO Regulation**' or '**EEOR**'); Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, as amended by Regulation (EU) 2015/2421 of 16 December 2015 (hereinafter, the '**EPO Regulation**' or '**EPOR**'); Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, amended by Regulation (EU) 2015/2421 of 16 December 2015 (hereinafter, the '**ESCP Regulation**' or '**ESCPR**'); and Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (hereinafter, the '**EAPO Regulation**' or '**EAPOR**').

[2] *Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU – EFFORTS* (Project JUST-JCOO-AG-2019-881802), with financial support from the Civil Justice Programme of the European Union. The EFFORTS Project is conducted by an international consortium including the Max Planck Institute Luxembourg and the Universities of Milan (coord.), Heidelberg, Brussels VUB, Vilnius and Zagreb (collectively referred to as the '**Project partners**'). For more information, please visit the Project's official website at 'Efforts', <https://efforts.unimi.it/> accessed 26 April 2022.

[3] See in particular the National Reports on Implementing Rules and Case Law published on 'Reports' (*Efforts*), <https://efforts.unimi.it/research-outputs/reports/> accessed 26 April 2022, as well as the National and International Exchange Seminar organised by the Project Partners between September 2021 and February 2022: 'Events' (*Efforts*), <https://efforts.unimi.it/events/> accessed 26 April 2022.

[4] EFFORTS is carried out by an international Consortium conducted by the Max Planck Institute Luxembourg and the Universities of Milan (coord.), Heidelberg, Brussels VUB, Vilnius, and Zagreb. For more information, please visit 'Project Partners' (*Efforts*), <https://efforts.unimi.it/partners/> accessed 2 May 2022.

the Project's ongoing research[5]. These materials are listed in the Annex at the end of this Report.

The following sections address the implementation of each Regulation in the legislation and case law of all the Member States covered by the Project. Specifically, sections II and III tackle the circulation of domestic titles under the BI bis and the EEO Regulations, while sections IV, V, and VI examine the application of the uniform European civil procedures set out in the EPO, ESCP, and EAPO Regulations.

II. Brussels I bis Regulation ('BI bis Regulation')

Even though the abolition of exequatur undisputedly represents one of the most significant innovations brought by the new BI bis Regulation[6], this reform does not seem to have led to any significant overhaul of the domestic procedural rules applicable in the Member States covered by the EFFORTS Project. With the noticeable exception of Germany, national legislators have indeed enacted very few provisions, if any, either to allow for the certification of outgoing titles and the direct enforcement of incoming judgments, court settlements, and authentic instruments under the Regulation. Furthermore, given the fairly long transitional period set out in Article 66 BI bis[7], relatively few court decisions have so far been found to apply Chapters III[8] and IV[9] of the BI bis Regulation. Nevertheless, the research conducted

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[5] According to the Project timeline, these activities include a Report on the Digitalization of the Enforcement Procedures and of Cross-Border Cooperation, as well as the drafting of seven Practice Guides on the cross-border recovery of claims in the targeted Member States and a set of Policy Recommendations for national and EU policymakers.

[6] Pursuant to art 80, the BI bis Regulation repealed Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (itself replacing the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters). According to the latter, the cross-border enforcement of judgments and extrajudicial titles within the EU remained conditional upon the granting of an *ex parte* declaration of enforceability issued by the competent authorities of the Member State of enforcement.

[7] According to this provision, in fact, Regulation (EC) No 44/2001 continues to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.

[8] See art 36-57 BI bis, dealing with the recognition and enforcement of judgments under the Regulation.

[9] See art 58-60 BI bis, laying out the rules governing the cross-border enforcement of authentic instruments and court settlements.

within the context of EFFORTS has already cast light on some recurring difficulties and gaps concerning both the European and domestic legal regimes set up under the Regulation.

The following subsections will therefore summarise the different approaches taken by national legislators (A) and then analyse the main interpretative hurdles that courts have faced since the entry into force of the BI bis Regulation (B).

A. Domestic implementing legislation on the BI bis Regulation

In general, all the Member States encompassed by EFFORTS followed a minimalistic approach regarding the implementation of the BI bis Regulation, to the point that several of them (Belgium, Croatia, and Italy) have not enacted any specific provisions in their national law yet[10]. This approach has resulted in some significant uncertainties affecting both the certification of outgoing titles (1) and the direct enforcement of foreign judgments, court settlements and authentic instruments (2).

1. Certification of outgoing titles

The analysis of the national rules and practices in the surveyed States has revealed three main categories of issues where domestic procedural law continues to play a very prominent role. These issues concern, respectively: the identification of the person or body competent to certify outgoing domestic titles (a); the procedure applicable to the issuance of certificates provided for in the BI bis Regulation (b); and the available remedies in case of an erroneous or wrongful decision by the certifying authority (c). As we shall see, the lack of sufficient guidance in the Regulation itself and the scarcity of national implementation rules has led to some inconsistent positions across the seven Member States on each of these topics.

[10] In **Italy**, see however art 1 para 14(e)(1) of Law of 26 November 2021, No 206, empowering the Italian Government to enact legislation specifying that the action for refusal of recognition and enforcement of, inter alia, foreign titles covered by the BI bis Regulation should take the form of summary or simplified proceedings. The details of this reform were discussed orally by Dr R. Bardelle during her keynote speech delivered at the Italian Exchange Seminar titled: 'Il riordino della disciplina italiana dei procedimenti di attuazione di provvedimenti stranieri e di contestazione del riconoscimento' (Verso una più efficiente esecuzione transfrontaliera dei crediti in materia civile e commerciale all'interno dello spazio giudiziario europeo, Milan (Italy), 22 October 2021).

a) Competent authorities for the certification of outgoing titles

Even though Articles 37 and 43 BI bis condition the cross-border recognition and enforcement of titles falling under the BI bis Regulation to the issuance of the appropriate certificate, the provisions laid out in the Regulation set very minimal requirements as to the designation of the competent authorities and the certification procedure.

With respect to judgments, Article 53 BI bis simply provides that the certificate set out in Annex I BI bis shall be issued by the 'court of origin', i.e. the court that rendered the decision whose recognition or enforcement is sought. However, this provision does not indicate whether the responsibility to issue the certificate should lie with a judge rather than with a court clerk or other judicial officer. Hence, divergent practices have emerged on this issue among the Member States covered by the EFFORTS Project. The latter interpretation appears to have prevailed in France[11] and Germany[12] – which enacted specific rules conferring the power to issue certificates under Article 53 BI bis upon the *Directeur de greffe* and the *Rechtspfleger*, respectively – as well as in Belgium – despite the absence of any implementing legislation[13].

Conversely, the former approach has been adopted in Croatia, Italy, Lithuania and Luxembourg, although these legal systems may differ both in terms of the underlying logic and the practical implementation of this principle. As to the underlying logic, Croatia and Lithuania seem to have opted for an application by analogy of the domestic procedural rules

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[11] See art 509-1 of the French Code of Civil Procedure, commented in Marco Buzzoni and Veerle Van Den Eeckhout, 'Collection of French Implementing Rules' EFFORTS Collection of national implementing rules, p 8, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.4-Collection-of-French-implementing-rules.pdf> accessed 1 May 2022.

[12] See § 1110 of the German Code of Civil Procedure, in connection with § 20(1) No 11 of the Judicial Officer Act (*Rechtspflegergesetz*). On these provisions, see Quincy C Lobach and Isabell Reich, 'Collection of German implementing rules' EFFORTS Collection of national implementing rules, p 2, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/08/Final_German-Report-on-Implementation-Rules-final-rev-UMIL.pdf> accessed 1 May 2022.

[13] On this point, see however Kim Van der Borght and others, 'Collection of Belgian Implementing Rules' EFFORTS Collection of national implementing rules, p 2, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/06/Collection-of-Belgian-implementing-rules.pdf> accessed 1 May 2022 suggesting that when an application for certification is filed before the issuance of the underlying judgment, the 'The respective judge may accept to issue the certificate when making its decision'.

applicable to writs of execution[14]. In contrast, the Italian and Luxembourgish solutions have been inspired by the recent case law of the CJEU describing certification under the EEO[15] and BI bis[16] Regulations as a judicial activity[17]. Regarding the practical implementation of the principle, different views have been expressed as to whether due process should prevent the same judge who decided the dispute on the merits from examining the application for certification[18].

With respect to authentic instruments and court settlements, the language of Article 60 BI bis is even broader, as it provides that the certificate set out in Annex II should be issued by 'the competent authority or court of the Member State of origin' without further

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[14] In **Croatia**, see in particular art 36 of the Croatian Enforcement Act (*Ovršni zakon*); adde Alan Uzelac, Marko Bratković and Juraj Brozović, 'Collection of Croatian implementing rules' EFFORTS Collection of national implementing rules, pp 1–3, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/06/Collection-of-Croatian-implementing-rules.pdf> accessed 1 May 2022; Ivana Kunda, 'Enforcement in national law and under the Brussels I bis: National report for Croatia' Project BI A RE (JUST/2014/JCOO/AG/CIVI/7749), para 3.1 ff, <https://www.pf.um.si/site/assets/files/3539/national_report_croatia.pdf> accessed 1 May 2022. For **Lithuania**, see art 646 of the Lithuanian Code of Civil Procedure; adde, generally, Simantas Simaitis, Vigita Vebraite and Milda Markeviciute, 'Collection of Lithuanian Implementing Rules' EFFORTS Collection of national implementing rules, p 1, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/06/D2.7-Collection-of-Lithuanian-implementing-rules.pdf> accessed 1 May 2022.

[15] See Case C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA*, ECLI:EU:C:2015:825, para 46.

[16] See Case C-579/17, *BUAK Bauarbeiter-Urlaubs - u Abfertigungskasse v Gradbeništvo Korana doo*, EU:C:2019:162, para 41; Case C-347/18, *A Salvoni v A M Fiermonte*, EU:C:2019:661, para 31.

[17] In **Luxembourg**, the judgment in *Imtech Marine* was explicitly mentioned as the reason for the latest reform of art 87 of the Amended Law on Judicial Organisation (*Loi modifiée sur l'organisation judiciaire*), which was enacted by the Luxembourgish Law of 15 July 2021 aiming at strengthening the efficiency of civil and commercial justice (*Loi du 15 juillet 2021 ayant pour objet le renforcement de l'efficacité de la justice civile et commerciale*). Accordingly, art 87 now provides that the certification must be performed by a judge rather than the chief court clerk (on the previous regime, see Veerle Van Den Eeckhout, 'Collection of Luxembourg Implementation Rules' EFFORTS Collection of national implementing rules, p 7, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.8-Collection-of-Luxembourg-implementing-rules.pdf> accessed 1 May 2022). In favour of a similar interpretation in **Italy**, see Francesca Villata and others, 'Collection of Italian Implementation Rules' EFFORTS Collection of national implementing rules, p 6, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/07/D2.2-Collection-of-Italian-implementing-rules-1.pdf> accessed 1 May 2022, and the references cited therein, n 3.

[18] For an overview of this debate in the context of the EEO Regulation, see Villata and others (cit n 17) n 51. In **Luxembourg**, the new art 87 of the Amended Law on Judicial Organisation weighs in favour of conferring the authority to certify a judgment to a different judge, as it provides that the certificate should be issued by 'the president or managing judge of the court that issued the judicial decision or the judge who replaces him/her'.

specifications. Hence, Article 60 BI bis leaves the Member States entirely free to designate the authority (or authorities) that may carry out the certification[19].

Against this background, most of the Member States covered by the EFFORTS Project delegated the power to issue certificates under Article 60 BI bis to the same authority which drew up the authentic instrument or approved the settlement whose enforcement is sought[20]. However, the French Code of Civil Procedure has opted for a different solution with respect to authentic instruments. Indeed, Article 509-3 of the French Code of Civil Procedure confers the authority to issue certificates under Article 60 BI bis upon the President of the Chamber of Notaries (*Président de la Chambre des notaires*) of the place where the authentic instrument has been drawn up[21].

b) Procedure applicable to the issuance of certificates

In accordance with the principle of procedural autonomy, most of the aspects related to the issuance of certificates under Article 53 BI bis are subject to the national law of the State of

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[19] Interestingly, the BI bis Regulation does not even require the Member States to communicate the identity of the courts or authorities designated under art 60 BI bis. Accordingly, there is no obligation for States to publish this information on the e-Justice Portal. This approach inevitably leads to a certain lack of visibility, especially where the law of the Member State of origin does not provide for any implementing provisions at the national level.

[20] In **Germany**, this solution is explicitly endorsed by § 1110 ZPO. See Lobach and Reich (cit n 12) p 2. In the other countries, the result can in most cases be inferred from domestic procedural law. In **Belgium**, see art 25 of the Notarial Act (cited in 'National Report: Belgium' Project EU-En4s (JUST-AG-2018/JUST-JCOO-AG-2018), p 77, <https://www.pf.um.si/site/assets/files/5926/belgium.pdf> accessed 1 May 2022); in **Croatia**, see art 36 of the Enforcement Act (on Croatian authentic instruments in general, adde Eduard Kunštek and others, 'National report: Croatia' Project EU-En4s (JUST-AG-2018/JUST-JCOO-AG-2018), <https://www.pf.um.si/site/assets/files/5926/croatia.pdf> accessed 1 May 2022); in **Lithuania**, see art 26 of the Law on the Notary (cited in Darius Bolzanas, Vigintas Visinskis and Dalia Visinskyte, 'National Report: Lithuania' Project EU-En4s (JUST-AG-2018/JUST-JCOO-AG-2018), p 34, <https://www.pf.um.si/site/assets/files/5926/lithuania.pdf> accessed 1 May 2022). In **Luxembourg**, see art 1 of the Amended Law of 9 December 1976 on the Organisation of Notaries (*loi modifiée du 9 décembre 1976 relative à l'organisation du notariat*). For the situation in **Italy**, see however Villata and others (cit n 17) p 6 (stating that: 'no official indication from legislative or administrative instruments may be reported on the authority competent to issue the certificate for authentic instruments (...) under Art. 60 Reg.').

[21] Art 509-3 of the French Code of Civil Procedure (for a description – and a critique – of this provision, see Buzzoni and Van Den Eeckhout (cit n 11) pp 9–10; 22–23).

origin[22]. Nonetheless, only three of the Member States studied (France, Germany, and – to a much lesser extent – Luxembourg) have set up ad hoc rules applicable to the issuance of the certificate[23].

In both France and Germany, the procedure takes place ex parte[24], and the refusal to issue the certificate needs to be reasoned[25]. Interestingly, however, the two countries take different approaches regarding the notification of the certificate to the debtor. On the one hand, § 1111 of the German Code of Civil Procedure specifies that the court shall carry out the notification ex officio. On the other hand, Article 509-6 of the French Code of Civil Procedure provides that: 'The certificate […] shall be delivered to the applicant against a receipt or by registered letter with acknowledgement of receipt'.

At first glance, this divergency might seem like a minor difference unable to affect the cross-border enforcement of judgments. In reality, however, the designation of the person or authority responsible for serving the Article-53 certificate on the debtor may very well determine the applicable law and influence the parties' enforcement (and anti-enforcement) strategies. On the one hand, in fact, the rule adopted by § 1111 of the German Code of Civil Procedure entails that German courts will in principle notify the certificate to the debtor without delay and under the law of the Member State of origin. On the other hand, the solution favoured by Article 509-6 of the French Code of Civil Procedure implicitly allows the applicant to choose when and how to serve the certificate on the debtor. This solution

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[22] See eg Enrique Vallines García, 'Article 53' in Marta Requejo Isidro (ed), *Brussels I Bis: A Commentary on Regulation (EU) No 1215/2012* (Edward Elgar Publishing 2022), p 729 (noting that the Regulation only requires that a certificate be issued 'at the request' of any interested party).

[23] For a summary description of the relevant provisions in **France** and **Germany**, see Buzzoni and Van Den Eeckhout (cit n 11) pp 8–10; and Lobach and Reich (cit n 12) pp 2–3, respectively. For **Luxembourg**, the new art 87 of the Law on Judicial Organisation only provides that: 'In civil and commercial matters, with a view to the recognition and enforcement of judgments given by Luxembourg courts pursuant to a Community act within the framework of judicial cooperation in civil matters of the European Union, the president or the judge in charge of the court which has given the judgment or the judge who replaces him: 1. certify enforceable titles with a view to their recognition and enforcement in another Member State of the European Union; 2. issue, upon request, enforceable titles and certificates'.

[24] Cf art 509-4 of the French Code of Civil Procedure and § 1111 of the German Code of Civil Procedure, which provides that the debtor may nevertheless be heard if the case falls under § 726 (1) (claim subject to a condition) and §§ 727 to 729 (enforcement against specific categories of debtors).

[25] For **France**, see art 509-4 of the Code of Civil Procedure; for **Germany**, cf BeckOK ZPO/Ulrici, 43. Ed. 1.1.2022, ZPO § 724 Rn. 31.

undoubtedly favours the creditor's enforcement strategies, especially because Article 43 BI bis does not impose any specific time frame on the creditor between the service of the certificate and the first enforcement measure[26].

Finally, it is also interesting to note that none of the Member States covered by the Project has explicitly addressed other procedural aspects related to the issuance of the certificate, such as the possibility to apply for certification before the issuance of the underlying judgment[27], the rules applicable to applications for partial certification, or the details relating to the exact scope of the verifications carried out by the certifying authority[28]. The same observations also extend to certificates issued under Article 60 BI bis[29].

c) Available remedies

Contrary to the approach followed under the EEO Regulation, the BI bis Regulation remains silent on the remedies available to the parties in case of a wrongful or erroneous decision on certification. Despite the importance of these rules for the cross-border circulation of titles across the EU, only two countries enacted explicit provisions to tackle these issues in their national procedural laws[30]. Furthermore, these provisions do not always address all the difficulties that may arise in connection with the certification of outgoing titles under the BI bis Regulation.

In France, Article 509-7 of the Code of Civil Procedure provides that the refusal to issue the certificate under Articles 53 and 60 BI bis may be challenged before the President of the

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[26] On the practical implications of art 43(1) BI bis, see also below II.B.3(a).
[27] See, however, Van der Borght and others (cit n 13) p 2, suggesting that, in Belgium, a request for certification can be submitted to the competent court clerk directly during the procedure; for a similar approach, adde Final Disposition No 25(5)(1) of the Spanish Code of Civil Procedure, cited in Vallines García (cit n 22) n 32.
[28] See Vallines García (cit n 22) pp 728–731, noting that the principle according to which the issuance of the certificate should be 'almost automatic' (CJEU, Case C-347/18, *A Salvoni*) is tempered by the fact that the issuing authority should also make sure that: (i) the judgment falls within the scope of BI bis, and that (ii) where the the judgment orders provisional or protective measures, the court had jurisdictioin on the substance of the matter.
[29] On this point, see e.g. Marlene Brosch, 'Article 60' in Marta Requejo Isidro (ed), *Brussels I Bis: A Commentary on Regulation (EU) No 1215/2012* (Edward Elgar Publishing 2022) underscoring how the difficulties that may arise in connection with the possible extension of the CJEU's case law upholding the 'jurisdictional nature' of certificates under Article 53.
[30] In **France**, see Article 509-7 of the Code of Civil Procedure; in **Germany**, see § 1111(2) of the Code of Civil Procedure.

Regional Court (*Tribunal judiciaire*), which rules on the certification after hearing both the applicant and the requested authority. Conversely, however, the French Code of Civil Procedure does not include any explicit remedy for debtors or other interested parties who might want to challenge the issuance of the certificate[31]. Similarly, French law does not specify how to apply for the rectification of material errors in the certificate that might affect recognition and enforcement under BI bis[32].

In Germany, § 1111(2) of the Code of Civil Procedure provides that the decision to issue a certificate under § 1111(1) may be contested through the same procedures as those available to challenge a court certificate of enforceability (*Vollstreckungsklausel*) under domestic law. Accordingly, German law did not set up any specific remedies for challenging the issuance or denial of certificates under the BI bis Regulation but rather opted for the application by analogy of pre-existing domestic procedural rules. Hence, the appropriate remedy may vary depending on the title whose enforcement is sought, the identity of the parties, and the kind of grounds (formal or substantive) raised by the applicant[33].

In the other Member States covered by the EFFORTS Project, the question of the remedies available against outgoing certificates and/or refusals of certification under BI bis remains open because of the absence of any national implementing rules on these issues[34].

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[31] See Buzzoni and Van Den Eeckhout (cit n 11) pp 9 and 24, and the references cited therein.

[32] On this specific point, see 'National Report: France' Project BI A RE (JUST/2014/JCOO/AG/CIVI/7749), pp 11–12, <https://www.pf.um.si/site/assets/files/3539/national_report_france.pdf> accessed 1 May 2022.

[33] Lobach and Reich (cit n 12) p 2.

[34] For **Belgium**, see eg Stefaan Voet and Pieter Gillaerts, 'Interplay of Brussels IA Regulation and National Rules: National Report for Belgium' Project BI A RE (JUST/2014/JCOO/AG/CIVI/7749), p 30, <https://www.pf.um.si/site/assets/files/3539/national_report_belgium.pdf> accessed 1 May 2022 (suggesting that, in Belgium, national rules on the correction and the interpretation of judgments could also apply to certificates under the BI bis Regulation); for **Croatia** Kunda (cit n 14) pp 23–25, discussing the remedies that might be available under Croatian law; for **Lithuania**, cf 'National Report: Lithuania (part I)' Project BI A RE (JUST/2014/JCOO/AG/CIVI/7749), pp 25–26, <https://www.pf.um.si/site/assets/files/3539/national_report_lithuania_-_part_1.pdf> accessed 1 May 2022, expressing the view that 'there is no specific legal remedy to challenge and/or withdraw the certificate of enforceability' in Lithuania.

