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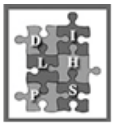

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Report on EU Policy Guidelines

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I. Introduction

Building on the deliverables drawn up in the framework of the EFFORTS Project,[1] the present Report formulates policy guidelines that the EU legislature and policymakers may wish to take into consideration with a view to removing the obstacles that still affect the cross-border enforcement of judicial and extrajudicial titles in civil and commercial matters within the EU, and thus hinder the free movements of persons, capitals, goods, services, and judgments in the Area of Freedom, Security and Justice.

Against this background, this Report targets, in particular, problems that originate from the interaction between national procedural rules and five European Regulations allowing for cross-border debt recovery across the Member States, namely the Brussels I bis Regulation and the Regulations on the European Enforcement Order, the European Small Claims Procedure, the European Payment Order, and the European Account Preservation Order (collectively referred to as '**the Regulations**').[2]

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[1] *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, see the Project's official website at 'Efforts', <https://efforts.unimi.it/>. With regards to the relevant Reports, see in particular the National Reports on Implementing Rules and Case Law, published under 'Reports' (*Efforts*), <https://efforts.unimi.it/research-outputs/reports/>; the National and International Exchange Seminar organised by the Project Partners between September 2021 and February 2022, published under 'Events' (*Efforts*), <https://efforts.unimi.it/events/>; and Marco Buzzoni and Carlos Santaló Goris. 'Report on Practices in Comparative and Cross-Border Perspective' <https://efforts.unimi.it/research-outputs/reports/> published under 'Reports' (*Efforts*). All the links cited in the present Report were last accessed 26 August 2022.

[2] 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**'): see esp. Burkhard Hess, 'Reforming the Brussels Ibis Regulation: Perspectives and Prospects' (2021) MPILux Research Paper Series 2021 (4) [www.mpi.lu]; 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

The interplay of these EU instruments with national rules signify, in fact, a major weakness of the current system, making it difficult for practitioners, and even more for consumers and businesses, to be cognizant of the mere existence and practical functioning of the available procedures and mechanisms in the different Member States.[3]

Having pursued clarity by identifying general trends and highlighting recurring issues affecting the cross-border enforcement of claims within the EU in the targeted Member States (namely, Belgium, Croatia, France, Germany, Italy, Lithuania, and Luxembourg)[4] and having fostered the improvement of existing national legislation by drafting Policy recommendations for national legislatures,[5] with the present Report the Project partners strive to contribute also to the improvement of existing EU legislation by drafting Policy guidelines for the EU legislature and policymakers.

In order to establish an efficient and agile mapping of the critical points and the envisioned path(s) forward, the following sections tackle the pertinent issues into homogeneous groups as follows:

- the BI bis and the EEO Regulations (section II): as illustrated infra, all the Member States encompassed by EFFORTS followed a minimalist approach regarding the implementation of the BI bis and EEO Regulations, to the point that several of them (Belgium, Croatia, and Italy) have not enacted any specific provisions in their national law yet. This approach has resulted in some significant uncertainties affecting both

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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**').

[3] This was also evidenced in a 2002 Study conducted by Prof. Dr. Dres. h.c. Burkhard Hess on improving efficiency of enforcement of judicial decisions within the European Union upon request of the EU Commission: see Study No JAI/A3/2002/02 on Making More Efficient the Enforcement of Judicial Decisions within the European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and Protective Measures. Illustrating that little harmonization occurred thereafter, see Fernando Gascón Inchausti and Marta Requejo Isidro, 'A Classic Cross-Border Case: The Usual Situation in the First Instance', in *Impediments of National Procedural Law to the Free Movement of Judgments. Luxembourg Report on European Procedural Law* vol. I, B. Hess and P. Ortolani (eds), (Beck/Hart/Nomos 2019) p 68 et seq.

[4] See 'Reports' (*Efforts*) <https://efforts.unimi.it/research-outputs/reports/>.

[5] See 'Policy Proposals' (*Efforts*) <https://efforts.unimi.it/research-outputs/policy-proposals/>.

the certification of outgoing titles (II.A and II.B) and the direct enforcement of foreign judgments, court settlements and authentic instruments (II.C);

- the EPO and ESCP Regulations (section III): this association is premised on the fact that – unlike the BI bis and EEO Regulations, which allow for the automatic recognition and enforcement of titles issued within the context of national procedures – the EPOR and the ESCPR embody fully fledged harmonised European procedures;[6]

- the EAPO Regulation, which will be addressed separately in light of its unique features (section IV);

- finally, this Report lays out some cross-cutting initiatives that European institutions could pursue to strengthen the overall regime of cross-border enforcement within the EU (section V).

II. The BI bis and EEO Regulations

By abolishing the exequatur proceedings across Member States for titles based on uncontested claims, the adoption of the EEO Regulation introduced what arguably remains the most significant innovation in the field of European judicial cooperation since the adoption of the Brussels Convention in 1968.[7] Since then, the principle of the direct cross-border enforcement of titles within the EU has progressively spread to other specific procedures[8] and sectorial instruments[9] before gaining a general consecration in the BI bis Regulation. As a result, creditors with an enforcement title issued by one Member State can now directly pursue the enforcement of their claim in another EU State without first

[6] See, in part., Xandra Kramer, 'Specific Instruments', in *Impediments of National Procedural Law to the Free Movement of Judgments. Luxembourg Report on European Procedural Law* vol. I, B. Hess and P. Ortolani (eds), (Beck/Hart/Nomos 2019), p 207 et seq.
[7] See Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968), *OJ* L 299, 31.12.1972, pp 32–42.
[8] See infra, sections III and IV.
[9] Most notably, see Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* L 7, 10.1.2009, pp 1–79.

obtaining a declaration of enforceability in the Member State of enforcement.[10] In exchange, the EEO and BI bis Regulations lay out the formal requirements designed to facilitate the circulation of titles from one Member State to another and afford some guarantees to the persons against whom the enforcement is sought.

The enforcement regime set up by the EEO and BI bis Regulations rests on two basic pillars: firstly, these instruments require the competent authorities of the Member State of origin to issue a certificate[11] designed to provide the competent authorities of the Member State of enforcement with detailed information regarding the parties, the underlying claim, and any additional conditions that might be relevant for its enforcement; secondly, the Regulations describe the challenges available in the Member State of enforcement and set out a list of limited grounds of refusal that can be raised against the recognition and/or enforcement of an incoming title.[12]

However, the EEO and BI bis Regulations do not go so far as to harmonise the rules governing the enforcement proceedings across the Member States. Rather, Articles 20 EEOR and 41 BI bis explicitly state that the enforcement procedures remain governed by the law of the Member State of enforcement. Thus, significant differences still exist as to the requirements that creditors must meet to benefit from the direct cross-border enforcement regime set up by the European Regulations.

This 'diluted' harmonisation[13] of the enforcement phase may result in additional – and sometimes unnecessary – complications, and in an increase in costs for creditors and debtors alike. As such, it may ultimately lead to a failure of enforcement and even amount to a denial of justice. Apart from the inherent complexity of national civil procedures, these difficulties may especially stem from gaps and inconsistencies within the Regulations themselves. Indeed, lack of guidance and coordination at the European level adds a layer of difficulty to

[10] See art 5 EEOR, and art 39 BI bis.
[11] See in particular arts 6, 9, 24, and 25 EEOR, and arts 53 and 60 BI bis.
[12] Beyond this underlying structure, the two instruments still present some considerable differences. Most noticeably, the Regulations differ both with respect to their scope of application – the EEO Regulation being limited to the cross-border enforcement of uncontested monetary claims (see arts 1 and 3 EEOR) – and with regard to the grounds for of refusal of recognition and enforcement. Specifically, refusal of enforcement under the EEO Regulation is limited to the irreconcilability between the incoming title and another title issued or recognised in the Member State of enforcement (cf arts 21 EEOR and 45 BI bis).
[13] The expression is taken from Gascón Inchausti and Requejo Isidro (cit n 3), p 81.

the proper identification and understanding of the process of enforcement by national authorities,[14] which may in turn lead to outcomes that deter economic operators from entering into cross-border relationships and hinder the very purpose of the European judicial cooperation in civil and commercial matters.

Against this background, the analysis of national rules and practices in the Member States studied has cast light on three main areas where the interaction between European and national law needs to be improved: the designation of the competent authorities and the applicable procedure regarding the certification of domestic titles with a view to their enforcement in another Member State (infra, II.A); the remedies available in the event of an erroneous or improper decision by the certifying authority (infra, II.B); and the rules governing the challenges against enforcement in the Member State addressed (infra, II.C). As illustrated, in particular, in the Report on Practices in Comparative and Cross-Border Perspectives, inconsistent positions across the seven Member States arise in these areas due to inadequate or insufficient guidance in the Regulations themselves and the scarcity of national implementation rules.

A. Certification of outgoing titles: Issuance of certificates and governing procedure

Under Articles 20 EEOR and 42 BI bis, creditors who wish to avail themselves of the provisions of the EEO or BI bis Regulation have to provide the enforcement authorities of the Member State of enforcement with the relevant certificate established by the competent authority in the Member State of origin.[15] These certificates play an essential role in the circulation of titles within the EU, as they contribute to the rapid and efficient enforcement of titles delivered abroad by providing 'key information' to the competent enforcement authorities and any interested party.[16] Despite the importance of certificates within the overall enforcement regime set out in the EEO and BI bis Regulations, European rules

[14] See Gascón Inchausti and Requejo Isidro (cit n 3), p 81, noting that: 'It is deplorable that the instructions given by the Regulation itself as to how to implement the rules are too vague'.
[15] See arts 9 EEOR and 53, 60 BI bis.
[16] Opinion of AG Bobek in Case C-347/18, *A Salvoni v A M Fiermonte*, EU:C:2019:370, para 50, describing the role of the certificate set out in art 53 BI bis.

nonetheless provide very little guidance as to the procedural standards that should govern their issuance in the Member State of origin.

Unsurprisingly, this situation has already raised serious interpretative issues and has led to a fragmented legal landscape across the Member States covered by the Project.[17] In light of these difficulties, deeper harmonisation in this area seems appropriate to avoid further impediments to the free circulation of titles within the EU.

Specifically, the first issue that would need to be clarified concerns the identification of the authority responsible for the certification of judgments covered by the EEO and BI bis Regulations. On this point, Articles 6 EEOR and 53 BI bis merely provide that the certificate should be delivered by the 'court of origin' without specifying the person or body who, within this court, should have the actual power to deliver the certificate.

In Case C-300/14,[18] the CJEU nevertheless ruled that the certification of domestic titles as an EEO requires 'a judicial examination' of all the requirements laid down in the Regulation and that, therefore, it could be carried out only by a judge.[19] The Court reached its conclusion by reasoning, on the one hand, that the 'legal qualifications of a judge are essential to the correct assessment — in a context of uncertainty as to the observance of the minimum requirements intended to safeguard the debtor's rights of defence and the right to a fair trial — of the remedies under national law in accordance with [the Regulation]'[20] and, on the other hand, that 'only a court or tribunal within the meaning of Article 267 TFEU is capable of ensuring, by means of a reference for a preliminary ruling to the Court of Justice, that the minimum requirements laid down by Regulation No 805/2004 are interpreted and applied uniformly throughout the European Union'.[21]

More recently, the CJEU also had twice the opportunity to affirm the 'judicial character' of the certification proceedings under Article 53 BI bis.[22] However, it only addressed this issue

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[17] See Buzzoni and Santaló Goris (cit n. 1), sections II and III.
[18] Case C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA*, EU:C:2015:825, para 46.
[19] Ibid, holding.
[20] Ibid, para 47.
[21] Ibid.
[22] 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.

at the threshold stage of admissibility and did not reach the question of whether the same rationales applicable under the EEO Regulations should also extend to certificates issued under Article 53 BI bis.

As the research conducted by the Project Partners has shown, the Member States covered by the EFFORTS Project have drawn very different conclusions from the CJEU's case law. In a slight majority of States, the certification of titles under both the EEO and BI bis Regulation is treated as a judicial function that has to be performed by a judge.[23] Some other States, however, may still distinguish between EEO certificates and certificates issued under

[23] See **Croatia**, **Italy**, **Lithuania** and **Luxembourg**, although with differences both in terms of the underlying logic and the practical implementation of this principle. As to the underlying logic, Croatia and Lithuania appear to have opted for an application by analogy of the domestic procedural rules applicable to writs of execution. 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>; 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>. 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. Conversely, the Italian and Luxembourgish solutions have been inspired by the recent case law of the CJEU on certification under the EEO Regulation (see Case C-300/14, *Imtech Marine Belgium NV v Radio Hellenic SA*, EU:C:2015:825, para 46) and BI bis Regulation (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). 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>). In favour of a similar interpretation in **Italy**, see Francesca C. 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>, and the references cited therein, n 3. 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. For an overview of this debate in the context of the EEO Regulation, see Villata and others (supra, in this fn) 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'.

Article 53 BI bis[24] or consider that the certification is a task that can be performed by court officers, provided that they have received appropriate legal training.[25]

Against this fragmented background, the circulation of titles within the EU would greatly benefit from an explicit extension of the CJEU's holding in Case C-300/14 to certificates issued under Article 53 BI bis. Indeed, this solution would not only foster consistency among different instruments and avoid the multiplication of certification proceedings at the national level, but would also better fit the purposes of the certificate laid out in Article 53 BI bis. In fact, even though the requirements for issuing such a certificate differ from those laid out in the EEO Regulation, it is indisputable that the certification of a title under BI bis might also require the competent authorities of the Member State of origin to perform some fairly complex verifications. To give just a few examples, the court of origin should be able to assess whether the underlying decision falls within the temporal and material scope of the Regulation (including whether it corresponds to the definition of 'judgment'[26] set out in the

[24] In favour of an interpretation: **France** – which enacted specific rules conferring the power to issue EEO certificates to the judge who rendered the decision, but left the power to grant certificates under Article 53 BI bis to the *Directeur de greffe* – as well as **Belgium** – despite the absence of any implementing legislation. In particular, for France, 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>. With regards to Belgium, 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, it is highly controversial whether this solution still applies following the CJEU's decision in *Imtech Marine*. See 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>; 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.

[25] This is the case in **Germany**, 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 Lobach and Reich (cit n 6) 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'.

[26] See CJEU, case C-568/20, *J v. H Limited*, EU:C:2022:264. On this judgment see, in part., Burkhard Hess, 'Exequatur sur exequatur (ne) vaut?', *IPRax* 2022, p 349. See further CJEU, Case C-579/17, *BUAK Bauarbeiter-Urlaubs - u Abfertigungskasse v Gradbeništvo Korana doo*, EU:C:2019:162. On the difficult issues that may arise in connection with this question see, very recently: CJEU, case C-700/20, *London Steam-Ship Owners' Mutual Insurance Association v. Kingdom of Spain*, EU:C:2022:488. Cf Burkhard Hess, 'Annotation to CJEU, 20 June 2022, case C-700/20, *London Steam-Ship Owners' Mutual Insurance Association*', *CMLR* 2022 (forthcoming).

Regulation and whether it was issued by a proper 'court'[27]) and correctly describe the legal effect of the decision in the Member State of origin (including, if applicable, the costs and interests) even if they do not explicitly appear in the decision itself.[28] Moreover, the certifying authority may also be required to verify that the court of origin had jurisdiction any time that the decision concerns a judgment ordering a provisional, including a protective, measure.[29] Taking into account the foregoing, the European legislature may consider amending the BI bis Regulation to explicitly state that the authority to certify domestic titles with a view to their enforcement abroad should be conferred upon a judicial body designed in accordance with national law.

Furthermore, the amendment should also take the opportunity to clarify some of the uncertainties that have emerged with regard to the procedural issues governing the certification proceedings. In this regard, some national rapporteurs have questioned whether the principle of due process should prevent the same judge who decided the dispute on the merits from examining the application for certification,[30] and whether an application for certification may be lodged at the outset of the proceedings.[31]

In our view, these questions should be answered by taking into account the principle of procedural economy and the fact that the judge who is called upon to issue the underlying decision is often best situated to assess whether the latter fulfils the certification requirements set out in the Regulation. Accordingly, parties should be explicitly allowed to apply for certification at the outset of the proceedings and submit their request to the same judge who renders the decision on the merits. This solution also has the advantage of striking a reasonable balance between the need to ensure compliance with the requirements set out in the Regulations and the importance of not replacing the exequatur proceedings in the

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[27] See CJEU, case C-551/15, *Pula Parking d.o.o. v Sven Klaus Tederahn*, EU:C:2017:193.
[28] See art 54 BI bis and points 4 and ff of the standard certificates reproduced in Annex I of the Regulation.
[29] See art 42(2) BI bis.
[30] For an overview of this debate in the context of the EEO Regulation, see Francesca Villata and others, 'Report on Italian Case Law' EFFORTS Collection of national case law <https://efforts.unimi.it/wp-content/uploads/sites/8/2022/04/D2.9-Report-on-Italian-Case-law.pdf> p 48. 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'.
[31] On this question, see in particular art 6 EEOR, as well as the discussions in Buzzoni and Santaló Goris (cit n. 1), pp 37–39.