2. Enforcement of foreign titles

Except for Germany, Lithuania, and Luxembourg, the Member States covered by the EFFORTS Project have not yet implemented any legislation concerning the enforcement of incoming titles under the BI bis Regulation. In these circumstances, ordinary rules applicable to the enforcement of domestic titles should nonetheless apply to judgments, authentic instruments and court settlements issued in another Member State (a). An important exception concerns the procedural rules governing applications for the refusal of recognition enforcement under Articles 45 and 46 BI bis (b).

a) Enforcement procedure

According to Articles 41 and 58 BI bis, the law of the Member State of enforcement applies to procedural issues not directly governed by the Regulation. Accordingly, the practical steps that a creditor has to follow to obtain the enforcement of a foreign title may significantly vary from one jurisdiction to another. In most countries, enforcement measures may be carried out directly by providing the competent enforcement authorities with the documents set out in Article 42 BI bis[35]. Nonetheless, some Member States might still require the creditor to apply for the issuance of a domestic enforcement authorisation, when such authorisation is also required before the enforcement of domestic titles[36].

b) Refusal of recognition and enforcement

Pursuant to Article 47 BI bis, applications for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to letter (a) of Article 75. Furthermore, Article 45(4) BI bis extends this solution to

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[35] For **Belgium**, see Van der Borght and others (cit n 13) p 2, stating that: 'In Belgium, the competent authority to implement the enforcement of foreign titles is the bailiff (in cases where the enforcing title is uncontested)'; for **France**, see Buzzoni and Van Den Eeckhout (cit n 11) p 10 ff (same solution); for **Germany**, see Lobach and Reich (cit n 12) pp 2–3 (noting that § 1112 of the German Code of Civil Procedure does not require the creditor to apply for a *Vollstreckungsklausel* before proceeding with the enforcement of a foreign title under BI bis); for **Italy**, see Villata and others (cit n 17) p 7 (stating that practice in Italy has followed the same approach).

[36] See eg the example of **Croatia** described in Uzelac, Bratković and Brozović (cit n 14) p 3: 'It is essential to understand that in Croatia, enforcement consists of two stages. First the competent court or notary public issues an enforcement order upon which, when that enforcement order becomes final, the enforcement is carried out by the competent body'.

applications for refusal of recognition under the Regulation. In either case, the procedure shall be governed by the law of the Member State addressed in so far as the Regulation does not cover it.

Even though these provisions expressly call upon the Member States to designate the competent authorities and the procedures applicable to the refusal of recognition or enforcement of incoming titles, four of the Member States covered by the EFFORTS Project – Belgium, Croatia, France, Italy, and Lithuania – did not enact any provisions to this effect in their national law. By contrast, Germany, Lithuania, and Luxembourg specified at least some of the rules governing applications for refusal of recognition or enforcement under the BI bis Regulation[37].

Consequently, parties that might want to apply for a refusal of recognition or enforcement in jurisdictions where no legislation has been enacted must refer to the communications made by the Member States under Article 75 BI bis and published on the e-Justice Portal[38]. However, the research conducted within the Project highlighted several shortages linked to this specific implementation strategy.

Firstly, the lack of explicit implementing provisions into national procedural law may hamper the visibility of the available remedies and threaten the effective application of the BI bis Regulation in the Member State of enforcement. As the Luxembourgish Government rightly underscored when enacting the new Article 685-4 of the New Code of Civil Procedure, the choice to implement explicit rules regarding the recognition and enforcement of incoming titles promotes ‘consistency and readability’ to the benefit of national and foreign practitioners alike[39].

Secondly, some national commentators have correctly pointed out that the communications made by the member States under Article 75 BI bis do not always contain all the details

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[37] In **Germany**, see § 1115 of the Code of Civil Procedure (commented in Lobach and Reich (cit n 12) p 3; in **Lithuania**, see arts 4 to 4^3 of the Law Implementing the European Union Legislation and International Legal Instruments Regulating the Civil Procedure of the Republic of Lithuania, cited in Simaitis, Vebraite and Markeviciute (cit n 14) pp 18–22; in **Luxembourg**, see art 658-4 of the New Code of Civil Procedure, cited in Van Den Eeckhout (cit n 17) p 7.

[38] See ‘European e-Justice Portal - Brussels I Regulation (recast)’, <https://e-justice.europa.eu/350/EN/brussels_i_regulation_recast> accessed 1 May 2022.

[39] On this point, see in particular Van Den Eeckhout (cit n 17) pp 7–8.

required to challenge the recognition and enforcement of incoming titles under the Regulation[40]. In the absence of sufficient guidance, the application of Chapters III and IV BI bis may therefore lead to difficulties or unpredictable results within the Member State addressed[41].

Thirdly, additional hurdles may also arise in cases where communications made by the Member States under Article 75 have become outdated following a reform of the domestic procedural system[42]. In such cases, it might not always be evident how the interpretation of an old declaration should reflect the new procedural context. Conversely, it should also be underscored that the presence of precise and up-to-date information may be a helpful interpretative support in case of ambiguities within the relevant national legislation. In a recent case concerning the interpretation of § 1115(5) of the German Code of Civil Procedure, for instance, the German Federal Supreme Court relied on the communication made by the German Government to the Commission under Article 75(b) BI bis in order to clarify the remedies available against a decision of refusal of enforcement[43]. This last example also demonstrates the crucial role that national case law plays in the practical implementation of the BI bis Regulation.

B. National case law on recognition and enforcement under the BI bis Regulation

Despite the relatively low number of judgments that have so far dealt with the cross-border enforcement of titles under BI bis, it is already possible to list four sets of recurring

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[40] On this point, see eg Ilse Couwenberg, 'European Private International Law and the National Judge. Some General Reflections by a Belgian Judge' in Geert Van Calster and Jura Falconis (eds), *European Private International Law at 50: Celebrating and Contemplating the 1968 Brussels Convention and Its Successors* (Intersentia 2018); on the remedies available in Belgium, see generally Van der Borght and others (cit n 13) pp 2–3; for Italy, see Villata and others (cit n 17) p 16, and the references cited therein.
[41] For an example of the interpretative issues that have arisen in France in connection with declarations made under art 75(a) BI bis, see eg Buzzoni and Van Den Eeckhout (cit n 11) pp 16–19.
[42] On this point, see ibid 17–18. It should be noted that the French Government has since updated its declaration under art 75(a) BI bis.
[43] See Bundesgerichtshof 15.07.2021, IX ZB 73/19, BeckRS 2021, 27907, reported in Quincy C Lobach and Isabell Reich, 'Report on German Case Law' EFFORTS Collection of national case law, p 3, <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/02/D2.10-Report-on-German-case-law.pdf> accessed 1 May 2022.

procedural issues that have arisen before national courts. These issues concern, respectively, the enforceability of the title in the Member State of origin (1); the issuance and value of certificates ex Articles 53 and 60 BI bis (2); the carrying out of enforcement measures in the Member State addressed (3); and, finally, the relations between actions for refusals of recognition and enforcement under the Regulation (4).

1. Enforceability of the decision in the Member State of origin

Following a seemingly uncontroversial rule, the enforceability of a title falling within the scope of the BI bis Regulation is, in principle, subject to the law of the Member State of origin[44]. Accordingly, Article 44(2) BI bis provides that, where the enforceability of a judgment is suspended in the Member State of origin, the competent authority in the Member State of enforcement shall suspend the enforcement proceedings upon application of the person against whom enforcement is sought.

Usually, these rules do not give rise to any particular difficulty before national courts. In a case decided on 19 February 2019, for example, the Higher Regional Court of Düsseldorf cited the principle according to which: 'a judgment is only enforceable in the Member State of enforcement as long as enforceability in the Member State of origin continues to exist' to refuse the enforcement of a Romanian judgment that was no longer enforceable in that State due to the passing of time[45]. Similarly, the Italian Court of Cassation held in 2017 that a German decision revoking an authentic instrument drawn up in that State and depriving it of its enforceability had to be recognised and given effect in Italy, and hence prevented the enforcement of the title in Italy[46].

However, determining the exact limits of this principle can sometimes be more controversial in practice. In a dispute falling under the scope of the old BI Regulation[47], for instance, the Italian Court of Cassation held that a decision issued in the Member State of origin that

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[44] See art 39 BI bis.
[45] Oberlandesgericht Düsseldorf, 19.02.2019, 3 Wx 174/18, BeckRS 2019, 6069, reported in Lobach and Reich (cit n 43) p 3.
[46] Cass. civ., 12.04.2017, n. 9350, sez. III, reported in Francesca Villata and others, 'Report on Italian Case Law' EFFORTS Collection of national case law, pp 22 and 33, <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/04/D2.9-Report-on-Italian-Case-law.pdf> accessed 1 May 2022.
[47] Regulation No 44/2001.

suspended the enforcement of an authentic instrument upon the posting of security could not affect the exequatur of the title in Italy[48]. To reach this conclusion, the Italian Court apparently reasoned that the posting of a security did not call into question the enforceability of the foreign instrument, but only concerned the enforcement of the title, which should be governed by the law of the Member State of enforcement.

Similarly, several court decisions have also highlighted how the application of the law of the Member State of origin is in fact limited by the procedural requirements set out in the law of the Member State addressed. In a decision issued in 2018, the German Federal Supreme Court accordingly held, for instance, that the enforcement of an incoming provisional attachment must be subject to the same time limits applicable to domestic provisional measures[49]. Similarly, the Italian Supreme Court recently stated, albeit arguably in dicta, that according to Italian law conditional obligations contained in a foreign judgment can only be enforced if the creditor demonstrates that the condition is satisfied, irrespective of whether the Member State of origin imposes the same burden of proof[50].

The same approach seems to have been followed by the French Court of Cassation in a very recent decision issued on 2 December 2021. In this case, the Court held that: 'a judgment given in another Member State must meet, independently of its enforceability, the same criteria as those applied by domestic law to determine whether a decision given by a national court allows the creditor to pursue its enforcement against his debtor's assets, so that it must, in accordance with the provisions of [Article L. 111-2 of the French Code of Civil Enforcement Procedures], establish a liquidated and enforceable claim against the latter'[51].

Finally, an interesting judgment issued by the Paris Court of Appeal in 2020 shows how the uniform rule of suspension set out in Article 44(2) BI bis does not necessarily prevent the creditor from seeking additional protective measures under the domestic law of the Member State of enforcement. In that case, the court suspended the enforcement of a Dutch

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[48] Cass. civ., 17.01.2013, n. 1164, sez. I, cited in Villata and others (cit n 46) pp 15 and 33.
[49] See Bundesgerichtshof, 13.12.2018, V ZB 175/15, BeckRS 2018, 37000, cited in Lobach and Reich (cit n 43) p 2 (judgment issued in the wake of the famous CJEU's decision in Case C-379/17, *Società Immobiliare Al Bosco Srl*, ECLI:EU:C:2018:806).
[50] Cass. civ., 20.02.2018, n. 4025, sez. III, cited in Villata and others (cit n 46) pp 24 and 32.
[51] Cass. civ. 2, 02.12. 2021, No 20-14.092.

judgment after its enforceability had been suspended in the Member State of origin but upheld the creditor's application for provisional measures under French domestic law[52].

2. Certification issues

Under Article 42 BI bis, creditors who seek to enforce a judgment or an extrajudicial title in another Member State under the provisions of the BI bis Regulation have to provide the enforcement authorities with a certificate issued according to Articles 53 or 60 BI bis. In principle, the certificate contains 'key information'[53] about the title whose recognition and enforcement are at stake, making the data 'easily understandable for the authorities and any interested party'[54]. However, national court decisions show that some uncertainties subsist regarding the degree of deference that the certificate should be awarded in the Member State of enforcement.

In France and Germany, in particular, courts had to rule on the standard of scrutiny that should apply to certificates erroneously delivered by foreign courts. In France, for instance, three judgments issued in three different cases had to decide whether the enforcement of a foreign judgment certified under Article 53 BI bis could be refused because the underlying title fell outside the temporal scope of application of the BI bis Regulation. In two out of three decisions[55], French courts held that they could not halt the enforcement because they lacked the authority to review the validity of a certificate issued in another Member State. Therefore, these judgments suggests that the regularity of a foreign certificate cannot be called into question before the courts of the Member State of enforcement.

Confronted with a different scenario, however, the Higher Regional Court in Munich held that the enforcement of an Italian judgment ordering a provisional measure should be

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[52] Cour d'appel de Paris, pôle 4, ch. 8, 16.01.2020, No 19/06986, reported in Marco Buzzoni, 'Report on French Case Law' EFFORTS Collection of national case law, p 19, <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/12/D2.11-Report-on-French-case-lawCONFIRMED.pdf> accessed 1 May 2022. To reach this conclusion, the court held that the foreign decision was still in place and that its enforceability had only been suspended pending the appeal.
[53] Opinion of AG Bobek in Case C-347/18, *A Salvoni*, EU:C:2019:370, para 50.
[54] Ibid.
[55] See Cour d'appel de Paris, pôle 4, ch. 8, 14.02.2019, No 17/22771, and Tribunal judiciaire de Paris, 17.09.2020, No 20/80618, *Reti Televisive Italiane c/ Dailymotion*; contra, see Cour d'appel de Paris, pôle 1 ch. 10, 04.03.2021, No 20/02881. On these decisions, see Buzzoni (cit n 52) pp 15, 20–23, 26–27.

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refused in a case where the foreign certificate did not include any description of the measure and did not specify whether the court had jurisdiction on the substance of the matter[56]. This solution has to be approved because the dispute did not involve a review by the German court of the Italian court's decision to issue a certificate under Article 53 BI bis, but rather the question whether the creditor had complied with the specific requirements for the enforcement of provisional measures under Article 42(2) BI bis.

Finally, further difficulties may arise in case of discrepancies between the information contained in the certificate and the content of the underlying title. For example, section 4.4. of the standard form set out in Annex I BI bis asks the court of origin to indicate, among other things, whether 'The judgment is enforceable in the Member State of origin without any further conditions having to be met'[57], or whether the judgment 'does not contain an enforceable obligation'[58]. In theory, this information should facilitate the task of the enforcement authorities in the requested Member State by allowing them to easily identify when the foreign decision has become enforceable and against whom. In practice, however, the information contained in the certificate may turn out to be inconsistent with the underlying decision.

In a case decided by the Metz Court of Appeal[59], for instance, the debtor tried to resist the enforcement of a Luxembourgish judgment by arguing that the certificate drawn up by the court of origin indicated that the judgment did not contain an enforceable obligation. The court rejected the argument, holding that the enforceability of the incoming decision resulted from the judgment itself.

On the one hand, the approach adopted by the Court of Appeal seems perfectly reasonable, since it allows the content of the judgment to prevail over that of the accompanying certificate. On the other hand, however, the solution adopted requires a thorough analysis of the title, which has the disadvantage of going against the very logic of the Regulation and carries the risk of misinterpreting the effects of the foreign decision. In an attempt to avoid this kind of difficulties, the German Federal Supreme Court sought guidance from the CJEU

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[56] Oberlandesgericht München, 09.11.2020, 7 W 1210/20, BeckRS 2020, 29974, cited inLobach and Reich (cit n 43) p 5.
[57] See Annex I BI bis, pt 4.4.1.
[58] See Annex I BI bis, pt 4.4.4.
[59] Cour d'appel de Metz, 1re ch., 20.03.2018, No 16/04164, cited in Buzzoni (cit n 52) pp 11–12, 31.

as to how the court of origin should fill in Section 4.4 of the certificate[60]. Unfortunately, the case was settled before the CJEU could address the question.

3. Enforcement in the Member State addressed

Two recurring issues are particularly illustrative of the difficulties that may arise from the practical interaction between the provisions of the BI bis Regulation and the procedural law of the Member State of enforcement. These issues concern the service of the certificate prior to the first enforcement measure (a) and the implementation of Article 55 BI bis, which limits the enforceability of foreign judgments ordering payment by way of a penalty (b).

a) Service of the certificate prior to the first enforcement measure

According to Article 43 BI bis, a person seeking to enforce a judgment given in another Member State must serve the certificate issued pursuant to Article 53 BI bis on the person against whom the enforcement is sought prior to the first enforcement measure. Furthermore, Article 43(3) BI bis specifies that this rule does not apply to the enforcement of judgments ordering a protective measure or where the person seeking enforcement proceeds to protective measures in accordance with Article 40 BI bis.

Despite the clear wording of Article 43 BI bis, however, it is not always easy to determine whether the Article-53 certificate should be served prior to enforcement. In this regard, an interesting decision given by a Luxembourgish court of first instance on 20 December 2017[61] shows indeed how the diversity of national measures may complexify the application of the BI bis Regulation. In that case, the claimant had first obtained a provisional judgement (*ordonnance de référé*) in France and later carried out an interlocutory attachment (*saisie-arrêt*) in Luxembourg based on the foreign decision. When the creditor applied to convert the attachment into a final third-party debt order as required by Luxembourgish domestic law, the debtor objected that the attachment was irregular because the creditor had not served

[60] Bundesgerichtshof, 25.01.2018, IX ZB 89/16, BeckRS 2018, 1121, reported in Lobach and Reich (cit n 43) p 3. The case concerned a German judgment whose enforceability had been declared conditional upon the posting of security

[61] Tribunal d'arrondissement Luxembourg, 17e ch., 20.12.2017, No 319/2017, mentioned in Veerle Van Den Eeckhout, 'Report on Luxembourg Case Law' EFFORTS Collection of national case law, n 26, <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/01/D2.15-Report-on-Luxembourg-case-law-confirmed.pdf> accessed 1 May 2022.

the certificate prior to carrying out the interlocutory attachment, which constituted the first enforcement measure under Article 43 BI bis. The creditor replied that service was not required because the case only concerned the enforcement of a protective measure under Article 40 BI bis[62]. The court agreed with the creditor, reasoning that an attachment under Luxembourgish law typically consists of two subsequent stages – an interlocutory attachment followed by a permanent third-party debt order – and that the first stage could be characterised as a 'provisional measure' under the Regulation. Accordingly, the court held that prior service of the certificate was excluded under Article 43(3) BI bis.

In cases where service of the certificate is required, further uncertainties arise as to the time period that should elapse between the notification and the first enforcement measure. Although the Regulation itself does not set an explicit deadline for such notification, Recital 32 states that : 'The certificate established under this Regulation, if necessary accompanied by the judgment, should be served on that person in reasonable time before the first enforcement measure'. Despite this clarification, however, the absence of a uniform time limit at the European level has already sparked litigation which might eventually lead to divergent interpretations across the Member States covered by the EFFORTS Project.

Indeed, even though courts in different Member States have equally emphasised the importance of serving the certificate prior to the first enforcement measure, the value of Recital 32 remains unclear[63]. For example, the enforcement judge in Paris recently held[64] that the enforcement of a foreign judgment could proceed even though the certificate of Article 53 BI bis had been served on the debtor only the day before the first enforcement measure. To reach this conclusion, the enforcement judge explicitly rejected the debtor's argument based on Recital 32 and held that neither the Regulation nor French domestic law

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[62] See art 43(3) BI bis.

[63] Cf Gž Ovr-569/2021-2, 24.05.2021, reported in Alan Uzelac, Marko Bratković and Juraj Brozović, 'Report on Croatian Case Law' EFFORTS Collection of national case law, p 1, <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/02/D2.13-Report-on-Croatian-case-law.pdf> accessed 1 May 2022 (decision issued by the County Court in Zagreb on 24 May 2021), with Tribunal judiciaire de Paris, JEX, 22.10.2020, No 20/80808 (decision not included in the Report of French Case Law).

[64] Tribunal judiciaire de Paris, JEX, 01.07.2021, No 21/80506 (not included in the Report on French Case Law).

requires a specific waiting period between the service of a court decision and the carrying out of enforcement measures[65].

b) Enforcement of penalties

So far, only two decisions have been found to deal directly with Article 55 BI bis, which provides that judgments ordering payments by way of penalty are enforceable in the Member State addressed only if the court of origin has definitively fixed the amount. Nevertheless, both decisions provide a good example of how the uniform rules of the BI bis Regulation can sometimes disrupt the ordinary application of national procedural law.

In the first case[66], the Italian Court of Cassation relied on Article 49 of the old BI Regulation 2000 (today, Article 55 BI bis) to reverse a judgment of the Turin Court of Appeal that had ordered the payment of interest on arrears without specifying their nature nor their extent. In this case, the Court of Cassation invoked the principle of effectiveness of European law and interpreted Article 49 BI 2000 as requiring the court of origin to determine the final amount of the penalty so that it could be enforced abroad, despite the fact that Italian courts are not generally required to do so under the ordinary rules of domestic procedural law.

Conversely, in the second case[67], the Paris Regional Court interpreted Article 55 BI bis as preventing the courts of the Member State of enforcement from determining the final amount of a penalty that had been ordered in the Member State of origin, even though this power would normally fall within the remit of the enforcement judge as a matter of French procedural law[68]. To displace this rule, the French court held that Article 55 BI bis contains an implicit rule of jurisdiction in favour of the courts of the Member State of origin.

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[65] Interestingly, the judge nevertheless noted that the underlying judgment had been served nineteen days before, and that it stated in particular that the defendants should pay their debts at a specific date and time which had already lapsed prior to the service of the certificate.
[66] Cass. civ., 07.05.2014, n. 9862, cited in Villata and others (cit n 46) pp 16 and 31.
[67] Tribunal judiciaire de Paris, 17.09.2020, No 20/80618, *Reti Televisive Italiane c/ Dailymotion*, cited in Buzzoni (cit n 52) pp 20–21, 33.
[68] See art L 131-3 of the French Code of Civil Enforcement Procedures.

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4. Relationship between applications for refusal of recognition and enforcement

One final issue that has emerged from national court decisions applying Chapters III and IV BI bis concerns the interaction between applications for refusal of recognition and enforcement brought under the Regulation.

In this regard, the enforcement judge of the Paris Regional Court[69] recently held that claims for refusal of recognition and claims for refusal of enforcement should be distinguished and that, according to the declaration made by the French Government pursuant to Article 75 BI bis[70], only the latter fell within the jurisdiction of the enforcement judge. Nevertheless, the judge noted that Article 36(3) BI bis allowed any court to rule on a claim for refusal of recognition where 'the outcome of proceedings […] depends on the determination of an incidental question of refusal of recognition'. Accordingly, the judge held that he could rule on the question of recognition without referring it to another court.

Conversely, a very recent decision handed down by the Italian Court of Cassation[71] ruled on a dispute where the debtor had first filed an application for refusal of recognition prior to any enforcement measure and subsequently applied to the Italian enforcement judge to resist the creditor's later attempts at enforcing the judgment. Following a decision of refusal of recognition handed down by the court of first instance, the debtor tried to obtain the lifting of the enforcement measures before the enforcement judge. The latter, however, denied the request and only suspended the enforcement pending the appeal of the refusal of recognition.

In our opinion, these two cases have been decided in a way that minimises duplicative litigation while also preserving consistency within the legal system of the Member State of enforcement. Undoubtedly, however, the interplay between the refusal of recognition and enforcement will continue to raise challenging issues in the future[72].

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[69] Tribunal judiciaire de Paris, JEX, 01.07.2021, No 21/80506 (not included in the Report on French Case Law).
[70] On this declaration, see Buzzoni and Van Den Eeckhout (cit n 11) pp 16–19 and supra, II.A.2.b.
[71] Cass. Civ., sez. VI, 04.05.2022, No 14019 (not included in the Report on Italian Case Law).
[72] For an illustration of some of these issues, see eg Buzzoni and Van Den Eeckhout (cit n 11) pp 18–19.