Member State of enforcement with mirroring procedures in the Member State of origin.[32] Indeed, the certification requirement should not be understood as an additional opportunity for the debtor to call into question the regularity of the procedure followed in the Member State of origin.[33]

B. The viable challenges against the certificate for enforcement pursuant to the BI bis and the EEO Regulations

A second area of the law where additional harmonisation at the European level has the potential to streamline the legal regime of cross-border enforcement under the EEO and BI bis Regulations concerns the challenges available against erroneous, improper, or outdated certificates issued under these Regulations. As the research conducted by the Project Partners has shown, the current framework set out by these instruments seems remarkably inconsistent and unnecessarily complex. In our view, European law would thus greatly benefit from further simplification.

On the one hand, the EEO Regulation set up a very complicated system to deal with the question of erroneous, improper, or outdated EEO certificates issued in the Member State of origin. In order to deal with these issues, Articles 6 and 9 EEOR distinguish no less than four different scenarios that may give rise to three different kinds of certificates.[34] Against this background, several uncertainties have arisen regarding the implementation of these provisions in national law.

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[32] On this point, see also Opinion of AG Bobek in Case C-347/18, *A Salvoni v A M Fiermonte*, EU:C:2019:370, para 54.

[33] See ibid, para 58: 'More particularly, the court of origin may not re-evaluate the substantive and jurisdictional issues that have been settled in the judgment the enforcement of which is sought'.

[34] Firstly, art 6(2) EEOR provides that the debtor should be allowed to apply for a certificate indicating the lack or limitation of enforceability any time that a judgment certified as an EEO has ceased to be enforceable or its enforceability has been suspended or limited (including, presumably, where this judgment has been subject to a successful review in accordance with art 19 EEOR); secondly, Article 6(3) provides that a 'replacement certificate' should be issued where a decision has been delivered following a challenge to a judgment certified as an EEO; finally, art 10 EEOR provides that a third kind of certificate that must be used by parties applying for the rectification or withdrawal of an EEO which contains a material error or was 'clearly erroneously granted' (a concept that is not defined in the Regulation itself).

For example, the national rapporteurs have raised concerns regarding the fact that, while EEO Regulation invariably refers to 'the court of origin' as the certifying authority, the different certificates laid out by the EEO Regulation may, in practice, rest on a plurality of court decisions rendered by different courts. Therefore, the reference to the 'court of origin' becomes ambiguous any time the relevant decision is issued by a court different from the one that issued the initial EEO.[35] The situation becomes even more uncertain if one considers that standard forms implicitly suggest that the issuing authority may differ from the court that rendered the initial title.[36]

Furthermore, an additional set of issues raised by national rapporteurs concerns the creditor's right to appeal against a refusal to issue certificates under the EEO 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.[37] Similarly, Italian courts were also confronted with the

[35] See Villata and others (cit n 22) 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 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>, p 41 (involving the enforcement of an incoming EEO). Analogous 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. 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'. See Uzelac, Bratković and Brozović (cit n 22), <https://efforts.unimi.it/wp-content/uploads/sites/8/2021/06/Collection-of-Croatian-implementing-rules.pdf>, pp 4–5. 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. 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>.

[36] 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.

[37] On this debate, see Villata and others (cit n 29) p 48, and the cases cited therein.

question of the remedies that, as a matter of Italian procedural law, should be available to debtors in cases where an initial application to withdraw the EEO has been rejected.[38] Overall, these cases not only show the importance of implementing explicit national rules to complement the provisions of the EEO Regulation, but also call for clearer and leaner guidance at the European level.[39]

By comparison to the cumbersome system of remedies set out by the EEO Regulation, the BI bis Regulation seems, on the other hand, to have ended up to the opposite extreme of the spectrum. In fact, the provisions of this Regulation remain completely silent on the remedies available to the parties in case of a wrongful or erroneous decision on certification. However, despite the pivotal role of this area of enforcement law in the context of the cross-border circulation of titles across the EU, only two Member States enacted explicit provisions to tackle – to some extent – these issues in their national procedural laws vis-à-vis the BI bis Regulation.[40] Hence, the question of the remedies available against outgoing certificates

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[38] See Villata and others (cit n 34) 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.

[39] For some illustrations, see in particular Uzelac, Bratković and Brozović (cit n 22) p 5 (**Croatia**); 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>, 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.

[40] In France art 509-7 of the Code of Civil Procedure provides that the refusal to issue the certificate under arts 53 and 60 BI bis may be challenged before the President of the 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. 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 (on this point, see also '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). In Germany, on the other hand, § 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-extisting 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 (see Lobach and Reich (cit n 6) p 2).

and/or refusals of certification under the BI bis Regulation remains pending in the majority of the Member States covered by the EFFORTS Project.[41]

In the meantime, the absence of clear guidance on this point, either at the European or domestic level has already exposed some serious flaws of the current regime. In France and Germany, in particular, courts have already had to rule on whether the authorities in the Member State of enforcement have the power to disregard the allegedly erroneous information contained in a foreign certificate, coming to partially inconsistent conclusions.[42] These decisions underline the importance of providing a remedy to challenge the issuance of the Article 53 certificate in the Member State of origin in order to avoid the possibility of parties being treated differently depending on the State in which enforcement is sought.

In this context, future reforms of the European rules applicable to the cross-border enforcement of claims should consider two different options in order to break down some of the barriers that still impede the free circulation of titles within the EU.

The first option – and the most consequential one – would be to acknowledge that the development of the European instruments allowing for the direct enforcement of titles

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[41] 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> (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**, cf Kunda (cit n 22) 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>, expressing the view that 'there is no specific legal remedy to challenge and/or withdraw the certificate of enforceability' in Lithuania.

[42] In France, three judgments issued in three different cases had to decide whether the enforcement of a foreign judgment certified under art 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, 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 (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, all cited in Buzzoni (cit n 52) pp 15, 20–23, 26–27). Confronted with a slightly different scenario, however, the Higher Regional Court in Munich rightly held that the enforcement of an Italian judgment ordering a provisional measure should be 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 (Oberlandesgericht München, 09.11.2020, 7 W 1210/20, BeckRS 2020, 29974, cited in Lobach and Reich (cit n 36) p 5).

across Member States has simply outgrown the provisions of the EEO Regulation. Although the abolition of exequatur by the EEO Regulation was rightly seen as a major turning point in this process, the modalities of implementation of this principle have not been fully satisfactory. Additionally, the added value of this Regulation within the overall framework of the EFFORTS Regulation has considerably diminished since the adoption of the EPO Regulation – which provides a more streamlined procedure for the direct cross-border enforcement of uncontested claims – and the abolition of the exequatur in the BI bis Regulation – which provides a general instrument applicable to most civil and commercial judgments, authentic instruments, and court settlements. As a result, the time might be ripe to adopt the Commission's proposal dating back to the recast of Regulation 44/2001,[43] finally abandoning the EEO Regulation and instead focusing on better regulating the certification process under the BI bis Regulation.

The second option – which constitutes a more moderate alternative – would be to amend the EEO and BI bis Regulations with a view to reducing the significant inconsistencies that currently affect these two Regulations. Specifically, the European legislature should work towards reducing and systematising the remedies available with respect to EEO certificates, on the one hand, and introducing a unique, simple remedy against certification decisions issued under the BI bis Regulation. Ultimately, these remedies should be sufficiently aligned so as to permit national legislatures to act a unique set of implementing rules applicable to both Regulations. This solution would facilitate the work of national courts and legal practitioners, would reduce the risk of regulatory arbitrage, and would foster consistency and predictability at the European and national levels.

C. Enforcement of foreign titles

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

[43] See art 92 of the Commission's Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), COM(2010) 748.
[44] See art 39 BI bis. See also Buzzoni and Santaló Goris (cit n 1) p. 17 et seq.

Member State of enforcement shall suspend the enforcement proceedings upon application of the person against whom enforcement is sought.

Nonetheless, among the main issues concerning national procedural obstacles to the circulation of judgments and extrajudicial titles are the obstacles to enforcement that arise in the interaction between EU law and domestic law, on the one hand, and between the national laws of the Member State of origin and that of enforcement, on the other.[45]

1. The relationship between claims for refusal of recognition and of enforcement

The first set of issues in this regard specifically concerns the relationship between claims for refusal of recognition and of enforcement under the BI bis Regulation. On this point, Articles 45 and 46 BI bis set out two different remedies (refusal of recognition and refusal of enforcement). These remedies appear to have the same object ('Grounds for refusal' in Article 45 BI bis), but are subject to procedural rules that differ in part.

From the eminently procedural pointview, the underlying question is whether the ones mentioned above amount to two remedies with two different claims with partly different objects or to one claim for refusal with two different remedies and partly different procedures. Some Member States (e.g., France, Italy) have tackled the distinction between the refusal of recognition and enforcement; others (e.g., Germany, Luxembourg) have not explicitly addressed them. Based on French case law, such distinction has procedural consequences: the refusal of recognition normally exceeds the powers of the enforcement judge but can be considered as an incidental application based on Article 36(3) BI bis.[46] Based on this interpretation, one can question whether the two refusals are actually different and subject to different procedural rules.

Clarity in this regard would be beneficial, especially as to how the two refusals could be coordinated. To the extent that the answer to this question appears to be predicated on the time of the commencement of enforcement proceedings, there may be merit in defining this

[45] See, esp., Michele Casi, 'National Procedural Impediments to the Circulation of Judgments and Extrajudicial Titles', in 'EFFORTS International Exchange Seminar', on file with the author.
[46] On this point, see e.g. *juge de l'exécution* Paris, 21.07.2021, No 21/20506.

aspect via an harminized solution at the European level. Indeed, the guidance contained in Article 43 and Recital 32 BI bis[47] seems insufficient on this point.[48]

2. Effects of the decision on the claim for refusal

The second issue concerns the effects of the decision on the claim for refusal under BI bis, in particular the extension of the matters covered by *res judicata*. Article 38(b) BI bis clearly distinguishes between these two kinds of decisions. Up to now, the extension of matters covered by *res judicata* has fallen under the competence of the national legislatures, which mostly shaped their legislative actions on general principles and rules of national civil procedure law.

The argument in favour of leaving these questions to the Member States rests on the fact that the need to coordinate different proceedings normally arises within a single legal system. For example, if the court in the Member State of enforcement rejects a first application seeking the refusal of recognition based on Article 45(1)(b), the question of the admissibility of a second application for refusal (of recognition or of enforcement) based on a different ground before the courts of that same Member State is a purely domestic one.

Nevertheless, the claim for refusal could also concern cross-border cases. For example, if a court in one Member State rejects a claim for refusal of recognition under Article 45(1)(b), one might wonder whether this question should be binding on the courts in a different Member State. In Case C-129/92,[49] the CJEU seemed to have ruled out this possibility by relying on the maxime '*exequatur sur exequatur ne vaut*'; more recently, however, the CJEU's judgment in Case C-568/20[50] cast some doubt on this solution.

Similarly, serious interpretative issues have also emerged about the interplay between claims for refusal of recognition or enforcement grounded in Article 45 BI bis and ordinary

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[47] 'In order to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State, 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. In this context, the first enforcement measure should mean the first enforcement measure after such service'.
[48] For an illustration, see Buzzoni and Van Den Eeckhout (cit n 23), pp 17–19.
[49] CJEU, case C-129/92, *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA.*, EU:C:1994:13, paras 29–31; see also the Opinion of AG Lenz in the same case, EU:C:1993:363, paras 21–23.
[50] CJEU, case C-568/20, *J v. H Limited*, EU:C:2022:264, paras 33–39.

challenges to enforcement that might be available under national procedural law.[51] In Germany, for instance, some doubts have been raised concerning the jurisdiction, admissibility, and scope of challenges brought against foreign titles under § 767 ZPO, which generally allows debtors to file an action raising a substantive objection to enforcement. Specifically, it has been questioned whether the effects of such challenges might extend beyond the territory of the Member State addressed.

As a result, one might wonder whether, in order to avoid an unwelcomed legal fragmentation within the Area of Freedom, Security, and Justice, EU law should directly lay out general rules governing the *res judicata* effect of judgments ruling on applications for refusal of recognition and enforcement.

3. The relationship between enforceability and enforcement

Finally, another issue concerns the conditions for enforcement set out in Article 41 BI bis. This mainly regards the interplay between the conditions of *enforceability* of a title applicable in the Member State of origin and the requirements for its actual *enforcement* in the Member State addressed.[52] Indeed, several courts have denied enforcement of a foreign titles based on the fact that either of these requirements were not fulfilled.[53] Therefore, enforcement under the BI bis Regulation is based on a two-step analysis, meaning that the judgment is only enforceable if it is still enforceable under the law of the Member State of origin and fulfils the conditions for its enforcement in the Member State addressed. Furthermore, a very recent case (still pending before the CJEU)[54] demonstrates that the same kind of difficulties may also arise under the EEO Regulation, and may equally affect claims for the suspension of the enforceability (or the enforcement) of a title issued in another Member State.

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[51] See art 41(2) BI bis, providing that: 'the grounds for refusal or of suspension of enforcement under the law of the Member State addressed shall apply in so far as they are not incompatible with the grounds referred to in Article 45'.
[52] On these difficulties, see in particular Buzzoni and Santaló Goris (cit n 1), p 16 ff.
[53] See *e.g. Bundesgerichtshof*, 25.01.2018, IX ZB 89/16, BeckRS 2018, 1121, reported in Lobach and Reich (cit n 36) p 3 (the case concerned a German judgment whose enforceability had been declared conditional upon the posting of security), and Cass. civ. 2, 02.12.2021, No 20-14.092, cited in Buzzoni and Santaló Goris (cit n 1), p 17.
[54] See CJEU, case C-393/21, *Lufthansa Technik AERO Alzey* (pending).

As these examples show, the difficult differentiation of the concepts of enforcement and enforceability lead to legal uncertainty and considerable delay for the parties. In this respect, the EU legislature and policymakers may consider to intervene by determining the law applicable to each of the conditions for enforcement.

III. The EPO and ESCP Regulations

The adoption of the EPO and ESCP Regulations marked a new stage in the harmonisation of European civil procedure. Indeed, these instruments were the first to set up uniform procedures which allow creditors to obtain an enforceable title valid in all Member States (except Denmark) at the end of rapid documentary proceedings, largely relying on standard forms and primarily governed by uniform European rules.

Applicable as of 18 December 2008 and 1 January 2009, respectively, the EPO and ESCP Regulations have already been subject to a periodical review by the European Commission, resulting in their partial reform by way of Regulation No 2015/2421. These amendments mostly concerned the ESCP Regulation and pursued three main goals: to encourage the use of the ESCP by broadening its scope of application and by harmonising and capping the costs of the procedure; to simplify the ESCP, in particular by reinforcing the written nature of the proceedings, promoting the use of new technologies and clarifying the remedies available to the debtor; and, finally, to improve the coordination between the ESCP and the EPO Regulations.

Despite these considerable ambitions, the research conducted within the context of the EFFORTS Project has shown that the actual use of the EPO and ESCP Regulation remains somewhat limited to this date.[55] With the notable exception of the EPO Regulation in Germany[56] and, to a lesser extent, the ESCP Regulation in Luxembourg,[57] the national reports all emphasise that these instruments struggled to meet the expectations set by the

[55] Buzzoni and Santaló Goris (cit n. 1), sections IV and V, respectively.
[56] Lobach and Reich (cit n 6), section IV.
[57] Van Den Eeckhout (cit n 22), pp 29–30.

Commission and that most judges, legal practitioners and economic operators remain to this date largely unfamiliar with the rules governing these procedures.

Specifically, the national rapporteurs have pointed to deficiencies in national implementation strategies, as well as the lack of coordination with other available mechanisms for the cross-border debt recovery within the EU, as the two main factors hindering the success of the EPO and ESCP Regulations in the Member States covered by the Project. Future reforms should therefore take these elements into account in order to ensure better coordination between European uniform rules and national legislatures in this area (infra, III.A) and devise a more comprehensive strategy to foster complementarity between the EPO and ESCP Regulations and alternative tools of European judicial cooperation (infra, III.B).

A. Improving the coordination between uniform European procedures and national rules

The research conducted within the framework of the EFFORTS Project points to deficiencies in national implementing rules as one of the main obstacles hindering the success of the EPO and ESCP Regulations in the national legal systems of the Member States addressed. Indeed, even though these instruments were designed to provide a set of harmonised provisions governing the examination, issuance, and challenges against the enforcement of uniform European titles, Member States still retain a considerable margin of discretion on several important matters, starting from the designation of the courts before which the procedure should be initiated to the rules governing the enforcement procedure of incoming titles. Similarly, the service of documents and other communications between the court and the parties remains largely governed by national law[58]. Indeed, the EPO and ESCP Regulation often set minimum standards that the Member States have to comply with rather than exhaustively regulate all the procedural aspects leading to the issuance of an enforceable title.