III. European Enforcement Order Regulation ('EEO Regulation')

Even though six out of the seven Member States covered by the EFFORTS Project have enacted at least some implementing legislation in relation to the EEO Regulation, the practical approaches and the extent to which national procedural law regulates the different issues addressed by this Regulation vary greatly from one country to another.

Hence, while Croatia, France, Germany, and Luxembourg have codified the rules applicable to the implementation of the EEO Regulation within the respective codes or acts regulating the national civil procedure and/or the enforcement of domestic enforcement titles[73], Lithuania has chosen to enact the relevant provisions by a special statute addressing the implementation of EU and international instruments into the national civil procedure[74]. Furthermore, while most countries have enacted a plurality of provisions dealing with several (if not all) of the topics covered by the EEO Regulation, Italy and Luxembourg have each implemented a single provision dealing with the issuance of EEOs regarding either authentic instruments[75] or judicial titles[76].

In Belgium, the Ministry of Justice initially drafted an official Circular on 22 June 2005 to compensate for the lack of any specific national implementing legislation[77]. Nevertheless, national rapporteurs have characterised the usefulness of this document as 'very

[73] In **Croatia**, see arts 357-361 of the Enforcement Act of the Republic of Croatia, cited in Uzelac, Bratković and Brozović (cit n 14) pp 26–30; in **France,** see arts 509 to 509-7 of the Code of Civil Procedure, as well as art L111-3 of the French Code of Civil Enforcement Procedures, cited in Buzzoni and Van Den Eeckhout (cit n 11) pp 76–78 and 86; in **Germany,** see §§ 1079-1086 of the Code of Civil Procedure, cited in Lobach and Reich (cit n 12) pp 26–34; in **Luxembourg,** see art 87 of the Act on Judicial Organisation, cited in Van Den Eeckhout (cit n 17) p 33 but subsequently amended by the Luxembourgish law of 15 July 2021 aiming at strenghtening the efficiency of civil and commercial justice.
[74] See in particular § VII of the Law Implementing the European Union Legislation and International Legal Instruments Regulating the Civil Procedure of the Republic of Lithuania, cited in Simaitis, Vebraite and Markeviciute (cit n 14) pp 29–32.
[75] See art 8 of the Italian Law of 7 July 2016, No 122, cited in Villata and others (cit n 17) p 79.
[76] See art 87 of the Luxembourgish Act on Judicial Organisation.
[77] On the content of this Circular, see in particular Van der Borght and others (cit n 13) pp 1 and 4 ff.

controversial'[78], to the point that both courts and scholars have expressed doubts as to the possibility of issuing EEOs in Belgium[79].

With these differences in mind, the following subsections will attempt to summarise the main takeaways regarding the implementation of the EEO Regulation in the national legislation (A) and case law (B) of the Member States covered by the EFFORTS Project.

A. Domestic implementing legislation on the EEO Regulation

Following the structure of the EEO Regulation, we will address, in turn: issues related to the competent authorities and procedures applicable to outgoing EEOs (1), the minimum standards that have to be fulfilled in order for a domestic judgment to be certified as an EEO (2), and the rules applicable to the enforcement of incoming EEOs (3).

1. Competent authorities and procedures applicable to outgoing EEOs

As the analysis of the National Reports suggests, all the Member States covered by the EFFORTS Project tend to distinguish between the rules applicable to the certification of judicial titles (judgments and court settlement) (a) and those applicable to authentic instruments (b). Therefore, we will briefly address these issues in turn.

a) Judicial titles

Under Articles 6, 10, and 24 EEOR, applications for the (re-)issuance, rectification, withdrawal, and suspension or limitation of enforceability of EEOs related to judicial titles are to be addressed to the 'court of origin'. Accordingly, certificates issued under the EEO Regulaiton are generally delivered by the same court that rendered the underlying judgment or approved the court settlement whose enforcement is sought. Even though this solution does not seem particularly controversial, national rapporteurs have underscored that some occasional difficulties might still arise in specific contexts.

[78] ibid 1.

[79] On this debate, see ibid 9–10 and the references cited therein.

In Italy, for instance, the national rapporteurs have rightly noted that the reference to the 'court of origin' contained in Article 6(2) EEOR[80] might be ambiguous in cases where the decision to suspend or limit the enforceability of the underlying judgment lies with a different court than the one that issued the initial decision and the corresponding certificate[81]. Indeed, the standard forms annexed to the Regulation also implicitly allow certificates to be issued by a court or authority other than the one responsible for the underlying title[82].

Similarly, in Croatia, Article 357 of the Enforcement Act grants the power to issue EEO certificates to 'the competent courts, administrative bodies, notaries public and legal or natural persons with public powers'. As the rapporteurs noted, this reference should normally encompass both municipal and commercial courts, depending on the one which 'has rendered the decision on the merits'[83]. Until very recently, however, the communication made by the Croatian Government on the European e-Justice Portal only mentioned the former as the competent authorities for (re)issuance and suspension of the EEO[84].

Furthermore, the CJEU also held that even though Article 6 EEOR does not specify the person or body who, within the court of origin, should be competent to issue the EEO certificate, 'certification itself requires a judicial examination of the conditions laid down by

[80] This provision addresses the cases where a certificate indicating the lack or limitation of enforceability should be issued because the underlying judgment has ceased to be enforceable or its enforceability has been suspended or limited.
[81] See Villata and others (cit n 17) pp 22–23 citing art 283 of the Italian Code of Civil Procedure. For an example of the litigation that these kinds of ambiguities may spark, see Cour de cassation, Civ. 2, 06.01.2012, No 10-23.518, cited in Buzzoni (cit n 52) p 41 (involving the enforcement of an incoming EEO). Analoguous problems may also arise where the application to issue the certificate is initially denied, but then granted following a challenge that may be provided under national law. Similar difficulties may finally arise in connection with replacement certificates issued following a challenge to a judgment certified as a EEO. Indeed, art 6(3) EEOR does not itself specify the court to which the application for a replacement certificate should be addressed.
[82] See point 3 of the standard forms set out in Annexes I to VI EEOR. On this possibility, see also André Huet, 'Titre exécutoire européen' (2020) Répertoire Dalloz droit international, No 43.
[83] See Uzelac, Bratković and Brozović (cit n 14) pp 4–5.
[84] See ibid 5. Noticeably, the Croatian Government has since updated its communication to specify that: 'An application for rectification or withdrawal of a court certificate must be submitted to (…) the court that issued the certificate' (see 'European e-Justice Portal - European enforcement order (Croatia)', <https://e-justice.europa.eu/376/EN/european_enforcement_order?CROATIA&member=1> accessed 1 May 2022, last updated 12 October 2021.

Regulation No 805/2004'[85]. Against this background, five out of the seven Member States covered by the EFFORTS Project have interpreted the EEO Regulation as requiring the certification to be carried out by a judge. In these cases, national law also specifies whether the 'same judge' who decided on the dispute or approved the underlying settlement should carry out the certification[86]. By contrast, however, §§ 1079 and 724(2) of the German Code of Civil Procedure, read in conjunction with § 20 (1) No 11 of the Judicial Officer Act (*Rechtspflegergesetz*), confer the power to issue certificates under the EEO Regulation upon the judicial officer[87]. Similarly, the Belgian Circular of 22 June 2005 also granted the authority to issue or certify outgoing EEOs to the court's chief clerk of the court that delivered the judgment or approved the settlement. However, whether this solution still applies following the CJEU's decision in *Imtech Marine* remains highly controversial[88].

Regarding the procedure applicable to the (re-)issuance and suspension of the EEO, several countries covered by the Project have decided to regulate the certification by aligning it with the rules applicable to the circulation of titles under BI bis[89] or with the relevant rules

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[85] Case C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA*, ECLI:EU:C:2015:825, para 46.

[86] In favour of this solution, see eg, in **France**, art 509-1 of the Code of Civil Procedure, cited in Buzzoni and Van Den Eeckhout (cit n 11) p 76: 'The following shall be submitted to the judge who rendered the decision or approved the agreement: (...) requests for certification of French enforceable titles with a view to their recognition and enforcement abroad pursuant to: (…) 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'; the same approach appears to prevail in **Croatia** and **Lithuania.** For these two countries, see respectively Uzelac, Bratković and Brozović (cit n 14) pp 4–5, and Simaitis, Vebraite and Markeviciute (cit n 14) pp 2–3. Contra, see in **Luxembourg** the new art 87 of the Law on Judicial Organisation, which expressly confers the authority to issue certificates upon 'the president or managing judge of the court that issued the judicial decision or the judge who replaces him/her'. For the situation in **Italy**, where the question remains debated because of the absence of explicit implementing rules, see Villata and others (cit n 17) p 22).

[87] See Lobach and Reich (cit n 12) pp 4 and 8, noting that the rule predates the CJEU's judgment in *Imtech Marine* and that 'the question has arisen in the literature whether the German implementation rules, which provide for a certification by the judicial officer, are in full conformity with the EEOR'.

[88] See Van der Borght and others (cit n 13); on this debate, see also Thalia Kruger and Fieke Van Overbeeke, 'European Enforcement Order' in Jan von Hein and Thalia Kruger (eds), *Informed choices in cross-border enforcement: the European state of the art and future perspectives* (Intersentia 2021), pp 51–63 and the Belgian National Report written by Fieke Van Overbeeke at pp 161-190.

[89] This particular approach appears to have been followed by the French and Luxembourgish legislatures. In **France**, see arts 509-1 to 509-7 of the Code of Civil Procedure, which mostly apply to both Regulations (with the important caveat that certification under BI bis is not performed by a judge). In **Luxembourg**, art 87 of the Law on Judicial Organisation also applies to certificates under both Regulations. More generally, see Lobach and Reich (cit n 12) p 2, noting that in **Germany:** 'the regulations themselves are accordingly systematically aligned as evidenced by the fact that some of the implementation rules of the regulations in turn refer to those

applicable to the certificate of enforceability under domestic law[90]. Conversely, Croatia and Lithuania both enacted ad hoc procedures for the certification of outgoing judgments under the EEO Regulation.

As the national rapporteurs rightly noted, the former approach has the advantage of allowing both courts and practitioners to 'rely on procedural mechanism with which there are already acquainted, thereby fostering the workability of the EEOR in practice'[91], even though this strategy might arguably hinder the specificities – and finally reduce the utility – of the Regulation itself. On the other hand, even though the latter strategy is theoretically more suited to address all the details laid out in the Regulation, this outcome entirely depends on the precision and overall coherence of the implementing rules[92]. In any case, the existence of explicit implementing rules is widely regarded as a helpful tool to enhance predictability and consistency in the application of European law[93].

In addition to these general remarks, we will address some of the recurring issues regarding the procedure for (re-)issuance, suspension, rectification, and withdrawal of the EEO in the section dedicated to national case law applying the EEO Regulation. Indeed, national legal systems may vary considerably with regard to issues such as the moment when an application for an EEO can be filed, the remedies available against certification decisions, and the rules applicable to service of the EEO certificate on the debtor.

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on other regulations, particularly to the EEOR as the first European instrument of the so-called second generation'.

[90] In this respect, see eg ibid 8, noting that: 'with regard to the various remedies provided for by the EEOR, many of the German implementation provisions refer to corresponding remedies under national law'.

[91] ibid 8.

[92] On this point, see in particular Uzelac, Bratković and Brozović (cit n 14) p 8, noting that: 'Bad drafting of the national implementation rules, initially misleading translation of the term EEO into Croatian, erroneous pointing to relevant rules of EA pose a problem in understanding of the aim of the Regulation and its adequate implementation before Croatian courts. Unfortunately, to some of the questions from this report, from the perspective of national law it is not easy to respond due to the bad drafting of the pertinent acts'.

[93] See Villata and others (cit n 17) p 34 and the references cited therein, stressing the need for clear and more exhaustive implementing rules at the national level; adde Van der Borght and others (cit n 13) pp 10–11 denouncing the pitfalls of the absence of national implementing rules in Belgium.

b) <u>Authentic instruments</u>

Under Article 25(1) EEOR: 'An authentic instrument concerning a claim within the meaning of Article 4(2) which is enforceable in one Member State shall, upon application to the authority designated by the Member State of origin, be certified as a European Enforcement Order, using the standard form in Annex III'. Furthermore, according to Article 4(2) and (3) EEOR, a 'claim' falls under the Regulation if it concerns a 'payment of a specific sum of money that has fallen due or for which the due date is indicated in the […] authentic instrument', and an act can be regarded as an 'authentic instrument if it refers to: '(a) a document which has been formally drawn up or registered as an authentic instrument, and the authenticity of which: (i) relates to the signature and the content of the instrument; and (ii) has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates; or (b) an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them'.

Within this framework, all the Member States covered by the EFFORTS Project seem to have adopted a similar approach by designating the notary who drew up the instrument as the authority competent to certify the title as an EEO[94]. Nevertheless, the kinds of enforceable titles that can be certified as EEOs and the procedural rules applicable to certification continue to vary from one country to the other.

Firstly, Article 3(1) EEOR, which defines the notion of 'uncontested claim', specifies that 'A claim shall be regarded as uncontested if: […] (d) the debtor has expressly agreed to it in an authentic instrument'. Hence, this requirement may well exclude some claims based on domestic enforceable titles from the scope of the Regulation. In *Zulfikarpašić* (C-484/15), for instance, the CJEU held that writs of execution issued by Croatian notaries on the basis of 'authentic documents' did not qualify as 'uncontested claims' within the scope of the EEO

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[94] For **Belgium**, see Van der Borght and others (cit n 13) pp 4–5 and the authorities cited therein; for **Croatia**, see art 357 of the Enforcement Act, referenced in Uzelac, Bratković and Brozović (cit n 14) p 4; in **France**, see art 509-3 of the Code of Civil Procedure, referenced in Buzzoni and Van Den Eeckhout (cit n 11) p 27 ff; in **Germany**, see §§ 1079 No 1 and 2, 797(2) ZPO, referenced in Lobach and Reich (cit n 12) p 4; in **Italy**, see art 8 of the Law No 122/2016 referenced in Villata and others (cit n 17) p 23; in **Lithuania**, see art 15(2) of Law Implementing the European Union Legislation and International Legal Instruments Regulating the Civil Procedure of the Republic of Lithuania, cited in Simaitis, Vebraite and Markeviciute (cit n 14) p 30; in **Luxembourg**, see art 1 of the Law on the Organisation of Notaries, referenced in Van Den Eeckhout (cit n 17) p 9.

Regulation[95]. Similarly, some French scholars have suggested that, even though authentic instruments drawn up by French notaries are enforceable as soon as they contain a liquidated and payable obligation and execution formula, Article 3(1)(d) EEOR requires an additional and explicit expression of consent by the debtor in order to proceed with immediate enforcement[96].

Furthermore, the procedural rules applicable to the certification of authentic instruments also vary from one country to another[97]. In particular, it appears that only three out of the seven legal systems covered by the research – namely, Croatia[98], France[99], and Germany[100] – provide a judicial remedy in cases where the notary refuses to certify a title as an EEO. Similarly, the national reports have highlighted that while the Croatian[101], German[102], and Lithuanian[103] legislators have conferred upon a court the power to rule on applications for rectification or withdrawal of certificates issued under Article 25 EEOR, Belgian[104] and

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95 See Case C-484/15, *I Zulfikarpašić v S Gajer*, ECLI:EU:C:2017:199, para 55, cited in Uzelac, Bratković and Brozović (cit n 14) p 5. In the same decision, the CJEU also held that Croatian notaries did not qualify as 'courts' within the meaning of the EEO Regulation..

96 See arts L111-2 and L111-3 of the French Code of Civil Enforcement Procedures; in favour of this additional requirement, see eg Huet (cit n 82) No 71. By comparison, German notarial acts are enforceable under domestic law only if they contain a specific clause by which the debtor gives their consent to direct enforcement ('*Unterwerfungserklärung*', see § 794 I No 5 of the German Code of Civil Procedure). As such, these instruments also plainly meet the definition of 'uncontested claim' set out in art 3(1)(d) EEOR. In Lithuania, the legislature partially avoided this debate by laying out a list of titles that should be regarded as 'authentic instruments' in art 15(1) of the Law Implementing the European Union Legislation and International Legal Instruments Regulating the Civil Procedure ('Authentic instruments shall mean promissory notes protested and non-protested by notaries, cheques, mortgage/pledge transactions with enforcement records made by notaries'). Naturally, the list set out in art 15 of the Law should be regarded as regular only insofar as the acts included in it are compatible with the autonomous interpretation of the Regulation provided by the CJEU.

97 Unfortunately, however, very few details concerning the procedures applicable to the (re-)issuance, suspension, rectification, or withdrawal of certificates based on authentic instruments have been published on the e-Justice Portal, which may be unsurprising given the level of generality of the information required under art 30(1)(c) EEOR ('1. The Member States shall notify the Commission of (…) (c) the lists of the authorities referred to in Article 25').

98 Uzelac, Bratković and Brozović (cit n 14) p 5.

99 Buzzoni and Van Den Eeckhout (cit n 11) pp 27–29.

100 Lobach and Reich (cit n 12) p 5.

101 Uzelac, Bratković and Brozović (cit n 14) p 6.

102 Lobach and Reich (cit n 12) pp 5–6.

103 Simaitis, Vebraite and Markeviciute (cit n 14) p 3.

104 Van der Borght and others (cit n 13) pp 5–6.

French[105] law seem to have left this task to the same notary who issued the initial certificate. In general, one could question whether procedural rules applicable to the certification of authentic instruments under the EEO Regulation should be re-assessed in light of the recent consecration of the judicial nature of the certification[106] and whether these national divergences remain squarely within the boundaries of the Member States' procedural autonomy.

2. Minimum standards

Chapter III EEOR lays out the minimum standards that domestic judgments falling under the Regulation need to fulfil to be certified as EEOs[107]. Firstly, Articles 13 to 18 EEOR provide specific safeguards to ensure that the debtor receives all the necessary information about the claim and is given an effective opportunity to participate in the proceedings[108]. Secondly, a judgment can be certified as an EEO only if national law allows the debtor to apply for a review under the exceptional cases set out in Article 19 EEOR.

Turning first to the minimum standards set out in Articles 13 to 18 EEOR, the overwhelming majority of the Member States covered by the Project did not enact any specific provision in their national laws[109]. As a result, issues such as the service of the claim

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[105] Buzzoni and Van Den Eeckhout (cit n 11) pp 28–30, and the references cited therein; see also Huet (cit n 82) nos 73–76.
[106] See above, III.A.1.a.
[107] For an overview of the practical difficulties that have arisen in connection with these standards, see also Kruger and Van Overbeeke (cit n 88) p 58 ff.
[108] These minimum standards concern the methods of service of the claim on the debtor (arts 13-15 EEOR), the level of information due about the claim (art 16 EEOR), and the procedural steps necessary to contest it under national procedural law (art 17 EEOR). Moreover, art 18 EEOR provides that non-compliance with these standards can be cured if the debtor had the right to effectively contest the judgment in accordance with the conditions set out in art 18(1) EEOR, or if the debtor's conduct demonstrated that they had personally received the document to be served in sufficient time to arrange for their defence even though the proceedings in the Member State of origin did not comply with the procedural requirements as set out in arts 13 and 14 EEOR.
[109] See Van der Borght and others (cit n 13) p 6 ('As regards the rules on service of documents or/and notifications for issuing an EEO certificate or any related document to it, the Belgian civil procedural rules – without prejudice to the minimum standards as set in Art. 13, 14 and 15 of the EEOR – are applicable'); Uzelac, Bratković and Brozović (cit n 14) p 6 ('There are no special rules on service provided for EEO. General national rules on service are to be applied'); Buzzoni and Van Den Eeckhout (cit n 11) p 30 ('Without prejudice to the provisions of the Service Regulation, rules on service are laid out by Articles 651 to 694 of the French Code of Civil Procedure'); Lobach and Reich (cit n 12) p 6 ('The German legislator has refrained from enacting specific

and the information due to the debtor remain governed by national law, and compliance with the minimum standards is usually examined ex post by the competent certifying authorities. An interesting exception to this approach can nevertheless be found in Article 14(1) of the Lithuanian Law Implementing the European Union Legislation, which specifies that any time that a claimant has applied for an EEO at the outset of the proceedings, the court has the duty to serve the documents in a manner compatible with Articles 13, 14 and 15 of Regulation (EC) No 805/2004[110].

Despite the lack of detailed implementing legislation, the national reports have unanimously indicated that ordinary rules of national procedural law usually comply with the minimum standards laid out in the EEO Regulation. In particular, the national rapporteurs have underscored that the overwhelming majority of the methods of service available in domestic civil proceedings are compatible with Articles 13 to 15 EEOR[111].

Similar observations about the scarcity of national implementing rules can be made regarding the minimum standard for review in exceptional cases set out in Article 19 EEOR. In *Imtech Marine*, the CJEU held that this provision does not require the Member States to establish any specific procedure in their national law. Instead, Member States may rely on existing remedies insofar as they effectively and without exception allow for a full review, in law and in fact, of a judgment in the two situations referred to in Article 19 EEOR[112]. Accordingly,

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provisions'); Villata and others (cit n 17) p 28 ('Service according to the Italian civil procedural law respects the minimum-rules of service laid down in Art. 13 and 14 EEO Reg., according to the doctrine'); Van Den Eeckhout (cit n 17) p 10 ('No special remarks').

[110] See Simaitis, Vebraite and Markeviciute (cit n 14) pp 3 and 30.

[111] It is important to note, however, that according to Recital 13 EEOR 'any method of service that is based on a legal fiction as regards the fulfilment of those minimum standards cannot be considered sufficient for the certification of a judgment as a European Enforcement Order', and that under art 14 EEOR methods of service without proof of receipt by the debtor are not admissible if the debtor's address is not known with certainty. Accordingly, the CJEU has precised (C-292/10, *G v Cornelius de Visser*, ECLI:EU:C:2012:142, para 68), that German rules allowing notification of a claim by publication do not comply with the minimum standards of the EEO Regulation. On the consequences of this ruling for the other legal systems covered by the Project, see in particular Uzelac, Bratković and Brozović (cit n 14) pp 6–7; Buzzoni and Van Den Eeckhout (cit n 11) p 31; Villata and others (cit n 17) pp 28–29.

[112] See CJEU, Case C-300/14, holding. Far from closing the debate regarding the Belgian courts' ability to issue certificates under the EEO Regulation, the CJEU's decision has apparently led to greater uncertainty among legal practictioners and even resulted in inconsistent decisions in Belgium. On these points, see in particular the results of the empirical study led within the context of the IC2BE Project (JUST/2013/JCIV/AG/4635),

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all the Member States covered by the EFFORTS Project have relied on pre-existing remedies to give effect to Article 19 EEOR, and six out of seven have also refrained from including any explicit reference in their legislation to the relevant remedies of domestic law[113].