In all these instances, the presence of explicit implementing rules might prove very helpful, especially where the rules laid down in the Regulations depart from the general principles that would apply in a purely domestic setting. To cite but one example, Article 5(1a) ESCPR

[58] See recitals nos 19–22 EPOR.

provides that: 'The court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests'. Furthermore, Article 8 ESCPR also encourages the use of distance communication technology in order to allow the parties to participate in the proceedings without being physically present. However, even though these provisions perfectly fit the needs of cross-border dispute resolution, they may create friction with the traditional principles of orality and proximity that often inspire small claims procedures at the domestic level and thus require some accommodations from national legislatures.

Against this background, the analysis of national legislation and case law in the seven Member States covered by the EFFORTS project has nonetheless highlighted several shortcomings affecting the national approaches to the implementation of the EPO and ESCP Regulations into the national legal systems. In Belgium and Italy, the national rapporteurs have therefore pointed to the complete lack of domestic implementing legislation as a major source of legal uncertainty and a powerful force against the development of a uniform approach to these instruments at the national level. In Croatia, France, and Lithuania, by contrast, national implementing rules governing uniform European procedures have been described as too technical or confusing compared to their domestic equivalents, thus potentially discouraging prospective users from initiating proceedings under the EPO and ESCP Regulations rather than national law.

The absence of clear and consistent guidance as to the application of the EPO and ESCP Regulations in the national legal systems becomes especially problematic in light of some decisions of the CJEU, which have left to national law the task of regulating some important issues that are not explicitly governed by the harmonised rules of the EPO and ESCP Regulations.

In Cases C-119/13 and C-120/13[59], for instance, the CJEU held that where an EPO has not been served in a manner consistent with the minimum standards laid down in Articles 13 to 15 of the Regulation and the irregularity is exposed only after the court of origin has declared the order enforceable, the provisions of the Regulation do not apply, but the defendant must have the opportunity to raise that irregularity under national law. Similarly, in Cases C-

[59] CJEU, joined cases C-119/13 and C-120/13, 4 September 2014, *eco cosmetics GmbH & Co. KG*, EU:C:2014:2144, paras 45–47.

453/18 and C-494/18[60], the CJEU held that Article 7(2)(d) and (e) EPOR should be interpreted to allow a court seised with an EPO application to request additional information from the creditor in order to carry out an *ex officio* review of the possible unfairness of the terms contained in a consumer contract, but did not reach the question of the remedies available if the court failed to conduct such a review. Regarding the ESCP Regulation, the CJEU held[61], finally, that the harmonised rules do not contain any guidance as to how the costs of the ESCP procedure should be allocated in cases where a party succeeds only in part and that the court may proceed according to national law, provided that it complies with the principles of equivalence and effectiveness of European law.

These cases further underscore the critical role that national law still plays in ensuring the smooth functioning of the EPO and ESCP Regulations. Nonetheless, the research conducted within the context of the EFFORTS Project has shown that so far only Germany has enacted a specific provision in order to implement the CJEU's holding in Cases C-119/13 and C-120/13. In all other cases, questions raised by European case law will have to be solved by interpreting national rules of general application, whose application in this area may sometimes be unclear and potentially lead to divergent results across the Member States.

In order to address the potential problems that may arise in connection with the national legislatures' inaction or inefficiency, the European Union should therefore consider using one or more of the policy tools at its disposal to bolster the effectiveness of the EPO and ESCP Regulations and further promote the use of these uniform European procedures. In our opinion, the European Union's action in this area could take the form of three different tools.

Firstly, and most obviously, the European legislature should strive to close the most noticeable gaps that have emerged within the context of the EPO and ESCP Regulations.

On the one hand, Article 20(1) EPOR should accordingly be amended to provide a uniform remedy in cases where an EPO has been declared enforceable even though the initial order was not regularly served on the debtor following the minimum standards set out in the

[60] CJEU, joined cases C-453/18 and C-494/18, *Bondora AS,* EU:C:2019:1118, paras 47 et seq.
[61] CJEU, case C-554/17, *Rebecka Jonsson*, EU:C:2019:124, paras 26–29.

Regulation. In our opinion, the European legislature should model the new Article 20(1) EPOR after Article 18 ESCPR to foster consistency across the Regulations. On the same occasion, Article 20(2) EPOR should also be redrafted to provide an additional remedy in cases where an EPO based on a consumer contract has been declared enforceable without the court first reviewing the possible unfairness of the terms.

On the other hand, the European legislature should tackle national differences regarding the costs of the ESCP Regulations by providing more detailed rules regarding the kinds of fees that may actually be charged by national authorities and their allocation between the parties. In this respect, it is important to note that significant differences may still subsist among Member States regarding court fees and other associated costs (such as translation and enforcement costs). To the extent possible, prospective users of the ESCP (especially parties established in a Member State other than the court seised) should be able to assess beforehand the maximum amount of money they could be required to pay as a consequence of this procedure. A possible solution in this regard would be to set a uniform cap that would apply across the European Union, and that would be calculated based on a comparative assessment of the rules that are currently applicable in the different Member States.

Secondly, the European Commission could also make use of the authority granted to it by Articles 30 EPOR and 26 ESCPR. According to these provisions, in fact, the Commission is empowered to adopt delegated acts that amend the standard forms on which these uniform procedures are based. In our opinion, these provisions might offer a leaner and less intrusive solution to deepen the harmonisation of European procedural law without relying on national interventions. For instance, the European Commission could take stock of the CJEU's judgment in Cases C-453/18 and C-494/18 and provide further guidance to creditors regarding the information and supporting documents that should be provided to the court at the time of the initial application for an EPO, especially where the dispute concerns a claim based on a consumer contract. This could be done by amending Form A reproduced in Annex I EPOR, and the same approach should also be extended to the Claim Form established under the ESCP Regulation.

Finally, the European legislature should also consider strengthening the Member States' duties regarding the application of the EPO and ESCP into their national law by replacing the information system set up by Articles 29 EPOR and 25 ESCPR with a more stringent implementation mechanism. Currently, Member States are only required to communicate to

the Commission a limited number of details regarding the application of these uniform provisions in their national legal system with a view to their dissemination through the *e-Justice Portal*. However, the research conducted within the context of the EFFORTS Project has shown that the Member States often overlook this obligation and that the data published on the *e-Justice Portal* is often insufficient, inconsistent, and/or outdated. Against this background, it could therefore be helpful to amend the Regulations to include positive obligations for the Member State to enact explicit provisions on the most crucial issues affecting the functioning of the European procedures. By way of example, the European legislature could impose a minimum amount of digitalisation of the procedure or require States to concentrate the jurisdiction to hear EPO and ESCP proceedings before a single national court. This approach would encourage the Member States to tackle some of the outstanding gaps that currently hamper the functioning of the EPO and ESCP procedures at the national level while also better serving the priorities set by the European Union's overall strategy.

B. Working towards a more comprehensive strategy in the field of cross-border enforcement

The second recurring issue that has been identified with regard to the implementation of the EPO and ESCP Regulations in the seven Member States covered by the EFFORTS Project concerns the significant overlap between these uniform procedures and their domestic counterparts. In this regard, several National Reports have underscored that creditors might find it preferable to rely on national law and then seek the certification of the resulting title under the BI bis or EEO Regulations rather than testing the relatively less known procedures laid out in the EPO and ESCP Regulations.[62] Conversely, the research conducted within the EFFORTS Project has also shown that the absence of a readily accessible alternative at the national level may significantly boost the use of uniform European procedures in the Member States addressed.[63]

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[62] See in particular Uzelac, Bratković and Brozović (cit n 22) pp 15 and 20 (critical assessments under EPO and ESCP); Buzzoni and Van Den Eeckhout (cit n 23) p 46 (critical assessment EPO); Simaitis, Vebraite and Markeviciute (cit n 22) p 10 (critical assessment ESCP).
[63] Van Den Eeckhout (cit n 22), pp 29–30.

In light of these considerations, any further reform of the EPO and ESCP Regulations should necessarily be seen in the broader context of European instruments that allow for direct cross-border debt recovery across the Member States.

Firstly, the European legislature could consider strengthening the complementarity between the EPO and ESCP Regulations and the other EFFORTS Regulations by focusing on their specific features. At their core, these procedures were designed to offer rapid, mostly written procedures that would lower procedural and linguistic barriers to the recovery of debts by relying on standard forms and documentary evidence. As such, the EPO and ESCP procedures are especially suited to be conducted through e-mail and other appropriate distance communication technology, such as videoconferencing (in cases where a hearing would be required). Although Regulation No 2015/2421 has already encouraged some digitisation under the ESCP Regulation, the time has come for the European legislature to act more decisively in this direction and make the use of digital means of communication compulsory under both the EPO and ESCP Regulations. In our view, two elements suggest that the time is ripe for this new step: on the one hand, the COVID-19 pandemic has created the right context for the accelerated development of the digitisation of civil procedure across the Member States; on the other hand, the specific features of these uniform European procedures, which offer simplified instruments for the recovery of claims, provide a particularly favourable environment for the future large-scale deployment of the e-CODEX Project promoted by the European Commission.[64]

Secondly, the European Union could also try to reduce the competition between the EPO and ESCP Regulations, on the one hand, and their domestic equivalents, on the other, by encouraging the Member State to make these procedures available to creditors engaged in purely domestic transactions. In this regard, it is worth noting, for instance, that French Law No 222-2019 of 23 March 2019 did contemplate the introduction of a national digital

[64] <https://www.e-codex.eu/>. See Regulation (EU) 2022/850 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726. The e-CODEX system was originally launched under the Multiannual e-Justice Action Plan 2009-2013; it was developed in the framework of e-Justice Communication via On-line Data Exchange between 2010 and 2016 by 21 Member States with the participation of other third countries/territories and organisations. To date, the system is managed by a consortium of Member States and other organisations, financed by an EU grant.

procedure for small claims[65] , which was explicitly 'inspired by the European Small Claims Procedure'.[66] Arguably, however, this approach represents a sub-optimal solution compared to the simple extension of the ESCP to domestic disputes, as it has the effect of duplicating mechanisms pursuing similar goals rather than simplifying the procedural landscape. In order to avoid these kinds of scenarios, the European legislatures should reconsider the European Commission's proposal put forward in 2013 within the context of the reform of the ESCP Regulation[67] and extend the scope of the uniform European procedures to a larger set of disputes by amending the current definition of 'cross-border cases'.[68] Furthermore, the European legislature could also explicitly offer the Member States the possibility to extend the applicability of the ESCP and EPO Regulations to purely domestic cases on an opt-in basis.

Finally, a third – and possibly more radical – solution would be to establish a clear differentiation among the existing Regulations allowing for the direct cross-border enforcement of titles within the European Union. This approach would reduce the overlap between the EEO and BI bis Regulations, on the one hand, and the EPO and ESCP Regulations, on the other, thus expanding the role of uniform European procedures in this area of the law. In order to achieve this result, domestic orders for payment procedures would need to be excluded from the scope of the BI bis and EEO Regulations – a solution which would at the same time reduce the difficulties related to the existence of a wide variety of simplified procedures across the different Member States[69] and encourage economic operators to turn themselves to the EPO and the ESCP.

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[65] 'Procédure dématérialisée pour les petits litiges' (*justice.gouv.fr*) <http://www.justice.gouv.fr/le-ministere-de-la-justice-10017/procedure-dematerialisee-pour-les-petits-litiges-33579.html>.

[66] 'European E-Justice Portal - Small Claims' <https://e-justice.europa.eu/42/EN/small_claims?FRANCE&member=1>.

[67] COM(2013) 794 final.

[68] See art 3 EPOR and art 3 ESCPR.

[69] See the hesitations surronding the meaning of 'court' for the purposes of determining whether Croatian notaries may issue domestic orders for payment eligible to circulate under the EEO and BI bis Regulations in CJEU, case C-484/15, *Ibrica Zulfikarpašić v. Slaven Gajer*, EU:C:2017:199 (EEO) and case C-551/15, *Pula Parking d.o.o. v. Sven Klaus Tederahn*, EU:C:2017:193 (BI bis), as well as problems arising from the differences concerning the time limits to file a statement of opposition under domestic law (case C-7/21, *LKW WALTER Internationale Transportorganisation AG v. CB and Others*, EU:C:2022:527).

Moreover, the ESCP Regulation could also be expanded in order to provide additional uniform rules allowing for an optional pre-trial ADR mechanism that could result in an amicable settlement between the parties, which could then circulate as an enforceable title within the European Union. This way, the ESCP could evolve into a full-fledged hybrid dispute resolution mechanism without any exact equivalent in other European Regulations.

IV. The EAPO Regulation

The text of the EAPO Regulation references two potential changes that shall be considered in the event of a recast. The first tackles whether the EAPO should allow the attachment of 'financial instruments' and not only of funds in the debtors' bank accounts.[70] The second deals with whether the 'amounts credited to the debtor's account after the implementation of the Preservation Order could be made subject to preservation under the Order'.[71] Nonetheless, other changes may prove to be desirable on the grounds of the comparative analysis of the EAPO national case law.[72] More concretely, the EU legislature and policymakers may consider amendments to, respectively, the EAPO's regime on jurisdiction;[73] the *periculum in mora* prerequisite;[74] and the information mechanism to search for the debtors' bank accounts.[75]

A. Potential amendments to jurisdiction

1. A more flexible jurisdictional regime for creditors with an enforceable title?

Once creditors have obtained an enforceable judgment, court settlement or authentic instrument, the jurisdiction to grant an EAPO lies with the courts of the Member State where the judgment was rendered, or court settlement approved,[76] or the authentic instrument

[70] Art 53(1)(a) EAPOR.
[71] Art 53(1)(b) EAPOR.
[72] Buzzoni and Santaló Goris (cit n. 1), 59-62.
[73] Art 6 EAPOR.
[74] Art 7(1) EAPOR.
[75] Art 14(1) EAPOR.
[76] Art 6(3) EAPOR.

drawn up.[77] Case law in Luxembourg shows that this just jurisdictional rule might be too rigid for creditors.

There were at least two cases in which creditors applied for EAPOs before the District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*) based on titles obtained in Spain and France.[78] Luxembourg was the Member State were the debtors' bank accounts were located. Most likely based on this reason, the creditors applied for an EAPO in Luxembourg instead of the Member State were the title was obtained. Had the European legislature adopted the EAPO Commission Proposal, it would have been possible to obtain the EAPO directly in Luxembourg. In fact, the Commission Proposal contained a double-track jurisdictional system[79] whereby creditors could apply for the EAPO before the Member State were the title had been obtained or before the courts of the Member State where the EAPO was meant to be enforced. However, the effects of the EAPOs requested in the Member State of enforcement were territorially limited to that Member State.[80] This means that, unlike the EAPOs granted by the courts of the Member State where the title was obtained, the EAPOs obtained in the Member State of enforcement could not have been recognised and enforced outside that Member State. Furthermore, in accordance with the Commission Proposal, creditors who applied for an EAPO were required to inform about other EAPO requests.[81]

Based on the case law referred above, the double-track jurisdictional system, as laid out in the EAPO Commission Proposal, may be taken into consideration for future amendments to the EAPOR.[82] The creditor would also be required to inform about other EAPO applications when applying for an EAPO. By allowing creditors to request an EAPO in the Member State of enforcement, the EAPO would respond better to the 'urgent need' that accompanies this proceeding.[83] Whereas EAPOs can be enforced in other Member States

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[77] Art 6(4) EAPOR.
[78] Tribunal d'arrondissement de Luxembourg, Ordonnance du 15.03.2022. The case concerning the request of an EAPO request based on a French enforceable title was reported by a Luxembourgish judge: Interview with a Luxembourgish judge held on 30 April 2021 (notes on file with the author). Outside the scrutinized jurisdictions in the EFFORTs Project, in Slovakia, the District Court of Bratislava I (*Okresný súd Bratislava I*) received a request for an EAPO based on an payment order granted in Germany: *Okresný súd Bratislava* I, 31.05.2021, 25Cbcud/7/2020, SK:OSBA1:2020:1120216618.1.
[79] Art 14(3) COM(2011) 445 final.
[80] Art 23 COM(2011) 445 final.
[81] Art 15(2)(h) COM(2011) 445 final.
[82] This would also approach the EAPO to the Brussels I bis Regulation, which states that claimants can apply for protective measures in the Member State of enforcement when they have obtained an enforceable title in the Member State of origin: Article 40 BI bis Regulation.
[83] Art 7(1) EAPOR.

without exequatur,[84] transmitting the EAPO from one Member State to another takes longer than if the EAPO is requested directly where the bank accounts are located. Additional delays are caused, among others, by the service of those documents or their translation.