The lack of visibility that may result from this situation has only partially been addressed by Article 30 EEOR, which, among other things, requires the Member States to notify the Commission of the procedures for review referred to in Article 19(1) and provides for their dissemination to the public. Indeed, the information communicated by the Member States appears at times to be insufficient to allow a potential debtor to identify the relevant provisions of domestic law[114].

3. Enforcement of incoming EEOs

In principle, Articles 5 and 20 EEOR provide that a judgment certified as an EEO is directly enforceable in the other Member States without the need for a declaration of enforceability, and that its enforcement is governed by the law of the Member State of enforcement under the same conditions as a judgment handed down in that State.

In light of these principles, only three of the Member States covered by the EFFORTS Project have enacted explicit provisions dealing with the enforcement of incoming EEOs. In Germany and Croatia, national implementing legislation attempts to clarify the domestic procedural rules applicable to applications for refusal of enforcement under Article 21 EEOR, stay or limitations of enforcement under Article 23 EEOR, and translations of documents in accordance with Article 20(2)(c) EEOR[115]. In Lithuania, by contrast,

published in Fieke Van Overbeeke, 'Belgium' in Jan von Hein and Thalia Kruger (eds), *Informed choices in cross-border enforcement: the European state of the art and future perspectives* (Intersentia 2021), pp 178–181.

[113] Art 364 of the Croatian Enforcement Act, which provides that: 'The rules on an appeal after the expiry of the time limit, ie on an action for the reasons for which such an appeal may be lodged (Articles 53 to 55), shall also apply to enforcement on the basis of a European Enforcement Order' is the only exception in this regard. On this provision, see also Uzelac, Bratković and Brozović (cit n 14) p 7.

[114] In this respect, see eg the declarations made by France ('The review procedure referred to in Article 19 is the ordinary procedure applicable to decisions taken by the court that issued the original enforcement order'), available at 'European e-Justice Portal - European enforcement order (France)', <https://e-justice.europa.eu/376/EN/european_enforcement_order?FRANCE&member=1> accessed 1 May 2022..

[115] In **Germany**, see in particular §§ 1082-1086 of the Code of Civil Procedure, commented in Lobach and Reich (cit n 12) p 7. In **Croatia**, see arts 361 to 363 of the Enforcement Act, commented in Uzelac, Bratković

Articles 17 and 18 of the Law Implementing the European Union Legislation distinguishes between applications for refusal of enforcement under Article 21 EEOR, which are subject to the jurisdiction of the Court of Appeal of Lithuania, and applications for stay or limitation of court decisions, which are dealt with at the district court level and subject to the application by analogy of the corresponding provisions of domestic law[116].

B. National case law on the EEO Regulation

The following paragraphs will address the most recurring issues that have emerged from the National Reports on Case Law. These issues fall into four different categories: the notion of 'uncontested claim' (1); the procedural rules governing the certification of outgoing titles as EEOs (2); the interaction between domestic procedural rules and minimum standards under the EEO Regulation (3); and, finally, the enforcement of EEOs issued in another Member State (4).

1. The notion of 'uncontested claim'

As already mentioned, Article 3 EEOR provides that the Regulation shall apply to 'judgments, court settlements and authentic instruments on uncontested claims'. According to this provision, a claim is to be regarded as uncontested if: the debtor has expressly agreed to it by admission or by means of a court settlement[117]; the debtor has never objected to it in the course of the court proceedings, in compliance with the relevant procedural requirements under the law of the Member State of origin[118]; the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, insofar as the default is tantamount to a tacit admission of the claim or the facts alleged by the creditor under the law of the Member State of origin[119]; or the debtor has expressly agreed to it in an authentic instrument[120].

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and Brozović (cit n 14) pp 7–8 (arguing that the references to domestic civil procedure contained in the implementing legislation are incorrect as a matter of Croatian law).

[116] See Simaitis, Vebraite and Markeviciute (cit n 14) pp 31–32.

[117] Art 3(a) EEOR.

[118] Art 3(b) EEOR.

[119] Art 3(c) EEOR.

[120] Art 3(d) EEOR.

Moreover, even though the authority to decide whether a claim is uncontested lies with the competent authority of the Member State of origin[121], the CJEU also held that the concept of 'uncontested claim' constitutes a uniform notion of EU law that should be assessed autonomously from national procedural law[122].

Predictably, the interpretation of Article 3 EEOR has given rise to significant litigation before the courts of the Member States covered by the Project, especially in cases involving the certification as an EEO of judgments given in default of appearance[123]. These cases are interesting because they cast light on the definition of the expression 'uncontested claim' and help define the exact scope of application of the EEO Regulation.

Overall, national courts appear to have construed the notion of 'uncontested claim' rather broadly, in a way that generally includes default judgments[124]. By contrast, the certification of a title is in principle excluded in cases where the underlying decision has been issued after adversarial proceedings where the defendant disputed the plaintiff's claim[125].

However, the reported cases also demonstrate that the application of the EEO Regulation does not encompass all instances where a judgment is given without the defendant entering an appearance. In Italy, for instance, courts have unsurprisingly refrained from certifying domestic orders for payment issued *ex parte* if the debtor later files an opposition within the relevant time limit set out by domestic law[126]. In a different setting, the Lithuanian Court of

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[121] See eg Tribunal d'arrondissement Luxembourg Jugement civil, No 76/08 (XIe chambre), 18.04.2008, reported in Van Den Eeckhout (cit n 61) p 12, where the court correctly held that a foreign title could not be enforced in Luxembourg as an EEO because the accompanying certificate failed to specify that the claim was 'uncontested' within the meaning of the Regulation.

[122] CJEU, Case C-511/14, *Pebros Servizi v Aston Martin Lagonda Ltd*, ECLI:EU:C:2016:448, holding.

[123] See Buzzoni (cit n 52) pp 50–51.

[124] On this point, see eg Tribunale of Novara, 23.05.2012, cited in Villata and others (cit n 46) pp 43 and 47, where the court held that when the defendant is in default, the claim can be certified as 'uncontested' for the purposes of the EEO Regulation, even if the court, according to the national rules on default, must consider all the factual background of the claim as 'contested'. The decision is interesting, because it adopted the same approach that would be later be endorsed by the CJEU in *Pebros Servizi*.

[125] On this solution, see eg the decisions cited in Uzelac, Bratković and Brozović (cit n 63) p 3.

[126] For an illustration, see the decisions concerning the Italian order for payment procedure cited Villata and others (cit n 46) p p 47 (Tribunale of Prato, 30.11. 2011, and Tribunale of Mantova, 10.07.2015). By contrast, domestic orders for payment that have become enforceable in the absence of any opposition may very well be certified as EEOs and enforced in another Member State. See eg Cour d'appel d'Aix-en-Provence, 20.08.2008, No 07/14921, cited in Buzzoni (cit n 52) p 50.

Appeal in Lithuania also excluded the applicability of the EEO Regulation in a case where the defendant had not attended a hearing but sent a pre-emptive notice to the court indicating the reasons for his absence[127]. Under these circumstances, the court held that the defendant's conduct could not amount to a tacit acceptance of the claim.

2. Procedural rules governing the certification of outgoing titles as EEOs

National rapporteurs have collected numerous national court decisions dealing with the rules applicable to the (re-)issuance, rectification, withdrawal, and suspension or limitation of enforceability of EEOs. These judgments are significant because they highlight how the concrete application of the EEO Regulation may at times meaningfully differ from one Member State to another.

Firstly, national interpretations may diverge in the Member States where no implementing provisions have explicitly designated the person or body competent to issue EEO certificates. Before the CJEU's decision in *Imtech Marine*[128], courts in Belgium and Italy had come to different conclusions on whether court clerks rather than judges could issue EEOs certificates. In a decision issued back in 2006, the Commercial Court of Hasselt held that applications could be submitted to the chief clerk of the court or tribunal that made the decision or court settlement[129]. Conversely, in a decision issued two years later, the Milan court of first instance held that the certification of a judgment as an EEO is not a mere administrative task but rather an exercise of judicial power that only a judge could perform[130]. Since then, the CJEU has endorsed the latter solution[131].

Secondly, the national legal systems covered by the EFFORTS Project may also take different stances about the moment when a creditor is allowed to apply an EEO. Indeed, even though Article 6 EEO suggests that an application for certification can be filed 'at any time to the court of origin', the practical impact of this provision seems to depend on the

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[127] See Court of Appeals of the RoL 22.08.2019, No e2-639-943/2019, cited in Simantas Simaitis, Vigita Vebraite and Milda Markeviciute, 'Report on Lithuanian Case Law' EFFORTS Collection of national case law, p 2, <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/01/D2.14-Report-on-Lithuanian-case-law.pdf> accessed 1 May 2022.
[128] See CJEU, Case C-300/14.
[129] Marco Giacalone and Gina Gioia, 'Report on Belgian Case Law', 10, pp 4–5.
[130] Villata and others (cit n 46) p 38.
[131] See above III.A.1.

specific features of the domestic procedural law of the Member State of origin. In Lithuania, Article 14 of the Law Implementing the European Union Legislation allows creditors to apply for the certification of judgment as an EEO at the very outset of the proceedings and provides that the application will be granted insofar as the claim falls under the scope of the EEO Regulation and the proceedings comply with European minimum standards[132]. Conversely, two decisions issued in Luxembourg held that applications for an EEO cannot be filed as long as the underlying judgment does not fulfil the conditions set out in Article 6 EEOR. Specifically, these courts required a judgment that had become at least provisionally enforceable in the Member State of origin[133].

Thirdly, some uncertainties have arisen regarding the creditor's right to appeal against a refusal to issue certificates under the Regulation. In Italy, for instance, courts have come to inconsistent solutions on whether, in the absence of any specific remedy in the Regulation, creditors should be allowed to renew their applications or rather be required to challenge the refusal before the Court of Appeal following the relevant rules of domestic civil procedure[134]. These cases show the importance of implementing explicit national rules to fill in the gaps in the EEO Regulation[135].

Fourthly, four reported decisions dealt with the remedies available following the initial certification of a judgment as an EEO. In this respect, the Supreme Court of Lithuania correctly noted that ordinary rules on appeal do not apply to decisions granting the issuance of an EEO[136]. In a second case, the Municipal Civil Court in Zagreb came to the same conclusion and added that the debtor could not challenge the EEO by alleging that the

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[132] See Simaitis, Vebraite and Markeviciute (cit n 14) p 30.

[133] See Jugement commercial II No 1895/12, 30.11.2012 and Tribunal d'arrondissement Luxembourg, Jugement civil No 127/13 (XI[e] chambre), 24.05.2013, both cited in Van Den Eeckhout (cit n 61).

[134] On this debate, see Villata and others (cit n 46) p 48, and the cases cited therein.

[135] For some illustrations, see in particular Uzelac, Bratković and Brozović (cit n 14) p 5 (**Croatia**); Lobach and Reich (cit n 43) p 5 (**Germany**). In **France**, art 509-7 of the Code of Civil Procedure only allows to challenge the refusal of certification if the determination has not been made by a judge. Therefore, this remedy is no longer available for the certification of judgments as EEOs since the adoption of Decree No 2017-892 of 6 May 2017, which transferred the authority to certify judgments from the chief court to the judge who issued the decision.

[136] See Supreme Court of the RoL 10.10.2014 No 3K-3-127/2014, reported in Simaitis, Vebraite and Markeviciute (cit n 127) pp 2–3. This solution is in line with art 10(4) EEOR, which provides that: 'No appeal shall lie against the issuing of a European Enforcement Order certificate'.

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underlying claim had been settled[137]. Finally, two Italian court decisions specified the remedies that, as a matter of Italian procedural law, are available to the debtor in cases where an initial application to withdraw the EEO has been rejected[138].

3. Interaction between domestic procedural rules and minimum standards under the EEO Regulation

The national rapporteurs have collected numerous court decisions dealing with the minimum standards set out in Articles 13 to 19 EEOR. Most of these decisions deal with the service of the claim (Articles 13 to 15 EEOR), albeit some difficulties have also arisen about the requirements regarding the information due to the debtor (Articles 16 and 17 EEOR), the cure of non-compliance (Article 18 EEOR), and the mechanisms for review in exceptional cases (Article 19 EEOR).

On the question of service, national courts seem to have correctly followed the principles laid out in Recital 13, Article 14(2) EEOR and the case law of the CJEU[139] in order to exclude national methods of notification that allow fictitious service on defendants whose address is unknown[140]. Conversely, an interesting decision issued by a judge of first instance in Italy held that the irregularities of service according to domestic or European rules do not automatically affect the certification of a judgment as an EEO, insofar as the violation does not amount to a breach of the minimum standards set out in the EEO Regulation[141]. Finally, a decision rendered by the Higher Regional Court in Stuttgart back in 2007[142] showed how

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[137] Municipal Civil Court in Zagreb, 10. 7. 2017, R1-eu-3/2017, reported in Uzelac, Bratković and Brozović (cit n 63) p 3. The court stressed that the settlement could only be raised as an obstacle to the enforcement, but did not affect the EEO itself.

[138] See Villata and others (cit n 46) p 48 and the references cited therein, suggesting that a challenge could be brought before the Court of Appeal, but that no further challenge is available before the Italian Court of Cassation.

[139] See CJEU, Case C-292/10.

[140] See Kammergericht, 27.06.2011, 12 W 30/11, BeckRS 2011, 19801, cited in Lobach and Reich (cit n 43) p 6 (excluding the mechanism of service in public governed by §§ 185 ff of the German Code of Civil Procedure is not compatible with the EEO Regulation); Court of Appeals of the RoL 10.06.2021, No e2-519-464/2021, cited in Simaitis, Vebraite and Markeviciute (cit n 127) p 2 (adopting the same solution with respect to service in absentia under Lithuanian law).

[141] Giudice di Pace of Bari, 14 November 2008, cited in Villata and others (cit n 46) p 47.

[142] Oberlandesgericht Stuttgart, 23.10.2007, 5 W 29/2007, 5 W 29/07, openJur 2012, 60088, cited in Lobach and Reich (cit n 43) p 6.

national rules of service can indirectly impact the effective circulation of titles under the EEO Regulation. In that case, the court of first instance ordered the parties to appear in court by using a method of service that did not comply with the requirements of the EEO Regulation. The court then ruled in favour of the claimant, but the application for an EEO was later refused because of non-compliance with the minimum standards. As the national rapporteurs have noted, this result is problematic because the creditor bore the consequences of non-compliance with the minimum standards even though the court itself is responsible for serving the relevant as a matter of German law[143].

In addition to the questions of service, some interesting cases have also dealt with the interaction between Articles 16 and 17 EEOR, which lay out the level of information due to the debtor, and Article 18 EEOR, which concern the cure of non-compliance with the minimum standards. In particular, it appears that several German court decisions have declined to issue EEOs based on cost decisions because they found that the rules of domestic civil procedure did not fulfil the minimum standards of the EEO Regulation[144]. Noticeably, German case law seems to consider that the deficiencies affecting the information given to the debtor, regulated by Articles 16 and 17 EEOR, cannot be cured under Article 18(2) EEOR, which only refers to Articles 13 and 14 EEOR. Similarly, the Court of Appeal of Bologna[145] held that when the irregularity concerns the information due to the debtor about the procedural steps necessary to contest the claim (Article 17 EEOR), the non-compliance with the minimum standards cannot be cured because of the wording of Article 18(1)(b) EEOR.

Finally, the Belgian Report discusses an important decision of the Court of Appeal of Antwerp which held that Belgian judgments might not be certified as EEOs because of the lack of an adequate procedure allowing for the review in exceptional cases in accordance with the requirements set out in Article 19 EEOR[146].

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143 ibid 7.
144 See ibid 8 and the references cited therein.
145 Corte d'appello of Bologna, 13.1.2016, cited in Villata and others (cit n 46) p 46.
146 Court of Appeal of Antwerp, Judgement of 27 February 2017, commented in Giacalone and Gioia (cit n 129) pp 5–6.

4. Enforcement of incoming EEOs

Many national court decisions included in the National Reports concern the enforcement of foreign titles certified as an EEO by the competent authorities of another Member State. More specifically, national courts had to deal with questions related to the enforcement procedure laid out in Article 20 EEOR, applications for refusal of enforcement, stay and limitation of enforcement under Article 23 EEOR, and finally, the interplay between recognition and enforcement under BI bis and the EEO Regulation.

On the first set of issues, national courts have mostly adopted a pro-enforcement stance towards the requirements set out in Article 20 EEOR[147] while also ensuring that the creditor complies with the specific conditions laid out by the domestic rules on enforcement. In this respect, courts in both Germany and Italy have consistently held that national law requires the service of the title on the debtor prior to the first enforcement measure[148].

Secondly, even though Article 21 EEOR lists only one ground for refusal of enforcement[149], Article 11 EEOR also clarifies that: 'The European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment'. This provision is important because enforcement of an EEO can take place even on the basis of a title that is only provisionally enforceable[150]. Nevertheless, Article 11 EEOR does not explicitly specify whether the enforceability of the judgment should be assessed exclusively with regards to the law of the Member State of origin, or, most probably, by also taking into account the law of the Member State of enforcement. Indeed, national case law shows that the enforcement

[147] See eg Buzzoni (cit n 52) p 52, and the French cases cited therein; Lobach and Reich (cit n 43) p 8, discussing translation issues before German courts; Villata and others (cit n 46) pp 48–49, noting that the provisions of art 20 EEOR displace national requirements regarding the execution formula; Simaitis, Vebraite and Markeviciute (cit n 127) p 2, for an analoguous approach in Lithuania.
[148] See Amtsgericht Augsburg, 27.01.2012, 1 M 10281/12, openJur 2012, 120564, cited in Lobach and Reich (cit n 43) p 6; Tribunale of Monza, 01.02.2010, cited in Villata and others (cit n 46) p 49; cf Tribunal de paix Luxembourg, 16.10.2013, Rép. fisc. No 3710/13 Van Den Eeckhout (cit n 61) p 14, holding that service of the EEO is not required where the creditor only seeks protective measures in accordance with Luxembourgish law.
[149] According to this provision, the enforcement of a judgment certified as an EEO can be refused only in case of irreconcilability of decisions.
[150] See Tribunal d'arrondissement Luxembourg, 23.03.2016, No 89/2016 (XVIIe ch.), cited in Van Den Eeckhout (cit n 61) p 14.

of incoming EEOs can be refused in both cases[151]. By contrast, national courts have unanimously held that the grounds for refusal of enforcement set out in the EEO Regulation are exclusive and that, in particular, debtors may not oppose the enforcement of an incoming EEO by invoking a violation of public policy[152] nor by arguing that the proceedings did not meet the minimum standards set out in the EEO Regulation[153].

Thirdly, national court decisions also generally held that applications for stay or limitation of enforcement under Article 23 EEOR may, in principle, only be granted if the debtor has already applied for the rectification or withdrawal of the EEO or challenged the underlying judgment in the Member State of origin[154]. Nevertheless, the Italian rapporteurs rightly point out that the Regulation remains silent as to the possibility of obtaining a stay of the enforcement proceedings under national rules in cases where the enforcement of the EEO is challenged on national grounds[155].

Finally, one conclusive remark can be made regarding some interesting judgments that have been issued in Germany and France on the interplay between EEO and the old BI Regulation[156]. According to German case law, in fact, creditors who have already obtained an enforceable EEO certificate in another Member State are not allowed to apply for a declaration of enforceability under Article 38 of the old BI Regulation, because they already

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[151] See Cour de cassation, Civ. 2, 06.01.2012, No 10-23.518, cited in Buzzoni (cit n 52) p 41 (foreign judgment successfully challenged in the State of origin by decisions having acquired res judicata effect). Cf the German decisions referenced in Lobach and Reich (cit n 43) pp 7–8, refusing enforcement on the basis that the title did not contain an enforceable obligation as a matter of German law.
[152] For some illustrations, see eg Buzzoni (cit n 52) pp 53–54, and the French cases cited therein; Lobach and Reich (cit n 43) p 8, and the German cases cited therein.
[153] On this point, see in particular the decisions issued by the French Court of Cassation in Cour de cassation, Civ. 2, 22.02.2012, No 10-28.379 and Cour de cassation, Civ. 2, 26.09.2013, No 12-22.657, cited in Buzzoni (cit n 52) pp 52–53.
[154] For some illustrations, see eg ibid 54, and the French cases cited therein; Villata and others (cit n 46) pp 49–50, and the Italian cases cited therein; Tribunal d'arrondissement Luxembourg, 12.01.2018, Jugement saisie-arrêt spéciale (IIIe ch) No 12/2018 Van Den Eeckhout (cit n 61) p 14, cited in.
[155] On this issue, see in particular Villata and others (cit n 46) pp 49–50.
[156] In this respect, art 27 EEOR provides that: 'This Regulation shall not affect the possibility of seeking recognition and enforcement, in accordance with Regulation (EC) No 44/2001, of a judgment, a court settlement or an authentic instrument on an uncontested claim'.

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hold a title allowing them to carry out enforcement measures in Germany[157]. However, this solution is unlikely to apply if the debtor has obtained the withdrawal of the EEO in the Member State of origin, as decided by the Versailles Court of Appeal in 2018[158].

While these solutions seem to strike the right balance between the creditor's right to effective enforcement and the risk of having two coexisting enforcement titles potentially circulating in the EU Member States[159], it will be interesting to see how national courts will react to cases where a creditor wants to apply for an EEO while he has obtained an Article-53 certificate under the new BI bis Regulation, or vice versa[160].

IV. European Payment Order Regulation ('EPO Regulation')

The EPO Regulation represents the first uniform European procedure allowing the cross-border recovery of claims within the European Union. Compared to the BI bis and EEO Regulations, which both facilitate the circulation of domestic enforcement titles issued under national procedural rules, the EPO Regulation contains a set of harmonised provisions governing the application, examination, and issuance of a European Order for Payment which allows for the direct enforcement of uncontested pecuniary claims in all European Member States, with the exception of Denmark.