Introducing a new ground for jurisdiction in the Member State of enforcement would not cause an impairment of the debtors' position. The debtor would be protected by the creditors' obligation to request the release of the funds attached that exceed the amount of the claim,[85] as well as by the liability regime for the damages that the EAPO might cause to the creditor.[86] In this framework, the debtor is also entitled to request the liberation of those funds.[87]

2. The boundaries of the arbitration exclusion: The need for clarification

Arbitration is among the subject matters excluded from the EAPOR.[88] Most scholars understand this exclusion to mean that, the moment parties decide to bring their claim before an arbitral tribunal, the EAPO cannot be used to protect such claim.[89] Despite this widespread interpretation, EAPO requests regarding claims pending before arbitral tribunals were brought before Lithuanian and Luxembourgish courts. In Lithuania, an EAPO was requested while the arbitral proceeding was still pending.[90] The Lithuanian Court of Appeals (*Lietuvos apeliacinis teismas*) did not find that the arbitration exclusion barred using an EAPO to protect that claim. Instead, it explored whether it was possible to grant the EAPO to guarantee the claim brought before an arbitral tribunal relying on the domestic jurisdictional rules. In Luxembourg, the District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*) accepted as a valid title to grant an EAPO a Luxembourgish decision granting a provisional measure (*saisie arrêt)* the basis of an arbitral award.[91]

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[84] Art 21 EAPOR.
[85] Art 27 EAPOR.
[86] Art 13 EAPOR.
[87] Art 33(1)(d) EAPOR and art 34(1)(b)(iv) EAPOR.
[88] Art 2(2)(e) EAPOR.
[89] 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), pp 109–111.
[90] 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> pp 2–3.
[91] Buzzoni and Santaló Goris (cit n. 1) pp 71–73.

The discrepancies and uncertainties surrounding the exclusion of arbitration call for clarification. At least, a clarification as to the meaning of the arbitration exclusion should be included a Recital.[92] In this respect, the European legislature may follow two options. On the one hand, it could opt in favour of the total exclusion of the EAPO in claims brought before an arbitral court.[93] However, this is not the approach that the CJEU followed in its *van Uden* judgment as concerns the possibility of requesting 'provisional, including protective measures' under the Brussels system, where the CJEU understood that arbitration was excluded as a subject matter[94] (for instance, when the claim concerns the payment of the arbitrator fees).[95] Consequently, as long as the claim that the provisional measure intends to protect falls within the material scope of the BI bis, the EAPOR could be used.[96]

On the other hand, the European legislature may opt in favour of acknowledging that the EAPO can be used in support of a claim brought before an arbitral court as long as the claim falls within the material scope of the EAPOR. However, this would need further clarification. From a jurisdictional perspective, it should be made clear that the domestic jurisdictional rules permitting courts to grant protective measures in support of arbitration proceedings can be used to grant EAPO. It should also be stated that a proceeding before an arbitral court would be considered a 'proceeding on the substance of the matter'. In this sense, the EAPOR should also state that an enforceable arbitral award could be considered a valid title to request an EAPO.[97]

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[92] As was done for the BI bis: Recital 12 BI bis.

[93] This seemed to be the approach defended by the European Commission in the Proposal of the EAPO Regulation: 'Arbitration is equally excluded from the scope. 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 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' (COM(2011) 445 final, p. 5).

[94] C-391/95, 17 November 1998, *Van Uden Maritime*, EU:C:1998:543, paras 29–30.

[95] Hubertus Schumacher, 'Art 2 EuKoPfVO' in Hubertus Schumacher, Barbara Köllensperger and Martin Trenker (eds) *Kommentar zur EU-Kontenpfändungsverordnung EuKoPfVO* (MANZ 2017), margin no. 67.

[96] Fernando Gascón Inchausti, 'Medidas provisionales y cautelares' in Blanco-Morales Limones et al (eds), *Comentario al Reglamento (UE) no 1215/2012 relativo a la competencia judicial, el reconocimiento y ejecución de resoluciones judiciales en material civil y mercantil* (Thomson Reuters Aranzadi), paras 32–33.

[97] Something that for some authors is already a valid title under the EAPO: Schumacher (n 26), margin no. 65. *Cuniberti* and *Migliorini* consider that a judgment declaring an enforceable arbitral award would be a valid title to request an EAPO: Gilles Cuniberti and Silvia Migliorini, *The European Account Preservation Order Regulation: A Commentary* (Cambridge 2018), p 71.

B. Restraining the *periculum in mora* under the EAPOR

According to Article 7(1) EAPOR, any creditor who wants to obtain an EAPO has 'to satisfy the court 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'. The so-called *periculum in mora* requirement is the centrepiece of the conditions that creditors have to satisfy to obtain an EAPO. All creditors, regardless of whether they have or do not have an enforceable title, have to prove it. According to the national case law examined within the EFFORTS project, the *periculum in mora* appears as one of the major difficulties that creditors have experienced while dealing with the EAPOR.[98] Many of the EAPO applications analysed with the Project ended up with rejections precisely because the creditors were unable to satisfy the requirement of the *periculum in mora* even if they had an enforceable title. Many EAPO applications were also rejected because the creditors were unable to prove that the debtor was taking actions intended to frustrate the enforcement as the Preamble suggests.[99]

The problems that creditors experience with the *periculum in mora* open the door to reconsidering the scope and content of this prerequisite. In this respect, the EU legislature may consider to restrain the *periculum in mora* to creditors without an enforceable title, as was the case with the EAPO Commission Proposal.[100] Such solution would be more coherent with the double nature of the EAPOR: as an interim measure during the proceeding on the merits of the claim and as a protective measure at the enforcement stage.[101] The existence of

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[98] Buzzoni and Santaló Goris (cit n 1), 72–73; Lobach and Reich (cit n 36); Uzelac, Bratković and Brozović, (cit n 22), 6. In the IC2BE Project (JUST-AG-2016-02, Grant Agreement No. 764217), issues concerning the EAPO's *periculum in mora* were detected in Germany, Luxembourg and Poland: Jan von Hein and Tilman Imm, 'Germany' 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 240 - 241; Veerle Van Den Eeckhout and Carlos Santaló Goris, 'Luxembourg' in Jan von Hein and Thalia Kruger (eds), ivi, 295–296; Agnieszka Frąckowiak-Adamska, Agnieszka Guzewicz and Agnieszka Lewestam-Rodziewicz, 'Poland' in Jan von Hein and Thalia Kruger (eds), ivi, pp 358–359.

[99] Recital 14 EAPOR. The EAPO Regulation puts an emphasis on the 'subjective element' of the *periculum in mora*: Bettina Nunner-Krautgasser, 'Der geplante Rechtsakt zur europäischen Kontenpfändung' in Burkhard Hess (ed), *Die Anerkennung im Internationalen Zivilprozessrecht - Europäisches Vollstreckungsrecht* (Gieseking 2014), 125.

[100] Art 7(1)(b) COM(2011) 445 final.

[101] Ilaria Pretelli, 'Provisional and Protective Measures in the European Civil Procedure of the Brussels I System' in Vesna Lazić and Steven Stuij (eds), *Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme*

the enforceable title should be sufficient to apply for an EAPO. Removing the *periculum in mora* for creditors with an enforceable title would also make the EAPO information mechanism more accessible.[102] In fact, courts cannot authorise a request for information unless creditors have satisfied the more general prerequisites to obtain an EAPO.[103]

Another option would be to modify the part of the Preamble that provides some guidance on the *periculum in mora*.[104] The Preamble should differentiate between creditors with and without enforceable titles.[105] It should state that creditors with an enforceable title only need to show that there is an enforceable title and that the debtor is not paying despite the fact that he/she was requested to do so. A failed first attempt to enforce the title in the Member State of origin would be also sufficient. For creditors without an enforceable title, the current threshold set in the Preamble to satisfy the *periculum in mora* requirement would remain applicable. This means these creditors would still have to prove that the debtor is taking actions intended to hinder the effective recovery of the claim.

C. Making the EAPO information mechanism more accessible

Currently, the EAPO information mechanism is limited to creditors with a title, though the title does not have to be enforceable.[106] Although case law shows moderate reliance on the information mechanism, it might be time to consider the possibility of extending its use to creditors without a title. This was initially foreseen in the EAPO Commission Proposal.[107] In 2021 France – originally the most reluctant Member State to allow creditors without an enforceable title to access the EAPO information mechanism–[108] extended access to its

(Springer 2017), p 108; Guillermo Schumann Barragán, 'Article 20' in Elena D'Alessandro and Fernando Gascón Inchausti (eds), *The European Account Preservation Order. A Commentary on Regulation (EU) No 655/2014* (Edward Elgar 2022), para 20.15.

[102] A problem observed for German courts: Lobach and Reich (cit n 36), p 6.

[103] Denise Wiedemann, 'Artikel 14 EU-KpfVO' in Thomas Rauscher (ed) *Europäisches Zivilprozess- und Kollisionsrecht* (5th ed Otto Schmidt 2022), para 14.

[104] Recital 14 EPOR.

[105] In favour of this approach, see also Burkhard Hess, 'The Effective Disclosure of the Debtor's Assets in Enforcement Proceedings' in Masahisa Deguchi (ed), *Effective Enforcement of Creditors' Rights* (Springer 2022).

[106] Art 14(1) EAPOR.

[107] Art 17 COM(2011) 445 final.

[108] Comments on Chapters I, II and III from the French delegation, 13260/11 JUSTCIV 205 CODEC 1280, 13140/12 ADD 13, p 14.

national registry of bank accounts, the FICOBA,[109] to creditors who apply for a national attachment order (*saisie conservatoire*) without a title.[110] Perhaps, now consensus may be more easily reached among the Member States to extend the use of the information mechanism to all kinds of creditors.

Another possible reform would be allowing creditors to rely on the EAPOR just to obtain information about the debtors' bank accounts. Under the current version of the EAPOR, the request for information about the debtors' bank accounts can be made only in the context of an EAPO request. The information obtained about the debtors' bank accounts can be used only to complete an EAPO application.[111] The cases analysed in the EFFORTS project show that some creditors were more interested in discovering if debtors have bank accounts in the other Member States than attaching the funds of those bank accounts.[112] If the creditors could simply use the EAPO information mechanism without applying for the attachment order, interest in the EAPOR might increase. Creditors would be able to combine the EAPO information mechanism with a domestic attachment order. Moreover, the idea of a separate tool to search for the debtors' bank accounts would reactivate one of the proposals of the 2006 Green Paper on the debtors' assets transparency,[113] and namely the proposal that explored the possibility of creating a mechanism to exchange information about the debtors' assets between enforcement authorities.[114]

From a more practical perspective, the Commission Implementing Regulation containing all the EAPO standard forms should incorporate a standard form that court can use to request information about the debtors' bank accounts from the information authorities.[115] This form already exists: however, it exists in a somewhat unofficial manner. It was created in 2020 by the European Judicial Network and it is available in the e-Justice portal.[116] Nonetheless, its

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[109] 'Fichier des comptes bancaires'. On the FICOBA see: < https://www.service public.fr/particuliers/vosdroits/F2233>.
[110] Art L151.A. Tax Procedures Book (*Livre de procédures fiscales*).
[111] Wiedemann, (cit n 84), para 14.
[112] Lobach and Reich (cit n 36), 14.
[113] European Commission, *Green Paper - Effective enforcement of judgments in the European Union: the transparency of debtors' assets* (COM(2008) 0128 final).
[114] Ibid, 8–9.
[115] Commission Implementi ng Regulation (EU) 2016/1823 of 10 October 2016 establishing the forms referred to in Regulation (EU) No 655/2014 of the European Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, C/2016/6339, *OJ* L 283, 19.10.2016, pp 1–48.
[116] Although it cannot be fulfilled online as the other standard forms: <https://e-justice.europa.eu/378/EN/european_account_preservation_order_forms?clang=en>.

use, contrary to the other standard forms, is not obligatory.[117] A pre-established standard form, which indicates all the necessary information that courts have to provide to the information authorities, would prevent issues like those observed between Lithuanian courts and the German information authority.[118]

V. Cross-cutting initiatives

In may respects, the implementation and concrete application of the EFFORTS Regulations appears to suffer setbacks arising from the interface of the Regulations with national legislation. This creates uncertainties in legal practice, to the detriment of predictability and efficiency.

A. Increasing awareness and access to information: The role of the e-Justice portal

A significant obstacle concerning cross-border enforcement procedures is the lack of information about the national enforcement rules of another Member State. Not all instruments are used often or properly in practice and praticioners and stakeholders often lack familiarity with them. This holds true, in particular, with respect to the ESCP and EAPO Regulations, though in some Member States the same applies also with respect to the EEO and EPO Regulations.[119] Against this background, two actions may be undertaken to increase awareness and access to information.

On the one hand, the information available on the **e-Justice portal**[120] appears insufficient: at times, it is simply missing, or it is available only in the language of the Member States it refers to, which makes the information of limited help. General descriptions are often provided, instead of detailed information. While an English translation/version is made available for most Member States, in the remaining cases the information is still available

[117] As it is indicated in the e-Justice portal ('non-compulsory form'): <https://e-justice.europa.eu/378/EN/european_account_preservation_order_forms?clang=en>.
[118] Buzzoni and Santaló Goris (cit n 1), pp 74–75.
[119] See, in part., Kramer (cit n 6), in passim.
[120] <https://e-justice.europa.eu/home?action=home>.

only in the national language of the Member State concerned, to the detriment of effective accessibility.

It follows that improvement of the information posted via the e-Justice portal is of the essence. In this regard, the Commission may consider setting up a system whereby it provides such information itself, with the allocation of the necessary resources, and in compulsory cooperation with the Member States.

Awareness of the existence of the e-Justice portal, together with the wealth of information that should come with it, should also be properly promoted via the national sources (and notably websites) of reference in each Member State. Proper reference to such information should not be limited to practitioners and to the judiciary: to the contrary, it should be extended to citizens, who ought to be in the position of making informed decisions, in a timely manner, with respect to their legal relationships.

B. Communication as a core instrument towards the proper functioning of cross-border justice: e-CODEX and the European Judicial Network

Fostering and facilitating communication is also a means to conducive to the proper functioning of cross-border justice, in general, and the EFFORTS Regulations, in particular.

In this context, **e-CODEX** is a system established primarily to promote the digitalisation of cross-border judicial proceedings and to facilitate the communication between Member States' judicial authorities,[121] and it is set to deeply influence national procedures.[122] In particular, e-CODEX aims at interconnecting the justice systems of the EU Member States by providing technical interfaces between the national IT systems. It creates the premise for direct electronic (cross-border) filings, direct communication between judges and it is designed to facilitate the enforcement of judicial decisions throughout the European Union.

As the EU Commission emphasised in its Communication of December 2020, the establishment of the e-CODEX system as a technical standard should be a priority for the

[121] See supra, n 59.
[122] On the pivotal role of e-CODEX, see esp. Burkhard Hess, 'Reforming the Brussels I[bis] Regulation: Perspectives and Prospects' (2021) MPILux Research Paper Series 2021 (4) [www.mpi.lu].

upcoming years.[123] Once established, the whole system of judicial cooperation in civil and commercial matters shall be reassessed from a perspective of interconnected national justice systems.

Furthermore, the EU legislature may rely on the cooperation mechanism of the **European Judicial Network (EJN) in Civil and Commercial Matters** in a proactive manner to improve the implementation and promote the take-up of these instruments.[124] By bringing together national authorities responsible for assisting local courts, the EJN was set up to facilitate judicial and legal cooperation between Member States. Since its inception, the EJN (in civil and commercial matters) has been an important tool for providing support for the implementation of EU civil justice instruments in daily legal practice. Notably, the EJN (in civil and commercial matters) facilitates and supports relations between national judicial authorities through contact points in each Member State and is thereby a tool to facilitate cross-border cases.

C. Education and training

The operation of the Regulations may be improved also through non-legislative and implementation measures. In this framework, **education and training** are a core tool and should be pursued as a major means to achieve the objective of effectiveness of the Regulations and harmonisation in this area of the law. To foster legal certainty and predictability, efficient and active promotion of the Regulations should be keenly pursued, providing the general public and professionals with the related information.[125] Such trainings

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[123] Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726 (COM(2020) 712 final), p 1.

[124] <https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do>. The EJN (in civil and commercial matters) was established by Council Decision 2001/470/EC of 28 May 2001 (subsequently amended by Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009) and started operating on 1 December 2002. All Member States except Denmark participate in the EJN (in civil and commercial matters).

[125] In this vein see, e.g., Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure of 13.10.2015 (COM(2015) 495 final), p 12; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure of 19.11.2013 (COM(2013) 795 final), pp 8-9.

should also be welcomed as they create the opportunity to bring together stakeholders from different Member States, so as to create an environment where experiences can fruitfully be shared and clarifications sought.