Within this framework, Member States nevertheless retain considerable discretion on a number of important matters, ranging from the designation of the authorities competent to

[157] Bundesgerichtshof, 04.02.2010, IX ZB 57/09, openJur 2011, 1444; 14.06.2012, IX ZB 245/10, BeckRS 2012, 13821; Oberlandesgericht Stuttgart, 20.04.2009, 5 W 68/08, EuZW 2010, 37-40, all reported in Lobach and Reich (cit n 43) pp 8–9.
[158] Cour d'appel de Versailles, 1re ch. 1re sect., 02.02.2018, No 16/01881, reported in Buzzoni (cit n 52) pp 48–49.
[159] See Lobach and Reich (cit n 43) p 9.
[160] This could happen, for instance, in a dispute where the creditor applies for an EEO in the Member State of origin following an unsuccessful attempt to enforce a default judgment in another Member State under the BI bis because of a violation of international public policy. Conversely, a creditor who first obtained an EEO which is then subject to a withdrawal application in the Member State of origin might be tempted to apply for a certificate under art 53 BI bis without waiting for a determination on the regularity of the EEO.

issue an EPO[161] to the rules governing the enforcement of incoming EPOs[162]. Similarly, the service of documents under the Regulation remains in principle governed by national law[163]. Indeed, the EPO Regulation does not exhaustively regulate all the procedural aspects leading to the issuance of an EPO, but rather sets the minimum standards that the Member States have to respect in exchange for the direct recognition and enforcement of their decisions across the European Union.

In the subsections below, we will first compare the general implementation strategies that the Member States have adopted with respect to the EPO Regulation (A) and then address some technical issues that have been brought before national courts regarding the concrete application of the EPO Regulation (B).

A. General implementation strategies in national legislation

National Reports have highlighted significant differences regarding the implementation of the EPO Regulation into the national legal systems covered by the Project. From the standpoint of general implementation strategies, the most considerable divergences concern the choice to set up a centralised court with general jurisdiction over EPO applications (1) and the level of digitalisation of the procedure (**Error! Reference source not found.**).

1. Distribution of competence among national courts

The uniform rules set out in the EPO Regulation do not fully harmonise the distribution of competence among national courts. Even though Article 6 EPOR specifies that international jurisdiction must be determined in accordance with the relevant rules of European law[164],

[161] See art 5 and 29(1)(a) of Regulation 1896/2006.
[162] See Recital 27 and art 21 of Regulation 1896/2006.
[163] See recitals nos 19-22 of Regulation 1896/2006.
[164] Today, these rules include in particular the provisions of the BI bis Regulation. Nevertheless, art 6(2) provides that applications brought against a consumer and relating to consumer contracts can only be filed before the courts of the Member State in which the defendant is domiciled.

Article 5 EPOR leaves the Member States free to designate which courts or authorities should have competence over EPOs or other related matters[165].

Against this background, six out of the seven Member States covered by the Project chose to align the competence to issue EPOs with the ordinary rules of domestic civil procedure. In Croatia, Lithuania, and Luxembourg, this is the consequence of explicit provisions which, either directly or by reference to the general rules of jurisdiction, confer the power to issue an EPO to the same courts that would have been competent to hear cases under the relevant domestic civil proceedings[166]. In Belgium, France, and Italy, the solution stems from the communications made by the Member States under Article 29(1)(a) EPOR[167]. In all these countries, the competence to issue an EPO varies depending on a number of factors, such as the identity of the parties, the value of the claim, or the subject matter of the underlying dispute.

Germany, by contrast, adopted a solution which starkly contrasts with the approach followed by the other legal systems studied. Under § 1087 of the German Code of Civil Procedure, the District Court (*Amtsgericht*) of Berlin-Wedding has in fact been granted exclusive jurisdiction over EPO applications, review procedures, and declarations of enforceability[168]. Furthermore, the responsibility to examine initial applications and issue certificates of enforceability lies with judicial officers, with judges intervening only in case of opposition or review[169]. In other words, Germany set up a centralised and streamlined system for the issuance of EPOs.

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[165] On this point, see also art 29(1)(a) EPOR, which requires the Member States to communicate to the Commission information regarding the courts which have jurisdiction to issue an EPO.
[166] For **Croatia**, see art 507i of the Civil Procedure Act, cited in Uzelac, Bratković and Brozović (cit n 14) pp 10 and 30; for **Lithuania,** see art 20 of the Law Implementing the European Union Legislation, cited in Simaitis, Vebraite and Markeviciute (cit n 14) pp 5 and 32; for **Luxembourg,** see art 49 of the New Code of Civil Procedure Van Den Eeckhout (cit n 17) pp 13 and 33–34.
[167] See the information published on 'European e-Justice Portal - European payment order', <https://e-justice.europa.eu/353/EN/european_payment_order> accessed 31 May 2022.
[168] See Lobach and Reich (cit n 12) pp 9–12, underscoring that 'The choice for that specific court can be traced back to the fact that the local court (*Amtsgericht*) of BerlinWedding is also the designated court for the domestic payment order proceedings in the event that the applicant does not have a place of residence in Germany'.
[169] See ibid 9, 11, and 35.

According to the German national rapporteurs, the choice to grant exclusive jurisdiction to the District Court of Berlin-Wedding helped develop a 'greater degree of expertise and experience' among judicial operators[170]. In this respect, the authors underscored that the concentration of EPO applications before a single court 'allows for the processing of EPO requests by personnel that routinely deals which such applications and are, therefore, likely to be better equipped' to deal with the complexity of European law[171].

Conversely, the other National Reports give a much more nuanced picture of the application of the EPO Regulation in their respective legal systems. With the possible exception of Croatia[172], the practical impact of the EPO Regulation on cross-border enforcement of claims appears to have been relatively small. In Belgium and Italy, this situation appears at least partly linked to the complete absence of national implementing rules clarifying the concrete functioning of the EPO procedure[173]. Nevertheless, the same conclusions as to the low use of the EPO Regulation and the relative lack of awareness of this instrument among national operators are also shared by the other national rapporteurs[174].

Given the perceived advantages of centralisation, it is thus somewhat surprising to note that France has recently abandoned the project to concentrate all applications for domestic and European orders for payment procedures before a single court[175] and that Croatia, which

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[170] ibid 13.
[171] ibid 12.
[172] See Uzelac, Bratković and Brozović (cit n 14) p 15 ('The provisions are relatively clear, although their use is not coordinated with other instruments such as EEO or Brussels I bis when it comes to the enforcement of EPOs'); during the debates held in the course of the Croatian Exchange Seminar, participants underscored how the application EPO procedure in Croatia remains more successful than the ESCP.
[173] On this point, see in particular the critical assessments contained in Van der Borght and others (cit n 13) p 17; and Villata and others (cit n 17) pp 48–49.
[174] For **France**, see Buzzoni and Van Den Eeckhout (cit n 11) p 48; for **Lithuania**, see Simaitis, Vebraite and Markeviciute (cit n 14) p 8; for **Luxembourg**, see Van Den Eeckhout (cit n 17) pp 17–18, as well as the national report prepared in the course of the IC2BE Project by Veerle Van Den Eeckhout and Carlos Santaló Goris, 'Luxembourg' in Jan von Hein and Thalia Kruger (eds), *Informed choices in cross-border enforcement: the European state of the art and future perspectives* (Intersentia 2021), pp 277–278.
[175] The project to concentrate (and digitalise) domestic and European order for payments before a single court had been first enacted by art 27 of the Law No 2019-222 of 23 March 2019, which was supposed to become applicable on 21 January 2021 at the latest. However, the project was first delayed by the COVID-19 pandemic and eventually abandoned through the adoption of art 57 of the Law No 2021-1729 of 22 December 2021, which repealed the reform introduced by art 27 of the Law No 2019-222. The change was apparently motivated

initially granted exclusive jurisdiction for EPOs to the commercial court in Zagreb, also abandoned this solution back in 2019[176].

2. The digitalisation of the EPO procedures

Another critical aspect regarding the implementation of the EPO Regulation into national law concerns the degree of digitalisation of the EPO procedure. In this regard as well, the National Reports show that significant differences persist as to the possibility of submitting and opposing EPOs in an electronic form, on the one hand, and as to the availability of electronic service of EPOs, on the other hand.

On the first point, Articles 7 and 16 EPOR respectively authorise the use of electronic communications services to file applications for an EPO and to oppose an EPO that has already been issued. Furthermore, Recital 11 EPOR also specifies that the use of standard forms in any communication between the court and the parties should have facilitated its administration and enabled the use of automatic data processing by the competent national authorities.

Despite these provisions, however, the degree of digitalisation of the EPO procedure remains rather limited in most of the legal systems covered by the Project. Indeed, electronic filing of EPO applications appears to be available only in Croatia[177], Lithuania[178], and Germany[179]. On the other hand, EPO applications must still be filed in paper form in

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by budgetary reasons. In the meantime, the French Government opted for a much more modest reform of the domestic order for payment procedure, introduced through the Decree No 2021-1322 of 11 October 2021.

[176] See Uzelac, Bratković and Brozović (cit n 14) p 10.

[177] See the communication made by the Croatian Government to the Commission pursuant to art 29(1)(c) EPOR and published on the e-Justice Portal: 'Forms, other applications or statements are to be submitted in written form, by fax or email'. See also Uzelac, Bratković and Brozović (cit n 14) p 10.

[178] Simaitis, Vebraite and Markeviciute (cit n 14) p 6: 'The form of submitting documents is regulated in Arts. 111 and 175^1-175^2 of the Civil Procedure Code enabling the parties to the case to submit documents to the court both by filing paper copies following procedural requirements (number of copies etc.) or filing electronic documents via Court Information System. The parties to the case are able to follow the procedure of their case in the system as well as review documents of the case'.

[179] See Lobach and Reich (cit n 12) p 9, indicating that the practice of the District Court of Berlin-Wedding has been to accept electronic applications for an EPO via the Electronic Court and Administration Mailbox (EGVP) as PDF files despite the lack of any specific statutory provision to this effect. On the modalities, see also the information published on 'Europäisches Mahnverfahren - Zahlungsbefehl - Dienstleistungen - Service Berlin - Berlin.de', <https://service.berlin.de/dienstleistung/327380/> accessed 1 June 2022.

Belgium[180], France[181], Italy[182], and Luxembourg[183]. Undoubtedly, the lack of accessibility resulting from the absence of electronic filing might hamper the attractiveness of the EPO procedure, especially in countries where domestic orders for payments may be requested electronically and then circulate under the EEO or the BI bis Regulations[184].

On the second point, Articles 13(d) and 14(1)(f) EPOR explicitly contemplate the possibility of serving the EPO using electronic means, provided that the minimum standards set out in the EPO Regulation are complied with and that the notification is carried out in accordance with the national law of the State in which the service has to be effected[185]. Hence, electronic service under the EPO Regulation remains subject to both national and European constraints. This circumstance might explain why the electronic notification of EPOs appears to be routinely available only in Croatia and Lithuania[186].

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[180] See the communication made by the Belgian Government to the Commission pursuant to art 29(1)(c) EPOR and published on the e-Justice Portal: 'The means of communication that are accepted by and available to the Belgian courts for purposes of the Regulation are confined to two: the form A application in Annex I may be lodged directly, with the supporting documents, at the registry of the court with jurisdiction; or the same form, with the supporting documents, may be sent to the court by registered post'.

[181] See Buzzoni and Van Den Eeckhout (cit n 11) pp 39–40 and the references cited therein, indicating that, despite the French Government declaration to the contrary, applications for an EPO must in practice be filed in paper form.

[182] See the communication made by the Italian Government to the Commission pursuant to art 29(1)(c) EPOR and published on the e-Justice Portal: 'The means of communication accepted for the purposes of the European order for payment procedure pursuant to Regulation (EC) No 1896/2006 are postal services'.

[183] See the communication made by the Luxembourgish Government to the Commission pursuant to art 29(1)(c) EPOR and published on the e-Justice Portal: 'Luxembourg accepts postal delivery as a means of communication'.

[184] As an illustration, it is therefore interesting to note that French law allows for the electronic filing of domestic orders for payments any time that the dispute falls within the jurisdiction of commercial courts.

[185] Additionally, it should also be reminded that, in cases of cross-border service, the provisions of the EPO Regulation do not affect the application of European rules on service. On this point, see art 27 EPOR.

[186] For **Croatia**, see Uzelac, Bratković and Brozović (cit n 63) p 11. For **Lithuania**, see Simaitis, Vebraite and Markeviciute (cit n 14) pp 6–7.

B. Technical issues arising from the application of the EPO Regulation

Among the numerous issues that national courts have faced with respect to the EPO Regulation, the most salient touch upon its scope of application (1), the jurisdiction to issue an EPO (2), and the service of documents (3).

1. Scope of application of the EPO Regulation

According to Articles 3 and 4 EPOR, the EPO procedure applies to the recovery of cross-border pecuniary claims for a specific amount that has fallen due. Furthermore, Article 2 EPOR provides that, in principle, the Regulation does not apply, inter alia, to claims arising from non-contractual obligations[187]. Even though very few judgments have been found to deal with these requirements[188], three interesting decisions must nevertheless be mentioned as they cast light on the scope of application of the EPO procedure.

The first decision deserving a special mention is a judgment issued on 12 October 2017 by the Belgian Constitutional Court[189]. In this case, the Constitutional Court held that a creditor in a purely domestic case could not rely on the provisions of the EPO Regulation in order to challenge the more restrictive restrictions set out by the Belgian legislator with regard to domestic order for payment procedures. According to the Court, the circumstance that cross-border cases falling under the scope of the EPO Regulation are treated differently than internal disputes does not amount to unlawful discrimination because litigants are not similarly situated. The decision is interesting because it refuses to expand the impact of the

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[187] According to art 2(2) EPOR, this principle is subject to three exceptions. In fact, a claim may fall within the scope of the EPO Regulation if it has been the subject of an agreement between the parties, if there has been an admission of debt, or if it relates to liquidated debts arising from joint ownership of property.

[188] This result is unsurprising given the overall structure of the EPO procedure. On the one hand, art 11 EPOR provides that the decision to reject the application for an EPO is issued using standard form D, which requires the court but does not oblige it to provide any further reasoning, and is not subject to any appeal. On the other hand, art 16 EPOR does not have to specify any reasons for contesting the claim with a statement of opposition. Therefore, the only scenario in which a court is effectively required to elaborate on the applicability of the EPO Regulation are cases where the defendant has applied for a review of the EPO under art 20(2) EPOR, arguing that the EPO was clearly wrongly issued having regard to the requirements laid down in the Regulation.

[189] Belgian Constitutional Court, 12.10.2017, No 6504 117/2017, reported in Giacalone and Gioia (cit n 129) p 7.

EPO Regulation beyond its regular scope of application and thus limits the influence of European law on domestic civil proceedings.

Issued in a very different scenario, two German decisions[190] dealing with the notion of 'non-contractual obligations' are also significant, both because they contain a rare interpretation of the requirement set out in Article 2(2)(d) EPOR[191] and because they highlight an interesting aspect of the interaction between Article 11 EPOR and domestic procedural law. In both cases, the dispute concerned a claim for unjust enrichment deriving from the payment of (supposed) contractual obligations between the parties. In both cases, the claimant had applied for an EPO before the District Court in Berlin-Wedding to recover the sums unduly paid in relation to an existing agreement, but the competent judicial officer had rejected the application on the ground that the claim concerned an extra-contractual obligation. At this point, the claimants filed a reminder before the District Court in accordance with § 11(2) of the German Judicial Officer Act, asking the court to reconsider the judicial officer's determination. The court granted their requests and held, in essence, that the notion of 'non-contractual obligations' should be interpreted autonomously and in line with the provisions of the BI bis Regulation. Therefore, the court held that claims for unjust enrichment may fall within the scope of the EPO Regulation when they relate to payments that the creditor made in order to fulfil his (supposed) contractual obligations.

From a procedural standpoint, these decisions are interesting because they underscore the residual role that domestic procedural law may play with respect to the remedies available against an irregular rejection of an EPO application, even though Article 11(2) EPOR explicitly excludes the claimant's right of appeal against this decision. On this point, Article 11(3) EPOR provides in fact that: 'The rejection of the application shall not prevent the claimant from pursuing the claim by means of a new application for a European order for payment *or of any other procedure available under the law of a Member State*'.

[190] Amtsgericht Berlin-Wedding, 10.02.2017, 70b C 6/17, BeckRS 2017, 108421 and Amtsgericht Berlin-Wedding, 13.04.2017, 70b C 5/17, BeckRS 2017, 108418, reported in Lobach and Reich (cit n 43) p 9.

[191] According to this provision, the EPO Regulation does not apply to 'claims arising from non-contractual obligations, unless: (i) they have been the subject of an agreement between the parties or there has been an admission of debt, or (ii) they relate to liquidated debts arising from joint ownership of property'.

2. Jurisdiction to issue an EPO

Several reported decisions have dealt with the question of international jurisdiction to issue an EPO. From a comparative standpoint, three different problems stood out in particular: the articulation between the EPO procedure and choice-of-court agreements; the special rules of jurisdiction applicable to consumers; and the prohibition to raise arguments about the lack of jurisdiction within the framework of the review procedure under Article 20 EPOR.

On the first issue, the courts of at least three different Member States – Croatia[192], France[193], and Luxembourg[194] – have confirmed that EPOs may be issued by the court designated by a choice-of-court agreement concluded between the parties[195]. This result is clearly correct, because Article 6 of the EPO Regulation provides that jurisdiction shall be determined in accordance with 'the relevant rules of Community law', an expression that plainly includes the rules of BI bis concerning choice-of-court agreements[196].

On the second issue, the Luxembourg Report on Case Law also highlighted how courts in Luxembourg have dealt with the special rule of jurisdiction set out in Article 6(2) EPOR[197]. In particular, the rapporteur noted that, compared to Article 17 BI bis, this provision affords broader protection to consumer defendants. As a result, courts have held that creditors cannot obtain an EPO against a consumer defendant in a State other than that of the

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[192] See Municipal Civil Court, 14. 6. 2021, P-eu-5/2021-2; High Commercial Court, Pž-4533/2020-2, reported in Uzelac, Bratković and Brozović (cit n 63) p 4.

[193] See Tribunal de commerce de Lille, Contentieux, 25.05.2016, No 2.015.005.134, and Cour d'appel de Poitiers, 2e ch., 05.06.2018, reported in Buzzoni (cit n 52) pp 65 and 70. In the latter case, the court nevertheless disregarded the choice-of-court agreement following the debtor's opposition, holding that it lacked jurisdictioin under the relevant rules of the BI Regulation because the dispute lacked any international element except for the choice-of-court agreement itself.

[194] See Cour de Cassation 08.10.2020, reported in Van Den Eeckhout (cit n 61) p 22.

[195] All these decisions were issued following an opposition by the debtor rather than the initial examination of the EPO application under Article 8 EPOR, which does not normally give rise to a reasoned opinion. They may nevertheless be cited as evidence of cases where the agreement between the parties contained a choice-of-court agreement and the court granted an EPO.

[196] See art 25 BI bis.

[197] On this specific issue, see Van Den Eeckhout (cit n 61) pp 23–25, as well as the national report drafted for the purposes of the IC2BE Project. See Van Den Eeckhout and Santaló Goris (cit n 174).

defendant's domicile even if the court seised would normally have jurisdiction under the provisions of the BI bis Regulation.

On the third issue, several national courts have held that in cases where debtors did not file a timely statement of opposition against an EPO, they cannot later use the review procedure set out in Article 20 EPOR to challenge the jurisdiction of the issuing court[198]. These decisions are in line with Case C-245/14, where the CJEU held that a defendant on whom an EPO has been regularly served could not contest the jurisdiction of the issuing court by filing a request for review under Article 20 EPOR, even where this determination was based on allegedly false information provided by the claimant in the application form[199].

Taken separately, each of these issues seems rather uncontroversial and does not appear to have raised particular problems before the courts of the Member States covered by the Project. Nevertheless, it could be interesting to see how national courts deal with disputes where these different rules intersect with each other. As an example, one might wonder whether the solution endorsed by the CJEU in Case C-245/14 would still apply if the initial EPO had been erroneously issued against a consumer by a court designated in a choice-of-court agreement but without jurisdiction under Article 6(2) EPOR.

3. Service of documents

The last set of cases related to the concrete application of the EPO Regulation touches upon the remedies available to defendants who wish to avoid or delay the enforcement of an enforceable EPO by challenging the regularity of service under the Regulation. Here, two different issues must be distinguished, depending on whether the challenge is raised before the court of origin or before the competent authorities in the State of enforcement.

In the first situation, the CJEU's judgment in Cases C-119/13 and C-120/13 has made clear that the review procedure set out in Article 20 EPOR does not apply in cases where an EPO has been declared enforceable even though the initial order had not been served in a manner

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[198] See Court of Appeal Ghent, Judgement of 5 November 2018, No 2018/7737, reported in Giacalone and Gioia (cit n 129) p 7; Cass. civ., 26.05.2015, n. 10799, sez. unite, reported in Villata and others (cit n 46) p 56; Tribunal d'arrondissement Luxembourg (première chambre), Jugement civil No 19/2018, 17.01.2018, reported in Van Den Eeckhout (cit n 61) p 21 (subject-matter jurisdiction).

[199] See CJEU, Case C-245/14, *Thomas Cook Belgium NV v Thurner Hotel GmbH*, ECLI:EU:C:2015:715, holding.

consistent with the minimum standards laid down in Articles 13 to 15 EPOR[200]. In the same judgment, the CJEU also made clear that the defendant must have the opportunity to raise that irregularity before the court of origin, which, if it is duly established, will invalidate the declaration of enforceability[201].

As a result, the Member States must determine the appropriate national procedure allowing the defendant to challenge an enforceable EPO in cases of invalid service of the initial order. So far, however, only two of the Member States covered by the Project appear to have explicitly addressed this specific question. In Germany, the legislator responded by introducing a new § 1092a in the Code of Civil Procedure, which allows the defendant to apply for suspension of the EPO before the court of origin if the service of the order did not comply with the minimum standards[202]. In Luxembourg, the Tribunal d'arrondissement of Luxembourg held that, even in the absence of any explicit national implementing rules on this issue, the defendant should be allowed to appeal against an EPO which has been declared enforceable despite a violation of the minimum standards set out in Articles 13 to 15 EPOR[203].

In the second situation, by contrast, the French Court of Cassation recently held[204] that only the courts of the Member State of origin have jurisdiction to review the service of the initial EPO, and thus a debtor could not challenge the service of a foreign EPO before French courts[205]. This outcome appears to be in line with Article 22(3) EPOR and with the overall structure of the EPO Regulation.

Nonetheless, the judgment must be distinguished from two slightly different issues that were also raised before French courts. On the one hand, in fact, a recent decision by the Regional

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[200] CJEU, Cases C-119/13 and C-120/13, *eco cosmetics GmbH & Co. KG*, ECLI:EU:C:2014:2144, holding.
[201] Ibid.
[202] See Lobach and Reich (cit n 12) pp 11–12, explaining that the application has to be filed within a period of one month, starting when the respondent was positively aware or should have been aware of the issuance of the EPO. If the application is successful, the EPO is annulled and, in the case of the EPO already being declared enforceable, the enforcement is declared inadmissible.
[203] Tribunal d'arrondissement de Luxembourg, 21.03.2017, 14[e] ch, No 78/2017, reported in Van Den Eeckhout (cit n 61) pp 20–21. In its judgment, the court relied on the fact that art 578 of the New Code of Civil Procedure provides that an appeal is open in all matters against first instance judgments, unless declared otherwise.
[204] Cour de cassation, Civ. 2, 27.06.2019, No 18-14.198, reported in Buzzoni (cit n 52) p 72.
[205] ibid 84.

Court of Paris[206] rightly held that, in accordance with Article 21 EPOR, the courts of the State of enforcement retain jurisdiction to rule on the regularity of the service of the enforcement title itself. On the other hand, an interesting judgment issued by the Court of Appeal of Lyon also made clear that even though defendants may only challenge the service of the initial EPO before the court of origin, they may nevertheless apply for a stay or limitation of enforcement in the State of enforcement under exceptional circumstances[207].

V. European Small Claims Procedure Regulation ('ESCP Regulation')

With the ESCP Regulation, the European Union introduced the second uniform European procedure after the entry into force of the EPO Regulation. Furthermore, before the entry into force of the BI bis Regulation, the ESCP Regulation was also the first European instrument allowing for the direct cross-border enforcement of contested civil and commercial claims within the EU[208]. As such, it certainly represented a considerable step forward for cross-border judicial cooperation at the time it was first enacted[209].

According to Recital 7 ESCPR, the objective of the Regulation is to facilitate access to justice and guarantee a level playing field for creditors and debtors throughout the European Union through the adoption of a simple, fast, and affordable harmonised procedure for the recovery of small claims in a cross-border setting[210]. Despite these ambitions, however, the actual implementation of the Regulation into the national legal systems remains, in most of the

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[206] Tribunal judiciaire de Paris, 27.02.2020, No 20/80041, reported ibid 72–73.
[207] See Cour d'appel de Lyon, 6e ch., 20.05.2021, No 20/05172, reported in ibid 73–74. In the case at hand, the court interpreted this possibility narrowly and in the end denied the defendant's application.
[208] On the one hand, in fact, Regulation No 44/2001 still required an exequatur before proceeding with the enforcement in another Member State; on the other hand, the EEO and EPO Regulation only apply to the cross-border enforcement of uncontested claims.
[209] Regulation No 861/2007 establishing the ESCP was first adopted on 11 July 2007 and became applicable on 1 January 2008. The ESCP Regulation was later amended by Regulation No 2015/2421.
[210] Recital 7 ESCPR. See also art 1(1) ESCPR, providing that: 'This Regulation establishes a European procedure for small claims (…), intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs. The European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States'.

countries analysed in the course of the EFFORTS project, decidedly underwhelming. In the following subsections, we will thus attempt to summarise the main obstacles that, according to the National Reports, have limited the effectiveness of the ESCP Regulation (A) and the few takeaways that can be gathered from the reported national case law (B).

A. General obstacles to the effectiveness of the ESCP Regulation

With the noticeable exception of Luxembourg – where the ESCP has been described as 'quite a popular procedure' for recovering cross-border claims of under 5,000 euros in value[211] – all the national reports are fairly critical of the instrument's aptitude to meet the objectives for which it was introduced. In general, the National Reports highlight that the ESCP Regulation remains, to this date, very rarely applied and relatively unknown to legal operators and end-users alike[212]. Moreover, although similar remarks are sometimes made in relation to other EFFORTS Regulations, the articulation between the ESCP Regulation and

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[211] On the situation in **Luxembourg,** see in particular Van Den Eeckhout (cit n 17) pp 19–22; and Van Den Eeckhout (cit n 61) pp 26–28 Among the factors contributing to this result, the author cites in particular: the absence of readily available alternatives for the recovery of small claims in cross-border cases under national law; the restrictive interpretation of art 6(2) EPOR taken by Luxembourgish courts, which may discourage the use of the EPO Regulation against consumer defendants; and the fact that, because of the country's size, issues of accessibility and concentration of competences are less acutely felt in Luxembourg than in other Member States.

[212] For **Belgium**, see Van der Borght and others (cit n 13) pp 24–25: 'The implementation of the ESCP in Belgium, despite its huge potential specifically for lowthreshold disputes – that are mostly consumer claims – has been remarkably under-used to the present day. The main reason behind this limited application mainly refers to the lack of awareness among citizens and some practitioners (e.g. lawyers and judiciary staff) about the existence and function of this procedure'. For **Croatia**, see Uzelac, Bratković and Brozović (cit n 14) p 20: 'Availability of other procedural mechanisms aiming at quick and efficient enforcement of claims within the European union make the use of this Regulation seldom'. For **France**, see Buzzoni and Van Den Eeckhout (cit n 11) p 58: 'On the one hand in fact, the existence of specific rules in the French Code of Civil Procedure provides a useful framework for the implementation of this uniform procedure into French law. On the other hand, the fact that the information published on the e-Justice Portal seems sometimes inconsistent and/or outdated creates some confusion and may therefore discourage French and foreign practitioners alike to make use of the ESCP procedure in France. Above all however, the fact that the procedure before French courts has not yet been fully digitalized does constitute a considerable obstacle to the development of the ESCP'. For **Italy**, see Villata and others (cit n 17) pp 60–61. In **Lithuania**, see Simaitis, Vebraite and Markeviciute (cit n 14) p 10: 'This procedure is not widely known and is rarely applicable due to its complexity and existence of more convenient national alternatives that can be applied at the choice of the claimant'.

the legal systems covered by the Project appears to be even more complex due to the specificities of this particular instrument.

In this regard, the first reason put forward by the national rapporteurs for the relative lack of success of the ESCP is the high degree of complexity and technicality of this instrument, even in comparison with other Regulations covered by the Project. Indeed, the ESCP represents the first European instrument of cross-border civil cooperation adopted with a view to harmonising all the stages of the procedure, from the initial filing of a claim, through the conduct of the proceedings and the production of evidence, to the delivery of a final decision on the merits. In these circumstances, the existence of clear implementing rules, as well as the training and expertise of judges, court officers, and other legal professionals who may be called upon to intervene in the proceedings, is essential for the proper functioning of the ESCP. In reality, however, it appears that two Member States covered by the Project – Belgium[213] and Italy[214] – have not yet adopted any explicit legislation to implement the ESCP at all and that, in contrast to the situation under the EPO Regulation, Germany has not fully implemented a centralised system for handling ESCPs either[215]. In this context, local lower courts are almost invariably left with very little guidance as to the few ESCP applications they might receive in addition to their ordinary – and potentially very significant – workload[216].

Apart from the high degree of complexity of the ESCP Regulation, the existence of other national procedures for the speedy recovery of small claims could be another factor hindering the attractiveness of this procedure. Indeed, no one doubts that the familiarity with national rules of civil procedure, coupled with the possibility of obtaining certification of an enforceable title under BI bis, could constitute a powerful incentive not to test the much less known provisions of the ESCP Regulation[217].

Finally, the last point that emerges from the National Reports is that in most of the Member States covered by the Project the use of electronic communications is still rather limited under the ESCP Regulation. Inevitably, this factor hampers the accessibility of this

[213] See Van der Borght and others (cit n 13) p 17 ff.
[214] See Villata and others (cit n 17) p 50 ff.
[215] See Lobach and Reich (cit n 12) pp 13–14.
[216] On this point, see eg Van der Borght and others (cit n 13) pp 24–25.
[217] On the potential impact of these factors, cf eg ibid 21–22; Van Den Eeckhout (cit n 61) pp 26–28.

instrument, in particular for foreign claimants who might be tempted to start civil proceedings in another Member State on the basis of uniform European rules. In this respect, it is interesting to note that three of the seven States covered by the Project – France, Italy and Luxembourg – have not yet implemented any electronic solution for filing claims under the ESCP Regulation, and that remote hearings and electronic taking of evidence is quite seldomly allowed outside the context of the COVID-19 pandemic[218]. Overall, the digitalisation of the ESCP appears therefore still ongoing.

B. Specific issues decided by national courts

Overall, the Reports on National Case Law contain a relatively small number of court decisions applying the ESCP Regulation. This result is not particularly surprising given that, on the one hand, decisions applying the ESCP Regulation are usually unpublished judgments of lower courts, and, on the other hand, the ESCP is applied rather rarely in most Member States covered by the Project. Two interesting remarks nonetheless stand out regarding the interaction between the uniform rules contained in the ESCP Regulation and national law.

The first remark concerns the role played by standard forms in the context of the ESCP. In this respect, it is interesting to note that courts in both Germany and Croatia consistently held that claim form A, set out in Annex I of the Regulation, has to be considered compulsory for filing both claims and counterclaims under Articles 4 and 5 ESCPR. With regard to the initial application, in particular, a recent judgment by the Regional Court of Nürnberg-Fürth interestingly held that the applicant's obligation to file the initial application using standard form A also extends to submissions following requests by the court to complete or rectify the application form in accordance with Article 4(4) of the ECPR[219]. In the Court's view, the filing of a separate document containing the requested rectifications and integrations therefore does not meet the formal requirements of this provision[220]. On

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[218] On this, see in particular the information published on 'European e-Justice Portal - Small claims', <https://e-justice.europa.eu/354/EN/small_claims> accessed 1 May 2022.

[219] Landgericht Nürnberg-Fürth, 08.10.2019, 5 S 5696/19, BeckRS 2019, 55390, reported in Lobach and Reich (cit n 43) p 10.

[220] See ibid, explaining that the Court reached its conclusion by comparing the wording of art 4(4) and 5(3) ESCPR and taking into account the general aim to simplify and speed up litigation. In this respect, the Court held that while art 5(3) ESCP expressly mention the defendant's right to file its response using 'any other

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the other hand, a very recent decision by the Croatian High Commercial Court also came to a similar conclusion regarding the interpretation of Article 5(6) ESCPR and held that any counterclaim must be filed using form A and served on the claimant in accordance with Article 13 ESCPR[221]. These decisions are significant because failure to comply with the requirements of Articles 4 and 5 ESCPR provisions may result in the court declaring the claim inadmissible or ignoring the counterclaim entirely in its judgment[222].

The second, more general, remark concerns the relationship between the harmonised provisions of the ESCP Regulation and the general principles of national civil procedure[223]. In two important decisions issued in 2019, the French Court of Cassation underscored that the application of the ESCP Regulation does not exempt French courts from respecting the parties' fundamental right to be heard enshrined in Article 16 of the French Code of Civil Procedure. In the first case, the Court applied this principle to reverse a lower court decision that had awarded the claimant compensation based on a claim that had first been introduced in response to the defendant's counterclaims and without giving the latter the opportunity to respond[224]. In the second, the Court conversely reversed the decision of a lower court that had declared a claim inadmissible because the dispute did not constitute a cross-border case within the meaning of Article 2 ESCPR without affording the claimant a chance to make its observation on this point[225]. These two judgments thus demonstrate that, in addition to the technical requirements set out in the ESCP Regulation itself, lower courts must always strive to interpret European law in a way that respects the parties' fundamental procedural rights.

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appropriate way not using the answer form', the wording of art 4(4) ESCP appears to be much stricter in this regard and only allow the claimant to submit supplementary documentation upon the Court's request.

[221] See High Commercial Court, 12.05.2021, Pž-761/2021, reported in Uzelac, Bratković and Brozović (cit n 63) p 6.

[222] See art 4(4) ESCPR. On the dismissal, see also Amtsgericht Geldern, 09.02.2011, 4 C 4/11, openJur 2011, 77304, reported in Lobach and Reich (cit n 43) p 10, holding that ony the dismissing judgment itself, rather than the claim form, should be served on the defendant.

[223] On the importance of these principles for the correct application of the ESCP Regulation, see Uzelac, Bratković and Brozović (cit n 14) p 20, stressing that 'understanding general procedural rules (both in terms of litigation and enforcement)' is required in order to fully understand how the ESCP may be applied in the national legal system.

[224] See Cour de cassation, Civ. 1, 10.04.2019, No 17-13.307, reported in Buzzoni (cit n 52) pp 91–92.

[225] See Cour de cassation, Civ. 1, 27.11.2019, No 18-14.985, reported in ibid 92–93.

VI. European Account Preservation Order Regulation ('EAPO Regulation')

The EAPO Regulation is the most recent of the five EU civil procedural instruments examined in the EFFORTS Project. It entered into force on 18 January 2017, introducing the very first cross-border EU civil protective measure in the Area of Freedom Security and Justice. 18 January 2022 marks five years since the EAPO Regulation came into force. This date also marks the Commission's deadline to submit to the 'European Parliament, to the Council and to the European Economic and Social Committee a report on the application of this Regulation' (Article 51 EAPOR). This makes the present report timely and pertinent for the evaluation the Commission is due to deliver. On the one hand, it provides a comparative overview of domestic legislative implementation of the EAPO Regulation in the Member States covered by the Project (A). On the other hand, it exposes the challenges and issues that national courts and practitioners have experienced while dealing with this instrument based on the collected case law (B).

A. Domestic implementing legislation on the EAPO Regulation

All Member States scrutinised during the EFFORTS Project have introduced specific legislative measures intended to facilitate the embedding of the EAPO Regulation within their domestic civil procedural systems. Notwithstanding, not all Member States have acted at the same time. While Germany and Lithuania had already approved their respective EAPO implementing acts before the entry into force of this instrument, Italy waited until 2020. The content and the extent of those reforms also vary from one Member State to another.

1. The content of the EAPO Regulation implementing acts

Contentwise, in general terms, the bulk of the EAPO Regulation national implementing acts focus on identifying the competent courts and authorities involved in the EAPO proceedings[226]. For instance, in all escrutinised jurisdictions other than France, the domestic

[226] The content of the EAPO Regulation domestic implementing acts appears to be influenced by the information that Member States had to provide to the Commission before 18 July 2016: art 50(1) EAPOR.

implementing legislations indicate at least which courts are competent: to issue an EAPO[227]; to decide on appeals against decisions rejecting an EAPO[228], to decide on debtors' remedies (Articles 33 and 34 EAPOR)[229].

National implementing legislation is also generally employed to designate the information authorities in charge of searching for debtors' bank accounts for the purposes of Article 14 EAPOR[230]. All Member States except France and Italy opted for designating a

[227] In **Belgium**, see art 1395(2)(1) Belgian Judicial Code (*Code Judiciare*) (Van der Borght and others (cit n 13) p 65). In **Germany**, see § 946 German Code of Civil Procedure (*Zivilprozessordnung*) (Lobach and Reich (cit n 12) p 66). In **Lithuania**, see art 31(18) Law Implementing the European Union legislation and International Legal Instruments regulating the Civil Procedure of the Republic of Lithuania No X-1809 of 13 November 2008 (*2008 m. lapkričio 13 d. Lietuvos Respublikos civilinį procesą reglamentuojančių Europos Sąjungos ir tarptautinės teisės aktų įgyvendinimo įstatymas Nr. X-1809*) (Simaitis, Vebraite and Markeviciute (cit n 14) p 48). In **Luxembourg**, see art 685(5)(2) New Code of Civil Procedure (*Nouveau Code de Procedure Civil*) (Van Den Eeckhout (cit n 17) pp 40–41). However, it should be noted that in **Croatia** and **Italy**, the implementing legislation only indicates which is the competent court to issue an EAPO when it is requested on the basis of an authentic instrument: art 364(b) Croatian Enforcement Act (*Ovršni zakon*) (Uzelac, Bratković and Brozović (cit n 14) p 37); art 2 Legislative Degree No 152/2020 (*Decreto legislativo No 152/2020*) (Villata and others (cit n 17) p 81).

[228] **Belgium**: art 602 Belgian Judicial Code (*Code Judiciare*) (Van der Borght and others (cit n 13) p 59). **Croatia**: art 364(b)(2) Croatian Enforcement Act (*Ovršni zakon*). **Germany**: § 953 German Code of Civil Procedure (*Zivilprozessordnung*) (Lobach and Reich (cit n 12) p 73). **Italy**: art 6 Legislative Degree No 152/2020 (Decreto legislativo No 152/2020) (Villata and others (cit n 17) p 83). **Lithuania**: art 31(22)(1) Law Implementing the European Union legislation and International Legal Instruments regulating the Civil Procedure of the Republic of Lithuania No X-1809 of 13 November 2008 (*2008 m. lapkričio 13 d. Lietuvos Respublikos civilinį procesą reglamentuojančių Europos Sąjungos ir tarptautinės teisės aktų įgyvendinimo įstatymas Nr. X-1809*) (Simaitis, Vebraite and Markeviciute (cit n 14) p 48). **Luxembourg**: art 685(5)(3) New Code of Civil Procedure (*Nouveau Code de Procedure Civil*) (Van Den Eeckhout (cit n 17), p 41).

[229] **Belgium**: art 1395(2)(2) Belgian Judicial Code (*Code Judiciare*) (Van der Borght and others (cit n 13), p 65). **Croatia**: art 364(b)(3) and (4) Croatian Enforcement Act (*Ovršni zakon*) (Uzelac, Bratković and Brozović (cit n 14), p 37). **Germany**: § 948 German Code of Civil Procedure (*Zivilprozessordnung*) (Lobach and Reich (cit n 12), p 68)**. Italy**: art 4 Legislative Degree No 152/2020 (*Decreto legislativo No 152/2020*) (Villata and others (cit n 17), p 82). **Lithuania**: art 31(22) Law Implementing the European Union Legislation and International Legal Instruments regulating the Civil Procedure of the Republic of Lithuania No X-1809 of 13 November 2008 (*2008 m. lapkričio 13 d. Lietuvos Respublikos civilinį procesą reglamentuojančių Europos Sąjungos ir tarptautinės teisės aktų įgyvendinimo įstatymas Nr. X-1809*) (Simaitis, Vebraite and Markeviciute (cit n 14), p 49)**. Luxembourg**: art 685(5)(4)(5) New Code of Civil Procedure (*Nouveau Code de Procedure Civil*) (Van Den Eeckhout (cit n 17), pp 41- 42)..

[230] **Belgium**: art 555(1)(25) Belgian Judicial Code (*Code Judiciare*) (Van der Borght and others (cit n 13), p 57). **Croatia**: art 364(b)(7) Croatian Enforcement Act (*Ovršni zakon*)(Uzelac, Bratković and Brozović (cit n 14), p 38)**. Germany**: § 948(1) German Code of Civil Procedure (*Zivilprozessordnung*) (Lobach and Reich (cit n 12), p 68). **Italy**: art 3 Legislative Degree No 152/2020 (Decreto legislativo No 152/2020) (Villata and others (cit n 17), p 81). **Luxembourg**: art 2(6) Amended law of 23 December 1998 creating a commission for the supervision of the financial sector (*Loi modifiée du 23 décembre 1998 portant création d'une commission de surveillance du*

single central body as the information authority. Conversely, in France, any of its 3,000 bailiffs may act as an information authority for the purpose of the EAPO Regulation[231]. Italy has both a central and decentralised system of information authorities. When the debtor's domicile is in Italy, the competent authority is the court of the debtors' domicile. However, if the debtor's domicile is outside Italy, the information authority is the president of the tribunal of Rome[232].

All Member States but Lithuania adopted specific measures to implement Article 14's mechanism to search for debtors' bank accounts. The implementing legislation shows that Croatia, France, Germany and Italy have relied on pre-existing national systems to retrieve information about debtor's accounts[233]. In Belgium though, a central register managed by Belgian Central Bank was set up with information about bank accounts existing in the country (*Point de contact central des comptes et contrats financiers*)[234]. Luxembourg opted instead for

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secteur financier). The Lithuanian implementing act only indicates that the information authority should be 'an institution authorized by the Government of the Republic of Lithuania': art 31(20) Law Implementing the European Union legislation and International Legal Instruments regulating the Civil Procedure of the Republic of Lithuania No X-1809 of 13 November 2008 (*2008 m. lapkričio 13 d. Lietuvos Respublikos civilinį procesą reglamentuojančių Europos Sąjungos ir tarptautinės teisės aktų įgyvendinimo įstatymas Nr. X-1809*) (Simaitis, Vebraite and Markeviciute (cit n 14), p 49). The Lithuanian government decided to appoint the State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania as the Lithuanian information authority: Resolution of 28 September 2016 No 964 regarding the granting of powers in the implementation of the Law on the Implementation of the European Union and International Legal Acts Regulating the Civil Procedure of the Republic of Lithuania (*Nutarimas 2016 m. rugsėjo 28 d. Nr. 964 dėl įgaliojimų suteikimo įgyvendinant Lietuvos Respublikos civilinį procesą reglamentuojančių Europos Sąjungos ir tarptautinės teisės aktų įgyvendinimo įstatymą*).

231 <https://e-justice.europa.eu/379/EN/european_account_preservation_order?FRANCE&member=1> accessed on 15 March 2022.

232 Art 3(1) Legislative Degree No 152/2020 (*Decreto legislativo No 152/2020*).

233 **Croatia**: art 364(b)(7) Croatian Enforcement Act (*Ovršni zakon*) (Uzelac, Bratković and Brozović (cit n 14), p 38). **France**: art L151(A) of the French Manual on Tax Procedures (*Livre des procédures fiscales*) (Buzzoni and Van Den Eeckhout (cit n 11), p 93). **Germany**: § 948(3) German Code of Civil Procedure (*Zivilprozessordnung*) (Lobach and Reich (cit n 12), p 68). **Italy**: art 3(2) Lgs. No 152/2020 (Villata and others (cit n 17), p 81). The Lithuanian Implementing Act does not mention how the information about the debtors bank accounts is retrieved, however according to the information provided by Lithuania, it information authority 'will collect information on the debtor's accounts in banks operating in the Republic of Lithuania from the Tax Accounting Information System': <https://e-justice.europa.eu/379/EN/european_account_preservation_order?LITHUANIA&clang=lt> accessed on 15 March 2022.

234 Act on the organization of a central point of contact for accounts and financial contracts and on the extension of access to the central file of notices of seizure, delegation, assignment, collective debt settlement

asking all the banks in its territory to disclose if they hold information about debtors' bank accounts (Article 14(5)(a) EAPOR)[235]. Such a mechanism did not previously exist in the Luxembourgish civil procedural system[236].

Besides designating the competent courts and authorities under the EAPO Regulation, or clarifying how information about creditors may obtain information about the debtors' bank accounts, some domestic implementing acts have addressed other aspects of the EAPO proceeding. Belgium adopted specific data protection measures concerning the information retrieved about debtors' bank accounts[237]. Similarly, the German implementing act indicates that the information collected about debtors' bank accounts has to be deleted immediately after such information is transferred to the court which submitted the request for information[238]. In this regard, the German legislator introduced a more stringent regime than the EAPO Regulation, which states that the data shall not be stored 'longer than six months after the proceedings have ended' (Article 47(2) EAPOR). The German implementing act also introduced a specific provision concerning the EAPO liability regime into the German Code of Civil Procedure[239]. It raised the fault-based liability set out in Article 13(1) EAPOR to a strict liability regime for the damages caused by EAPO which is considered to be 'unfounded since it was issued'[240].

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and protest (*Loi portant organisation d'un point de contact central des comptes et contrats financiers et portant extension de l'accès au fichier central des avis de saisie, de délégation, de cession, de règlement collectif de dettes et de protêt*).

[235] Art 3 Act of May 17, 2017 relating to the implementation of Regulation (EU) No 655/2014 of the European Parliament and of the Council of May 15, 2014 creating a European banking account preservation order procedure, intended for Facilitate the cross-border recovery of debts in civil and commercial material, modifying the New Code of civil procedure and the modified law of December 23, 1998, leading to the creation of a financial sector surveillance commission (*Loi du 17 mai 2017 relative à la mise en application du Règlement (UE) No 655/2014 du Parlement européen et du Conseil du 15 mai 2014 portant création d'une procédure d'ordonnance européenne de saisie conservatoire des comptes bancaires, destinée à faciliter le recouvrement transfrontière de créances en matière civile et commerciale, modifiant le Nouveau Code de procédure civile et la loi modifiée du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier*).

[236] Van Den Eeckhout and Santaló Goris (cit n 174) pp 296–297.

[237] Articles 1391(3) and 1391(4) of the Belgian Judicial Code (*Code Judiciare*) (Van der Borght and others (cit n 13), pp 62 - 63).

[238] § 948(3) German Code of Civil Procedure (*Zivilprozessordnung*) (Lobach and Reich (cit n 12), p 68).

[239] § 958 German Code of Civil Procedure (*Zivilprozessordnung*) (Lobach and Reich (cit n 12), p 79).

[240] Anna Katharina Raffelsieper, *Die Rückabwicklung der vorläufigen Vollstreckung im nationalen und europäischen Zivilprozessrecht* (Nomos 2018), 262.

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Finally, it is worth mentioning the second Luxembourgish act on EAPO Regulation[241]. It aimed at facilitating the transit from the provisional attachment of bank accounts achieved through the EAPO into a garnishment measure. To put it in more practical terms, it set up a specific procedure to transfer any debtors' bank account funds attached by an EAPO into the creditors' bank accounts once creditors have obtained an enforceable title.

2. The EAPO Regulation as an opportunity to introduce more general changes in the national civil procedural systems

Some national legislators found in the EAPO Regulation an opportunity to introduce more general amendments in their domestic procedural systems, beyond those strictly intended to facilitate the application of EAPO proceedings. For instance, in Belgium, the EAPO information mechanism was also made accessible in the context of a domestic provisional attachment of debtors' bank accounts[242].

In France, the EAPO Regulation similarly inspired a recent legislative reform[243] that broadened the possibilities of obtaining information about debtors' bank accounts from the FICOBA, a national registry containing information about all bank accounts held in the country[244]. Before the EAPO, access to the FICOBA was limited to creditors who had obtained an enforceable title. When implementing the Regulation, however, the French legislator allowed creditors who have obtained an EAPO to rely on the FICOBA to retrieve information about debtors' bank accounts irrespective of the presence of an enforceable title[245]. In other words, creditors with a non-enforceable title who could not access the FICOBA on the basis of domestic procedural law gained such access through the EAPO proceedings. The French legislator considered that, in such a scenario, there was an

[241] Art 718(1) Luxembourgish Code of Civil Procedure (*Nouveau Code de Procedure Civile*) (Van Den Eeckhout (cit n 17), pp 43 - 45).
[242] Art 1447(1)(1) Belgian Judicial Code (*Code Judiciare*) (Van der Borght and others (cit n 13), pp 64 - 66).
[243] See Art 58 of the law No 2021-1729 of 22 December 2021, amending Art L. 151 A of the French Tax Procedures Book (*Livre des procédures fiscales*).
[244] On the FICOBA, see <https://www.service-public.fr/particuliers/vosdroits/F2233> accessed on 15 March 2022.
[245] Art L. 151 A French Tax Procedures Book. Under the EAPO Commission Proposal, all kind of creditors, even those without an enforceable title could access a request for information through the EAPO information mechanism: Art 17 COM/2011/0445 final.

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imbalance between creditors who could apply for an EAPO and those who could not[246]. To compensate for such unequal treatment between the categories of creditors, it was decided to expand access to the FICOBA to creditors who apply for a domestic provisional attachment (*saisie conservatoire*) of bank accounts and do not have an enforceable title[247].

In Germany, the implementation of the EAPO Regulation also triggered a reform which made obtaining information about debtors' assets more accessible in the course of civil enforcement proceedings[248]. Before the EAPO Regulation, court bailiffs could only search for information about debtors' assets during the enforcement of claims above 500 euros. In the EAPOR there is no such minimum threshold to request the investigation of debtors' bank accounts. For that reason, it was decided to abandon the referred 500 euros minimum threshold of the claim[249].

B. Case law on the EAPO Regulation

Case law on the EAPO Regulation is generally scarce. Except in Belgium, judgments on the EAPO were nonetheless found in all other jurisdictions analysed in the EFFORTS project[250]. Among the collected judgments we included those decisions in which the EAPO Regulation was referred to either *obiter dictum* or as a source to interpret domestic legislation[251]. The limited number of judgments found is mainly explained by the limited number of EAPO applications before national courts. In 2020, French and Luxembourgish courts received just

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[246] See <http://www.senat.fr/amendements/2020-2021/835/Amdt_38.html> accessed on 15 March 2022.

[247] Before this reform, a French court had already reached the same conclusion that such a difference of treatment between creditors with and without access to the EAPO Regulation 'constitutes an unjustified breach of equality and discrimination between creditors': Cour d'appel de Paris, Pôle 1 – chambre 10, 28.01.2021, No 19/21727.

[248] An example of 'voluntary alignment between national and EU law': Wolfgang Hau, 'Overcoming Follow-Up Fragmentation through Bottom-Up Harmonisation?' in Anna Nylund and Magne Strandberg (eds), *Civil Procedure and Harmonisation of Law* (Intersentia 2019), 70.

[249] Deutscher Bundestag, Drucksache 18/9698, 23-24.

[250] Whereas no judgments were found in Belgium, one court in this Member State (the First Instance of Liège) made the second preliminary reference to the CJEU about the EAPOR: Case C-291/21, *Starkinvest SRL*.

[251] Still, it shows certain progress compared to the number of judicial decisions under the IC2BE project, the project that preceded EFFORTS, where just 25 cases on the EAPO were collected: Jan von Hein and Tilman Imm, 'Conclusions' in Jan von Hein and Tilman Imm (eds), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives* (Intersentia 2021), 213 – 245.

19 and 18 EAPO applications, respectively.[252] In the same year, in Germany there were 31 EAPO proceedings[253], while Lithuanian courts received just 11 EAPO requests[254].

Most of the collected judgments were either judgments rejecting applications for an EAPO; or judgments on appeals against judgments rejecting an EAPO application. This makes the collected judicial decisions particularly pertinent to identifying issues that creditors might have experienced when requesting an EAPO and how courts have interpreted this instrument. This subsection analyses, following the structure of the EAPO proceedings, the different problems and courts' approaches towards the EAPO identified across the collected judgments.

1. Jurisdictional aspects of the EAPO Regulation

a) ***International jurisdiction***

Only three judgments so far – one in Lithuania[255], one in Germany, and one in Luxembourg[256] – have tackled issues of international jurisdiction arising under the EAPO Regulation.

The Lithuanian case concerned the EAPO Regulation special jurisdictional forum for consumers. Following Article 6(2) EAPOR, 'where the debtor is a consumer who has concluded a contract with the creditor for a purpose which can be regarded as being outside the debtor's trade or profession, jurisdiction to issue a Preservation Order intended to secure a claim relating to that contract shall lie only with the courts of the Member State in which the debtor is domiciled'. It only applies in those cases where 'the creditor has not yet obtained a judgment, court settlement or authentic instrument'. In the case in question, the District

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[252] The statistics on the application of the EAPO before French courts were provided by the French Ministry of Justice. For Luxembourg see: Parquet général du Grand-Duché de Luxembourg, *Juridictions judiciairesRapport d'activité 2020,* <https://justice.public.lu/dam-assets/fr/publications/rapport-activites-judiciaires/Rapports-juridictions-judiciaires-2020.pdf> accessed on 15 March 2022.
[253] Statistisches Bundesamt, *Rechtspflege Zivilgerichte 2020*, <https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/zivilgerichte-2100210207004.pdf?__blob=publicationFile> accessed on 15.03.2022.
[254] Leituvos Teismai, *2020 metų statistikos ataskaitos: Civilinių bylų nagrinėjimo ataskaita (I instancijos teismuose) 2020*, <https://www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/statistika/106> accessed on 15 March 2022.
[255] Vilniaus apygardos teismas, 01.12.2017, byla e2S-1356-656/2017.
[256] Tribunal d'arrondissement de Luxembourg, Ordonnance du 15.03.2022.

Court of Vilnius rejected the issuance of an EAPO because the debtor was a consumer and was domiciled in Germany[257]. However, the creditor had already obtained an enforceable title. Therefore the District Court of Vilnius should not have applied the special jurisdiction for consumers. The judgment was appealed before Regional Court of Vilnius, which rightly found that the jurisdiction to grant the EAPO had been 'incorrectly established'[258]. On that basis, it set aside the decision of the District Court of Vilnius.

In Germany, the High Regional Court of Hamm had to clarify whether a decision on a German interim attachment order (*arrest*) was considered judgment for the purpose of EAPOR[259]. Following Article 6(3) of the EAPOR, when creditors have already obtained a judgment and apply for an EAPO, then the jurisdiction to issue the EAPO lies in the courts of the Member State where the judgment was obtained. Therefore, if the German interim attachment order were considered a judgment, German courts would have had jurisdiction to issue grant the EAPO. The High Regional Court of Hamm found that the decision on the interim attachment order was not a judgment for the purpose of the EAPO Regulation. The court stated that the German domestic attachment order 'serves exclusively to secure the claim to that specified extent, but not to satisfy the creditor'. In the view of the High Regional Court of Hamm, a judgment would be a court's decision requesting the 'debtor to meet the creditor's claim'. Therefore, the German interim attachment order would not grant German courts the necessary jurisdiction to grant the EAPO.

In the Luxembourgish case, the District Court of Luxembourg had received a request for an EAPO based on a Spanish enforceable judgment[260]. The court rightly rejected the application stating that, according to Article 6(3) EAPOR, the EAPO had to be requested in the Member State where the judgment was issued, which in that case would have been Spain[261].

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[257] Vilniaus apygardos teismas, 01.12.2017, byla e2S-1356-656/2017, para 4.
[258] Vilniaus apygardos teismas, 01.12.2017, byla e2S-1356-656/2017, para 11.
[259] Oberlandesgericht Hamm, Beschl. v. 13.11.2019–I-8W30/19, ECLI:DE:OLGHAM:2019:1113.8W30.19.00 (Lobach and Reich (cit n 43), p 13).
[260] Tribunal d'arrondissement de Luxembourg, 15.03.2022, ordonnance.
[261] Paradoxically, a request for an EAPO in the Member State of enforcement would have been possible had the European legislator adopted the jurisdictional regime of the EAPO Commission Proposal, which permitted a request for the EAPO in the Member State of enforcement: Art 14(3) COM/2011/0445 final.

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b) Domestic competent court

Case law reveals that creditors experienced some issues in trying to determine which national court is competent to grant an EAPO in Croatia and Germany. For instance, in Croatia, several courts declined to issue an EAPO because they mistakenly considered that the District Court of Zagreb was the competent court[262]. Coincidence or not, the District Court of Zagreb also used to be the central court that issued all the EPOs in Croatia until the end of 2018[263]. Therefore that might explain why these courts believed that the District Court was also responsible for the issuance of EAPOs.

In Germany, there were issues to determine which was the competent court to issue the EAPO when this instrument was used along with an EPO or a national payment order. In Germany, the District Court of Berlin-Wedding has exclusive competence to issue EPOs[264], except in labour-related claims[265]. Similarly, at the German State level, the issuance of domestic payment orders is often concentrated in just one court[266]. The question arose whether these central courts were also competent to issue EAPOs. In the case of the EPO, the High Regional Court of Hamm determined that the EPO central court was not competent to issue EAPOs[267]. Instead, it found that an EAPO should be issued by the court

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262 Visoki trgovački sud Republike Hrvatske, 05.5.2020, Pž-1231/2019-2 (Uzelac, Bratković and Brozović (cit n 63), p 7); Visoki trgovački sud Republike Hrvatske, 07.10.2020, Pž-4056/2020-2 (Uzelac, Bratković and Brozović (cit n 63), p 7).

263 Uzelac, Bratković and Brozović (cit n 14) p 10.

264 § 1087 German Code of Civil Procedure.

265 § 46(b)(2) German Labour Court Act (*Arbeitsgerichtsgesetz*).

266 Following Paragraph 689(3) of the German Code of Civil Procedure 'the State governments are authorized to allocate dunning procedures to a district court for the districts of several district courts by means of statutory ordinances if this serves to deal with them more quickly and efficiently'. In some cases, there is even one single court for more than one German State. Such would be the case of the District Court of Hamburg Altona which is competent to issue the domestic payments orders in Hamburg and Mecklenburg-Western Pomerania: Act on the State Treaty between the Free Hanseatic City of Hamburg and the State of Mecklenburg-Western Pomerania on the establishment of a joint dunning court dated October 10, 2005, GVBl. p 512 and amendment of 16.9.2016, GVBl. pp 472, 473, 790. The only German State that has more than one court competent to issue domestic payment orders is North Rhine-Westphalia. It has two courts: District Courts of Hagen and Euskirchen (Ordinance of the Minister of the Interior and Justice of January 28th, 1999, GVOM NRW p 43, last amended by law of April 5th, 2005, GVOM NRW p 332 and ordinance of September 24th, 2014, GVOM NRW p 647).

267 Oberlandesgericht Hamm Beschl. v. 10.4.2017–32 SA 28/17, BeckRS 2017, 110970, ECLI:DE:OLGHAM:2017:0410.32SA28.17.00 (Lobach and Reich (cit n 43), p 12).

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which the parties had chosen through a choice of court agreement to decide on the merits of the claim. Conversely, the Regional Court of Freiburg considered that the District Court of Stuttgart, the central court for national payment orders in the State of Baden-Württemberg[268], was competent to issue EAPOs[269]. It argued that under German law, the court which issues the domestic payment order is also the competent court on the merits until the defendant lodges a statement of opposition against the payment order and contentious proceedings begin.

The High Regional Courts of Cologne and Schleswig-Holstein reached an identical conclusion to the one adopted by the Regional Court of Freiburg[270]. They considered that the competent court for the issuance of a domestic payment order is also competent to issue an EAPO. Interestingly, in their reasoning, these courts also referred to CJEU judgment C-555/18, the first on a preliminary reference about the EAPO Regulation[271]. In this judgment, the CJEU found that the Bulgarian proceedings to obtain a domestic payment order 'must be regarded as proceedings on the substance of the matter pending before that court within the meaning of Article 5(a) of Regulation No 655/2014'[272]. In this regard, the Regional Court of Cologne stated 'even if the decision of the CJEU was made on the Bulgarian and not on the German order for payment procedure, the Senate, according to the provisions of Bulgarian law reproduced there, appears to have a comparable starting point to that in German civil proceeding'[273]. Consequently, the first CJEU judgment on the EAPO Regulation served to reinforce the position of those courts considering that the German State-level central courts for the national payment orders could also issue EAPOs.

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[268] § 2 Judicial Jurisdiction Ordinance of Baden-Württemberg (*Zuständigkeitsverordnung Justiz*)
[269] Landgericht Freiburg, Beschl. v. 20.08.2018 – 5 O 269/18, BeckRS 2018, 21743, ECLI:DE:LGFREIB:2018:0820.5O269.18.00 (Lobach and Reich (cit n 43), p 12).
[270] Oberlandesgericht Köln Beschl. v. 18.1.2022 – 8 AR 54/21, BeckRS 2022, 1702. ECLI:DE:OLGK:2022:0118.8AR54.21.00; Oberlandesgericht Schleswig Beschl. v. 15.2.2022 – 2 AR 37/21, BeckRS 2022, 2403, ECLI:DE:OLGSH:2022:0215.2AR37.21.00.
[271] C-555/18, 7.11.2019, *K.H.K. (Account Preservation)*, ECLI:EU:C:2019:937.
[272] C-555/18, 7.11.2019, *K.H.K. (Account Preservation)*, ECLI:EU:C:2019:937, para 50.
[273] Oberlandesgericht Köln Beschl. v. 18.1.2022 – 8 AR 54/21, BeckRS 2022, 1702. ECLI:DE:OLGK:2022:0118.8AR54.21.00, para 9.

c) The exclusion of arbitration

Arbitration is one of the subject matters expressly excluded from the scope of application of the EAPO Regulation (Article 2(1) EAPOR). Such exclusion is identical to the one found under the BI bis Regulation (Article 1(2)(d)); and the EEO Regulation (Article 2(2)(d)). Only two courts of all the sscrutinised jurisdictions, one in Lithuania and one in Luxembourg, received EAPO applications in claims that had been brought before an arbitral tribunal. Whereas just two cases might appear insignificant, the extent of arbitration exclusion is not a pacific question among scholars[274]. Consequently, any domestic case law can be relevant to shed light on this issue.

In the case before the Lithuanian Court of Appeals, the court had to assess 'whether where the substance of the dispute is not in court but in arbitration, the creditor is entitled to request a European Account Preservation'[275]. The Lithuanian Court of Appeals conveyed an exhaustive analysis of the problem, finding several reasons against the possibility that a court could grant an EAPO when the main dispute is brought before an arbitral tribunal. Firstly, the court stated that, in light of the wording of Articles 5 and 6, the EAPO has to be granted by the court with jurisdiction to decide on the merits of the claim. In the court's view, this does not occur 'where the dispute is subject to arbitration'[276]. From a historical perspective, the court referred to the EAPOR Proposal[277], in which the Commission stated that 'even though there might be a case for allowing parties to an arbitration to have recourse to the European procedure, the inclusion of arbitration would entail complex questions which have not yet been addressed by EU law, e.g. under which circumstances arbitral awards can be put on an equal footing with judgments and it did not seem appropriate to address them for the first time in this instrument'[278].

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[274] Up to six different interpretations have been identified among scholars: Denise Wiedemann, 'The European Account Preservation Order' in Jan von Hein and Thalia Kruger (eds), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives* (Intersentia 2021), 109 – 114.
[275] Lietuvos apeliacinis teismas, 28.11.2017, Byla no. e2-1387-178/2017, para 15 (Simaitis, Vebraite and Markeviciute (cit n 127), p 5).
[276] Lietuvos apeliacinis teismas, 28.11.2017, Byla no. e2-1387-178/2017, para 17 (Simaitis, Vebraite and Markeviciute (cit n 127), p 5).
[277] Lietuvos apeliacinis teismas, 28.11.2017, Byla no. e2-1387-178/2017, para 20 (Simaitis, Vebraite and Markeviciute (cit n 127), p 5).
[278] COM/2011/0445 final, 3.1.1.

The Lithuanian Court of Appeals also differentiated between the exclusion of arbitration under the B I bis Regulation and the EAPO Regulation[279]. Under the BI bis Regulation, it is possible to request provisional measures even if the main dispute is decided before an arbitral court. The CJEU confirmed this in C-391/95, *Van Uden*, rendered for the 1968 Brussels Convention but, in principle, still applicable to the Brussels I bis Regulation[280]. In this decision, the CJEU affirmed 'that the existence of an arbitration clause does not have the effect of excluding an application for interim measures from the scope of the Convention'[281]. What matters to decide whether the Brussels Convention could apply to a procedure on interim measures was the 'nature of the rights which they serve to protect'[282]. The CJEU also stated 'where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention'[283]. Still, the CJEU affirmed that it would be still possible to rely on Article 24 Brussels Convention (now Article 35 Brussels I bis Regulation) to obtain provisional measures[284]. That provision states that other courts than those with jurisdiction to decide on the merits could grant 'provisional, including measures'. However, for the Lithuanian Court of Appeals, the *Van Uden*'s solution could not apply 'by analogy to the EAPOR' because an EAPO can be granted only by courts with jurisdiction on the merits of the claim[285]. It would not be thus not possible to rely on Article 35 Brussels I bis Regulation to grant an EAPO[286].

Ultimately, the Lithuanian Court of Appeals explored whether it would have been possible to rely on the domestic rules on jurisdiction to grant an EAPO[287]. Article 27(1) of the

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[279] Lietuvos apeliacinis teismas, 28.11.2017, Byla no. e2-1387-178/2017, para 21 (Simaitis, Vebraite and Markeviciute (cit n 127), p 5).
[280] C-186/19, 3 September 2020, *Supreme Site Services*, ECLI:EU:C:2020:638, para 50.
[281] C-391/95, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543, para 27.
[282] C-391/95, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543, para 33.
[283] C-391/95, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543, para 24.
[284] C-391/95, 17 November 1998, *Van Uden*, ECLI:EU:C:1998:543, para 29.
[285] Lietuvos apeliacinis teismas, 28.11.2017, byla e2-1387-178/2017, para 21 (Simaitis, Vebraite and Markeviciute (cit n 127), p 5).
[286] Katharina Hilbig-Lugani, 'Artikle 6 EuKoPfVO' in Wolfgang Krüger and Thomas Rauscher (eds), *Münchener Kommentar zur Zivilprozessordnung*, Band 3 (C.H. Beck 2017), marginal no. 7.
[287] Lietuvos apeliacinis teismas, 28.11.2017, byla e2-1387-178/2017, para 23 (Simaitis, Vebraite and Markeviciute (cit n 127), p 5). Similarly, a court in Poland considered that it is possible to rely on the domestic rules on jurisdiction to grant an EAPO: Grzegorz Pobożniak and Paweł Sikora, 'The Admissibility of a

Lithuanian Act on Commercial Arbitration establishes that 'a party shall be entitled to request Vilnius Regional Court to take interim measures or require to preserve evidence before the commencement of arbitral proceedings or the constitution of an arbitral tribunal'[288]. However, the Lithuanian implementing legislation of the EAPO Regulation states 'an application for a European Account Preservation Order is to be made to the court of first instance which has jurisdiction over the substance of the dispute'[289]. Therefore, only courts which decide on the merits of the claim could grant an EAPO[290]. If the dispute is brought before an arbitral tribunal, there would not be a court to issue an EAPO.

The background of the Luxembourgish EAPO proceedings involving the arbitration exclusion was slightly different[291]. In this case, the creditor had already obtained an enforceable arbitral award when the application for the EAPO was submitted. The District Court of Luxembourg did not find any impediment to grant the EAPO to the creditor relying on the arbitral award as the title to obtain the EAPO. Once the debtor was notified about the EAPO, they requested the revocation of the EAPO before the District Court of Luxembourg on the basis of Article 33 EAPOR. However, the request for review was dismissed without the Luxembourgish court ever examining the arbitration exclusion.

2. Prerequisites to obtain an EAPO: the *periculum in mora*

Any creditor who applies for an EAPO has to prove that 'there is an urgent need for a protective measure in the form of a Preservation Order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult' (Article 7(1) EAPOR). This prerequisite corresponds to one of the archetypical conditions to obtain domestic provisional

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European Account Preservation Order in the Event of an Arbitration Clause', (2018) Czech (& Central European) Yearbook of Arbitration 226.

288 Official translation: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/35954312dcb311e6be918a531b2126ab?jfwid=> accessed on 15 March 2022.

289 Art 30(18) Law of the Republic of Lithuania on the Implementation of European Union and International Legal Acts Regulating Civil Procedure (*Lietuvos Respublikos civilinį procesą reglamentuojančių Europos Sąjungos ir tarptautinės teisės aktų įgyvendinimo įstatymas*)(Simaitis, Vebraite and Markeviciute (cit n 14), p 48).

290 Lietuvos apeliacinis teismas, 28.11.2017, byla e2-1387-178/2017, para 23 (Simaitis, Vebraite and Markeviciute (cit n 127), p 5).

291 Tribunal d'arrondissement de Luxembourg, 24.09.2021, ordonnance.

measures: the *periculum in mora*[292]. In the EAPO Regulation, this prerequisite affects all kinds of creditors, irrespective of whether they have already obtained an enforceable title or not[293]. Proving the *periculum in mora* is the most recurrent subject matter among the collected judgments on the EAPO Regulation: in 34 out of 70 judgments, courts addressed the EAPO's *periculum in mora*.

Article 7(1) is drafted in a relatively broad manner, without giving any examples of concrete circumstances that could serve to justify the existence of the risk[294]. In this regard, the Preamble offers some guidance. Recital 14 states that the *periculum in mora* exists where, by the time of the enforcement of the creditors' title, the debtor 'may have dissipated, concealed or destroyed his assets or have disposed of them under value, to an unusual extent or through unusual action'. Therefore, the risk occurs as a result of the debtors' specific actions to frustrate the future enforcement of the creditors' title[295]. Recital 14 also includes a list of specific circumstances that, individually considered, could serve to satisfy the *periculum in mora*. One of them would be 'any recent action taken by the debtor with regard to his assets'.

Judgments from Croatia, Germany, and Lithuania reveal that courts in these Member States tend to rely on Recital 14 EAPOR to interpret an EAPO's *periculum in mora*[296]. At the same time, these judgments often show that creditors have difficulties satisfying the *periculum in*

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[292] Lidia Sandrini, 'La procedura per l'adozione dell'ordinanza europea di sequestro conservativo dei conti bancari' in Pietro Franzina and Antonio Leadro (eds), *Il sequestro europeo di conti bancari: Regolamento (UE) n. 655/2014 del 15 maggio 2014* (Giuffre 2015), 47.

[293] Under the EAPO Commission Proposal the *periculum in mora* a prerequisite just for creditors without an enforceable title: Art 7(1)(b) COM(2011) 445 final.

[294] Katharina Hilbig-Lugani, 'Artikle 7 EuKoPfVO' in Wolfgang Krüger and Thomas Rauscher (eds), *Münchener Kommentar zur Zivilprozessordnung, Band 3* (C.H. Beck 2017), marginal no. 1.

[295] Recital 14 puts a particular emphasis on the 'subjective element' of the *periculum in mora*: Barbara Köllensperger 'Art. 7 EuKoPfVO' in Hubertus Schumacher, Barbara Köllensperger and Martin Trenker (eds), *Kommentar zur EU-Kontenpfändungsverordnung EuKoPfVO* (MANZ 2017), marginal no. 11.

[296] **Croatia**: Visoki trgovački sud Republike Hrvatske, 05.05.2020, Pž-1847/2020-2 (Uzelac, Bratković and Brozović (cit n 63), p 6). **Germany**: Landgericht Arnsberg, 29.10.2018, 4 O 329/18, BeckRS 2018, 41506; Oberlandesgericht Hamm, 14.01.2019, I-8 W 51/18, BeckRS 2019, 769; Landgericht Bremen, 07.01.2020, 3 O 2166/19, BeckRS 2020, 4950, ECLI:DE:LGHB:2020:01.07.3O2166.19.00 (Lobach and Reich (cit n 43), p 14). **Lithuania**: Kauno apygardos teismas, 07.08.2018, byla e2-2120-555/2018 Panevėžio apygardos teismas, 02.10.2018, e2S-648-212/2018; Šiaulių apylinkės teismas, 09.11.2018, e2-15962-650/2018; Šiaulių apygardos teismas, 08.01.2019, byla 2S-110-357/2019; Panevėžio apygardos teismas, 07.01.2019, byla e2S-91-544/2019; Vilniaus apygardos teismas, 10.01.2019, byla 2S-49-431/2019; Vilniaus apygardos teismas, 17.01.2019, 2S-65-653/2019; Šiaulių apygardos teismas, 29.01.2019, byla 2S-170-357/2019.

mora in the light of the standards set by Recital 14. On most occasions, the judgements are about EAPO applications which were rejected because creditors have failed to satisfy this requirement[297]. Even in those cases when creditors had already obtained an enforceable title and applied for an EAPO upon an unsuccessful attempt to enforce the title in the Member State of origin, courts applied the same interpretation of the *periculum in mora* in light of Recital 14, leading to rejection to issue the EAPO[298].

In Luxembourg, there was also a decision in which an EAPO application was rejected because the creditor had not satisfied the *periculum in mora*[299]. However, this decision does not contain any reference to Recital 14. Therefore, it is not clear whether the court took the Preamble into consideration or not. The same occurs with the only found French judgment in which a court examined the EAPO's *periculum in mora*[300]. Paradoxically, another French court did mention Recital 14, but *obiter dictum* during the assessment of conditions to obtain a domestic preservation order (*saisie conservatoire*), rather than an EAPO[301]. Similarly, the Lithuanian Court of Appeals found in Recital 14 a hermeneutic tool for evaluating the *periculum in mora* in an application for a national provisional measure[302].

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[297] **Croatia**: Općinski građanski sud u Zagrebu, 24.06.2020, R1-eu-25/2020-2; Općinski građanski sud u Zagrebu, 25.06.2020, R1-eu-46/2019-9; Općinski građanski sud u Zagrebu, 25.06.2020, R1-eu-47/2019-9 (Uzelac, Bratković and Brozović (cit n 63), p 6). **Germany**: Landgericht Arnsberg, 29.10.2018, 4 O 329/18, BeckRS 2018, 41506; Landgericht Bremen, 07.01.2020, 3 O 2166/19, BeckRS 2020, 4950, ECLI:DE:LGHB:2020:01.07.3O2166.19.00 (Lobach and Reich (cit n 43), p 14). **Lithuania**: Panevėžio apygardos teismas, 02.10.2018, e2S-648-212/2018; Utenos apylinkės teismas, 16.03.2018, byla e2VP-2040-1027/2018; Kauno apygardos teismas, 07.08.2018, byla e2-2120-555/2018; Šiaulių apylinkės teismas, 09.11.2018, e2-15962-650/2018; Panevėžio apygardos teismas, byla 07.01.2019, byla e2S-91-544/2019; Šiaulių apygardos teismas, 08.01.2019, 2S-110-357/2019; Šiaulių apygardos teismas, 29.01.2019, byla 2S-170-357/2019. Although in Lithuania, one can also find judgments in which a second instance court upheld a decision rejecting an EAPO application because it considered that the first instance court had not correctly assessed the *periculum in mora*: Vilniaus apygardos teismas, 10.01.2019, 2S-49-431/2019; Vilniaus apygardos teismas, 17.01.2019, 2S-65-653/2019.

[298] See among others judgments: **Germany**: Oberlandesgericht Hamm, 14.01.2019, I-8 W 51/18, BeckRS 2019, 769, (Lobach and Reich (cit n 43), p 14), **Lithuania**: Panevėžio apygardos teismas, byla 07.01.2019, byla e2S-91-544/2019; Šiaulių apygardos teismas, 29.01.2019, 2S-170-357/2019.

[299] Tribunal d'Arrondissement de Luxembourg, 30.08.2018, ordonnance (Van Den Eeckhout (cit n 61), p 29).

[300] Cour d'appel de Versailles, 4e ch., 13.07.2020, No 18/05040 (Buzzoni (cit n 52), p 99).

[301] Tribunal judiciaire de Paris, JEX, 18.03.2021, No 20/81520.

[302] Lietuvos apeliacinis teismas, 10.10.2019, byla e2-970-464/2019; Lietuvos apeliacinis teismas, 01.10.2020, byla e2-1175-464/2020; Lietuvos apeliacinis teismas, 08.10.2020, byla e2-1295-407/2020; Lietuvos apeliacinis

3. Mechanism to obtain information about the debtors' bank accounts

The collected judgments reflect a moderate reliance on the EAPO information mechanism (Article 14 EAPOR). Only 16 out of the 70 collected judgements mention that creditors requested information about debtors' bank accounts held in another Member State[303]. These judgments also reveal some issues in accessing the information mechanism by the creditors or in the cross-border communication between courts and information authorities.

There are cases in Croatia, Germany, and Lithuania where creditors found their request for information rejected because Article 7's *periculum in mora* had not been satisfied[304]. Indeed, Article 14(3) EAPOR expressly provides that access to the information mechanism is conditional upon the satisfaction of the prerequisites to obtain an EAPO[305]. Therefore, the difficulties of access to satisfy the *periculum in mora* hinder the possibilities of obtaining information about the debtors' bank accounts too.

Regarding cross-border communications, several Lithuanian courts found their requests for information rejected by the German information authority, the Federal Office of Justice (*Bundesamt für Justiz*), because the court had not included the debtors' address in their information requests[306]. The EAPO Regulation does not indicate which kind of information has to be included in the information request. The Commission Implementing Regulation

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teismas, 22.10.2020, byla e2-1391-464/2020 ; Lietuvos apeliacinis teismas, 18.03.2021, byla e2-183-407/2021 (Simaitis, Vebraite and Markeviciute (cit n 127), p 5).

303 In one Lithuanian judgment, the court acknowledged that the creditor had not indicated any details of the debtors' bank accounts, nor requested to search the debtors' accounts in other Member States: Marijampolės apylinkės teismas, 22.02.2018, byla e2SP-1721-399/2018.

304 **Croatia**: Visoki trgovački sud Republike Hrvatske, 5. 2. 2021, Pž-157/2021-2; Općinski građanski sud u Zagrebu, 24. 06.2020, R1-eu-25/2020-2; Općinski građanski sud u Zagrebu, 25.06.2020, R1-eu-46/2019-9; Općinski građanski sud u Zagrebu, 25.06.2020, R1-eu-47/2019-9 (Uzelac, Bratković and Brozović (cit n 63), p 6). **Germany**: Landgericht Arnsberg, 29.10.2018, 4 O 329/18, BeckRS 2018, 41506; Oberlandesgericht Hamm, 14.01.2019, I-8 W 51/18, BeckRS 2019, 769 (Lobach and Reich (cit n 43), p 14). **Lithuania**: Panevėžio apygardos teismas, 07.01.2019, byla e2S-91-544/2019; Šiaulių apygardos teismas, 08.01.2019, byla 2S-110-357/2019; Šiaulių apygardos teismas, 29.01.2019, byla 2S-170-357/2019.

305 Lidia Sandrini, 'La procedura per l'adozione dell'ordenanza europea di sequestro conservativo dei conti bancari' in Pietro Franzina and Antonio Leadro (eds), *Il sequestro europeo di conti bancari: Regolamento (UE) n. 655/2014 del 15 maggio 2014* (Giuffre 2015), 61.

306 Marijampolė District Court, 12.09.2018, case no. e2SP-741-985/2018; Vilnius District Court, 28.09.2018, case no. e2S-2657-232/2018; Vilnius Regional District Court, 22.05.2019, case no. e2-2052-804/2019; Klaipeda Regional Court, 14.06.2019, case no. e2-5117-877/2019.

containing the EAPO standard forms also lacks a specific form for the courts to request information[307]. Consequently, it would not have been possible for Lithuanian courts to know that they had to include the debtor's address[308].

Finally, an Italian judgment shows how national authorities could sometimes be overly zealous when providing their assistance in the context of Article 14 EPOR[309]. The Italian court, acting as the Italian information authority, had received a request to search for the debtor's bank accounts from a Spanish court. The Italian court proceeded to search for the debtor's bank accounts. However, this court also ordered the attachment of the funds in the accounts which were found. Following Article 14(6) EAPOR this second step should not have occurred because 'as soon as the information authority of the Member State of enforcement has obtained the account information, it shall transmit it to the requesting court in accordance with Article 29'. Therefore, the Italian court should have just collected the information about the debtor's bank accounts and sent it to the requesting Spanish court.

4. Enforcement and debtors' remedies against the EAPO

Concerning the enforcement of the EAPO, there is just one Italian judgment. It was a case in which the Tribunal of Busto Arsizio had to determine the competent body to enforce in Italy an EAPO rendered in another Member State[310]. Following the information provided by Italy to the Commission on the basis of Article 50 EAPOR, the competent Italian authority to enforce EAPOs was 'the ordinary court of the third party's place of residence (Article 678 of the Code of Civil Procedure)'. The Tribunal of Busto Arsizio clarified that the 'third party' was the bank while 'ordinary court of place of residence' of the bank could be either 'the

[307] In 2020, the European Judicial Network created an additional non-mandatory standard form to facilitate courts in requesting information about the debtors' bank accounts to the information authorities. This standard form was uploaded to the *e-justice* portal: <https://e-justice.europa.eu/378/EN/european_account_preservation_order_forms?clang=en> accessed on 1 March 2022.

[308] Nonetheless, on the Federal Office of Justice website, it is indicated that the request for information shall include the debtors' domicile: <https://www.bundesjustizamt.de/EN/Topics/Courts_Authorities/CAAI/CAAI_node.html> accessed on 15 March 2022.

[309] Tribunale de Belluno, 29.09.2020, published in Rivista di diritto internazionale privato e processuale, 2021, p 134 (Villata and others (cit n 46), pp 70 - 71).

[310] Tribunale di Busto Arsizio, 29.04.2019 (Villata and others (cit n 46), p 70).

court of the place where the bank has its head office' or 'the court of the place where is located the bank branch where the account was held'.

Additionally, during the EFFORTS International Exchange Seminar held on 25 February 2022, one of the participants, a French lawyer, mentioned that some French banks have doubts regarding the territorial reach of EAPOs. Specifically, French banks wonder whether an EAPO can only target funds held in bank accounts opened in France, or may also reach bank accounts held in foreign branches of French banking institutions.

Only three judgments were found regarding debtors' remedies against the EAPO: two in Luxembourg and one in France.

In Luxembourg, both judgments were rendered by the District Court of Luxembourg and resulted from the debtors' requests to revoke the EAPO based on Article 33 EAPOR. In the first case, the debtor requested the revocation of the EAPO, arguing that they did not receive the documents referred to in Article 28 EAPOR upon the preservation of the bank accounts within the 14-day deadline set out in Article 33(1)(b) EAPOR[311]. Indeed, the bank accounts were attached in December 2020, but the debtor was only served with the documents in March 2021. The debtor was domiciled in the Member State of enforcement of the EAPO. Following Article 28(3) EAPOR, the authorities in the Member State of enforcement were responsible for serving the documents on the debtor. In this regard, the District Court of Luxembourg determined that the creditor was not responsible for the delay in service. Furthermore, the court also acknowledged that, regardless of the delay, the debtor had been served with the documents. For those reasons, the court rejected the debtor's request to revoke the EAPO.

In the second case, the debtor demanded the revocation of the EAPO, arguing that the claim fell within the already-referred exclusion of arbitration (Article 2(1)(c) EAPOR)[312]. Subsidiarily, the debtor stated that the creditor had obtained the EAPO through an 'abusive forum shopping'. The debtor considered that the real creditor was domiciled in a third State and had created a legal person in Luxembourg for the sole purpose of applying for an EAPO. The District Court of Luxembourg dismissed the debtors' request because the EAPO had

[311] Tribunal d'arrondissement de Luxembourg, 20.04.2021, ordonnance No 2021-TAL-0005.
[312] Tribunal d'arrondissement de Luxembourg, 24.09.2022, ordonnance.

not attached any funds on any of the debtors' bank accounts. Therefore, the court considered that, based on Luxembourg law, the debtor lacked a specific interest in requesting the revocation of the EAPO (*intérêt à agir*).

In the French case, the debtor contested the EAPO arguing it had been granted by a court which was not competent within France to grant the EAPO[313]. The EAPO had been issued by a French enforcement judge. The debtor considered that following Article 6(1) EAPOR, the EAPO should had been granted by the court with jurisdiction to decide on the merits. In this case, it would have been the court that the parties had designated through a choice of court agreement. However, the court which decided on the debtor's request to revoke the EAPO considered that Article 6(1) EAPOR only establishes the rules on international jurisdiction. The competent court within each Member State is determined based on national law. The court considered that, according to the French domestic law, the enforcement judge was competent to grant the EAPO. Consequently, the debtor's request to revoke the EAPO was rejected.

[313] Tribunal judiciaire de Paris, JEX, 18.03.2021, No 21/80457.

Annex

A. Statutes

France:

- Decree No 2021-1322 of 11 October 2021 (*Décret nº 2021-1322 du 11 octobre 2021*) (**EPO Regulation**)

- Law No 2021-1729 of 22 December 2021 (*Loi nº 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire*) (**EPO Regulation**)

Italy:

- Law of 26 November 2021, No 206 (*Legge n. 206 del 26 novembre 2021, Delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata*) (**Italy**) (**BI bis Regulation**)

Luxembourg:

- Law of 15 July 2021 aiming at strengthening the efficiency of civil and commercial justice (*Loi du 15 juillet 2021 ayant pour objet le renforcement de l'efficacité de la justice civile et commerciale*) (**Luxembourg**) (**BI bis and EEO Regulations**)

B. Case law

Belgium:

- Tribunal de première instance de Liège, 07.05.2021, *Starkinvest SRL* (case referred to the CJEU, C-291/21) (**EAPO Regulation**)

France:

- Tribunal judiciaire de Paris, JEX, 18.03.2021, No 21/80457(**EAPO Regulation**)
- Tribunal judiciaire de Paris, JEX, Paris, 18.03.2021, No 20/81520 (**EAPO Regulation**)
- Tribunal judiciaire de Paris, JEX, 01.07.2021, No 21/80506 (**BI bis Regulation**)
- Cass. civ. 2, 02.12.2021, No 20-14.092 (**BI bis Regulation**)

Germany:

- Oberlandesgericht Köln Beschl, 18.01.2022 – 8 AR 54/21, BeckRS 2022, 1702 (**EAPO Regulation**)
- Oberlandesgericht Schleswig Beschl. v. 15.02.2022 – 2 AR 37/21, BeckRS 2022, 2403 (**EAPO Regulation**)

Italy:

- Cass. Civ., sez. VI, 04.05.2022, No 14019 (**BI bis Regulation**)

Lithuania:

- Vilniaus apygardos teismas, 01.12.2017, No e2S-1356-656/2017 (**EAPO Regulation**)
- Marijampolės apylinkės teismas, 22.02.2018, No e2SP-1721-399/2018 (**EAPO Regulation**)
- Utenos apylinkės teismas, 16.03.2018, No e2VP-2040-1027/2018 (**EAPO Regulation**)
- Kauno apygardos teismas, 07.08.2018, No e2-2120-555/2018 (**EAPO Regulation**)

- Marijampolė apylinkės teismas, 12.09.2018, No e2SP-741-985/2018 (**EAPO Regulation**)
- Vilnius apylinkės teismas, 28.09.2018, No e2S-2657-232/2018 (**EAPO Regulation**)
- Panevėžio apygardos teismas, 02.10.2018, No e2S-648-212/2018 (**EAPO Regulation**)
- Šiaulių apylinkės teismas, 09.11.2018, No e2-15962-650/2018 (**EAPO Regulation**)
- Panevėžio apygardos teismas, 07.01.2019, No e2S-91-544/2019 (**EAPO Regulation**)
- Šiaulių apygardos teismas, 08.01.2019, No 2S-110-357/2019 (**EAPO Regulation**)
- Vilniaus apygardos teismas, 10.01.2019, No 2S-49-431/2019 (**EAPO Regulation**)
- Vilniaus apygardos teismas, 17.01.2019, No 2S-65-653/2019 (**EAPO Regulation**)
- Šiaulių apygardos teismas, 29.01.2019, No 2S-170-357/2019 (**EAPO Regulation**)
- Vilnius Regional District Court, 22.05.2019, No e2-2052-804/2019 (**EAPO Regulation**)
- Klaipeda Regional Court, 14.06.2019, No e2-5117-877/2019 (**EAPO Regulation**)
- Lietuvos apeliacinis teismas, 10.10.2019, No e2-970-464/2019 (**EAPO Regulation**)
- Lietuvos apeliacinis teismas, 01.10.2020, No e2-1175-464/2020 (**EAPO Regulation**)
- Lietuvos apeliacinis teismas, 08.10.2020, No e2-1295-407/2020 (**EAPO Regulation**)
- Lietuvos apeliacinis teismas, 22.10.2020, No e2-1391-464/2020 (**EAPO Regulation**)

Luxembourg:

- Tribunal d'arrondissement Luxembourg, 17[e] ch., 20.12.2017, No 319/2017 (**BI bis Regulation**)

- Tribunal d'arrondissement de Luxembourg, ordonnance, 20.04.2021, No 2021-TAL-0005 (**EAPO Regulation**)

- Tribunal d'arrondissement de Luxembourg, ordonnance, 24.09.2021 (**EAPO Regulation**)

- Tribunal d'arrondissement de Luxembourg, ordonnance, 15.03.2022 (**EAPO Regulation**)